



2023 City Attorneys Spring Conference

Conference Papers

**Hyatt Regency Monterey
Monterey, California**

May 17-19, 2023

Mission Statement:

**To restore and protect local control for cities
through education and advocacy to enhance
the quality of life for all Californians.**

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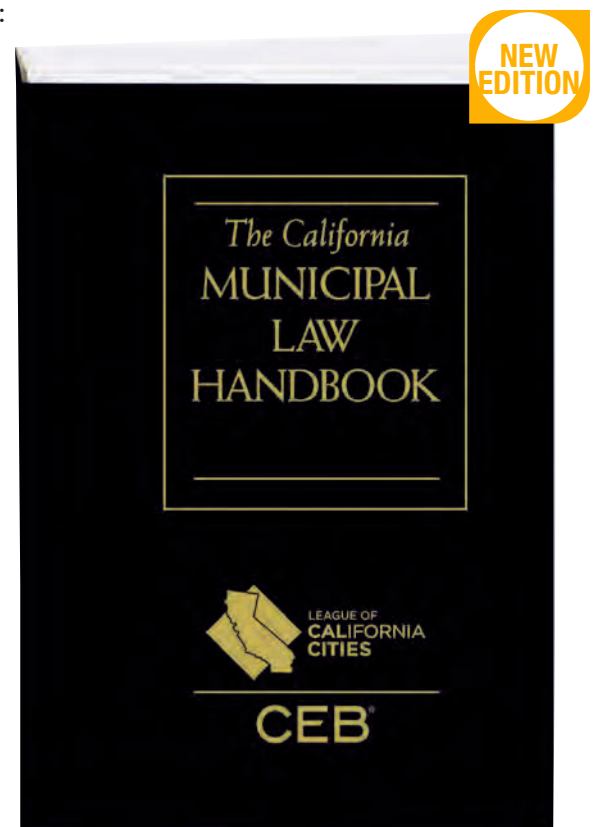
The California Municipal Law Handbook 2023

This handbook gives you the background, tools, and guidance you need in all major areas of California municipal law. Known as the definitive resource in its field, this work of over 300 municipal attorneys from the City Attorneys Department of the League of California Cities (Cal Cities) is published annually by CEB. Key 2023 updates include:

- New requirements for teleconferenced meetings and the exclusion of audience members for disorderly conduct.
- Legislative updates that provide detailed procedures for local agencies distributing agenda-related materials to a Brown Act body when public inspection location is not open to the public.
- Updates affecting personnel, including current minimum wage requirements, statutory bereavement leave provisions, and enhanced protections for off-the-job cannabis use and reproductive health decisionmaking.
- Expanded discussion regarding regulating business & personal conduct, including coverage of transportation network companies, taxicab companies, junk dealers, recyclers, and camping in public places and homelessness.
- And more!

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MCLE Information

The League of California Cities (Provider No. 1985) is a State Bar of California minimum continuing legal education (MCLE) approved provider and certifies this activity meets the standards for MCLE credit by the State Bar of California in the total amount of 11.25 hours, including .75 hours of Implicit Bias subfield credit and 1 hour of Competence Issues subfield credit.

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MCLE credit is being tracked through your registration for the conference and the receipt of your conference materials. At the time that you receive your conference materials, you will be required to verify your State Bar number which will serve as proof of your attendance.

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- Once during Wednesday afternoon sessions.
- Twice on Thursday: once during morning sessions and once during afternoon sessions.
- Once on Friday during morning sessions.

Certificates of attendance will be emailed after the conference.

Evaluations

PLEASE TELL US WHAT YOU THINK! We value your feedback. An electronic version of the evaluation is available by scanning the below QR code, plus the [link](#) will be emailed after the conference. Please tell us what you liked, what you didn't, and what we can do to improve this learning experience.





2023 CITY ATTORNEYS SPRING CONFERENCE

Wednesday, May 17 – Friday, May 19

Hyatt Regency Monterey

2022-2023 City Attorneys Department Officers

President

Eric Danly, City Attorney, Petaluma

First Vice President

Joseph Montes, City Attorney, Alhambra, San Marino, and Santa Clarita

Second Vice President

Susana Alcala Wood, City Attorney, Sacramento

Department Director

Michael Colantuono, City Attorney, Grass Valley

WEDNESDAY, MAY 17

10:30 a.m.–6:15 p.m.

REGISTRATION OPEN

Regency Foyer

11:45 a.m.–12:45 p.m.

LUNCH ON YOUR OWN

1:00–3:00 p.m.

GENERAL SESSION

Regency Grand Ballroom

Moderator: Eric Danly, President, City Attorneys Dept. and City Attorney, Petaluma

Welcoming Remarks

Speaker: Christine Davi, City Attorney, Monterey

Land Use and CEQA Litigation Update

Speaker: William Ihrke, City Attorney, Cerritos and La Quinta, Partner, Rutan & Tucker

“...and Other Duties as Required”: Talking to Non-Clients

Speakers: Derek Cole, City Attorney, Oakley, Sutter Creek, Partner, Cole Huber
Joseph “Seph” Petta, Deputy City Attorney, Half Moon Bay, Partner, Shute, Mihaly & Weinberger
Zaynah Moussa, City Attorney, Vernon
Deepa Sharma, Assistant City Attorney, Piedmont, Partner, Burke, Williams & Sorensen

WEDNESDAY, MAY 17

3:15–4:45 p.m.

GENERAL SESSION

Regency Grand Ballroom

Moderator: Michael Colantuono, Department Director, City Attorneys Dept. and City Attorney, Grass Valley, Managing Shareholder, Colantuono, Highsmith & Whatley

Implementing Districts - Now That You Have Gone to Districts, What Next?

Speakers: Holly O. Whatley, Shareholder, Colantuono, Highsmith & Whatley
Doug Johnson, President, National Demographics Corporation
Randi Johl, Legislative Director / City Clerk, Temecula

Housing Legislation and Status Density Bonus Law Update

Speakers: Iman Novin, President, Novin Development Corp.
Patricia Curtin, Legal Counsel to Cities and Special Districts, Fennemore Wendel
Amara L. Morrison, Director, Fennemore Wendel

5:00–6:00 p.m.

New Lawyers Meet and Greet *(Under 10 years of municipal law practice)*

Regency Grand Ballroom

Meet colleagues, learn about the City Attorneys Department, share ideas about municipal law, and engage with the Cal Cities Attorney Development and Succession Committee.

6:00–7:30 p.m.

RECEPTION

Monterey Ballroom

Make new friends and see old ones while enjoying delicious appetizers and tasty beverages during the evening networking reception. *No host beverages.*



MCLE Credit

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- Twice on Thursday: once during morning sessions and once during afternoon sessions.
- Once on Friday during morning sessions.

THURSDAY, MAY 18

8:00 a.m.–4:00 p.m.

REGISTRATION OPEN

Regency Foyer

8:00–9:30 a.m.

BREAKFAST

Regency Foyer

8:30–9:30 a.m.

CONCURRENT GROUP DISCUSSIONS

New for 2023! Grab breakfast off the buffet and join one of these topical group discussions:

Coastal Cities

Spyglass

Moderator: Cindie McMahon, City Attorney, Carlsbad

Diversity, Equity and Inclusion Town Hall

Big Sur

Moderator: Michael Lawson, City Attorney, Hayward

Homelessness and the Unsheltered

Cypress

Moderator: Andrew Jared, Senior Counsel, Colantuono Highsmith & Whatley

Solo and Small City Attorney Offices

Oak Tree

Moderator: Heather Stroud, City Attorney, South Lake Tahoe

9:45–11:15 a.m.

GENERAL SESSION

Regency Grand Ballroom

Moderator: Susana Alcala Wood, Second Vice President, City Attorneys Dept. and City Attorney, Sacramento

Preparation of Official Statements: Interplay between Disclosure Counsel and the Client

Speakers: Jeffrey Masey, Senior Deputy City Attorney, Sacramento
Lawrence Chan, Shareholder, Stradling Yocca Carlson & Rauth

The Unsheltered Residing in our Communities: Navigating Constitutional and Practical Concerns

Speakers: Rene Alejandro Ortega, Partner, Shute, Mihaly & Weinberger
Eric Salbert, Deputy City Attorney, Chico, Senior Associate, Alvarez-Glasman & Colvin

THURSDAY, MAY 18

11:30 a.m.–12:30 p.m.

GENERAL SESSION

Regency Grand Ballroom

Moderator: Joseph Montes, First Vice President, City Attorneys Dept. and City Attorney, Alhambra, San Marino, and Santa Clarita, Partner, Burke, Williams & Sorensen

Municipal Tort and Civil Rights Litigation Update

Speakers: Alana Rotter, Partner, Greines, Martin, Stein & Richland
Neil Okazaki, Deputy City Attorney / Police Legal Advisor, Corona

12:30–1:30 p.m.

NETWORKING LUNCHEON

Monterey Ballroom

1:45–3:15 p.m.

GENERAL SESSION

Regency Grand Ballroom

Moderator: Eric Danly, President, City Attorneys Dept. and City Attorney, Petaluma

Department Business Meeting and Colleague Recognition

- *President's Report – Eric Danly*
- *Department Bylaws Amendments – Eric Danly*
- *Director's Report – Michael Colantuono*
- *Colleague Recognition – Department Officers*

Labor and Employment Litigation Update

Speakers: Geoffrey S. Sheldon, Partner, Liebert Cassidy Whitmore
Elizabeth Tom Arce, Partner, Liebert Cassidy Whitmore

3:30–5:00 p.m.

GENERAL SESSION

Regency Grand Ballroom

Moderator: Susana Alcalá Wood, Second Vice President, City Attorneys Dept. and City Attorney, Sacramento

SB 1383: What it is and How it Impacts Every Jurisdiction

Speakers: Dana Dean, Counsel, Hanson Bridgett
Beth Hummer, Counsel, Hanson Bridgett
Alene Taber, Counsel, Hanson Bridgett

(MCLE Specialty Credit for Implicit Bias)

DEIB, Microaggressions, and Decentering: A Path to Cultural Shift in Organizations

Speakers: David Gonzalez, Associate, Aleshire & Wynder
Elena Gerli, City Attorney, Suisun City, Assistant City Attorney, La Cañada Flintridge and Rancho Palos Verdes, Partner, Aleshire & Wynder
Yecenia Vargas, Assistant City Attorney, Perris and Cypress, Associate, Aleshire & Wynder

FRIDAY, MAY 19

7:00–7:45 a.m.

FUN RUN

*Sponsored by Best Best & Krieger
Regency Foyer*

8:00–9:00 a.m.

NETWORKING BREAKFAST

Monterey Ballroom

8:00–10:30 a.m.

REGISTRATION

Regency Foyer

9:00–10:30 a.m.

GENERAL SESSION

Regency Grand Ballroom

Moderator: Joseph Montes, First Vice President, City Attorneys Dept. and City Attorney, Alhambra, San Marino, and Santa Clarita, Burke, Williams & Sorensen

General Municipal Litigation Update

Speaker: Pamela K. Graham, Senior Counsel, Colantuono Highsmith & Whatley

What to do When First Amendment Auditors Come to Town

Speaker: Deborah Fox, Principal and Chair of First Amendment and Trial & Litigation Practice Groups, Meyers Nave

10:45 a.m.–Noon

GENERAL SESSION

Regency Grand Ballroom

Moderator: Michael Colantuono, Department Director, City Attorneys Dept. and City Attorney, Grass Valley, Managing Shareholder, Colantuono, Highsmith & Whatley

(MCLE Specialty Credit for Competence Issues)

Impaired Colleague? Addressing Attorney Competency, the Warning Signs, and Getting Help

Speaker: Lita Abella, Sr. Program Analyst, Office of Professional Competence, Lawyer Assistance Program, The State Bar of California

Closing Remarks / Evaluations / Adjourn

SHARE YOUR THOUGHTS!

Send us your feedback on the conference by scanning this QR code.





“... and Other Duties as Required”: Talking to Non-Clients

Wednesday, May 17, 2023

Derek Cole, City Attorney, Oakley, Sutter Creek,
Partner, Cole Huber

Joseph “Seph” Petta, Deputy City Attorney, Half Moon Bay,
Partner, Shute, Mihaly & Weinberger

Zaynah Moussa, City Attorney, Vernon

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“...And Other Duties As Required”: Talking to Non-Clients

Wednesday, May 17, 2023

**Attorney Development and Succession Committee
League of California Cities
Spring 2023 City Attorneys Department Conference**

**Derek P. Cole, City Attorney, Oakley and Sutter Creek
Partner, Cole Huber**

Zaynah Moussa, City Attorney, Vernon

**Deepa Sharma, Assistant City Attorney, Piedmont
Partner, Burke Williams & Sorensen LLP**

**Seph Petta, Deputy City Attorney, Half Moon Bay
Partner, Shute Mihaly & Weinberger LLP**

INTRODUCTION

A core function of the city attorney is advising staff, boards, commissions, and city councils that are part of the client municipal entity. A natural adjunct of these attorney-client communications are the city attorney's communications with third parties. These third parties include, for example, developers, constituents, vendors, and other public agencies. Attorney communications with third parties present special challenges and call for a different set of skills than communicating with the client. While such third-party interactions are not limited to development projects and proposals that come before the city, those circumstances offer a particularly wide range of third-party contacts and communications that city attorneys deal with. This is the context selected by the Attorney Development and Succession committee to identify and highlight essential skills for communicating with non-clients.

Through a series of call-in questions and accompanying panel discussions, the presentation addresses different ways that city attorneys interact with entities and persons outside of the city, in the context of a hypothetical transactional matter (e.g., a proposed development). Specifically, the program addresses the essential skills that city attorneys need to effectively interact with developers and their counsel, members of the public, and the media.

In addition to addressing political, legal, and strategic considerations involved in these interactions, the program tangentially addresses the strain arising from interactions with these various third parties under challenging and stressful circumstances. The program offers some strategies for maintaining a professional and emotional balance.

Each discussion segment begins with the moderator in the guise of a "radio host" briefly discussing with a "caller" a conundrum in which a city attorney interacts with a third party, involving the issues outlined below. The panelists will then discuss the issues and share their strategies for steering through them. For purposes of this paper, the term "city attorney" refers to a city attorney, assistant city attorney, or deputy city attorney, as applicable, as these situations can be experienced by everyone in the office.

Developers and their Counsel:

- interactions before project approval vs. after
- interactions when projects are denied
- administrative record considerations

The Media:

- maintaining client confidentiality
- deciding who "speaks" for the city

Members of the Public:

- keeping your cool during public meetings
- fielding complaints
- appearance of being too “project friendly”

Maintaining Resilience:

- public discourse has become more confrontational, and technology makes it easier to target city attorneys and public officials
- acknowledgement of the professional and personal toll of these interactions, suggested strategies, and resources

Panelists will discuss the challenges that city attorneys may face when project developers submit written statements or assertions that are inaccurate, misleading, or inflammatory, either in whole or in part, either before or during a meeting, including addressing concerns and issues relating to the administrative record. Project opponents may also submit such written statements, and the city attorney will need to determine what, if anything, should be addressed, refuted, or corrected in writing prior to the meeting, keeping administrative record considerations in mind. If a developer’s project is denied during or at the conclusion of the administrative process, or may be anticipated to be denied, different communications strategies may be called for.

Project opponents may also be confrontational and may view the city as favorable to developers rather than citizens or special interest groups. Panelists will discuss approaches and strategies that can be employed. Some of these strategies involve working with city staff and officials before a public meeting at which a controversial project will be considered. Other strategies may be used during the meeting itself, to avoid disruptions and ensure the people’s business is done.

The media, including social media, can be utilized by opponents or proponents of any given issue. The challenges for city attorneys relating to the First Amendment and the media will also be considered. Panelists will discuss the importance of deciding who speaks for the city, and how to interact with members of the media. In today’s pluralistic media environment, interactions with newspapers, social media, and bloggers call for different strategies.

This paper offers tips and suggestions on the tools and strategies covered in each segment and provides links to public-domain resources relating to the topics, as well as on stress reduction and resilience building for attorneys.

Essential Skills Subcommittee
Attorney Development and Succession Committee
City Attorneys Department
League of California Cities

CALL #1 – COMMUNICATIONS WITH DEVELOPERS’ COUNSEL

The processing of development entitlements for a project will often involve the city attorney’s office prior to the hearing itself. We encounter various levels of experience and expertise in the applicant pool; some developers will engage their counsel early on, and for those with experience in developing projects it may be easier to communicate and secure agreement on fundamental issues of a legal nature. In some instances, it merely leads to entrenched, hardened positions early on, for counsel unwilling to entertain a view that differs from that which is favorable to their client. In those situations, it may be necessary to advise the client by means of a confidential memorandum of the issues that they may face during the course of a hearing, and how reactions or responses may affect the legal position of the city in the event of a challenge.

For developers who do not have retained counsel, and who believe for whatever reason that it is unnecessary for them to secure the services of their own counsel, the city attorney’s office may be asked to assist with explaining legal requirements, particularly with respect to conditions of approval, CEQA requirements and mitigation measures, or some aspect of housing legislation. The developer might expect the city attorney’s office to explain legal requirements, and/or to prepare necessary documentation. To the extent the developer seeks to rely on the city staff and city attorney’s office, they should tell the developer (sometimes more than once) that staff and the city attorney represent the city, and not the developer, and reiterate that if the developer desires legal advice the developer will need to secure developer’s own counsel.

Both developers and their counsel may lose sight of the fact that communications between the city and the developer are not privileged unless and until a project is approved, and that anything they generate may be provided in response to a Public Records Act request and may also appear in the administrative record for the proceedings. A reminder is often in order; including a reminder that video conferencing mechanisms where chat or other transcription features are employed will also constitute public record documents.

Practice Pointers

1. Whether to respond to developer’s emails before the hearing on the project; possible approaches
 - a. Remind staff (and the developer and/or developer’s counsel if necessary) that the common interest privilege does not attach until a project has been approved (see references to *Ceres* case, below)
 - b. Advise staff that Zoom call chats and other forms of recordation of video communications are public record and may be required to be included in response to a Public Records Act request, and/or in the administrative record

- c. The city attorney or staff may need to respond in writing to clarify and/or provide corrections for the administrative record, at least as to factual issues that may have been misrepresented
 - d. Respond in writing only to the effect that the city attorney will follow up, to avoid inclusion of the city attorney's analysis in administrative record, which could be used to challenge the project decision
 - e. Go old school; pick up the phone and call developer or their counsel to discuss legal issues
 - f. Provide city staff with pertinent points and accompanying legal analysis, which they can include in agenda report and the administrative record
2. Establish consistent ground rules and protocols on what is best handled by way of email or letter vs. telephone calls, video conference, and in-person meetings
 3. Communicate internally to determine whether a response should come from the city attorney or department staff; often the tone of a discussion or issue shifts when the message is delivered by an attorney
 4. The city attorney may need to delve into the conditions of approval and provide analysis to staff as to the legal requirements and/or permissible parameters for such conditions with respect to a particular application
 5. In certain circumstances, it may be necessary to prepare an analysis for staff's use in light of the possibility/probability of subsequent litigation when project developers are clearly adverse to the city (e.g., Housing Accountability Act).
 6. Interactions with the developer if the planning commission denies the project, despite meeting legal standard
 - a. The city attorney may consider discussing potential project modifications and/or concessions with staff prior to consideration of the project by the city council; such an approach would need to include evaluation of whether the scope of such revision would require return to the planning commission for consideration pursuant to Government Code §65857
 - b. Following discussion with staff, the city attorney may discuss with developer's counsel possible options for modifications/concessions to project before project consideration by the city council, subject to the caveat noted above

- c. The city attorney may invite the developer's counsel to offer its legal opinion and objections to the planning commission decision to be analyzed by the city attorney and considered by the city council

Further Resources

- Scope of Materials and E-Mails in the Administrative Record in CEQA and Other Writ Cases
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2014/2014-Spring-Conf/5-2014-Spring-Holly-Whatley-Scope-of-Materials-and>
- Existence and Scope of the Common Interest Privilege Before and After Ceres
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2014/2014-Spring-Conf/5-2014-Spring-Sarah-Owsowitz-Existence-and-Scope-o>
- Tips for Dealing with Difficult People:
<https://www.lawpracticetoday.org/article/tips-dealing-difficult-people/>
- Who is the client?
https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.13-Exec_Summary-Redline.pdf
- Practicing Ethics – A Handbook for Municipal Lawyers (Chapter 1: Defining the Client & Chapter 7: Duty of Confidentiality)
[https://www.calcities.org/docs/default-source/city-attorneys/practicing-ethics---a-handbook-for-municipal-lawyers-\(revised-2nd-edition-2020\).pdf?sfvrsn=3c4d92d4_1](https://www.calcities.org/docs/default-source/city-attorneys/practicing-ethics---a-handbook-for-municipal-lawyers-(revised-2nd-edition-2020).pdf?sfvrsn=3c4d92d4_1)

CALL #2 – TALKING TO THE MEDIA

Media requests for information are often directed to councilmembers, who may feel pressured to respond. Development projects, potential and existing litigation, personnel matters, or matters relating to law enforcement, will often lead to media requests for comment, and the attendant possibility of the disclosure of sensitive or confidential information. City attorneys generally will seek to avoid having individual councilmembers commenting on such matters, which can be difficult for electeds to understand or comply with, as they may feel they were elected to communicate with and answer questions from the constituents they see at community events and other public venues.

Councilmembers may also have different views from the city attorneys and/or their elected colleagues with respect to any given sensitive matter. If there is a social media policy or an ethics policy, those should be reviewed and shared in advance. It may be desirable or necessary for the city attorney and/or the Public Information Officer (PIO) to prepare a number of talking points that are geared to avoid disclosing privileged and/or confidential information and will effectively communicate the city's position on the matter, as well as identify issues and areas of concern that should be avoided if at all possible. For cities that do not have a PIO, it may fall to the city attorney, who is often viewed as a de facto PIO.

For purposes of this presentation, although censurable conduct may be engaged in by a councilmember, that is an internal issue and not the focus of the presentation, which looks to outside communications.

Practice Pointers

1. Who speaks for the City? Understand that elected representatives may feel an obligation to speak to, or on behalf of, their constituents, which may pose a concern with respect to sensitive or confidential matters, the public disclosure of which may lead to further legal issues
 - a. Ideally a single point person will be identified for communications (see 3, below)
 - b. If that is unacceptable to the council, consider the preparation of talking points that could serve to focus and limit council responses on issues of interest to the media
 - c. For electeds who wish to express their own views on matters that are not confidential, suggest that they first convey the city's official position, if there is one
 - d. If you are assisting as outside counsel in a litigation matter, refraining from comment and referring the media to the city attorney could be appropriate
2. Is there a city social media policy or ethics policy that may bear on the communications issue? If so, review with and attempt to guide city representatives into compliance with the same
3. Why should a city have a spokesperson?
 - a. As a public figure, what you say in public – during city council or community meetings, community events, and on social media platforms - can be used against you or the city

- b. A PIO exists to represent the city. Many large departments that have frequent incidents (police, fire, and public utilities departments or districts) may also have a PIO
 - c. PIOs are not necessarily subject matter experts, but they serve to manage the information between the media and the city. As a situation or information develops, the city manager, city council, or department head may be able to truthfully say that they weren't aware of the facts, did not know all the details, etc.
 - d. An experienced PIO will create a strategy on key information to share and relay, and help train the media not to seek out information from other city sources. PIOs are expected to respond to the media within 20 minutes, even if is to relay that they are working on getting details
 - e. For agencies that do not have a PIO, the city attorney may become a de facto PIO.
4. Be mindful of the goals and/or practices of (some, not all) media outlets:
- a. A newsworthy soundbite from a high-profile person (such as a council member, city manager, department head, union representative, policy maker)
 - b. Potential preference for speaking with someone who is not used to dealing with the media
 - c. An attempt to secure more information than the person wished to impart
 - d. Use of key words that can be sensationalized
 - e. Material that is actually used may be only a snippet of what the interviewee actually conveyed, regardless of the intent behind the statements
 - i. With so many people getting their news online, some reporters and journalists may be tracked, paid, or assigned more stories based on the number of clicks their articles receive.
 - f. Reporters differ in their level of experience and by medium (radio vs. television vs. print vs. blogs). Most large networks and print publications value credibility and will fact-check, which is not always the case for smaller publications and blogs with fewer resources and, arguably, less accountability

5. General Media Tips and Pitfalls

- a. PIOs may recommend that you refrain from saying “no comment,” but not to be afraid to say that you don't know.
- b. It is okay to let the media know that now is not a good time: say you're heading to a meeting and find out when is a good time to call them back. Use those few minutes to contact the PIO and seek advice on how to respond. Most media will expect the designated PIO to provide the follow-up call. PIOs usually operate 24/7 and should be available to assist and provide guidance
- c. Safe Phrases to Use:
 - i. The information is developing, please contact the city's PIO for the latest update
 - ii. We are still assessing the situation
 - iii. We don't have all the facts, too soon to tell

6. How to Respond in an Interview:

- a. Always assume that whatever you say, regardless of whether it is being recorded, will be used.
- b. How did you feel today's event went?
 - i. Response - I'm disappointed we did not get a resolution to the issue
 - ii. What will be printed - Council member _____ is "disappointed" at his/her/their colleagues
 - iii. What you could have said - I think today's event was disappointing in that we did not get to a resolution.
- c. Instead of answering the question - respond with what *you* want to relay
 - i. Always identify 2-3 points you want to convey
 - ii. Make each statement stand on its own

7. Seeking to avoid journalist release of confidential information

- a. Establish good relationship with local journalists to request retraction of unintended disclosure of private or confidential information (may be easier to accomplish in smaller cities)
- b. Establish strong internal policies and training for city staff and elected officials regarding the use of email, text message, and other electronic communications (even on personal devices) that may be subject to PRA or subpoena disclosure

8. Seeking to remove an online social media post

- a. First Amendment protections will apply if the councilmember uses their social media account to communicate official agency business, which may create a designated/limited public forum
 - i. If there are public comments or reactions relating to the post, then more likely that First Amendment protections apply
 - ii. First Amendment prohibition against government taking actions that infringe upon citizen's fundamental speech rights does not apply to private parties, such as social media companies like Facebook. But a local agency's request of Facebook to remove a post may be deemed to be a "state action" and could cause potential First Amendment liability for Facebook as well as the local agency related to removal of a post
 - iii. A court order can be issued to social media platforms to remove postings that are deemed illegal, or which violate specific laws or policies. However, under the Communications Decency Act (47 U.S.C. § 230), social media platforms, as a third-party to a proceeding and publisher of user-generated content, are currently immune from a court order to remove the content, even if the content is deemed illegal

9. Steps to Seek Removal of Online Post

- a. Facebook will remove content that users post on their platform if the content violates Facebook's Community Standards - <https://transparency.fb.com/policies/community-standards/>
 - i. One of Facebook's policies is based on removal of "private and personal information" or "private information obtained from illegal sources."

- b. To report content, use the report link near the content itself. You can also report through Facebook’s Help Center. (See <https://www.facebook.com/help/1380418588640631>.) A person can report content only if they have a Facebook account. (See https://www.facebook.com/help/408955225828742?helpref=about_content.)

10. AB 587 (Bus. & Prof. Code §§22675 -22681) effective Jan. 1, 2023

Social media platform companies are required to disclose their content moderation policies and to submit semiannual reports detailing their moderation activities. Social media companies that generate more than \$100 million in gross revenue must publicly post their content moderation policies and semiannually report data on their enforcement of the policies to the attorney general. Violation of AB 587 will be a civil penalty not to exceed \$15,000 per violation per day.

Further Resources

- Social Media and Public Agencies: Legal Issues
https://www.ca-ilg.org/sites/main/files/file-attachments/3_-_social_media_paper_110813_0.pdf
- Navigating Social Media: “You Are What You Tweet”
https://www.calcities.org/docs/default-source/planning-commissioners-academy---session-materials/you-are-what-you-tweet-an-official-survival-guide.pdf?Status=Master&sfvrsn=5bf84d18_3
- Media Relations Tips for Newly Elected Officials
https://www.ca-ilg.org/sites/main/files/file-attachments/media_relations_tips_for_newly_elected_officials_march_2014_0.pdf?1395707392
- Ethics of Speaking One’s Mind
<https://www.westerncity.com/article/ethics-speaking-ones-mind>
- Short Sound Bite Secrets
https://www.ca-ilg.org/sites/main/files/file-attachments/short_sound_bite_tipsheet_january_2013_3.pdf?1498252437
- Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives (see in particular Part V: “The nature of litigation and communications with the media”)
https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/2016-Annual/10-2016-Annual_Arce_Walter_Guiding-Legislative-Bod

CALL #3 – TALKING TO MEMBERS OF THE PUBLIC

Both in-house and contract city attorneys have a unique opportunity to build and maintain trust in local government through their relations with the community. And we all need to use this opportunity to maximum advantage in this time when so many Californians have lost trust in local government and government workers.

We can do our part to build and maintain trust in part by vigilantly safeguarding the processes that allow community members to participate in and monitor their local government. We can also explain our roles as process guardians (not policy makers) and respond to general inquiries about process, the Brown Act, and the Public Records Act. We can also let everyone know that, although our offices do not provide civil representation or legal advice to members of the public, we do share information about local law. After all, our local laws apply in our communities, so let those in our communities know and better understand what those laws provide.

Of course, there is a downside to visibility, in particular for in-house city attorneys. Because we are constant fixtures in the community, in-house attorneys may become lightning rods on certain community issues with significant legal ramifications. For instance, a neighborhood group may blame one of us because the city "allowed" another adult entertainment venue to open near their homes. Or the business community may blame the city attorney for resisting its proposal for a law banning panhandling in the downtown. We can deal with these challenges by providing clear, concise explanations of the law and our roles in a non-defensive manner. That is, we can explain that as the city's attorney we do not advance or oppose policies. Rather, as in these examples, we are simply discharging our duty to uphold the Constitution. And, further to the examples noted above, we can offer the council the option of considering an ordinance establishing time, place and manner restrictions on adult entertainment and panhandling.

Again, it may be advisable to establish flexible procedures or protocols covering how and when we will participate (or not) in community meetings, and our availability to meet with community representatives. We must then explain those protocols and take care to treat all groups and similarly situated community members equally.

Practice Pointers

1. Particularly when facing a hearing on a potentially controversial project, seek to prepare staff and the board or commission chair or mayor on how to deal with acrimonious public comments, so they are better equipped to maintain objectivity/non-bias

- a. Provide analysis to staff before the meeting regarding applicable legal standards and factual findings to be established relating to consideration of the project
 - b. Provide legal options and analysis of potential risks if the project decision conflicts with any legal standard and/or requirement
 - c. Remind the governing body (in particular, the board or commission chair or mayor) of the applicable legal standard prior to or at the meeting
 - d. Be aware of public perception and political climate, but maintain objectivity
2. Possible approaches to address and interact with the public during the meeting
- a. The city attorney may remind the public of legal standard (so the client is not forced to do so) in a respectful manner, but not directly respond to public comments
 - b. In some cases, it may be appropriate for the city attorney to refrain from interjecting
 - c. Listen carefully, and respond to the substantive points and core concerns being raised rather than to the emotional overlay or tone accompanying the points
 - d. Have certain generic comments prepared to be used to de-escalate a situation, such as “[t]his is a new area of law, and there is not a great deal of case law that addresses this particular topic” or directly reference the applicable code section modified by the State Legislature; for example, “[w]e understand the concerns and frustrations being expressed by residents of the area, but the state’s legislation does not permit the city to deny a housing project of this nature or to reduce the density unless it finds that the development would have specific adverse effects on public health or safety that cannot feasibly be mitigated (GC § 65589.5(j)(1)), and any findings an agency may make to that effect would be subject to challenge under a standard of review which is more difficult to sustain than the usual standard for review of agency determinations,” or with respect to CEQA, for example, “under the Housing Accountability Act legislation, inconsistency between the Zoning Ordinance and General Plan is deemed not to be an environmental impact.” The Housing Accountability Act also provides other quotable restrictions or mandates with respect to agency findings, depending on the sensitivities raised by the project under review

- e. Suggest a continuance if further research is required on any given point or, for example, to accommodate negotiations with developer as to a particular condition or requirement desired by the city and/or neighbors, subject to the restrictions of Government Code § 65857
- f. Remind the board or commission of Brown Act limitations if a discussion veers into items not listed on the agenda and is not limited to brief response or directives to staff. Often in response to public comment, council and commission members will want to engage in substantive discussion and potential action on topics outside the noticed agenda items. The city attorney should provide a reminder that members of the public were not given notice of the discussion and potential action and recommend issuing a directive to staff to agendaize the item(s) for a future meeting if additional discussion is desired.
- g. If necessary, remind the board or commission chair or the mayor that a warning is needed before anyone who is disrupting the meeting sufficiently to the extent that it prevents the conduct of the meeting can be ejected. Consider a recess to see if tempers cool; if they do not, consider adjournment of the meeting (to either a date certain or as may be noticed in future, depending on the actions being considered).

Further Resources

- Dealing with Emotional Audiences:
https://www.ca-ilg.org/sites/main/files/file-attachments/everyday_ethics_emotional_audiences7-2013.pdf?1442364939
- Free Speech vs Hate Speech
Practical Guidelines for Managing Public Forums:
<https://www.ca-ilg.org/sites/main/files/file-attachments/free-speech-vs-hate-commission-guidelines-12.12.2013.pdf?1442364939>
- Beyond the Usuals
Ideas to Encourage Broader Public Engagement in Community Decision Making:
https://www.ca-ilg.org/sites/main/files/file-attachments/beyond_the_usuals_8_15.pdf?1477947600
- Dealing with Deeply Held Concerns and other Challenges to Public Engagement Processes:
https://www.ca-ilg.org/sites/main/files/file-attachments/deeply_held_concerns.pdf?1497552740

- Everyday Ethics for Local Officials - Dealing With a Grandstander:
[https://www.ca-ilg.org/sites/main/files/file-attachments/resources Everyday Ethics Aug02 0.pdf?1497552868](https://www.ca-ilg.org/sites/main/files/file-attachments/resources_Everyday_Ethics_Aug02_0.pdf?1497552868)
- Stepping Into the Evolving Role of the City Attorney: Executive Management Team Member, Crisis Manager, Legal Advisor and Team Builder – What Roles Can or Should You Play? (see in particular p. 9: “Opportunities and Challenges with the Community”)
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2012/Spring-2012/5-2012-Spring-Carvalho-Guinn-Moutrie-Stepping-Into>
- Dealing With Difficult Situations at City Council Meetings: Legal and Practical Considerations for City Attorneys
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2013/2013-Spring-CLE/5-2013-Spring-Michael-Jenkins David-Kahn-Dealings>

Mindfulness and Resilience – Further Resources

- Competency and Mindful Lawyering
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2021/21-Spring/5-2021-Spring;-Fingerman-Competency-and-Mindful-La.aspx>
- High-Tech Intimidation, Stress, and the Public Official
<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/2016-Annual/10-2016-Annual Carlton High-Tech-Intimidation-th>
- CA Lawyers Association: Mental Health Wellness Strategies for Attorneys
<https://calawyers.org/california-lawyers-association/wellness-strategies-for-mental-health-issues-among-attorneys-and-legal-professionals/>
- ABA Resources on Attorney Wellness, Mindfulness, and Work-Life Balance
https://www.americanbar.org/groups/lawyer_assistance/resources/lawyer_wellness/

A separate Resources Index, presented with these materials, is provided for Department members who may wish to have the resource available on work laptops or binder, or otherwise available in an abbreviated format.

**ESSENTIAL SKILLS: TALKING WITH NON-CLIENTS
RESOURCES INDEX**

	SOURCE	TITLE
1.	League of California Cities	<u>Scope of Materials and E-Mails in the Administrative Record in CEQA and Other Writ Cases</u>
2.	League of California Cities	<u>Existence and Scope of the Common Interest Privilege Before and After Ceres</u>
3.	ABA - Law Practice Today	<u>Tips for Dealing with Difficult People</u>
4.	State Bar of California	<u>Who is the client?</u>
5.	League of California Cities	<u>Practicing Ethics – A Handbook for Municipal Lawyers (Chapter 1: Defining the Client & Chapter 7: Duty of Confidentiality)</u>
6.	Institute for Local Government	<u>Social Media and Public Agencies: Legal Issues</u>
7.	League of California Cities	<u>Navigating Social Media: “You Are What You Tweet”</u>
8.	Institute for Local Government	<u>Media Relations Tips for Newly Elected Officials</u>
9.	Western City Magazine	<u>Ethics of Speaking One’s Mind</u>
10.	Institute for Local Government	<u>Short Sound Bite Secrets</u>
11.	League of California Cities	<u>Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives (see in particular Part V: “The nature of litigation and communications with the media”)</u>
12.	Institute for Local Government	<u>Dealing with Emotional Audiences</u>
13.	Orange County Human Relations Commission via Institute for Local Government	<u>Free Speech vs Hate Speech, Practical Guidelines for Managing Public Forums</u>
14.	Institute for Local Government	<u>Beyond the Usuals, Ideas to Encourage Broader Public Engagement in Community Decision Making</u>

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15.	Institute for Local Government	<u>Dealing with Deeply Held Concerns and other Challenges to Public Engagement Processes</u>
16.	Institute for Local Government	<u>Everyday Ethics for Local Officials - Dealing With a Grandstander</u>
17.	League of California Cities	<u>Stepping Into the Evolving Role of the City Attorney: Executive Management Team Member, Crisis Manager, Legal Advisor and Team Builder – What Roles Can or Should You Play? (see in particular p. 9: “Opportunities and Challenges with the Community”)</u>
18.	League of California Cities	<u>Dealing With Difficult Situations at City Council Meetings: Legal and Practical Considerations for City Attorneys</u>
19.	League of California Cities	<u>Competency and Mindful Lawyering</u>
20.	League of California Cities	<u>High-Tech Intimidation, Stress, and the Public Official</u>
21.	California Lawyers Association	<u>Mental Health Wellness Strategies for Attorneys</u>
22.	American Bar Association	<u>ABA Resources: Wellness, Mindfulness, and Work-Life Balance Resource Links</u>



Implementing Districts - Now That You Have Gone to Districts, What Next?

Wednesday, May 17, 2023

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YOUR CITY HAS TRANSITIONED TO DISTRICT ELECTIONS--NOW WHAT?

THE LEAGUE OF CALIFORNIA CITIES
CONFERENCE
May 17, 2023

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Introduction

Over the last several years, cities and other local agencies throughout California have transitioned from at-large elections to district-based elections, largely in response to claims their at-large system violated the California Voting Rights Act (“CVRA”). The CVRA prohibits using an at-large election system if doing so “impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an elections” (Elec. Code, § 14027.) Since the law’s passage in 2002, at least 185 cities and nearly 400 other California jurisdictions have made the switch. This paper’s focus is not on the threshold issue of CVRA compliance or whether to transition to district-based elections. Rather, the paper focuses on the myriad of issues that may arise after a city has made that transition.¹

Who Represents Whom?

A. When do new districts take effect?

To answer this question, we distinguish between the effective date of an ordinance and the date the districts that such ordinance creates are implemented. As with all non-urgency ordinances, the effective date is 30 days after adoption, although it seems reasonable to take the position that the ordinance is one “[r]elating to an election” and therefore may take effect immediately on second reading. However, it may be best to make the ordinance effective in 30 days (especially as the election will be months away) to allow time for any referendum petition challenging the district map’s adoption to circulate. (E.g., *Ortiz v. Board of Supervisors* (1980) 107 Cal.App.3d 866 [ordinance redistricting board of supervisors could not be immediately effective so as to defeat referendum power].) For election purposes, however, the maps themselves are implemented at “the first election for council members in each city following adoption of the boundaries of council districts, excluding a special election to fill a vacancy or a recall election” (Elec. Code, § 21606, subd. (b) and § 21626, subd. (b).)

¹ For a primer on the CVRA generally, see “The California Voting Rights Act: Recent Legislation & Litigation Outcomes” prepared by Youstina N. Aziz, James L. Markman and Dr. Douglas Johnson and presented at the Spring 2018 City Attorney’s Conference. <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/2018-Spring-Conference/5-2018-Spring-Aziz-Johnson-Markman-California-Vot>

B. Who represents whom until the new districts take effect?

Based on the statutory language, at a minimum, until the next regularly scheduled election, a council member is politically accountable to the district in place when they were elected. (See, Elec. Code, § 21606, subd. (d) and § 21626, subd. (b).) This construction flows from the requirement that if, in the interim, a vacancy occurs, the appointed or elected replacement to serve out the balance of the term must come from the original district that elected the departing council member. (97 Ops.Cal.Atty.Gen. 12 (2014); see also Gov. Code, § 36512.) Elections Code section 21606, subdivision (a) further supports this conclusion and states, “The term of office of any council member who has been elected and whose term of office has not expired shall not be affected by any change in the boundaries of the district from which the council member was elected.” Charter cities have the same rule. (Elec. Code, § 21626, subd. (a).) Otherwise, redistricting that changed the political tenor of a district could lead to the immediate recall of an incumbent elected previously, as was recently attempted in Sacramento.

But such interpretation does not mean that a council member must represent only those residing in the district that elected them. Recently, the Orange County Board of Supervisors attempted to mandate that the districts it drew following the decennial census would become immediately effective and adopted a resolution that individual supervisors could not direct the use of county resources outside their newly drawn district except in limited circumstances. This effectively limited the supervisors’ representation to their new districts. The Attorney General issued an opinion that the county could not prohibit supervisors from representing the districts that elected them pending the next regularly scheduled election at which the new maps would apply. (Opinion No. 22-501, 2022 WL 2960559 (July 20, 2022).) The opinion also concluded that nothing prohibited the county from allowing supervisors also to represent the residents of their new districts. (*Id.*, at pp. 5-6.)

That same reasoning should apply to cities to permit city council members to represent the constituents of their newly drawn districts even before the map takes effect at the next regularly scheduled election. The period of potential “double representation” is simply an artifact of the redistricting process. (Cf., e.g., *Legislature v. Reinecke* (1973) 10 Cal.3d 396, 405.) It similarly allows an area to effectively go unrepresented pending an election, too, as when an area moves from a Senate seat scheduled for election to one that is not – voters there may have to wait six years for an opportunity to vote for a state senator. (*Ibid.*)

C. How do you encourage council members to develop a citywide perspective?

One challenge of moving from an at-large election system to a district-based one is the incentive council members to focus exclusively on their district to the exclusion of the city as a whole. To mitigate this effect, some cities also undertook efforts to buffer city services from district by district demands. One common example of such an effort is cities conducting city-wide surveys of road construction dates and adopting a date-driven citywide repaving schedule. Another example is allocating equal numbers of events held in each district.

Changes to Districts After Creation

A. Can a city return to at-large districts?

Theoretically, a city could return to at-large districts, but it should proceed with great caution if it considers doing so.

Cities that convert to a district-based election system after receiving a CVRA demand letter do not need voter approval to make the change provided the ordinance accomplishing the change declares it is being made “in furtherance of the purposes of the California Voting Rights Act of 2001.” (Gov. Code, § 34886.) If making a change for any other reason, however, voter approval is necessary. Government Code section 34873 expressly allows amendments to ordinances establishing by-district election systems, and that power has been construed to authorize an ordinance to change the election system to an at-large approach with voter approval. (*Bridges v. City of Wildomar* (2015) 238 Cal.App.4th 859 [“Accordingly, the City Council had the authority to act as it did—to alter the voting system from by-district to at-large, as approved by the electorate.”].) Notably, *Bridges* focused on the city council’s power to propose an ordinance converting to an at-large election system after voters had approved the initial incorporation of the city and a district-based election system. While procedurally such a change is permissible with voter approval, the resulting election system must still comply with the CVRA, and Wildomar’s experience following its conversion to an at-large system is instructive on the challenges associated with such a change.

Within months of voters’ decision to elect Councilmembers at large, Wildomar received a CVRA claim and opted to return to by-district elections to

avoid the anticipated significant legal defense costs. Wildomar’s experience illustrates a common approach to a CVRA claim. As a practical matter, given the high costs to defend a CVRA claim (Santa Monica has reportedly spent many millions in its CVRA case now pending in the California Supreme Court) and the short deadline to act to limit plaintiff’s attorneys’ fees, many cities opt to transition to district-based elections rather than evaluate or otherwise litigate whether racially polarized voting actually occurs in their elections. Racially polarized voting is key to establishing a CVRA violation. (Elect. Code, § 14028.) It exists when a protected minority group’s preferred candidate of choice differs from the candidate preferred by the majority.

Absent that time pressure, some cities might revisit whether, in fact, racially polarized voting exists in their jurisdiction. Any city considering such a change should first engage a demographer to prepare a racially polarized voting analysis. The analysis will likely need to account for voter preferences in an existing district-based system versus those in a proposed at-large system. If evidence of racially polarized voting patterns is present, moving to an at-large system without triggering a new CVRA claim is unlikely, as there are several California attorneys active statewide on CVRA claims who would likely pounce on the opportunity to challenge a return to at-large elections, particularly when a city-funded study has found evidence of racially polarized voting.

B. Can a city change the number of districts and/or move to a directly elected Mayor?

When responding to a CVRA demand, a City need not obtain voter approval of either an ordinance to convert to district-based elections (including the number of districts) or the map adopted to implement the change. (Gov. Code, § 34886.) Such map may be adopted by ordinance or resolution. (Elec. Code, §§ 21601, subd. (a) and 21621, subd. (a).) Even after a city has moved to district-based elections following a CVRA demand, it may change the number of districts and/or to an at-large mayor with voter approval. Whether a map implementing such change can be effective at times other than the redistricting following the decennial federal census is unclear.

Government Code section 34871 provides the general rules for the number of districts or the method of mayoral election, and unless proposed to comply with the CVRA, voter approval is required. (Gov. Code, § 34871.) For general law cities, a city may have five, seven or nine districts or, alternatively, four, six or eight districts with a directly elected mayor pursuant to section 34900. (*Ibid.*) Any

change in the number of districts cannot affect a councilmember’s term. (Gov. Code, § 34873.) Accordingly, it is easier to increase, than to reduce, the number of council seats. Shrinking the council, while legally possible, takes significant coordination to time the effective date of such an ordinance to avoid shortening the term of a council member and to avoid having a greater number of council members qualified to hold office concurrently than are authorized by the ordinance—a condition that Government Code section 34875 prohibits.

If voters approve a proposed ordinance to change the number of council members or to provide for a directly elected mayor, the city must adopt new districts. (Gov. Code, § 34877.5.) In drafting the map, both general law and charter cities must comply with Election Code provisions applicable to drawing district boundaries generally, such as ensuring the districts are substantially equal in population and comply with the federal and state constitutions and the federal Voting Rights Act of 1965. (*Ibid.*; Elec. Code §§ 21603 and 21623.) Also, cities must solicit public input and hold hearings as required in the Elections Code. (Gov. Code, § 34877.5; Elec. Code, §§ 21607, 21627.) Finally, if the districts are in the original ordinance submitted to the voters, the map must first have been submitted to the city’s planning commission, or if there is no planning commission, the city council, “for an examination as to the definiteness and certainly of the boundaries of the legislative districts proposed.” (Gov. Code, § 34874.)

It is uncertain whether a proposed district map not adopted in response to a CVRA demand requires voter approval. One might argue that when adopted mid-cycle and not in response to a CVRA claim, the map requires voter approval under Government Code sections 34874 and 34877. But legislative intent and rules of statutory construction weigh heavily in favor of interpreting the law to eliminate the requirement of voter approval of district maps. One of the express purposes of 2016’s AB 278 was to remove the need for voter approval of an adopted map. This goal makes sense. Requiring voter approval of the district map could lead to voters approving a move to districts or changing the number of Council seats, but then effectively nullify that approval by rejecting the necessary map. Not requiring such pre-approval, but leaving the implementing map subject to referendum, allows efficient adoption of the map—including the required public hearing process—while respecting voter control via a referendum petition. And construing section 34877 to apply only to the question of altering the number of districts, as distinct from also approving an implementing map, gives effect to AB 278’s amendments without requiring the implied repeal of any statute. On balance, the stronger argument is that voter approval of a new map is not required. In light of the lack of clarity in the statute, however, cities considering altering the number of

districts mid-decade would be wise to include the map in the original ordinance put to the voters, despite the potential negative impact on support for the proposal, to avoid both the arguable need to put a second measure before the voters and the risk of a potential legal challenge to the lack of that second measure.

Notably, no published decision addresses whether the second portion of this process—drawing new maps—can occur other than in conjunction with decennial redistricting following the U.S. Census. The Election Code generally only permits mid-cycle redistricting: 1) if a court orders it; 2) the council is settling a claim that the district boundaries violate the United States Constitution, the federal VRA or the Elections Code rules for redistricting; or 3) the city’s boundaries change and the new population is more than 25 percent of the city’s earlier population. (Elec. Code, § 21605.) These same rules apply to charter cities unless their charters provide different rules. (Elec. Code, § 21625, subd. (c).)

However, cities have a strong argument that an exception allows new districts in response to a voter approved change in their number. When a city adopts council districts “for the first time,” the limitation on mid-cycle districting does not apply. ((Elec. Code, §§ 21605, subd. (b) and 21625, subd. (b).) Although, arguably, a city moving from five districts to seven, for example, is not adopting council districts for the first time, it is adopting the sixth and seventh districts for the first time. And construing that provision to permit mid-cycle redistricting in response to this change is consistent with and recognizes a city’s general power to amend its ordinance regarding the number of districts. Absent a court decision addressing the question, however, a general law city could minimize any uncertainty regarding the issue by coordinating a change in the number of districts with the decennial redistricting. A charter city could also take that route, or it could adopt a charter provision explicitly allowing a mid-decade redistricting.

C. How are annexations handled?

Elections Code section 21601 governs how cities handle district boundaries when annexing new territory. The default rule adds the new territory to the “nearest existing council district without changing the boundaries of the other council district boundaries.” (Elec. Code, § 21603, subd. (a).) If, however, more than four years remain before the next federal decennial census redistricting and the new territory’s population is more than 25 percent of the City’s population in the most recent federal decennial census, then the city council may redistrict. (Elec. Code, § 21603, subd. (b).) Unless a charter city has adopted a different standard by ordinance or in its charter, the same rules apply. (Elec. Code,

§ 21623.) Note that the 25 percent population test uses the annexed area’s population pre- not post-annexation.

D. How to respond to Census data

Once a city has district-based elections, it must redistrict in response to the decennial federal census. The Fair Maps Act provisions governing the substantive and procedural requirements apply to general law cities (Elec. Code, §§ 21600 et. seq.) and to charter cities with some exceptions when a city’s charter provides other rules. (Elec. Code, §§ 21620.) Many cities recently went through this exercise. The Act provides rules about the timing of adopting a new map, the number of public hearings that should take place and their timing, limits on when a city may release its first draft map and detailed requirements regarding information that the city must post on its website and maintain through the next redistricting cycle. (Elec. Code, §§ 21600 et. seq; Elec. Code, §§ 21620.)

Traditionally, compliance with equal population requirements in any mid-decade redistricting would be evaluated using the most recent population data available (typically Department of Finance estimates, local estimates or American Community Survey population estimates). But Government Code 21601(a)(1) and 21621(a)(1) state that when adopting districts for the first time or for decennial redistricting “shall be based on the total population of residents of the city as determined by the most recent **federal decennial census ...**.” It is unclear whether that requirement applies to mid-cycle redistricting under Government Code 21605 and 21625. Logically, more recent population estimates would be used, but statutorily a claim that such data violate 21601(a) or 21621(a) might be possible. Federal precedents make clear that more recent population estimates can meet Federal requirements for equal population, but the FAIR MAPS Act is less clear and might reflect a lack of legislative confidence in alternative data sources or a desire to eliminate local discretion as to what data source to draw from to require use of a noncontroversial data source.

Using a local population estimate presents its own risks. If one is used, Federal standards for the quality and detail of those estimates are demanding. Either the Census Bureau must be engaged to conduct a Special Census (which is very expensive and time consuming²), or a parcel-by-parcel analysis of residential construction and demolitions throughout the entire jurisdiction since the last

² Presuming the Census Bureau will even agree to do the work, regardless of the fee: <https://www.census.gov/programs-surveys/specialcensus.html>

decennial Census count, paired with a detailed analysis of likely vacancy rates and persons-per-household counts, are required.

Challenges to District Lines

A. Current issues in challenges to district lines

The Fair Maps Act invites legal challenges to maps that, before the Act, would have been non-justiciable. For example, when and how many public hearings to conduct before adopting a map would have been within the discretion of the Council. So, too, would have been whether to draw a map to favor a political party or to expressly consider a community's relationship with an incumbent. But the Fair Maps Act provides guidelines on each of these, creating new possible claims. Of course, compliance with the federal and state constitutions and the federal Voting Rights Act has always been required.

It is beyond the scope of this paper to catalog all redistricting challenges following the 2020 redistricting cycle, but we note a few and their procedural status at the time of this paper.

- *Chaldean Coalition v. County of San Diego Independent Redistricting Commission* (San Diego Superior Court Case No. 37-2022-00008447)

This suit challenges the Commission's adoption of the County's supervisorial map, alleging the Commission unlawfully divided the Chaldean community of interest in violation of the federal and state constitutions and the federal Voting Rights Act. It also alleges procedural claims, including that the Commission released its first draft map prematurely and that certain Commissioners were not qualified to serve.

The petitioners unsuccessfully sought a TRO to prevent use of the new map for the 2022 elections. Trial is set for May 2023.

- *Latino Information & Resource Network et al. v. City Of West Sacramento* (Yolo Superior Court Case No. CIV-21-1886)

This suit began in October 2021 as a CVRA suit to compel the city to transition to district-based elections. In January 2022, the city adopted a resolution of intention to make that transition and settled

with the plaintiffs. But after the city approved first reading of an ordinance to adopt the district map in May 2022, plaintiffs claimed the map failed to comply with the terms of the settlement agreement, including, among other provisions, that the map comply with the FAIR MAPS Act’s requirement to minimize divisions of communities of interest—in this case the Latino community in the Broderick/Bryte neighborhood. The Court agreed with plaintiffs that the city’s map improperly divided that neighborhood and ordered the city to use plaintiffs’ offered alternative, which included that neighborhood in one district.

- *SLO County Citizens for Good Government et al. v. County of San Luis Obispo* (San Luis Obispo County Superior Court Case No. 22CVP-0007)

This suit alleges the Board of Supervisors adopted a map dramatically different than its predecessor “for prohibited partisan purposes”—a classic partisan gerrymandering claim. The suit claims the Board “packed” Democratic voters, who they claimed outnumbered Republicans county-wide by 6,000–7,000, into two districts, while leaving Republican-leaning three districts. Following the 2022 election that shifted the Board’s majority, the Board entered settlement negotiations and ultimately agreed to repeal the map and adopt a map “compliant” with applicable law by May 15, 2023.

- *Steve Tate, et al. v. Shannon Bushey et al.* (Santa Clara Superior Court Case No. 22CV396857)

This suit challenged Morgan Hill’s minor changes to the then-existing map of city council districts, which had been adopted before the Fair Maps Act took effect. Petitioner alleged the adopted map did not meet the Fair Maps Act requirement that districts be contiguous. The Court agreed (as did the City’s demographer and City Attorney) that one district was not contiguous, issued an injunction preventing use of the map and allowed the City a brief period to adopt a compliant map, which it did in May 2022.

B. Update on Santa Monica CVRA litigation

Unlike many cities that opted to convert to district-based elections after receiving a CVRA demand letter, Santa Monica litigated the claim that its at-large election system discriminated against Latinos.³ The trial court ruled in Petitioner's favor, but the Court of Appeal reversed, finding the City's voting system did not violate the CVRA or California's constitutional guarantee of equal protection. (*Pico Neighborhood Association v. City of Santa Monica* (2020) 51 Cal.App.5th 1002, *as modified on denial of reh'g* (Aug. 5, 2020); petition for review granted and ordered depublished (Oct. 21, 2020). Depublication upon a grant of Supreme Court review is rare since adoption of a Rule of Court allowing decisions to remain persuasive, but not binding, authority pending review, which might portend poorly for Santa Monica's prospects in the high court. The Court of Appeal determined that Petitioner failed to establish the at-large system diluted the Latino vote because the alternative district-based voting system Petitioner advanced did not create a majority-Latino district. Because a majority-minority district was not shown to be possible, the Court held Petitioner could not prove at-large elections diluted the Latino vote. It also found no evidence of intent to discriminate against minorities when it created the at-large system and, thus, no equal protection violation occurred. The fact that Latinos had been elected to office in Santa Monica may have affected the Court of Appeal's view of the case.

The Supreme Court ordered the parties to brief "What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act?" As of January 5, 2023, the matter was fully briefed. On March 9, 2023, the Supreme Court notified the parties it anticipates setting oral argument in that matter with the next few months. As this paper is drafted, argument has not yet been set.

³ For those interested, the City of Santa Monica maintains a web page with copies of the pleadings and briefs filed in the case to date. <https://www.santamonica.gov/election-litigation-pna-v-santa-monica>



Housing Legislation and Status Density Bonus Law Update

Wednesday, May 17, 2023

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State Density Bonus Law Update
and
Significant 2022 Housing Legislation

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Cal Cities City Attorneys Spring Conference
May 17-19, 2023
Monterey, CA

This paper will be presented at the 2023 Cal Cities City Attorneys Spring Conference and provides an update on recent changes to State Housing statutes, including the State Density Bonus Law (SDBL). This paper will provide a detailed summary of the SDBL, recent legislative amendments to the SDBL, 2022 case law relating to SDBL, and a summary of the most recent updates to State Housing statutes including AB 2011, SB 682 and SB 423.

I. STATE DENSITY BONUS LAW

State Density Bonus Law (SDBL), codified at Government Code section 65915 *et.seq.*, was enacted in 1979. In summary, the SDBL encourages applicants to construct affordable housing units in exchange for an increase in density in a residential or mixed-use housing project, as long as the project includes a certain percentage of affordable units at specified levels of affordability. The levels of affordability include very-low income, low-income or moderate-income households and vary from county-to-county/region to region depending upon the area median income, or AMI.

In exchange for providing affordable housing units, a local agency grants to the applicant, an increase in the otherwise “maximum allowable gross residential density” (discussed below). If requested by the applicant, a local agency shall grant concessions/incentives and/or waivers/modifications of development standards (discussed below).

Despite having been enacted over 43 years ago, it is the authors’ collective opinion that applicants have historically been reluctant to utilize the benefits of the SDBL up until the last several years. While there are a variety of reasons for this hesitancy, we believe many applicants were cautious about creating a perception that they were insensitive to the concerns of their local communities relative to size, scale and density of proposed projects. In addition, applicants were reluctant to provide financial pro formas of their projects to justify a concession (which is no longer a requirement in the law). Rather than viewing SDBL as a right created decades ago by the State legislature, our experience is that applicants —up until just recently—have relied on SDBL sparingly to increase the number of units for their projects.

Through recent amendments to the SDBL, the legislature has made it easier for applicants to secure greater density or housing development projects and to request concessions and waivers of development standards without having to provide detailed financial information and by shifting the burden to substantiate a denial of a requested waiver or concession to the local agency.

The SDBL is first summarized below as it existed on December 31, 2022, and the paper continues with a discussion of amendments from the 2022 legislative session.

A. State Density Bonus Law as of 2022

Generally, the SDBL requires cities and counties to grant a density bonus (or an increase in the density of the development project), based on a specified formula, when an applicant for a housing development, which includes at least five units, agrees to construct a project that contains at least one of the following:

- a) Ten percent of the total units of a housing development for low-income households.
- b) Five percent of the total units of a housing development for very low-income households.
- c) A senior citizen housing development or age-restricted mobile home park.
- d) Ten percent of the units in a common interest development (CID) for moderate-income households provided the units are available for public purchase.
- e) Ten percent of the total units for transitional foster youth, disabled veterans, or homeless persons.
- f) Twenty percent of the total units for lower income students in a student housing development, as specified.

Government Code section 65915 (b) (1).

While it varies, in our experience, most market rate and affordable housing developers provide either ten percent of a project's units for low-income households or five percent of a project's units for very-low households, or some combination thereof. Given current market conditions, we see fewer market rate developers seeking entitlements for a common-interest development, even though only ten percent of the units are required to be set aside for moderate income households.

1. Concessions/Incentives and Waivers/Modifications

One of the most powerful aspects of the SDBL is an applicant's ability to apply for concessions/incentives and/or waivers/modifications to local development standards. In order to increase the density of a project, it is frequently necessary to increase the size and mass of the structure that requires and encompasses that increase in unit count. As a result, the SDBL allows a density bonus applicant to apply for a modification to (or elimination of) zoning standards on the following bases.

An applicant can request a "concession" or "incentive" of a development standard (e.g., site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio; see *Government Code section 65915 (o) (1)*) in order to facilitate the construction of the development including the density bonus or "extra" units. *Government Code section 65915 (k) and (l)*. To deny a concession or incentive, the local agency must find, based upon substantial evidence, that the requested concession or incentive: 1) does not result in identifiable and actual cost savings to the project to provide for the affordable housing costs; or 2) would have a specific adverse impact on public health, safety or on property which is listed on the state Register of Historical Resources and there is no feasible method to satisfactorily mitigate the specific adverse impact without making the project unaffordable to the affordable households; or 3) would be contrary to state or federal law. *Government Code section 65915 (d) (1)*.

The local agency has the burden of proving a denial of a requested concession or incentive. This is a high standard to meet and appears to make it very difficult for agencies to make the requisite findings based upon substantial evidence standard.

Prior to a Court of Appeals decision in 2021, local agencies routinely required a density bonus applicant to submit detailed financial pro-formas in order to justify a requested concession or incentive. Following Schreiber v. City of Los Angeles (69 Cal. App. 5th (2021)), local agencies can no longer require pro-formas to demonstrate project economic feasibility.

An applicant is also authorized by SDBL to request waivers or modifications of development standards that would have the effect of physically precluding the construction of the project including the affordable units. The most typical standards are height limits and setbacks. As with requested concessions or incentives, a local agency can only deny the requested waiver if it finds, based upon substantial evidence, that the waiver would have a specific adverse impact on public health or safety or on property which is listed on the state Register of Historical Resources and where there is no feasible method to satisfactorily mitigate the specific adverse impact or, is contrary to state or federal law.

Importantly, SDBL authorizes the award of attorneys' fees and costs if a court finds that the refusal to grant the requested waiver is in violation of the SDBL. *Government Code section 65915(e)*.

It is also important to keep in mind that an applicant may request an unlimited number of waivers in addition to being authorized to request the following number of incentives or concessions of development standards:

- (a) **One incentive or concession** for projects that include:
 - (i) At least 10 percent of the total units for lower income households;
 - (ii) At least 5 percent for very low-income households; or
 - (iii) At least 10 percent for moderate income persons and families in a development in which units are for sale.
 - (iv) At least 20 percent of the units for lower income students in a student housing development.
- (b) **Two incentives or concessions** for projects that include:
 - (i) at least 17 percent of the total units for lower income households;
 - (ii) at least 10 percent for very low-income household; or
 - (iii) at least 20 percent for moderate income persons and families in a development in which units are for sale.
- (c) **Three incentives or concessions** for projects that include:
 - (i) at least 24 percent of the total units for lower income household;

- (ii) at least 15 percent for very low-income households;
- (iii) or at least 30 percent for moderate income persons and families in a development in which the units are for sale.

(d) **Four incentives or concessions** for a project with at least 80 percent of the total units for lower income households and no more than 20 percent of the total units for moderate income households.

Government Code section 65915 (d) (2).

SDBL defines “maximum allowable residential density” as the density allowed under the zoning ordinance and land use element of a local agency’s general plan. If there is a density range, the maximum allowable residential density means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. If there is a conflict between the density allowed under the zoning ordinance and the land use element of the general plan, the general plan density prevails. *Government Code section 65915 (o) (5).*

Applicants for a density bonus are entitled to the following maximum density bonus depending upon the level of affordability provided by the developer:

- (a) 50% bonus for 15% of the units set aside for very-low-income households;
- (b) 50% bonus for 24% of the units set aside for low-income households; and
- (c) 50% bonus for 44% of the units set aside for moderate income households but which such units must be for sale only.

Government Code section 65915 (f).

Just because a applicant applies for a density bonus, does not mean the applicant is required to use all or any of the bonus units authorized under the SBDL. *Government Code section 65915 (f).* We have a number of clients that actually leave some amount of increased density on the table.

2. Parking Requirements

SDBL provides that, upon the applicant’s request, the local government may not require parking standards greater than the following (including parking for disabled persons and guests):

- (a) Zero to one bedroom: one onsite parking space per unit.
- (b) Two to three bedrooms: one and one-half onsite parking spaces per unit.
- (c) Four or more bedrooms: two and one-half parking spaces per unit.

Government Code section 65915 (p).

In the event the total number of parking spaces is a fractional number, the number is required to be rounded up to the next whole number. A developer can request parking

concessions and incentives in excess of those listed above and such a request for further reductions in parking requirements does not impact the number of concessions or incentives to which the developer is otherwise entitled.

Government Code section 65915 (p).

Additionally, if a rental project contains at least 80 percent of units for lower income residents and no more than 20 percent of units for moderate income residents, then, upon the request of a developer, a local government must eliminate parking minimums if the development is:

(a) Located within one-half mile of a “major transit stop” to which there is unobstructed access. “Major transit stop” is separated defined in Public Resources Code section 21155, which generally, requires there be bus or transit service with no greater than a 15-minute headway.

(b) Rental housing for persons who are 62 years of age or older, or a special needs rental housing development for lower income households, with paratransit service or unobstructed access, within one-half mile, to a fixed bus route that operates at least eight times per day.

(d) A supportive housing development of rental units for lower income households.

In order to qualify as “unobstructed access” to a major transit stop, the route must be free of natural or constructed impediments or obstacles such as freeways, rivers, mountains and bodies of water.

Government Code section 65915 (p).

B. 2022 Amendments to State Density Bonus Law

Following is a summary of the bills passed in the 2022 legislative session amending the SDBL.

1. AB 2334 (Wicks)

This amendment allows a housing development project to achieve increased height and unlimited density if it is located in an urbanized area, with very low vehicle travel in specified counties, so long as 80% of the units are restricted to lower income households and no more than 20% are for moderate-income households.

“Very low vehicle travel area” is defined to mean an urbanized area where the existing residential development generates vehicle miles traveled (VMT) in a designated county. *Government Code section 65915 (o) (9).*

This bill also expands the following provisions, which currently apply to housing developments within one-half mile of a major transit stop that restrict 100 percent of units to

either low income or moderate-income households, to developments that are located in a very low vehicle travel area:

- (a) A height increases of up to three additional stories, or 33 feet.

Government Code section 65915 (d) (2) (D).

- (b) No imposition of maximum controls on density by the local government.

Government Code section 65915 (f) (3)(D) (ii).

The bill also adds “a minimum lot area per unit requirement” to the list of items considered a development standard *Government Code section 65915 (o) (2)*. The amendments further revise the definition of “maximum allowable residential density” to require density to be determined using the dwelling units per acre adopted by the local agency through either a zoning ordinance, specific plan or the land use element of the general plan. If a local agency does not have a dwelling units per acre standard, then “the maximum allowable density” must be calculated using the floor area ratio, lot size or other similar standard, and adopted by the local agency. *Government Code section 65915 (o)(6)*.

The amendment also mandates that greater density prevails if there is an inconsistency in the density between zoning ordinances and general plans (including specific plans). *Government Code section 65915 (o)(6)*.

2. AB 682 (Bloom)

This amendment prohibits a local agency from requiring any minimum unit size requirements or minimum bedroom requirements in conflict with the SDBL’s provisions with respect to a shared housing building eligible for a density bonus under these provisions. This approach seeks to maximize the number of units within permitted square footage by creating a new "shared housing" category within SDBL by automatically conferring two concessions to shared housing projects, such that these projects would not need to meet local requirements regarding minimum unit size and minimum bedroom requirement.

“Shared housing building” means a residential or mixed-use structure, with five or more shared housing units and one or more common kitchens and dining areas that are designed for permanent residence of more than 30 days by its tenants. The kitchens and dining areas within the shared housing building must adequately accommodate all residents. Such a “shared housing building” may include other dwelling units that are not shared housing units, so long as those dwelling units do not occupy more than 25 percent of the floor area of the shared housing building. A shared housing building may include 100 percent shared housing units.

“Shared housing unit” is defined to mean one or more habitable rooms, not within another dwelling unit, which includes a bathroom, sink, refrigerator, and microwave, and is used for permanent residence.

Government Code section 65915 (o) (7).

3. AB 1551 (Santiago)

Previously existing law, until January 1, 2022, required a city, county, or city and county to grant a commercial developer a “development bonus” when an applicant for approval of a commercial development had entered into an agreement for partnered housing with an affordable housing developer to contribute affordable housing through a joint project or 2 separate projects encompassing affordable housing.

AB 1551 added Government Code section 65915.7 which revives the above-described provisions regarding the granting of development bonuses to certain projects. The bill would require a city or county to annually submit to the Department of Housing and Community Development information describing an approved commercial development bonus.

“Development bonus” is defined to include the following:

- (1) Up to a 20-percent increase in maximum allowable intensity in the General Plan.
- (2) Up to a 20-percent increase in maximum allowable floor area ratio.
- (3) Up to a 20-percent increase in maximum height requirements.
- (4) Up to a 20-percent reduction in minimum parking requirements.
- (5) Use of a limited-use/limited-application elevator for upper floor accessibility.
- (6) An exception to a zoning ordinance or other land use regulation.

Government Code section 65915.7 (b).

II. 2022 CASE LAW REGARDING DENSITY BONUS LAWS

***Bankers Hill 150 v. City of San Diego*, 74 Cal.App.^{5th} 755, 289 Cal.Rptr. 3d 268 (2022). The granting of a concession or waiver shall not be required or interpreted to require a general plan amendment, zone change, or amendment to development standards.**

In *Bankers Hill 150 v. City of San Diego*, the court rejected a challenge by Park West Community Association (Association) that a 204-unit, 20-story mixed-use project in downtown San Diego was inconsistent with the city's land use regulations. The Association argued that the project was inconsistent with the city polices because it was too dense, too tall, improperly obstructed views, and towered over smaller adjacent buildings.

In seeking project approval, the developer sought a density bonus under the SDBL (Gov. Code §65915 et seq.). With this density bonus, the developer sought to exceed the maximum capacity of 147 units, increase height, avoid street setbacks, reduce driveway widths, eliminate two on-site loading spaces for trucks, and reduce the number of private storage areas for residents.

The Association argued that the city abused its discretion in approving the project because it was inconsistent with development standards and policies set forth in the City's General Plan and the Uptown Community Plan. The Association asserted the building's design improperly obstructed views, failed to complement neighboring Balboa Park, and towered over adjacent smaller-scale buildings. The Association argued that the City could not reasonably approve the project given its inconsistencies with the standards for development in the community.

The court noted that the Association did not take into account the developer's use of the SDBL. SDBL incentivizes the construction of affordable housing by allowing a developer to add additional housing units beyond the land use designation and secure other "incentives" in exchange for a commitment to provide affordable units. When a developer meets the requirements of the SDBL, a local government is *obligated* to approve projects with increased density, and grant waivers and/or concessions from development standards unless certain limited exceptions apply.

The court recognized that concessions may be rejected if the city can establish the concession would not result in identifiable and actual cost reductions to provide for affordable housing costs. The only other exceptions to the requirement to grant concessions or waivers and reductions of standards require a city to find, based on substantial evidence, that doing so (1) would have "a specific, adverse impact . . . upon public health and safety," (2) would have an adverse impact on any historic resource, or (3) would be contrary to state or federal law.

The court held that the developer was entitled to a waiver of *any* development standard that would have the effect of physically precluding the construction of the project at the permitted density and with the requested incentive unless the city could make the specified findings to warrant an exception from the SDBL.

III. QUESTIONS FOR DISCUSSION

- A. If a local ordinance requires affordable unit to be integrated with market rate units, can concessions/waivers be used to allow affordable units to be in a separate building or parcel than market rate units?
- B. How is "maximum allowable residential density" defined? Does the project need to provide maximum density required in the General Plan before it can seek concessions/waivers?
- C. What type of documentation is required in denying a concession or waiver? Are findings required to be made and what evidence should be presented?
- D. Does the SDBL require deed restrictions on affordable units (for sale or rental)?
- E. Can a local agency's inclusionary housing ordinance requirements be counted toward affordable units to achieve a density bonus?

- F. What are some specific development standards that a local agency can legally deny?

IV. 2022 HOUSING LAWS

Following are the most significant changes made to the Housing Laws in the 2021-2022 legislative session.

1. SB 897 (Wieckowski) – Accessory Dwelling Units

This bill, codified at Government Code section 65852.2 (a) (1) (B) requires that the standards imposed on accessory dwelling units (ADUs) be objective. “Objective standard” is defined as a standard that involves no personal or subjective judgment by a public official and is uniformly verifiable, as specified. The bill would also prohibit a local agency from denying an application for a permit to create an accessory dwelling unit due to the correction of nonconforming zoning conditions, building code violations, or unpermitted structures that do not present a threat to public health and safety and are not affected by the construction of the accessory dwelling unit.

This bill would increase the maximum height limitation that may be imposed by a local agency on an accessory dwelling unit to 18 feet if the accessory dwelling unit is within $\frac{1}{2}$ mile walking distance of a major transit stop or a high-quality transit corridor, as those terms are defined, or if the accessory dwelling unit is detached and on a lot that has an existing multifamily, multistory dwelling, as specified. The bill would increase the maximum height limitation that may be imposed by a local agency on an accessory dwelling unit to 25 feet if the accessory dwelling unit is attached to a primary dwelling, except as specified.

This bill would change the height limitation applicable to an accessory dwelling unit subject to ministerial approval to 18 feet if the accessory dwelling unit is within $\frac{1}{2}$ mile walking distance of a major transit stop or a high-quality transit corridor, as those terms are defined, or if the accessory dwelling unit is detached and on a lot that has an existing multifamily, multistory dwelling, as specified. The bill would change the height limitation applicable to an accessory dwelling unit subject to ministerial approval to 25 feet if the accessory dwelling unit is attached to a primary dwelling, except as specified. The bill, if the existing multifamily dwelling exceeds applicable height requirements or has a rear or side setback of less than 4 feet, would prohibit a local agency from requiring any modification to the existing multifamily dwelling to satisfy these requirements. The bill would prohibit a local agency from rejecting an application for an accessory dwelling unit because the existing multifamily dwelling exceeds applicable height requirements or has a rear or side setback of less than 4 feet.

This bill would also prohibit a local agency from imposing any parking standards on an accessory dwelling unit that is included in an application to create a new single-family dwelling unit or a new multifamily dwelling on the same lot, provided that the accessory dwelling unit meets other specified requirements.

This bill would require a permitting agency to return in writing a full set of comments to the applicant with a list of items that are defective or deficient and a description of

how the application can be remedied by the applicant, if the permitting agency denies an application for an accessory dwelling unit or junior accessory dwelling unit.

2. AB 2011 (Wicks) – Ministerial Process for Housing on Property Designated for Office and Retail

Effective July 1, 2023, AB 2011 (which amends Government Code section 65400) creates a CEQA-exempt, ministerial approval process for multifamily housing developments on sites within a zone where office, retail or parking are the principally permitted use, not unlike SB 35. The law provides for two different qualifying criteria: (1) for 100-percent affordable projects; and (2) for mixed-income projects (typically 15% affordability) located "commercial corridors." AB 2011 projects must pay prevailing wages to construction workers and participate in apprenticeship programs

The expedited approval process allows for qualifying projects to be approved within 90 days for projects with less than 150 units or 180 days for projects with more than 150 units. If an AB 2011 application is deemed inconsistent with qualifying criteria, a local agency has 60 days for projects with less than 150 units, or 90 days for projects with more than 150 units, the local agency must identify those areas of inconsistency.

While a local agency may conduct design review, it must take place within the above-mentioned timeframes and be based only on objective standards.

AB 2011 mandates the affordable units be deed restricted to 55 years for rental units or 45 years for owner-occupied for both the 100-percent affordable housing projects in commercial zones and the mixed income housing projects along commercial corridors. For the mixed-income projects along commercial corridors, rental projects must include either 8% very low-income units and 5% extremely low-income units or 15% lower income. For owner-occupied projects, either 30% of the units must be reserved for moderate income households or 15% low income.

The law also provides densities at various levels (between 20 dwelling units/acre to 80 dwelling units/acre) in the commercial corridors depending on whether the project is located in a metropolitan area or not, the project site's size and its proximity to major transit. Development must meet objective standards for the closet zone in the city that permits multi-family residential use at the residential densities permitted under AB 2011; if no such zone exists, the project is permitted to carry the highest density within the city. Potential height limits can range from 35 feet to 65 feet. For these mixed-use commercial corridor projects, no parking can be required, except for EV parking spaces or accessible parking spaces.



Preparation of Official Statements: Interplay between Disclosure Counsel and the Client

Thursday, May 18, 2023

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Lawrence Chan, Shareholder, Stradling Yocca Carlson & Rauth

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PREPARATION OF OFFICIAL STATEMENTS – INTERPLAY BETWEEN DISCLOSURE COUNSEL AND THE CLIENT

Presented at

LEAGUE OF CALIFORNIA CITIES 2023 City Attorneys Spring Conference

Thursday, May 18, 2023, 9:45-11:15 a.m. General Session
Hyatt Regency Monterey

JEFF MASSEY, Senior Deputy City Attorney, City of Sacramento (Panelist)
LAWRENCE CHAN, Shareholder, Stradling Yocca Carlson & Rauth (Panelist)

SUSANA ALCALA WOOD, City Attorney, City of Sacramento (Session Moderator)

OVERVIEW

State and local governments, some occasionally and some routinely, borrow money among other purposes, to finance infrastructure, to fund cash flow needs, or to refinance existing borrowings. Such borrowings are commonly structured as bonds, notes, certificates or other debt instruments and sold to the public market. When such municipal securities are sold to the public market, they are subject to securities antifraud rules which, as further discussed below, require that potential investors be provided with all information necessary to make an informed decision as to whether to purchase the security.

The document by which a municipal issuer (e.g. a city, county, school district, utility district, etc.) typically discloses the necessary information to a potential investor is referred to as a “Preliminary Official Statement” or “Official Statement” (referred to herein as the “Official Statement”). Note, for any issuance of a municipal security, the Preliminary Official Statement is used to solicit potential investors and becomes the final “Official Statement” once the securities are sold and the final pricing-related terms of the securities (e.g. maturity dates, principal amounts, interest rates, prepayment terms) are incorporated into the Official Statement.

Historically, counsel to the underwriting bank on a municipal securities offering would be the primary drafter of the Official Statement. Over the last few decades, in part as a result of the U.S. Securities and Exchange Commission (the “SEC”) making it clear that the Official Statement is the *issuer’s* document and the *issuer* is responsible for the content therein and any material omissions therefrom, it has become common practice for the issuer to retain counsel to serve as “Disclosure Counsel.” The role of Disclosure Counsel is to assist the issuer in preparing the Official Statement and to be the primary drafter of all or a portion thereof. Since Disclosure Counsel is engaged by the issuer, Disclosure Counsel has an attorney-client relationship with, and a fiduciary duty to, the issuer.

This paper will provide an overview of: (1) the typical contents of an Official Statement, the legal standard under federal securities law that an Official Statement must satisfy, and potential consequences of inadequate disclosure, and (2) the process by which issuers and issuer’s counsel generally work with Disclosure Counsel to prepare and finalize the Official Statement.

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This paper only addresses the federal antifraud rules in the context of Official Statements prepared for primary security offerings. It should be noted that such antifraud rules apply in other contexts in which the SEC may deem that the issuer is “speaking to the market” (e.g. ongoing financial reporting, press releases and public speeches by an issuer’s executive officers or elected officials).

I. Overview of the Contents of an Official Statement.

The Official Statement is the equivalent to the prospectus provided to potential investors in the corporate setting. Under the federal antifraud rules described below, the Official Statement must not contain any “material” misstatements and must contain all “material” information (i.e. no material omissions). The concept of “materiality” will be discussed in more detail in Section II below.

An Official Statement will generally include, among others, the following information:

A. Terms of the Securities.

The Official Statement will describe the basic terms relating to the repayment and prepayment/redemption of the securities and any other structuring features that are applicable or unique to the security. These include, but are not limited to:

- Dates on which interest and/or principal are due to the investor.
- Maturity date(s) of the securities.
- Prepayment/redemption features, which describe the dates, the circumstances under which and in certain instances, the proceeds from which the issuer may prepay the debt.

B. Source of Funds and Security for Repayment.

The Official Statement will describe the pledge of funds to repay the securities and the funds and accounts from which the securities will be repaid.

For example, in the context of a property tax-secured transaction (e.g. a general obligation bond or bonds issued pursuant to the Mello-Roos Community Facilities Act of 1982 (the “Mello-Roos Act”), the Official Statement will describe the authority for the levy of the tax, the pledge of the tax and the transfer of funds to repay the securities. The Official Statement will also typically describe the taxation method, the property tax base (e.g. value of the property, largest taxpayers, status of development and impediments/risks to development (if not fully developed) and any history of property tax delinquencies. In the context of a general fund-backed or enterprise revenue transaction, the Official Statement will describe, among other items, the general fund or enterprise’s historical performance, budgetary forecast, any financial or operational risks and planned future borrowings.

C. General and Specific Risk Factors.

The Official Statement will typically provide a summary of certain risk factors relevant to the nature of the security being offered. For example, for property tax/land-secured securities, the Official Statement would typically discuss risks that could erode the property tax base (e.g. failure to complete development, natural hazards, environmental issues). In addition, investors are also typically cautioned regarding the potential for changes in state laws that may result in challenges to raising revenue sources (e.g. Proposition 218 and Proposition 26), and federal law with respect to the tax treatment of interest on the securities.

Disclosure of risks specific to a particular offering may be warranted under certain circumstances. For example, the property relating to a land-secured security may be subject to ongoing environmental remediation, which increases both the cost to develop and the risk that the land may remain undeveloped.

II. Legal Standard for Official Statements.

A. Key Antifraud Provisions.

Two key antifraud provisions under federal law are applicable to municipal securities – Section 17(a) of the Securities Act of 1933 and Rule 10b-5 promulgated under the Securities Exchange Act of 1934. Section 17(a) of the Securities Act of 1933 states as follows:

“It shall be unlawful for any person in the offer or sale of any securities...(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of ***any untrue statement of a material fact or any omission to state a material fact*** necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.”

Under Section 17(a), a negligence standard is applied, meaning that the SEC can successfully show a securities fraud violation if the issuer “knew or should have known” of the misstatement or omission.

Rule 10b-5 states as follows:

“It shall be unlawful for any person...(a) to employ any device, scheme, or artifice to defraud, (b) to ***make any untrue statement of a material fact or to omit to state a material fact*** necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

Under Rule 10b-5, the SEC must show that the violation was intentional or the issuer acted recklessly.

B. The “Materiality” Standard.

As described in Section II.A. above, misstatements or omissions in an Official Statement are violative of the antifraud provisions if they are “material.” The SEC has never defined what would be considered “material.” The concept of “materiality” has been interpreted and guided by court cases and SEC enforcement actions. The commonly articulated standard of whether a piece of information is material is that there “must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the *total mix* of information made available.” The question to be asked when preparing an Official Statement is whether a particular piece of information or fact would be important to, or would sway, a potential investor in their decision as to whether or not to purchase the security.

III. Consequences of Violations of the Antifraud Rules.

A. SEC Enforcement Actions.

The SEC undertakes investigations and enforcement actions with respect to municipal securities offerings, which have increased in frequency in recent years. Whether or not the SEC ultimately charges an issuer and staff, the process can be time consuming and expensive for the issuer. It is important to note that an SEC investigation is not litigation, which means that rules of court in a typical lawsuit are generally not applicable. The SEC will generally issue broad document subpoenas as well as personal subpoenas to the issuer’s officers and staff. SEC investigations have no set timeline or budget. The process can result in the issuer committing significant staff time and resources as well as significant legal, accounting and other consulting expenses.

Most enforcement actions result in settlements with the SEC. Settlements have taken various forms and the following are certain of the consequences that have resulted from settling enforcement actions:

- Monetary fines against the issuer and individuals (i.e. officers and staff).
- Prohibition of individuals involved with the alleged violations from future participation in any securities offering.
- The SEC can require that the issuer implement procedures to promote future compliance with the antifraud rules. This can take the form of requiring the issuer to hire third-party consultants to monitor compliance.
- The SEC can require that the issuer disclose the settlement in the issuer’s Official Statements with respect to future securities offerings.

In addition to the foregoing penalties and sanctions that could be imposed by the SEC, an enforcement action and the settlement thereof could result in the reduced ability or inability for the issuer to access the public securities market for a certain period of time. If the issuer does access the public market, the market may impose an interest rate penalty as a result of the enforcement or

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settlement. Such challenges could pose operational and financial difficulties for the issuer beyond any immediate penalties that the SEC imposes.

B. Examples of Enforcement Actions.

- **Westlands Water District** (“Westlands”): In 2010, Westlands reclassified approximately \$8.3 million received in prior years as well as approximately \$1.46 million in reserves to include such amounts as revenues for fiscal year 2010. In 2012, Westlands recorded a prior period adjustment for fiscal year 2010 which reclassified approximately \$8.4 million, previously included as a capital expense, as an operating expense (in effect increasing operating expenses for fiscal year 2010). The foregoing accounting transactions were approved by Westlands’ auditors. In 2012, Westlands issued a series of bonds and in the related Official Statement, Westlands disclosed the foregoing accounting transactions. However, Westlands did not explain the effect such accounting transactions would have had on Westlands’ debt service coverage ratio for fiscal year 2010 (i.e. the ratio of revenues to the amount of debt service payable). The SEC charged Westlands, the general manager and the assistant general manager with violations of the antifraud rules as a result of such omission.

Westlands and the officers charged in the enforcement action settled with the SEC. Westlands agreed to pay a fine of \$125,000. The general manager and the assistant general manager paid \$50,000 and \$20,000, respectively, to settle the charges.

- **Sweetwater Union High School District** (“Sweetwater”): In 2018, Sweetwater’s current year budget and interim financial reports showed that Sweetwater would end the fiscal year with a general fund balance of approximately \$19.5 million. In reality, as a result of previously approved payroll increases that were not reflected in the budget and interim financial reports, Sweetwater was actually projected to end the fiscal year with a general fund deficit of \$7.5 million. The inaccurate projections were incorporated into the Official Statement for a bond offering in 2018.

Sweetwater and Sweetwater’s then-chief financial officer settled the enforcement action with the SEC. Among other requirements, Sweetwater agreed to engage an independent consultant to evaluate its policies and procedures related to its municipal securities disclosures. The chief financial officer agreed to pay a \$28,000 penalty and was barred from participating in any future municipal securities offerings.

IV. Role of Disclosure Counsel.

Disclosure Counsel will generally be tasked as the primary drafter of the Official Statement. However, while Disclosure Counsel drafts and prepares the Official Statement, the information therein will be drawn from multiple sources which, depending on the type of transaction, may come from the issuer, third-party consultants or other financing participants (e.g. a developer in the context of property tax/land-secured transactions).

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The appropriate Disclosure Counsel on a particular transaction should not only have federal securities law and relevant state law expertise but should have experience with the type of security being offered and issues surrounding the source of repayment. For example, Disclosure Counsel hired for a water utility enterprise financing should have sufficient familiarity with water utilities from both an operational and financial perspective. Disclosure Counsel hired for a land-secured transaction should have familiarity with the process of real estate development, factors that could impede development and risks surrounding investments secured by real estate in general.

Oftentimes, the same firm that is serving as bond counsel on a transaction will also serve as disclosure counsel.

V. Process of Preparing Official Statements.

A. General. The general process for preparing an Official Statement initially involves Disclosure Counsel, through its own due diligence (e.g. review of relevant documentation and research) and through discussions/communication with the issuer, issuer’s counsel and other financing participants, preparing a first draft. However, depending on the issuer (generally very large and frequent issuers), the preparation of the disclosure regarding the operations and finances of the issuer in general-fund and enterprise revenue transactions may instead be initially drafted or updated by the issuer internally and then provided to Disclosure Counsel to prepare the subsequent drafts.

After the initial draft is produced, a meeting is typically held among the members of the financing team to review and discuss the draft. Subsequent drafts will similarly be reviewed and discussed with the financing team. When the Official Statement is in substantially final form, it will be presented to the issuer’s legislative body for approval before being released to potential investors.

B. Nuances Depending on the Deal and Interplay with Disclosure Counsel.

Section A above outlined, at a high level, the process of preparing an Official Statement. In real-time, the communications between Disclosure Counsel and the issuer as well as other members of the financing team that occur frequently are key to the due diligence process and the shaping of information that is ultimately included in the Official Statement.

This section will highlight some of the differences by which due diligence is conducted and information is gathered for Official Statements depending on the type of security, using property tax/land-secured financings and general fund and enterprise revenue financings as examples.

Property Tax/Land-Secured Transactions. Many property tax/land-secured transactions involve a development project that is not complete. In such transactions, it is inherent that the developer, rather than the issuer, will be the party with a significant portion of the relevant information needed for the Official Statement. For example, in an ongoing development, the developer will have the most up-to-date information with respect to the infrastructure completed and remaining to be completed, the status of vertical development, the expected pricing (i.e. for sale and for lease products), and estimated pace of absorption. In such context, Disclosure Counsel will likely have frequent communication with the developer regarding the proposed development, and perhaps less so with the issuer, as the Official Statement is developed.

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However, as Disclosure Counsel cannot solely rely in all instances on information provided by the developer, issuer staff and issuer's counsel should be engaged in reviewing the information provided by the developer and included in the Official Statement. If the development is a large-scale commercial project or of other significant importance to the community, the issuer's community/economic development, public works and/or legal departments will likely be engaged with the project. As a result, the issuer may also have in-house knowledge of the status of development, entitlements, or environmental/hazardous substance issues, if any.

The following are examples of information which the issuer may be privy to in property tax/land-secured transactions that should be raised with Disclosure Counsel:

- Proposed uses of property within the vicinity of the development that could affect value or absorption of the development.
- Disputes with the developer that may impact the proposed financing or the development.
- Threat of litigation regarding the development.
- Potential mapping or other entitlement issues that could delay or impede development.

General Fund/Enterprise Revenue-Backed Transactions. Unlike the due diligence and information gathering process for a property tax/land-secured financing described above, the information for a general fund or enterprise revenue transaction will almost entirely be drawn from within the issuer's organization. In addition, there will be differences depending on the issuer. A very large issuer (e.g. the State of California, large cities and counties and large utility districts) will generally need to draw upon the expertise of various departments (finance, debt management, risk management, legal, public works, human resources, resource management, information technology, etc.) to gather the necessary information for the Official Statement. In contrast, if the issuer is a single purpose special district (e.g. a small utility, a small school district) with a small number of staff, almost all information for the draft Official Statement may be drawn from a few individuals. In all cases, during the course of preparing an Official Statement, Disclosure Counsel should have open and frequent communication with all relevant issuer staff and counsel.

Similar to the inability of Disclosure Counsel to rely solely on developers to provide information in a land-secured transaction, Disclosure Counsel cannot uncover all material information regarding an issuer's operations and finances without the expertise of the issuer's staff and counsel. The following are examples of information that the issuer's staff and issuer's counsel should raise with Disclosure Counsel as they may not be uncovered through public sources or Disclosure Counsel's prior knowledge of the issuer's operations and financial condition:

- Significant budgetary proposals that could impact the source of repayment.
- Internal investigations of staff or other matters which may materially affect operations or finances.

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- Pending or threatened litigation that may impact operations, finances or the authorization for the financing.

Most general fund-back securities in the State of California are structured as lease revenue financings in which the leasing of certain property owned by the municipality serves as the security for the financing. The legal premise for repayment of the security involves the municipality having use and occupancy of the property subject to the financing leases. The due diligence process regarding the leased property is therefore crucial from both a security and a disclosure standpoint. Such process involves, among others, vetting of any recorded and unrecorded real estate rights affecting the proposed leased property and any natural or environmental hazards. Any issues uncovered that could materially impact the issuer's right to use and occupancy of the property would be disclosed in the Official Statement or could instead render the property unusable for the financing. Failure to have appropriate issuer staff and counsel involved in the due diligence process could result in an omission of material information concerning the property in the Official Statement or the improper use of such property as security for the offering.

The following are examples of issues that have been uncovered in the context of general fund lease transactions:

- During discussions with the issuer, it was discovered that there were plans in the near term to demolish and rebuild the property in question. As a result, the decision was made to use an alternate property as security for the transaction.
- The due diligence process discovered that significant portions of the property was leased to a third-party user, requiring the agreement of the existing user to subordinate their lease to the financing leases.
- The property was subject to reversionary rights to the prior owner under certain circumstances, requiring disclosure in the Official Statement.

C. Establish Procedures.

While the process for preparing an Official Statement can vary depending on factors such as the type of security (as described above), the SEC has stated that issuers should establish a written policy or procedure for preparation of Official Statements by appropriate staff and issuer's counsel (e.g. the city attorney, general counsel). As an example, such procedures could require that certain staff members review and approve of the sections of an Official Statement for which they are the subject matter experts before the Official Statement is provided to more senior officers for a comprehensive review. The process and procedures should not be overly rigid and should be tailored to fit how the particular municipality operates.

VI. Conclusion.

When a municipality issues securities to the public market, the SEC has made it clear that the municipality is subject to the antifraud rules described above and that the issuer is ultimately

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responsible for the contents of and material omissions from the Official Statement. Violation of such rules can have serious legal, financial and reputational consequences for the municipality and the individuals involved. It is therefore crucial that the key staff and the legislative body “buy in” to the idea that providing accurate and complete disclosure to investors is important and to be taken seriously. Further, it is recommended that an issuer establish procedures and processes for review of its Official Statements.

It is now common for issuers to engage Disclosure Counsel to assist with preparing Official Statements. However, while Disclosure Counsel will conduct the due diligence that it deems necessary in its drafting the Official Statement, there will be information material to the offering that lies with the issuer’s staff, officers and members of its legislative body (especially in the context of utility and general fund-backed securities). Therefore, it is important for the issuer and issuer’s counsel to have open dialogue with Disclosure Counsel in order to best prevent any instances of inadequate disclosure.



The Unsheltered Residing in our Communities: Navigating Constitutional and Practical Concerns

Thursday, May 18, 2023

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5.2023 Spring; Ortega & Salbert

The Unsheltered Residing in our Communities: Navigating Constitutional and Practical Concerns.

I. Overview

California is home to nearly one-fourth of the nation's unsheltered population,¹ and homelessness in California continues to rise.² For example, from 2019 to 2022, California's unhoused population increased from approximately 151,000 to 171,000. Of the 171,000 unhoused individuals, 67%, or 115,000 persons, were unsheltered, living in places not intended for human habitation.³ The growing homeless population continues to put pressure on local governments, which are tasked with creating plans to reduce homelessness in their communities. Both the State and federal government have recently provided millions of dollars of additional funding, some of it pandemic-related, to address this issue. Local governments face an enormous challenge in creating these plans, especially given that homelessness largely results from the state's decades-long housing crisis and the resulting lack of affordable housing.⁴

Both the lack of affordable housing and insufficient shelter capacity leads many unhoused individuals to reside in encampments, resulting in communities demanding that local and state leaders do more to address a proliferation of encampments. Public pressure may force local leaders to resort to abating encampments. Indeed, abatement may be necessary because conditions may threaten the public health and safety of the community as well as those living in the encampments.

Nevertheless, abatement requires careful consideration because courts have made clear that there are constitutional limits to such measures. Moreover, if done improperly, abatement just shifts people to other locations and perpetuates the cycle of trauma already suffered by many of those unhoused. Abatement can also result in the cutting off of certain community and social support ties. As a result, rather than immediately abating homeless encampments, many cities have opted for a cooperative approach—assisting those experiencing homelessness with relocating them away from sensitive areas, such as schools and creeks and waterways, providing intensive case management as well as sanitation and trash service, and carrying out abatement as a last resort.

Below we summarize some of the constitutional limits on abatement of encampments.

II. Constitutional Considerations for Addressing Encampments

a. **Abating encampments may violate the Fourth Amendment's prohibition on unreasonable searches and seizures**

The Fourth Amendment protects people from unreasonable searches and seizures by the government. The government may not seize property unless it has an objectively reasonable

belief that the property is (1) abandoned, (2) presents an immediate threat to public health or safety, or (3) is evidence of a crime, or contraband.⁵

In *Lavan v. City of Los Angeles*, the Ninth Circuit Court of Appeals upheld an injunction preventing the City of Los Angeles from seizing and destroying unattended property of unhoused individuals. There, the City seized and destroyed property it believed was abandoned, which would have rendered the seizure reasonable under the Fourth Amendment. However, plaintiffs alleged their belongings included forms of identification and, in some cases, were neatly packed in a manner displaying ownership. The court concluded the City seized and destroyed property it knew was not abandoned.

The seizure and immediate destruction of unattended items based on size is also unconstitutional. Citing *Lavan*, the court in *Garcia v. City of Los Angeles*, enjoined the City from enforcing an ordinance allowing it to immediately seize and destroy “bulky” personal property (defined as property larger than can fit in a 60 gallon trash can) stored in public areas.⁶ The City argued that it was too complex to determine whether a bulky item is abandoned. The court agreed that the bulky item provision would “make it easier to clean up sidewalks” but noted that the rule would “eviscerate the Fourth Amendment.”

These restrictions require local agencies to carefully consider whether their handling of a person’s property is constitutional, even in circumstances that may appear burdensome to decisionmakers. In *Smith v. Reiskin*, District Court for the Northern District of California considered whether the San Francisco Municipal Transportation Agency could lawfully withhold a vehicle from a homeless individual who received thirty (30) parking citations, but could not pay the \$11,116.75 in outstanding fines.⁷ The vehicle could be seized without warrant if the community caretaking doctrine were satisfied, which allows for the impoundment of a vehicle that may “jeopardize public safety and the efficient movement of vehicular traffic.”⁸ Because non-payment of fines is not such an interest, the Northern District held the vehicle needed to be returned so that plaintiff would have the ability to work toward paying off the outstanding fines.⁹

b. Abating encampments may violate the Due Process Clause of the Fourteenth Amendment

Under the Fourteenth Amendment, the government may not deprive any person of life, liberty, or property without due process of the law.

In addition to the Fourth Amendment violation in *Lavan*, the court also found a Fourteenth Amendment violation related to the immediate destruction of seized property because the City of Los Angeles had failed to provide the property owners with notice and a meaningful opportunity to be heard. The City argued it was impracticable to provide a pre-deprivation hearing when seizing property, and while the court agreed, it noted that “efficiency must take a backseat to constitutionally protected interests” and that Los Angeles’ interest in keeping its parks clean was outweighed by the plaintiffs’ interest of not having their personal property destroyed.

Cities may also violate the substantive Due Process Clause of the Fourteenth Amendment if they place a person in a situation of known danger with deliberate indifference to their personal or

physical safety. In *Sacramento Homeless Union v. County of Sacramento* unhoused individuals brought action against the county, city, and others, alleging they had been subjected to state-created danger in violation of federal and state constitutions by the clearing or sweeping of existing encampments during periods of extreme heat and by failing to open a sufficient number of cooling centers and other safe, air-conditioned locations.¹⁰ Relying on *Kennedy v. Ridgefield*¹¹, the court granted a preliminary injunction barring the City of Sacramento from clearing encampments. Relying on this state-created danger doctrine, district courts have likewise barred several cities from carrying out abatements during the height of the pandemic, which occurred, for example, in Sausalito¹² and Santa Cruz¹³.

More recently, in *Fitzpatrick v. Little*, the District Court considered such a claim, noting that the state-created danger doctrine requires proof that: “(1) the state officers’ affirmative actions created or exposed the plaintiff to an actual, particularized danger that he or she would not otherwise have faced; (2) the plaintiff suffered an injury that was foreseeable; and (3) the officers were deliberately indifferent to the known danger.”¹⁴ Because the complainants failed to identify any actual injuries, the District Court dismissed this claim.¹⁵

c. Barring individuals from sleeping in public can violate the Eighth Amendment’s prohibition on cruel and unusual punishment

Under the Eighth Amendment, the government cannot require excessive bail, impose excessive fines, or inflict cruel and unusual punishment.

Courts have held that the Eighth Amendment bars enforcement of anti-camping ordinances unless shelter is available. In *Martin v. City of Boise*, the Ninth Circuit Court of Appeals issued a unanimous decision finding the City’s prohibition against sleeping in public violated the Eighth Amendment’s prohibition on cruel and unusual punishment when the homeless individuals have no access to alternative shelter. After *Martin*, cities generally cannot enforce ordinances that criminalize sleeping in public unless the city has shelter space available within its jurisdiction. However, the court in *Martin* made clear that limitations could still be placed on camping or sleeping during certain times and in certain places. Recently, the Ninth Circuit extended *Martin* to civil infractions. In *Johnson v. City of Grants Pass*, the Ninth Circuit ruled that an ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Eighth Amendment.¹⁶

Other courts have limited the application of *Martin* in various contexts. This is not surprising because *Martin* itself cautions that its holding is a “narrow one,” explaining, “‘we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place.’ [Citation.] We hold only that ‘so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],’ the jurisdiction cannot prosecute homeless individuals for ‘involuntarily sitting, lying, and sleeping in public.’”¹⁷ Likewise, the *Martin* decision specifies that, “our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is

unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible.”¹⁸

In *Gomes v. County of Kauai*, the District Court for the District of Hawaii considered whether the County of Kauai could penalize a homeless person for camping at Salt Pond Beach Park.¹⁹ The District Court quoted a portion of the above language from *Martin* indicating that prohibitory ordinances may be validly enforced “at particular times or in particular locations,” and dismissed the complaint where there was no indication that camping was prohibited at more than one public park in Kauai.²⁰

Similarly, in *Fitzpatrick v. Little*, the District Court for the District of Idaho reviewed whether Idaho officials could lawfully proscribe camping at Idaho’s Capitol Complex.²¹ However, the regulation at issue limited in scope as to the area of enforcement.²² Because *Martin* ruled the Eighth Amendment is not violated by such limited laws, and because plaintiffs’ actions were other than involuntary, the District Court held that plaintiffs failed to state any Eighth Amendment violation.²³

d. Homeless encampments may be expressive conduct protected under the First Amendment

Courts have held that homeless encampments may be symbolic of speech and therefore protected under the First Amendment.

In *Phillips v. City of Cincinnati*, the court held that the action of living in a homeless encampment can be expressive conduct protected by the First Amendment.²⁴ In *Phillips*, plaintiffs alleged that by living in encampments located in open and obvious areas, including the City’s central business district, they were calling attention to the city’s affordable housing crisis. The court agreed, noting the “nature and location” of the encampments made it plausible that onlookers would understand the residents were “communicating a message about the City’s inability to provide sufficient affordable housing.”

Not all courts have arrived at the same conclusion reached in *Phillips*. In *Fitzpatrick v. Little*, the District Court considered, *inter alia*, whether homeless persons camping in Boise’s Capitol Complex were protected by the First Amendment.²⁵ Upon finding the Capitol Complex to be a traditional public forum and the homeless’ alleged speech protected, and through the lens of the complainant’s as-applied challenge, the District Court explained the relevant inquiry is whether the anti-camping ordinance in question was content-neutral.²⁶ In other words, that the “restrictions are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant government interest, and they leave open ample alternative channels for communication of the information.”²⁷

The *Fitzpatrick* Court reasoned that because the complainants made an as-applied challenge, the content-neutral analysis needed to consider whether so-called “viewpoint discrimination” occurred.²⁸ “A regulation engages in viewpoint discrimination when it regulates speech based on the specific motivating ideology or perspective of the speaker.”²⁹ “In other words, the

government engages in viewpoint discrimination when it ‘targets ... particular views taken by speakers on a subject.’”³⁰

The District Court found that: (1) “the Campers have failed to plausibly allege that these statements and enforcement actions taken targeted the particular views of the Campers, rather than being utilized to enforce the anti-camping statute, indifferent to their actual message;” (2) the ordinance was “content-neutral because it doesn’t require any officer to ‘examine the content of the message conveyed to determine whether conduct violates the statute;” (3) the ordinance advanced the government’s “interest[s] in maintaining the Capitol grounds in an attractive and intact condition, ... ensuring the health and safety of its citizens, and providing unobstructed grounds and convenient access to the Capitol Mall area;” (4) the ordinance was narrowly tailored; and (5) the homeless had alternative channels to communicate their views.³¹ Consequently, the District Court dismissed the complainants’ First Amendment claims.³²

e. Fining homeless persons may provoke Excessive Fines claims under the Eighth Amendment

Some homeless persons and/or their advocates, have claimed that fines associated with the abatement of homeless encampments violate the Eighth Amendment’s proscription against excessive fines. In *Fitzpatrick v. Little*, the District Court recited that such a claim requires one to establish that the amount of the fine is “grossly disproportional to the gravity of the defendant’s offense.”³³ The factors to be reviewed in making such a determination are: “(1) The nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of harm caused by the offense.”³⁴ Moreover, reviewing courts “should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.”³⁵ Because the complainants were fined a total of \$72 (\$15.50 for each offense), and a parking fine of \$63 had been upheld in another case, the District Court held the fines did not violate the Excessive Fines Clause and dismissed that claim accordingly.³⁶

III. Considerations Moving Forward

Local governments should be aware of the constitutional limits on abating encampments. In situations where it is necessary, consideration should be given to a more cooperative approach that may involve:

- Notice: Giving ample notice to those who are to be affected by the abatement;
- Fines: Ensuring that any fines imposed are proportional to the specific offense at issue;
- Coordination: Engaging county, nonprofit, and community partners to let them know the need to abate a location to coordinate resources which will be necessary, including available shelter beds, as well as available transitional and other housing resources;
- Potential Relocation: If necessary, assisting with relocation away from sensitive areas;
- Manage Personal Property: Establish a personal property management system that will provide guidance to those working with unhoused residents to sort property that can be stored for later retrieval, and that which can be discarded;

- Hygiene and Trash Service: for larger encampments, providing hygiene and trash services so long as the encampment is not in a sensitive area while further enlisting those agencies that can provide needed services.

Abatements do little to address the primary cause of homelessness – the lack of affordable housing. The “Housing First” approach is one potential alternative because it focuses on providing housing to unsheltered persons before addressing job instability, substance abuse and other factors that otherwise might prevent one from obtaining shelter. However, the building of sufficient new affordable housing takes time and, therefore, local governments should look for creative solutions that address the health and trauma of those community members living on the streets.

¹ *How Does Homelessness In California Compare With Other States?*, available at: <https://www.nytimes.com/2019/10/17/us/homelessness-california-population-states-comparison.html>.

² *California Homeless Population Grew By 22,000 Over Pandemic*, available at, <https://calmatters.org/housing/2022/10/california-homeless-crisis-latinos/>.

³ The Point-in-Time (PIT) count is a count of sheltered and unsheltered people experiencing homelessness on a single night in January. HUD requires that Continuums of Care conduct an annual count of people experiencing homelessness who are sheltered in emergency shelter, transitional housing, and Safe Havens on a single night. Continuums of Care also must conduct a count of unsheltered people experiencing homelessness every other year (odd numbered years). Each count is planned, coordinated, and carried out locally. See [U.S. Department of Housing and Urban Development Continuum of Care \(CoC\) Homeless Assistance Programs Homeless Populations and Subpopulations Reports](#).

⁴ HOMELESSNESS IS A HOUSING PROBLEM: HOW STRUCTURAL FACTORS EXPLAIN U.S. PATTERNS (Gregg Colburn & Clayton Page Aldern, 2022); see also, Streecher, Jialu L., *Homelessness in California: Causes and Policy Considerations*, Policy Brief, Stanford Institute for Economic and Policy Research.

⁵ *Lavan v. City of Los Angeles*, 693 F.3d 1022 (2012).

⁶ *Garcia v. City of Los Angeles*, 11 F.4th 1113 (2021).

⁷ *Smith v. Reiskin* (N.D. Cal. 2018) 2018 WL 7820727, *1.

⁸ *Id.* at *3 (quoting *South Dakota v. Opperman* (1976) 428 U.S. 364, 368-69).

⁹ *Id.* at *4.

¹⁰ *Sacramento Homeless Union v. County of Sacramento* (E.D. Cal., July 29, 2022, No. 222CV01095TLNKJN) 2022 WL 3019735.

¹¹ In *Kennedy v. Ridgefield*, 439 F.3d 1055 (2006) the court ruled that the government could be held liable for affirmatively, and with deliberate indifference, placing an individual in a dangerous situation they would not have otherwise faced.

¹² *Sausalito/Marin County Chapter of California Homeless Union v. City of Sausalito* (N.D. Cal. 2021) 522 F.Supp.3d 648, modified in part sub nom. *Sausalito/Marin County Chapter of California Homeless Union v. City of Sausalito* (N.D. Cal., May 26, 2021, No. 21-CV-01143-EMC) 2021 WL 2141323.

¹³ *Santa Cruz Homeless Union v. Bernal* (N.D. Cal. 2021) 514 F.Supp.3d 1136, modified (N.D. Cal., Apr. 1, 2021, No. 20-CV-09425-SVK) 2021 WL 1256888.

¹⁴ *Id.* at *14-15.

¹⁵ *Id.* at *15.

¹⁶ *Johnson v. City of Grants Pass* (9th Cir. 2022) 50 F.4th 787.

¹⁷ *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584 (quoting *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3d 1118, 1138).

¹⁸ *Id.* at 617, fn. 8.

¹⁹ *Gomes v. County of Kauai* (D. Haw. 2020) 481 F.Supp.3d 1104, 1106-07.

²⁰ *Id.* at 1108-09.

²¹ *Fitzpatrick v. Little* (D. Idaho 2023) 2023 WL 129815, *11-13.

²² *Id.* at *13.

²³ *Id.*

²⁴ *Phillips v. City of Cincinnati* (S.D. Ohio 2020) 479 F.Supp.3d 611.

²⁵ *Fitzpatrick*, 2023 WL 129815, *6-9.

²⁶ *Id.* at *6-7.

²⁷ *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.

²⁸ *Fitzpatrick*, 2023 WL 129815, *7.

²⁹ *Boardman v. Inslee* (9th Cir. 2020) 978 F.3d 1092, 1110.

³⁰ *Id.* (internal citation omitted).

³¹ *Fitzpatrick*, 2023 WL 129815, *7-8.

³² *Id.* at *9.

³³ *Id.* at *14 (quoting *United States v. Bajakajian* (1998) 524 U.S. 321, 336-37).

³⁴ *Id.* (quoting *Pimentel v. City of Los Angeles* (9th Cir. 2020) 974 F.3d 917, 921).

³⁵ *Id.* (quoting *Bajakajian* 524 U.S. at 336).

³⁶ *Id.*



Municipal Tort and Civil Rights Litigation Update

Thursday, May 18, 2023

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

League of California Cities
City Attorneys Spring Conference
Monterey, California
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I. CIVIL RIGHTS – LAW ENFORCEMENT LIABILITY

A. In *Golick v. State of California*, 82 Cal. App. 5th 1127 (2022)

- **No duty of care was found to hostage victims killed by person who exchanged fire with a deputy sheriff.**

In *Golick et al. v. State of California et al.*, 82 Cal. App. 5th 1127 (2022), Pathway Home, a private corporation, contracted with the State Department of Veterans Affairs and provided mental health services at the Veterans Home. An agreement between the State and Pathway included a lease of space at the Veterans Home. Also, an interagency agreement between the State and the Sheriff's Department obligated the latter to "respond to all calls for service" at the Veterans Home, including "criminal, non-criminal, and traffic related calls."

A month after one veteran was terminated from the program for violating policies and his treatment plan, he returned and entered the facility with a loaded semi-automatic rifle. He held three employees hostage and exchanged gunfire with a sheriff's deputy. During the shooting sequence, which lasted approximately 10 seconds, the deputy fired 13 rounds and the veteran fired 22 rounds. Law enforcement officers had no further engagement with Wong. About eight hours later, an FBI SWAT team entered the room and found the veteran and the three employee hostages dead.

The victims' families filed wrongful death actions against multiple defendants, including the County, the Sheriff's Office, and the sheriff's deputy. Plaintiff's allegations included the following: (1) a contract between CALVET and the sheriff's office required providing service calls at the Veterans Home, and (2) the County had a special relationship with Pathway's employees.

The trial court sustained demurrers, and the First District Court of Appeal affirmed. First, the County defendants owed no duty of care under the special relationship doctrine because a contractual obligation to respond to service calls does not equate to a contractual duty to protect the deceased employees from patients. Second, the sheriff's deputy did not

increase the risk of harm. Allegations that the deputy's conduct agitated the veteran and prompted him to kill his hostages were speculative. Furthermore, the plaintiffs did not allege that the hostages detrimentally relied on anything that the deputy said or did.

Significance: While the deputy had a duty to act reasonably when using deadly force, it did not include a duty to prevent the hostage-taker from shooting the hostages where the facts did not show that the deputy's actions increased the hostage's risk of harm. Also, there was no special relationship between the hostages and the deputy because the deputy gave no assurances to the employees about their safety. Furthermore, the complaint only alleged that the Sheriff's Department had a contractual obligation to respond to service calls at the Veterans Home; however, this did not create a contractual duty to protect the decedents from patients.

B. *Verdun v. City of San Diego*, 51 F.4th 1033 (9th Cir. 2022)

- **Ninth Circuit upholds chalking practice under the special needs exception to the warrant requirement.**

In 2021, the Sixth Circuit held in *Taylor v. City of Saginaw, Michigan*, 11 F.4th 483 (6th Cir. 2021) that chalking tires for purposes of parking enforcement was a search under the 4th Amendment and was not justified as a community caretaking function or as an administrative search. However, in October of 2022, the Ninth Circuit ruled oppositely.

The City of San Diego utilized tire chalk since at least the 1970s as an efficient and cost-effective way to determine a car's violation of time limits on City parking spots. The City's parking officer places a chalk mark on every vehicle parked in a given area of the City; parking officers do not single out particular vehicles. Plaintiffs, who were found in violation of the City's parking time limits, challenged under 42 U.S.C. § 1983 alleging that such actions by the City violated the Fourth Amendment.

In *Verdun v. City of San Diego*, 51 F.4th 1033 (9th Cir. 2022), the Majority, in a decision authored by Judge Daniel Bress, questioned whether tire chalking constitutes a search under the physical trespass theory of *United States v. Jones*, 565 U.S. 400 (2012), a Supreme

Court case involving the installation of a GPS tracking device on a vehicle to monitor movements. But assuming arguendo that it is a search, the administrative search doctrine permits the chalking. Under that doctrine, warrantless searches that are reasonable under the circumstances are permitted where not for the primary purpose of crime control. The Majority found that chalking tires is minimally intrusive and serves the “strong governmental interest in managing traffic and parking.”

Judge Patrick Bumatay dissented, arguing that the city violated the Fourth Amendment under the Constitution’s history and text. The majority opinion stated that the dissent provided an “unsupported and revisionist account of Fourth Amendment doctrine.”

Significance: This decision provides guidance that California cities may use chalk to mark the tires of parked vehicles to track how long they have been parked to enforce parking restrictions in unmetered public parking spaces. However, the 9th Circuit decision creates a split with the 6th Circuit. A petition for writ of certiorari was filed on March 24, 2023

C. *Peck v. Montoya*, 51 F.4th 877 (9th Cir. 2022).

- **Non-integral participants in an excessive force claim are entitled to qualified immunity.**

Peck v. Montoya, 51 F.4th 877 (9th Cir. 2022) arises from an officer-involved shooting of a 60-year-old legally blind man. While on the phone with his contractor, the man showed his real estate agent a gun and said he wanted to kill his contractor. Hearing this over the phone, the contractor called the police. Deputies arrived, surrounded his home, and confronted him with guns drawn. The deputies learned during a prolonged stalemate - which included swearing at the officers and the man pulling down his pants and “mooning” the deputies – that the gun was in the house. The blind man -- agitated and screaming the deputies should kill him -- said “If you come in my house, I’m going to shoot you.” He also asked the deputies, “What are you going to do, shoot a blind man?” Seeing movement in the house, the deputies fatally

shot him through the window. There was a triable issue of fact as to whether he grabbed his gun before they fired.

The man's surviving spouse brought an action for excessive force against the deputies under 42 U.S.C. Section 1983. The District Court denied summary judgment for all defendants, and the deputies appealed.

The Ninth Circuit held that while the deputies said the man "reached for and grabbed onto" the gun, the facts most favorable to the non-moving plaintiff on summary judgment would be that the deputies shot an unarmed and blind man. Plaintiff's expert testified that (1) the deputy's description of where the gun was located is inconsistent with where it was recovered, and (2) the decedent must have been standing at least several feet away from the gun. Therefore, on the claim of excessive force, the Ninth Circuit concluded that deputies who shot the man were not entitled to qualified immunity.

As to the three officers who did not shoot, the Ninth Circuit pointed out that "individual actions" do "not themselves rise to the level of a constitutional violation" under Section 1983 unless the official is an "integral participant" in the unlawful act (citing *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 941 (9th Cir. 2020)).

Accordingly, the Ninth Circuit reversed the District Court by finding that the non-shooting officers were not integral participants. They did not meet a liability test for officers who (1) "knew about and acquiesced in" the violation as part of a "common plan" or (2) "set in motion" acts by others that they "knew or reasonably should have known" would cause others to violate the Constitution. *Id.* at 891. The shooting was completely unplanned, and they did not have any reason to know that their actions—providing armed backup—would cause a constitutional violation. Therefore, they were not integral participants subjecting themselves to liability.

Significance: The case provides an analysis of the integral-participant doctrine in the Ninth Circuit. This doctrine subjects individual police officers to potential liability without

identifying or analyzing an officer’s specific conduct. This becomes a fact-intensive analysis. The Ninth Circuit has previously come to opposite findings of liability in two cases analyzed in this decision. In *Boyd v. Benton County*, 374 F.3d 773 (9th Cir. 2004), officers executed a warrant on a residence, during which a flash-bang grenade was purportedly improperly deployed. The court rejected the contention that only the officer who threw the flash-bang grenade could be held liable. In that case, every officer was aware of the decision to use the flash-bang, did not object to it, and participated in the search operation knowing the flash-bang was to be deployed. In *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007), it was alleged that officers improperly placed hobble restraints on an arrestee. The Ninth Circuit found that officers who had initially tackled the suspect and those who handcuffed him could be held liable for another officer’s ultimate application of hobble restraints. There, the Ninth Circuit found that those actions were instrumental in the officers’ gaining control of [him], which culminated in “excessive force.”

D. *Villalobos v. City of Santa Maria*, 85 Cal.App.5th 383 (2nd Dist. 2022)

- **Officers acted reasonably using less lethal force on an armed suspect where negotiations were futile, he was acting more agitated and erratically, and he presented an immediate threat of harm to himself.**

Santa Maria Police Department officer responded to a report of a “suspicious person with a knife.” When they arrived at the scene, they saw Decedent standing in the middle of the road holding a knife with a long blade. The officers ordered him to drop it, but he refused. He then walked over to front of a gas station’s price sign yelling at the officers and holding a knife to his throat. A detective said to Decedent, “You know it’s a sin to kill yourself.” Decedent responded, “I am not going to kill myself, you are going to kill me. . . . You guys are here to hurt me.” The detective repeatedly told Decedent that they didn’t want to hurt him.

The incident was recorded on video. Decedent appeared upset, chattered incessantly, and placed the knife to his throat as if he planned to kill himself. Spanish-speaking officers

and FBI-trained negotiators attempted to calm him and persuade him to surrender. At the 42nd minute, a sergeant orders officers to deploy less-than-lethal beanbag rounds and 40mm rubber projectiles because of Decedent's "failure . . . to converse with the negotiators to establish any meaningful dialogue." There was also a change in the Decedent's demeanor, as he appeared to look for escape routes.

The officers fired several times, striking Decedent in the torso with projectiles. He grabbed the knife with both hands and jumped up and down three times. Each time, he forcefully stabbed himself in the abdomen. He then appeared on the video to slash his throat with the knife. He then charged full speed toward the officers with a knife clearly visible in his right hand, and the officers fired several rounds of live ammunition. The cause of death was multiple gunshot wounds.

Plaintiff's expert opined that a reasonable officer acting consistent with standard police practices would have allowed the negotiation process to continue. The Court of Appeal, however, disagreed, finding that Decedent charged the officers in an apparent attempt to commit "suicide by cop." "Despite stabbing himself three times in the abdomen and slashing his throat with the knife, Decedent was unable to kill himself. So he provoked the police into killing him." Plaintiff argued that the police should have had a plan on how to proceed without the use of deadly force after the firing of less-lethal weapons, such as a police dog, rushing in with shields, deploying water cannons, or utilizing the SWAT team. But the Court of Appeal made clear that there is no precedent requiring the use of all feasible alternatives where deadly force is justified. As such, the Court of Appeal found that the trial court properly granted the defendants' motion for summary judgment.

Significance: This is a good state court decision to reaffirm the principle that law enforcement officers are not required to use less intrusive means when confronted with a situation in which deadly force could justifiably be used. As the Ninth Circuit stated in *Scott v. Henrich*, 39 F. 3d 912 (9th Cir. 1994): "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment."

E. ***Smith v. Agdeppa*, 56 F.4th 1193, 2022 (9th Cir. 2022)**

- **The Ninth Circuit finds “pervasive” disputes of material fact precluded granting summary judgment for officers who used deadly force in the throes of a violent altercation.**

In *Smith v. Agdeppa*, 56 F.4th 1193, 2022 (9th Cir. 2022), the Ninth Circuit affirmed a district court order, finding that “pervasive” disputes of material fact precluded granting summary judgment in favor of a police officer following a fatal officer-involved shooting.

In the men’s locker room of a Hollywood gym, Albert Dorsey was shot and killed during an encounter with Los Angeles Police Department Officers Edward Agdeppa and Perla Rodriguez. The officers had responded to a call regarding a trespasser refusing to leave a gym, after threatening and assaulting other gym members and staff. When they arrived at the gym, they found Dorsey naked and dancing to music. Dorsey ignored orders to get dressed and leave. The officers made unsuccessful attempts to handcuff Dorsey. Agdeppa managed to place one handcuff onto Dorsey’s right wrist, but for roughly a minute and twenty seconds, Dorsey used his size to thwart the smaller officers’ attempts to handcuff him. After a continued struggle, Rodriguez deployed her taser. Both officers attested that they used their tasers in “stun” mode several times as Dorsey became increasingly aggressive. The officers indicated that Dorsey did not attempt to flee but instead advanced towards them punching at their heads and faces while the handcuff attached to his wrist also swung around and struck them. The officers stated that Dorsey struck Rodriguez, knocked her to the ground, allegedly straddled her, and began repeatedly striking her with his fists. Fearing for his partner’s life, Agdeppa allegedly warned Dorsey to stop before shooting him five times, killing him. Agdeppa said he was six to eight feet away from Dorsey when he fired the shots.

The Majority Opinion stated that eyewitness accounts and audio recordings from body worn cameras conflicted with this account of events. Witnesses said Agdeppa was within arm’s length of Dorsey and was holding Dorsey’s arm. Also, the deputies could not be heard

issuing a warning to Dorsey before the shooting. Lastly, the Circuit Court noted that photographs showed Rodriguez to be “unscathed,” and the officers’ medical records reflected only minor injuries.

Agdeppa moved for summary judgment, relying on qualified immunity. The trial court denied the motion and the Ninth Circuit affirmed, stating that the “pervasive disputes of material fact make this case a textbook example of an instance in which summary judgment was improper.” The panel majority concluded that “a jury could find that a reasonable officer in Agdeppa’s position would not have believed that Rodriguez or anyone else was in imminent danger and, thus, would have understood that his use of deadly force violated plaintiff’s Fourth Amendment rights.” They also found “a reasonable factfinder could decide that Agdeppa’s characterization of the events in the locker room was contradicted by other evidence in the record. A reasonable jury could also conclude that Agdeppa had an opportunity to warn Dorsey and did not do so. Both were valid grounds for the district court to properly deny qualified immunity.”

Judge Daniel Bress dissented, opining that the “split-second decision” by Agdeppa presented “a classic case for qualified immunity.” He found that the majority decision was “contrary to law and requires officers to hesitate in situations in which decisive action, even if leading to the regrettable loss of human life, can be necessary to protect their own.” He stated:

[T]he dangers of today’s decision are especially ominous. At what microsecond interval in the final heated moments of this escalating confrontation was Agdeppa somehow legally required to hit the “pause button” and recite some yet-undisclosed, court created warning script? The uncertainty the majority opinion invites stands as a further condemnation of its holding. And the rule of law it treats as clearly established on these facts could well make the difference in whether officers like Agdeppa and Rodriguez make it out of a violent altercation alive. No clearly established law remotely requires officers who already put themselves in harm’s way to do so as riskily as the majority opinion now demands.

Significance: This case demonstrates challenges in obtaining favorable qualified immunity rulings. Of significant concern is that the panel majority references that the Los Angeles Board of Police Commissioners’ internal investigation found no exigency that required the officers to stay physically engaged with Dorsey. Agdeppa filed a Petition for Rehearing on February 13, 2023. He asserts that there is no clearly established law requiring an officer to refrain from shooting or to issue a specific verbal warning before utilizing lethal force to stop a violent physical assault on a fellow officer. He further asserts that the Majority failed to analyze any factually similar cases that would have placed Petitioner on notice that his actions were unlawful.

F. ***Murguia v. Langdon*, 61 F.4th 1096 (9th Cir. 2023)**

- **Police officer and county social worker may be liable under § 1983 for injuries caused by a third party where the officer and social worker’s conduct allegedly rendered the victim more vulnerable to injury than had the employee not acted (the “state-created danger” exception to immunity)**

Jose Murguia called 911 seeking emergency mental health help for the mother of his infant twins, Heather Langdon. Sheriff’s department deputies went to the couple’s home and separated Murguia from Langdon and the twins. A neighbor took Langdon and the twins to a church, where the pastor called the City of Visalia police. The police who responded drove Langdon to a shelter, which in turn called the City of Tulare Police Department. The Tulare police officers called Child Welfare Services, who determined that Langdon did not present an immediate danger to the twins. Tulare police officers then drove Langdon and the twins to a motel for the night. Early the next morning, Langdon drowned the twins.

Murguia sued two of the sheriff’s deputies, a Tulare police officer, and the social worker for their role in these events. The complaint alleged violation of Fourteenth Amendment substantive due process rights. The district court dismissed the complaint with

prejudice for failure to state a claim. The Ninth Circuit reversed over a dissent from Judge Ikuta.

The panel majority explained that failing to prevent private parties' actions typically is not a basis for liability under the Due Process Clause, but that there are two exceptions: (1) “when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger (the state-created danger exception)”; and (2) “when a special relationship exists between the plaintiff and the state (the special-relationship exception).”

The special-relationship exception did not apply because the defendants did not have custody of the twins as that exception requires. But the state-created danger exception did apply as to some of the defendants—namely, the Tulare police officer who arranged a motel room and left Langdon isolated there with the twins, and the county social worker, who “rendered the twins more vulnerable to physical injury” by allegedly falsely telling the Tulare officer that Langdon had no history of child abuse when in fact she had a history, and Child Welfare Services had an open case against her.

In dissent, Judge Ikuta argued that the majority erred in allowing a substantive due process claim “despite the absence of any abuse of power entrusted to the state,” and instead based “solely on negligence and mistake, exactly what the Supreme Court has told us not to do.” Judge Ikuta also disagreed with the notion that “officials may be liable for failing to take affirmative action to protect children from a dangerous parent”

Significance: *Murguia* provides a useful primer on the special-relationship and state-created danger bases for substantive due process liability. Judge Ikuta’s dissent is also notable in that, like other dissents she has written, it is written to highlight where the Ninth Circuit has deviated from Supreme Court precedent (*e.g.*, “[T]he majority makes three mistakes that conflict with the Supreme Court's doctrine and, in doing so, finally tears our state-created danger doctrine clear of its moorings.”) This can bolster a Supreme Court certiorari petition by

pointing to the dissent to support an argument that the Ninth Circuit is acted contrary to Supreme Court doctrine. This makes the case another one to keep an eye on for further developments.

II. SUBSTANTIVE DUE PROCESS

A. *Sinclair v. City of Seattle*, 61 F.4th 674 (9th Cir. 2023)

- **Under binding Ninth Circuit precedent, parents have a Fourteenth Amendment substantive due process right to the companionship of their adult children (an outlier position)**

Plaintiff's adult son was shot in Seattle's Capital Hill Occupied Protest (CHOP) zone, which the Seattle police withdrew from policing for a month during the 2020 George Floyd protests. Plaintiff sued the City under § 1983, alleging that it violated her Fourteenth Amendment substantive due process right to her son's companionship. Her theory was that the City's handling of CHOP created a foreseeable danger, and that the City was deliberately indifferent to the danger.

The district court dismissed the case with prejudice. The Ninth Circuit affirmed.

Writing for the Ninth Circuit panel, Judge Ryan Nelson observed that it is well-settled that parents have constitutional rights to the companionship of their *minor* children, and that binding Ninth Circuit precedent extends that right to *adult* children. (*Id.*) Accordingly, the question was whether Plaintiff could establish that (1) the City's "affirmative actions created or exposed her son to 'an actual, particularized danger [that he] would not otherwise have faced,' (2) that the injury he suffered was foreseeable, and (3) that the [City] was deliberately indifferent to the known danger." The panel found that the Plaintiff's allegations "support the strong inference that the City acted with deliberate indifference toward the dangers of permitting and encouraging establishment of the CHOP zone." But, the Plaintiff could not show a *particularized* danger to her son, distinct from the danger to anyone in the CHOP zone.

Judge Nelson also wrote a separate concurrence pointing out that most other circuits do not recognize a substantive due process right to the companionship of adult children, and arguing the Ninth Circuit to revisit en banc its past recognition of such a right.

Significance: *Sinclair* highlights an area of potential exposure for public entities in the Ninth Circuit that doesn't exist in other circuits—i.e., liability to parents for loss of companionship of their adult children. Judge Nelson's concurrence is an effort to change the law, either via en banc review or by drawing the attention of the U.S. Supreme Court. This is an area to keep an eye on.

III. CIVIL RIGHTS – FIRST AMENDMENT

A. *Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023)

- **A city ordinance prohibiting landlords from inquiring into tenants' or potential tenants' criminal background violated the landlords' First Amendment speech rights—but the ordinance's prohibition on landlords *acting* based on criminal history information did not violate the landlords' Fourteenth Amendment substantive due process.**

The City of Seattle enacted the Fair Chance Housing Ordinance, which prohibits landlords from inquiring about tenants' criminal history and from taking adverse action, such as denying tenancy, based on that information. Landlords and a trade association sued the City, alleging that the ordinance violated their First Amendment and substantive due process rights. The district court upheld the ordinance. The Ninth Circuit reversed in an opinion holding that there was no substantive due process violation, but that the ordinance did impermissibly impinge on landlords' free speech rights.

First Amendment. The panel opinion applied the “intermediate scrutiny” test applicable to commercial speech. (The panel punted on whether the regulated speech might be non-commercial, triggering strict scrutiny, since the result would have been the same under either test.) Under the intermediate scrutiny standard, courts analyze whether the regulated speech is

misleading, whether the asserted government interest is substantial, whether the regulation directly advances the government interest, and whether it is no more extensive than necessary to serve that interest. The panel summarily concluded that the regulated speech is not misleading or illegal, and that the City’s interest in reducing barriers to housing and the use of criminal history as a proxy for racial discrimination—are substantial. It also found that the ordinance directly advanced the City’s interests, and that an exception for federally assisted housing did not undermine its efficacy. But, the ordinance failed the final prong of the intermediate scrutiny test: It was not narrowly drawn to achieve the City’s goals. The Ninth Circuit reasoned that other jurisdictions’ ordinances that are designed to achieve the same goals don’t foreclose *all* inquiry into criminal history; they allow landlords to consider at least some criminal history. That other jurisdictions’ ordinances “appear to meet [the City’s] housing goals but [are] significantly less burdensome on speech” indicates that the City’s inquiry provision is not narrowly tailored.¹

Substantive due process. The panel also considered whether the ordinance’s “no adverse action” prong violated landlords’ Fourteenth Amendment substantive due process right to exclude people from their property. The panel concluded that there is no fundamental right to exclude, and therefore the ordinance only had to pass rational basis review. Because there was a rational basis for the ordinance (reducing barriers to housing and reducing racial discrimination), it “easily” survived Fourteenth Amendment review.

Judge Wardlaw and Judge Bennett each wrote separate opinions to explain their differing views on whether the regulated speech was commercial (Judge Wardlaw) or non-commercial (Judge Bennett). Neither viewed the answer to that question as impacting the outcome of the appeal. Judge Gould, however, *would* have reached a different outcome: He wrote separately to explain his view that the no-inquiry provision is narrowly tailored to the government’s interest, and therefore constitutional.

¹ The panel expressly did *not* opine on the constitutionality of those other jurisdictions’ ordinances.

Significance: The opinion notes that other cities, including some in California, have adopted ordinances similar to Seattle’s, or variations on Seattle’s. The *Yim* opinion provides a framework for reviewing existing ordinances to assess whether they are constitutional, and for any cities drafting new ordinances in this area.

B. *No on E v. Chiu*, 62 F.4th 529 (9th Cir. 2023)

- **Plaintiffs failed to establish reasonable likelihood of establishing First Amendment violation in City ordinance requiring “secondary-contributor” disclosures on political ads by independent expenditure committee.**

Under a San Francisco ordinance, committees spending money to support or oppose a candidate for City elective office or City measure must disclose not only the name of the top contributors to the committee, but also, where those contributors are themselves committees, the name of and dollar amount contributed by *those* committees’ top contributors. The information must appear in print, audio, and video ads.

An independent expenditure committee (“No on E”), the committee’s founder, and a No on E contributor whose major donors would be subject to the disclosure requirement, sued to invalidate the ordinance on First Amendment grounds. The district court denied their motion for a preliminary injunction. The Ninth Circuit affirmed.

The Ninth Circuit first considered its jurisdiction, and concluded that the appeal was not moot despite the election having occurred, because the election-related controversy was capable of repetition yet evading review. Turning to the merits, the Ninth Circuit agreed that the plaintiffs did not establish a likelihood of success on the merits. Compelled disclosure requirements are reviewed under an “exacting scrutiny” standard, which requires a “substantial relation between the disclosure requirement and a sufficiently important governmental interest.” (Internal quotation marks omitted.) The secondary-contributor requirement passed that test. The requirement is substantially related to the City’s compelling interest in

“informing voters about who funds political advertisements.” Any burden on the Plaintiffs’ First Amendment rights was modest, especially given the City’s offer that it would not enforce the ordinance with respect to print ads that were 5”x5” or smaller, or to digital and audio advertisements of 60 seconds or less. And the requirement was sufficiently narrowly tailored to the interest in information disclosure.

Significance: *No on E* provides a comprehensive overview of the First Amendment analysis that applies to election disclosure requirements. Although Plaintiffs’ challenge to the ordinance here failed, the court noted a distinction between that is worth taking into account when drafting this type of ordinance: Disclaimers that consume the *majority* of the space/time in an ad may be deemed an impermissible burden on free speech, whereas disclaimers consuming less than 40% of the space/time are likely not unduly burdensome. Specifying that disclaimers are required only on ads of a certain size or length, such that they don’t consume the majority of the advertisement, thus, may help an ordinance survive a constitutional challenge.

C. ***Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180 (9th Cir. 2022)**

- **Church could bring facial challenge to county’s zoning scheme, and zoning scheme was an impermissible prior restraint on religious expression.**

A non-profit and its director applied to the County of Maui for a special use permit to hold “weekly church service[s],” “sacred programs, educational, inspirational, or spiritual including Hawaiian cultural events, and spiritual commitment ceremonies such as weddings” on land the director owned. The County’s zoning scheme provides five guidelines for considering a church or religious institution’s special use permit application, but doesn’t specify which ones *must* be considered or are dispositive. The planning commission denied the application for failure to satisfy two of the guidelines, even though another guideline was satisfied.

Plaintiffs sued the County, alleging—among other things—that the County zoning scheme violates the First Amendment’s prohibition on prior restraints. They asserted this both as a facial challenge (i.e., to the regulations as written) and an as-applied challenge. The district court granted summary judgment for the County on that claim. The Ninth Circuit reversed.

Under established case law, plaintiffs can bring facial challenges to laws aimed at expressive conduct, but not to laws of general application without a close connection to expression. The Ninth Circuit held that a facial challenge was permissible here because the zoning scheme regulates use of property for expressive conduct, namely, religious activity. Turning to the merits, the Ninth Circuit held that the zoning scheme was an unconstitutional prior restraint. Laws cannot condition enjoyment of a constitutional right on the “uncontrolled will of an official”—for example, by requiring a permit that can be granted or withheld as a matter of discretion. The County scheme did just that. As written, it allowed the planning commission to deny a permit based on any of the five guidelines, including “whether ‘[t]he proposed use would not adversely affect surrounding property.’” That “adversely affect” guideline is not objective; it allows “a limitless range of subjective factors,” amounting to “unbridled discretion.” Although some of the other guidelines were more objective, the scheme did not *require* that they be considered or make them dispositive. They thus did not save it. Because the regulation “gives officials unbridled discretion to deny a permit [and] limits expressive conduct,” it violates the First Amendment.

Judge Clifton dissented in part. He “reluctantly” agreed that the plaintiffs had standing to bring a facial challenge under binding precedent, but he disagreed that the facial challenge succeeded. In his view, “[w]hen the procedural protections afforded by the permit scheme are properly accounted for, the challenged guideline sufficiently fetters government decisionmakers.”

Significance: In light of *Spirit of Aloha*, consider reviewing your local zoning provisions to ensure that, to the extent they impact expressive conduct, they provide objective criteria and cabin decisionmakers’ discretion.

IV. MUNICIPAL TORT LIABILITY

A. *Hacala v. Bird Rides, Inc.*, _ Cal.App.5th __, 2023 WL 2851729 (2023)

- **City immune from liability to pedestrian injured by tripping over electric scooter.**

The family of a pedestrian who tripped over a Bird scooter parked on a City of Los Angeles sidewalk sued the City and Bird for negligence and related claims. The trial court sustained both defendants’ demurrers without leave to amend. The Court of Appeal affirmed the dismissal as to the City. It reversed as to Bird, over a dissent.

Plaintiffs’ claims against the City were premised on City employees allegedly failing to monitor Bird’s compliance with the rules imposed in Bird’s City-issued operating permit. The Court of Appeal rejected that theory in light of Government Code section 821, which immunizes public entities’ employees from liability for injuries caused by a failure to enforce an enactment, and section 815.2, under which a public entity is not liable for an injury if its employee is immune from liability. The appellate court rejected an argument that enforcing the permit requirements was a *ministerial* task, and therefore not within section 821 immunity: The permit terms gave the City *discretion* to remove improperly parked scooters and to revoke Bird’s permit, but did not *require* the City to do so.

The Court of Appeal also held that the plaintiffs could not assert a dangerous condition claim against the City: Sidewalks aren’t defective or dangerous simply because third parties may improperly park scooters on them in a way that could harm others.

By contrast, the panel majority held that plaintiffs could pursue negligence claims against *Bird* for failure to exercise ordinary care in managing its scooters—specifically, on theories that it knew customers were likely to leave scooters on sidewalks in a manner that posed a tripping hazard but failed to locate and remove such scooters, and to install “always-on” lights on its scooters to make them more visible. The majority also held that plaintiffs

could pursue a public nuisance claim against Bird. Justice Lavin dissented on these points; he would have affirmed the demurrer as to both Bird and the City.

Significance: Electric scooters have become part of the urban landscape in many cities. *Hacala* gives cities a strong defense to tort claims by pedestrians injured by parked scooters, especially where the scooter company is operating under a permit from the city, and the permit gives the city discretion as to enforcement of permit conditions.

B. *Greenwood v. City of Los Angeles*, 89 Cal.App.5th 851 (2023)

- **Under Government Code section 855.4, a city is immune from claims based on failure to remedy dangerous condition on public property (typhus).**

A deputy city attorney sued the City of Angeles on a dangerous condition theory, alleging that accumulated trash and other items outside her office caused a typhus outbreak and caused her to become ill. The City demurred based on Government Code section 855.4, which provides that public entities aren't liable for (a) injuries "resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community if the decision whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion be abused," or (b) injuries "caused by an act or omission in carrying out with due care a decision described in subdivision (a)." The trial court sustained a demurrer, and the Court of Appeal affirmed.

The Court of Appeal found it "apparent from the face of the complaint" that the City's decision not to take steps to stop the spread of typhus next to City Hall was an exercise of discretion. The court rejected the plaintiff's argument that section 855.4 immunity *also* required that the City acted with the due care referenced in section 855.4, subdivision (b): Subdivisions (a) and (b) are distinct bases for immunity, so immunity attaches if *either one* applies.

Justice Bendix wrote separately to question a prior decision, *Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, to the extent that it holds that section 855.4 immunizes public entities from any disease-related injury occurring on public property—Justice Bendix would distinguish between a governmental response to a disease outbreak (covered by section 855.4) and a public entity’s responsibility to keep its facilities safe and sanitary. She nonetheless agreed that the demurrer was properly sustained here because the allegations pertained to a government response to a disease outbreak.

Significance: Given the number of camps of unhoused people in urban areas these days, cities are likely to be seeing more of this type of claim. Section 855.4 immunity should be on the radar screen of any attorney defending these claims.

C. ***Malear v. State of California*, 89 Cal.App.5th 213 (2023)**

- **The doctrine of substantial compliance can excuse a plaintiff’s filing an initial complaint that does not comply with the Government Claims Act, if the plaintiff files a First Amendment Complaint that does comply with Claims Act requirements before litigation begins in earnest.**

A San Quentin prisoner who contracted COVID-19 sought to sue the State for transferring prisoners to San Quentin, blaming the transferees for a COVID-19 outbreak.

Plaintiff presented a Government Claims Act claim to the defendants on July 15, 2020. He filed his complaint on July 27, 2020, *before* defendants notified him of whether his claim was rejected. Three months later, after his claim was rejected, Plaintiff filed an amended complaint that alleged he’d complied with the claims presentation requirement. He then served the First Amended Complaint, and a copy of the original complaint, on the defendants. The trial court sustained a demurrer on the ground that Plaintiff had not complied with the Claims Act presentation requirements because he sued before receiving notice that his claim was rejected.

The Court of Appeal reversed, holding that Plaintiff had substantially complied with the Claims Act presentation requirements. Although his initial complaint was premature, his superseding First Amended Complaint fulfilled the purposes of the Claims Act: “[F]or practical purposes, the lawsuit here did not begin in earnest until defendants were served with Malear’s first amended complaint”—i.e., until after defendants had considered and rejected the claim as presented. Defendants, thus, had an opportunity to consider the claim before actively entering litigation.

Malear disagreed with *Lowry v. Port San Luis Harbor District* (2020) 56 Cal.App.5th 211, which read *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983 as eliminating the substantial compliance doctrine for prematurity defects (and on which the trial court had relied in sustaining the demurrer). *Malear* read *DiCampli-Mintz* more narrowly than *Lowry*: *Malear* construed *DiCampli-Mintz* as only rejecting substantial compliance regarding who a claim must be *delivered to*—i.e., the facts presented in *DiCampli-Mintz*. *DiCampli-Mintz* concluded that applying the substantial compliance rule in that context would have been inconsistent with the Claim Act’s purpose and would have created uncertainty in the claims presentation process. *Malear* reasoned that there were no similar concerns here.

Malear emphasized the “narrow[ness]” of its own holding: “[W]e simply hold that when a lawsuit is prematurely filed before the actual or deemed denial of a government claim, application of the substantial compliance doctrine is generally appropriate if the original complaint is not served before an amended complaint alleging the requisite denial of a government claim is filed in compliance with Code of Civil Procedure section 472.”²

Significance: *Malear* creates a split with *Lowry* as to *DiCampli-Mintz*’s impact on substantial compliance arguments in Claims Act presentation cases. Unless and until the Supreme Court takes up the issue, in any case where premature complaint filing is at issue,

² Note that only *part* of the *Malear* decision was certified for publication. The Claims Act discussion is in the published portion of the opinion, and therefore citeable/precedential. Later sections of the opinion addressing the merits of the plaintiff’s claim and the applicability of California Emergency Services Act immunity are unpublished, and therefore not citeable or precedential.

there will be room to argue in the lower courts as to which of the decisions is closer factually, and which is more persuasively reasoned.

D. *California-American Water Company v. Marina Coast Water District*, 86 Cal.App.5th 1272 (2022)

- **Public entities can impliedly or expressly waive their right to require Government Claims Act compliance; a plaintiff claiming waiver does not need to establish detrimental reliance.**

The Monterey County Water Resources Agency, California-American Water Company (“Cal-Am”), and the Marina Coast Water District (“Marina”), got into a dispute over a water supply project. Marina is a public agency entitled to the protections of the Claims Act.

Cal-Am presented a Claims Act claim to Marina, contending that Marina was responsible for causing the water supply project to fail. Cal-Am later sued Marina. Marina asserted a Claims Act defense, arguing that Cal-Am’s Claims Act claim was substantively deficient. Cal-Am opposed the defense, arguing that Marina impliedly and/or expressly waived its right to require Claims Act compliance by (1) entering into an agreement with an alternative dispute resolution procedure that superseded the Claims Act, and (2) Marina’s counsel’s actions and statements. The trial court granted summary judgment for Marina. The Court of Appeal reversed, finding triable fact issues as to both implied and express waiver. In so holding, it rejected Cal-Am’s argument that implied waiver requires the plaintiff to prove that it detrimentally relied on the alleged waiver; the Court of Appeal held that implied waiver turns solely on whether the waiving party’s conduct was ““so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.”” (Opinion 21-22.)

Significance: Various statutes provide that public entities can lose the benefits of certain Claims Act defenses if they do not provide timely notice with statutorily-prescribed language, and send it to the correct place. But *Cal-Am* appears to be the first precedential

decision recognizing that entities also may impliedly waive their right to require compliance with Claims Act presentation requirements in other ways, including through statements by their lawyers or by entering into contracts with other dispute resolution procedures. The availability of an implied waiver argument is likely to make Claims Act presentation-requirement defenses a tougher ground for demurrer or summary judgment, especially given that a plaintiff asserting implied waiver does not have to prove detrimental reliance.

E. *Marin v. Department of Transportation*, 88 Cal.App.5th 529 (2023)

● **The *Privette* doctrine shielded a public entity from liability for an injury to its contractor’s employee, where the public entity did not exercise its retained control in a way that affirmatively contributed to the employee’s injury.**

A construction worker employed by a Department of Transportation contractor was killed on a highway owned and operated by the Department, when a drunk driver entered closed lanes of the work site and hit him. His family sued the Department for creating a dangerous condition on public property in violation of Government Code section 835, and vicarious liability for its employees’ negligence under Government Code section 815.2.

The Department moved for summary judgment, arguing among other things that *Privette v. Superior Court* (1993) 5 Cal.4th 689 barred the suit because the Department had delegated workplace safety to its subcontractor. Under *Privette* and its progeny, one who hires an independent contractor is not liable for injuries to the contractor’s employees, unless the hirer retains control over worksite safety, and its exercise of retained control affirmatively contributed to the employee’s injuries. (5 Cal.4th at p. 702; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202, 215; *Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 276.) This requires, among other things, a showing that the hirer *induced* the injury-causing conduct or its exercise of retained control contributes to the injury *independently* of any contribution by the contractor. (*Sandoval, supra*, 12 Cal.5th at p. 277.)

The trial court granted summary judgment, and the Court of Appeal affirmed.

The appellate court first addressed the trial court’s evidentiary rulings—specifically, the trial court’s summarily sustaining 31 of the Department’s 32 evidentiary objections in a blanket ruling with no explanation. The trial court’s approach left no way of knowing whether the court had accepted all the grounds offered for each objection or just one. Without a “meaningful basis” to review the trial court’s reasoning under the abuse-of-discretion standard usually applicable to evidentiary rulings, the appellate court “g[a]ve plaintiffs the benefit of the situation and consider[ed] all the evidence in the record” as if the Department had waived its objections.

Turning to the merits, the appellate court reasoned that the Department’s contract with its independent contractor expressly delegated matters of safety at the project site. That the contract gave the Department’s residential engineer the final decision on manner of performance of the work “does not suffice to raise a triable issue as to whether the [Department] retained control over safety at the project site and actually exercised this retained control in such way as to affirmatively contribute to the decedent’s death.” Nor did any of Plaintiffs’ other evidence suffice. That the Department could have authorized a lane closure at most proved that the Department was aware of an unsafe practice and failed to exercise retained control to correct it. And evidence that the Department expected its contractor’s employees to learn and follow safety policies is not evidence that the Department both retained control and exercised its retained control in a way that affirmatively contributed to the injuries. Because it was undisputed that the Department did not “direct the means or methods of decedents’ work on the day in question or instruct his employer on how to provide for his or his coworkers’ safety, summary judgment was appropriate.”

Significance: *Marin* provides a useful review of the *Privette* doctrine regarding when a hirer—including a public entity—may and may not be liable for injuries to a contractor’s employee. The contours of the doctrine may be helpful in deciding how to structure relationships with contractors, and in assessing potential liability if an injury occurs. *Marin*’s decision to treat the Department’s evidentiary objections as waived also reinforces the

importance of securing reasoned rulings on objections at the summary judgment stage whenever possible. One way to increase the likelihood of obtaining specific, reasoned rulings is to limit the number of objections you make, by paring down to only the strongest, most important ones.

F. ***Fajardo v. Dailey*, 85 Cal.App.5th 221 (2022)**

- **Size alone does not determine whether rut in sidewalk presents a dangerous condition; defendant seeking summary judgment has the burden of presenting admissible evidence on the size of a rut and on the surrounding circumstances.**

Plaintiff allegedly tripped and fell on an asphalt patch between two sidewalk slabs while on a walk around his neighborhood. He sued the landowner whose property the sidewalk abutted. The trial court granted summary judgment for the landowner, arguing that the sidewalk condition was a trivial defect. The trial court granted the motion. The Court of Appeal reversed.

The Court of Appeal began with an overview of sidewalk defect liability: Although property owners are required to maintain their land in reasonably safe condition, “a property owner is not liable for damages caused by a minor, trivial, or insignificant defect on its property.” A defect may be trivial as a matter of law—and a case susceptible to summary judgment—where reasonable minds could only conclude that there was no substantial risk of injury. But summary judgment is inappropriate where the evidence would permit reasonable minds to differ on whether the defect was dangerous. The size of the crack is relevant, but not definitive for these purposes: Courts must consider any circumstances that “‘might make the defect more dangerous than its size alone would suggest’”

Applying these standards, the *Fajardo* court found that the defendant failed to meet his moving burden of proving that the defect was trivial as a matter of law. Although the defendant claimed that the rise was less than one inch, her expert’s declaration to that effect

did not explain how the expert knew that. It thus had no evidentiary value. And the defendant did not provide an admissible photo or other evidence of the asphalt patch *at the time of the accident*.

Fajardo further held that even if the defendant *had* met her burden, the plaintiff's evidence created a triable issue of material fact on the height differential. That evidence included an expert declaration that the rise was more than an inch high, supported by admissible photographs. It also included a detailed photo of the asphalt patch two days after the plaintiff's fall, showing that the patch "appears to have a rough texture, an uneven surface, and a jagged edge where it meets the concrete." Based on this evidence, "[r]easonable minds could differ about whether the condition of the asphalt patch, combined with the one- and one-half inch height differential, 'presented a substantial risk of injury.'"

Significance: *Fajardo* provides a clear discussion of the trivial defect doctrine in the context of sidewalk accidents, and illustrates that it is not enough for a defendant to submit evidence of the size of a crack or rise—the defendant must present evidence of "all" the surrounding circumstances. *Fajardo* also drives home the importance of dotting i's and crossing t's when it comes to authenticating evidence: Explain how the declarant knows the information asserted, when photos were taken and by whom, etc.

G. *Flores v. City of San Diego, 83 Cal.App.5th 360 (2022)*

- **Because City's vehicle pursuit policy training included fewer minutes of instruction than required by POST standards, City was not entitled to Vehicle Code section 17004.7 immunity from claims based on a death in a motorcycle death while being pursued by police.**

Plaintiffs whose son/boyfriend died in a motorcycle crash while being pursued by police sued the City of San Diego for wrongful death and negligence. The trial court granted summary judgment for the City based on Vehicle Code section 17004.7. Section 17004.7 immunizes an agency from liability for collisions involving vehicles being pursued by peace

officers, if the agency does three things: (1) *adopts* a written policy on vehicle pursuits that complies with the section 17004.7, (2) *promulgates* a policy that complies with section 17004.7, and (3) *trains* officers on the policy in compliance with section 17004.7.

The Court of Appeal reversed. Although the City had *adopted* a compliant vehicle pursuit policy, it failed to prove as a matter of law that it adequately *trained* officers on the policy.

As context: Section 17004.7, subdivision (b)(1) requires “regular and periodic training on an annual basis for[] vehicular pursuits” Section 17004.7, subdivision (d) defines “regular and periodic training” to mean “annual training that shall include, at a minimum, coverage of each of the subjects and elements set forth in subdivision (c) and that shall comply, at a minimum, with the training guidelines established pursuant to Section 13519.8 of the Penal Code.” Penal Code section 13519.8 authorizes the Commission on Peace Officer Standards and Training (POST Commission) to develop “guidelines” for creating vehicle pursuit policies, and “standards and objectives” for training regarding those policies. POST Commission Regulation 1081 requires a minimum of one hour of annual training.

Flores held that Regulation 1081’s training requirements are “training guidelines established pursuant to” section 13519.8, and therefore that an agency must adhere to them in order to qualify for section 17004.7 immunity. It rejected the City’s argument that Regulation 1081 is inapposite because section 17004.7 refers to “guidelines” established pursuant to section 13519.8, and the POST Commission developed Regulation 1081 under section 13519.8’s authorization to develop “standards and objectives” (not “guidelines”) for training. The court concluded that the Legislature “used the terms ‘guidelines’ and ‘standards’ interchangeably in the statutory scheme related to vehicle pursuit policies,” and that section 17004.7 requires compliance with “any vehicle pursuit training regulations established by the POST Commission” pursuant to section 13519.8.

Flores also rejected an argument that the POST Commission exceeded its authority in setting minimum time standards for training. Section 13519.8 delegates to the POST Commission the creation of courses, standards, and objectives for training. *Flores* concluded that the Commission reasonably interpreted “Standards” to include “the minimum amount of time the training should comprise,” to help ensure meaningful and effective training.

Flores’s conclusion that section 17004.7 requires compliance with Regulation 1081’s minimum time standard meant that to be entitled to summary judgment, the City had to present undisputed facts demonstrating that it provided at least one hour of vehicle pursuit policy training in the year before the incident. The City failed to make that showing: The City’s training video for its vehicle pursuit policy was just under 26 minutes long, and there was no evidence of vehicle pursuit policy training beyond the video. Accordingly, the trial court erred in granting summary judgment.

Significance: *Flores* highlights that it’s not enough merely to adopt a vehicle pursuit policy—to secure section 17004.7 immunity, make sure that officers are trained on the policy for at least an hour every year.

H. *Thompson v. County of Los Angeles*, 85 Cal.App.5th 376 (2022)

- **Liability under Government Code section 815.6 must be based on an enactment that creates an obligatory duty, not a discretionary duty.**

Los Angeles County social workers concluded that plaintiffs’ young son was at risk of harm and took him into protective custody. After a juvenile court released the child to his parents, they sued for negligence per se and intentional infliction of emotional distress. The trial court sustained the County’s demurrer, concluding that plaintiffs did not allege a mandatory duty that would overcome Government Code section 815’s governmental immunity. The Court of Appeal affirmed.

The appellate court observed that plaintiffs appeared to be relying on Government Code section 815.6, which says that “Where a public entity is under a mandatory duty imposed by an

enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” The court explained that liability under section 815.6 requires “an enactment that creates an obligatory duty,” not a “discretionary or permissive duty.” Put another way, “[i]t is not enough that an enactment requires a public entity or officer to perform a function if the function itself involves the exercise of discretion.”

The only duty that plaintiffs identified was a policy manual requirement that social workers make “‘necessary collateral contacts’ with people ‘having knowledge of the condition’ of children subject to allegations.” The appellate court held that this provision is discretionary, not mandatory: Many people have “knowledge” of a child’s condition, and the County exercises discretion in deciding which of them are “necessary” contacts. Because the provision requires discretion, it “does not create a mandatory duty” triggering liability under section 815.6.

Significance: *Thompson* highlights the broad immunity bestowed on public entities, and the high bar that plaintiffs face in attempting to identify a mandatory duty that would defeat immunity under Government Code section 815.6. The opinion would support an argument that arguable violation of a requirement that vests discretion in public officials is not sufficient to create liability.



Labor and Employment Litigation Update

Thursday, May 18, 2023

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Labor and Employment Litigation Update

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Labor and Employment Litigation Update Spring 2023

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I. INTRODUCTION

In the last six months, California and Federal appellate courts decided cases that will significantly impact labor and employment law. Though there have been many important cases decided since last fall, there were several we feel are especially worthy highlighting in this update as they are particularly impactful on employment in the public sector.

The recent case decisions discussed herein cover a wide range of employment issues that public agencies commonly face. Amongst these decisions, we saw several cases brought by public employees alleging violations of the First Amendment by employers. What stands out is the level of attention the appellate courts paid in their analysis of whether the employee was speaking on a matter of public concern and how the employer handled disciplining the employee for their speech. The decisions in these cases, amongst the other cases involving employee retaliation complaints, serve as an important reminder for employers to be careful in issuing discipline based off the content of an employee's speech.

In addition to cases involving violations of the First Amendment, the past sixth months brought cases resulting in a new analysis of Whistleblower complaints and 1983 claims, highlighted how employers should treat military leaves under USERRA, as well as impacted bargaining practices for agencies and unions, and many more.

The next section includes cases with key developments in labor and employment law. We broke down these cases into three categories: (1) Harassment, Discrimination, and Retaliation cases; (2) Employee Leaves cases; (3) Employee Discipline cases; and (4) Labor Law cases. Additionally, at the end of this update in chapter (5) "Eye to the Future" we included two particularly relevant case decisions pending review in the California Supreme Court, as well as some proposed legislation that could have profound impacts on public employment.

II. CASES

Chapter 1: Harassment, Discrimination, and Retaliation

Kaur v. Foster Poultry Farms LLC, 83 Cal.App.5th 320 (2022) - WCAB's Denial Of Discrimination Claim Does Not Stop FEHA Discrimination Claim

In September 2022, the Court of Appeal decided *Kaur v. Foster Poultry Farms LLC*, which affirmed that a Workers' Compensation Appeals Board (WCAB) decision did not prevent an employee from filing claims under the Fair Employment and Housing Act.

In 2013, Gurdip Kaur, an employee at Foster Poultry Farms LLC, slipped at work while wearing company-issued rubber boots and broke her wrist. After surgery, Kaur returned to work and despite her work restrictions, Foster Farms forced her to perform her normal job duties. Kaur struggled to perform her normal job duties, but Foster Poultry denied her requests for an accommodation. She was terminated in late 2013, but was then reinstated after contesting her termination. In 2016, Foster Poultry restructured and gave her a new job she could not perform one-handed, so she was terminated again.

In 2016, Kaur filed a petition against Foster Poultry with the Workers' Compensation Appeals Board (WCAB) alleging discrimination for filing her claim, in violation of Labor Code Section 132(a). Her claim was heard in an administrative hearing and was eventually denied.

In 2017, before her workers' compensation claim was decided, Kaur also sued Foster Poultry under the FEHA. Kaur's five FEHA claims were centered around discrimination due to race/nationality and disability. When Kaur's workers' compensation claim was denied, Foster Poultry asserted an affirmative defense to Kaur's lawsuit, arguing that all of Kaur's disability related claims were barred by the legal doctrines of res judicata and collateral estoppel. Simply put, these doctrines generally preclude a person from re-litigating issues that were argued and decided in prior proceedings, even if the second lawsuit raises different causes of action. Together, these doctrines can be referred to as "issue preclusion."

The trial court granted summary judgment for Foster Poultry due to its affirmative defense. Kaur appealed. The primary issue on appeal was whether the trial court properly decided that the WCAB's denial of Kaur's 132(a) claims precluded her FEHA claims. The California Court of Appeal held that Kaur's FEHA claims were not precluded.

For an issue to be precluded, the issue must be identical to that decided in a former proceeding. The issue must also have been actually litigated and necessarily decided in the former proceeding. In addition, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

The Court of Appeal focused on the first prong of the above test, i.e., whether the issues were identical. In the WCAB claim, the issue was whether Kaur experienced discrimination on account of the industrial nature of her injury. On the other hand, Kaur's FEHA claims were broader, and centered on whether she experienced discrimination on account of her disability, and whether she was unlawfully discharged because of her disability. Moreover, Kaur's other FEHA claims, such as her allegations that she was not provided a reasonable accommodation and was not engaged in a good faith interactive process, involved entirely different issues from the WCAB claim. The Court further found that, in deciding the WCAB issue, the administrative hearing judge ignored certain FEHA requirements because the issue was so distinct from FEHA and involved different considerations.

For all these reasons, the Court of Appeal held that the denial of the WCAB claim did not preclude Kaur's FEHA claims, and she could move forward with her lawsuit.

A concurring opinion cautioned that this decision should be interpreted narrowly, and that the decision did not mean that factual findings by an administrative hearing judge on a WCAB claim can never result in issue preclusion on a FEHA claim. Rather, the opinion noted that one must look carefully at the underlying issues and findings of fact. A claim decided in a WCAB setting may indeed prevent a FEHA claim if the issues and inquiries are similar enough.

The *Kaur* case emphasizes the need for public agencies to be aware that the FEHA may apply with respect to both industrial and non-industrial injuries and illnesses.

Killgore v. SpecPro Services, LLC 51 F.4th 973 (9th Cir. 2022) - An Employee's Communications To A Supervisor Regarding Possible Unlawful Activity Triggered The California Whistleblower Protection Act

In October 2022, the Ninth Circuit Court of Appeals held that employee's disclosures to his supervisor, as a person with authority over him, provided an independent ground for asserting a whistleblower retaliation claim under California's Whistleblower Protection Act. *Killgore v. SpecPro Services* serves as a reminder for employers to take employee's concerns of wrongdoing by their employers or supervisors seriously and to promptly investigate.

SpecPro Professional Services, LLC, is an environmental services firm that assists government agencies with the preparation of environmental assessments. The U.S. Army Reserve Command hired SpecPro to assist in preparing an environmental assessment for a new helicopter training area.

Aaron Killgore, an employee at SpecPro, was assigned this project. Killgore had a small team of colleagues and reported to his supervisor, William Emerson. Killgore also reported to Chief Laura Caballero, the Army Reserve's project leader.

Killgore and his team discovered that there were discrepancies between the facts they had found on the ground and what the Army Reserve wanted SpecPro to report in their environmental assessment. When Caballero directed Killgore to omit certain information from the report, Killgore pushed back and told Caballero that failing to report certain facts would violate a federal law called NEPA and other federal regulations.

Following this pushback, Caballero called Emerson to raise concerns about Killgore. Emerson then told Killgore to complete the report on time and to exclude the information that Caballero wanted excluded. Killgore again explained that this might be illegal, but Emerson told Killgore that their chief goal was to keep Caballero happy to win any future Army Reserve contracts.

Killgore and his team eventually drafted the environmental assessment and included the information that Caballero wanted excluded. Caballero then instructed the team to take out the

information and complained to Emerson and the general manager of SpecPro during a meeting. After this meeting, Emerson fired Killgore for failing to meet company and customer expectations.

In May 2018, Killgore filed a lawsuit against SpecPro, asserting that his termination violated the California Whistleblower Protection Act (CWPA). Labor Code section 1102.5 provides whistleblower protections to employees who disclose wrongdoing to authorities. Specifically, section 1102.5 prohibits an employer from retaliating against an employee for sharing information the employee “has reasonable cause to believe . . . discloses a violation of state or federal statute” or of “a local, state, or federal rule or regulation” with a *government agency*, with a *person with authority over the employee*, or with *another employee who has authority to investigate or correct the violation*. [emphasis added].

The District Court dismissed Killgore’s lawsuit because it ruled that Killgore’s communications to Emerson and Caballero were not protected by the CWPA. The District Court decided that because Emerson, a private citizen in the employ of a private business, did not have the power to correct the Army Reserve’s noncompliance, Killgore’s communications to Emerson were not protected. In doing so, the District Court interpreted section 1102.5(b) to mean that a protected disclosure must be made to “a person with authority over the employee” who also has the authority to “investigate, discover, or correct” the violation.

Emerson then appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit took up the question of whether Killgore’s communications were protected.

The Ninth Circuit found that the District Court incorrectly interpreted the CWPA by limiting the avenues for employees to report wrongdoing. The Ninth Circuit held that the CWPA prohibits employers from retaliating against employees who disclose potential wrongdoing through any one of several avenues: government or law enforcement agencies; a person with authority over the employee; other employees with authority to investigate, discover, or correct the violation or noncompliance; or any public body conducting an investigation, hearing, or inquiry.

The *Killgore* case is a helpful reminder of the statutory framework for whistleblower claims. If an employee comes to a supervisor, or to any individual who has any authority to investigate or correct a violation of the law, it should be treated as a protected CWPA communication and investigated.

Opara v. Yellen, 57 F.4th 709 (9th Cir. 2023) - Little Direct Evidence of Age-Related Discriminatory Animus is Necessary to Establish a Prima Facie Case of Age Discrimination

Opara was born in 1954 and is Nigerian. Opara served as an IRS Revenue Officer for twenty-seven years. As a Revenue Officer, Opara was responsible for using the IRS’S integrated data retrieval system (“IDRS”) to access information for taxpayers assigned to her, as well as assisting walk-in tax payers who were not assigned to her. The Treasury Department’s IRS

terminated her after determining that Opara committed several Unauthorized Access of Taxpayer Data (“UNAX”) offenses.

As part of her position, Opara received annual training on proper usage of the IDRS which focused on UNAX trainings and signed “Certifications of Annual UNAX Awareness Briefings” as well as the IRS’s IDRS Security Rules. The IDRS Security Rules explicitly state: “(1) Do not attempt to access (research or change) your own account or that of a spouse, other employee, friend, relative, or any other account in which you may have a personal or financial interest; and (2) Access only those accounts required to accomplish your official duties. You have no authority to access an account of a celebrity or well-known taxpayer unless you are assigned such an account.”

There were two tax interactions at issue that precipitated Opara’s termination from the IRS. First, Opara used the IDRS to access tax records of two married and jointly filed taxpayers she personally knew from her religious congregation on two occasions. She further called the IRS service center to inquire about notifications on their account in the IDRS. Second, IRS electronic records showed again that she accessed the tax records via IDRS of two different married and jointly filed taxpayers two times. This time she knew the husband and his father since they worked as contractors at her home in early 2016.

Following Opera’s call to the IRS service center on behalf of the taxpayer she knew from her religious congregation, the campus employee who spoke with Opara sent an email to Opara’s manager. Opara’s manager then contacted the Treasury Inspector General for Tax Administration (“TIGTA”) regarding a possible issue. In the TIGTA Memorandum documenting the interview, Opara was asked “Have you ever committed UNAX?” Opara in response stated “she could not recall as she was almost 63 years old and she had difficulties recalling.” When asked if she accessed IRS records of anyone she knew personally,” she “claimed that she could not recall.” However, when they asked if she knew the tax payers in question, she stated she knew them through church.

On August 2, 2017, following the interview with TIGTA, Opera’s access to all IRS computer systems - including IDRS and email was suspended, which was a standard procedure when employees were under investigation for UNAX violation. During that time she was reassigned to perform administrative work. On October 23, 2017 Opara received a “Notice of Proposed Adverse Action” from the IRS Territory Manager enumerating six instances in which she “improperly accessed taxpayer data on the IDRS without an official reason to do so” and proposed removal. At the oral hearing, Opara asserted that the hearing official was aware of her previous successful EEO complaint against his assigned mentee involving disparaging remarks on age and national origin, including general comments that “if anyone is too old to do this job, she should quit” and that the “job was better with young people.” Opera also attributed her misconduct, at least in part to a language barrier.

Following her hearing, Opara received a termination letter from management explaining that “after reviewing the evidence and the IRS Manager’s Guide,” she decided that Opara’s misconduct is a UNAX and discharge was the proper penalty. She also found Opara to be

“evasive and misleading” in her interview with TIGTA because she repeatedly indicated that she could not recall if she accessed IDRS records for people she personally knew, citing her age and failing to take responsibility for her actions.

On August 20, 2018, Opara filed a formal EEO complaint against the Department of Treasury alleging that agency management discriminated against her based on her age and national origin. She then filed a lawsuit against the Secretary of the Treasury in the U.S. District Court for the Central District of California asserting claims of discrimination based on age and national origin. The District Court granted summary judgment for the Treasury Secretary concluding that Opara (1) failed to establish a prima facie case of age discrimination; and (2) failed to show the reasons for Opara’s termination were pretextual for age and national origin discrimination. The District Court further reasoned that management had to recommend removal for the assessed UNAX violations and that there were “legitimate, nondiscriminatory reasons” justifying Opara’s reassignment to administrative work after losing access to the IRS’s electronic systems.

On appeal, the Ninth Circuit Court of Appeals held that the record supported Opara’s prima facie case of age discrimination. The Court agreed with the trial court in that most of Opara’s evidence is comprised of “circumstantial evidence” including her “superiors’ alleged exaggeration of offenses, assignments of menial tasks,” and selection of draconian penalties, etc.” However, the Court focused on the scant direct evidence of illegal animus, e.g., that she previously lodged a successful EEO complaint, involving comments that “if anyone is too old to do this job, she should quit” and that “the job was better with young people.” The Court considered whether the person involved in these comments was someone who was “involved in the decision-making process.” The Ninth Circuit reasoned that because “very little evidence is necessary” to establish a prima facie case through direct evidence, the Court was satisfied that the record taken as a whole, supports Opara’s prima facie case of discrimination.

The Court also found the Secretary offered legitimate, non-discriminatory reasons for its decision to terminate Opara. The reasons cited included the IRS Manager’s Guide including instructions to propose removal, her reassignment to normal administrative work following her suspended access to the IDRS system, and finally the IRS Manager’s Guide to terminate Opara as a penalty for UNAX violations.

The *Opara* case demonstrates that discrimination claims, even those brought in federal court, only require minimal direct evidence animus towards a protected category to establish a prima facie case of discrimination. This case also highlights the fact that the employer’s ability to prove it had legitimate (aka objectively reasonable) reasons for its decisions will determine whether the employer prevails or not in a discrimination lawsuit.

Atalla v. Rite Aid Corporation, F082794, Super. Ct. No. 19CECG00569 (Filed 2/ 24/23; Cert. for Publication 3/14/ 23) - Inappropriate Text Messages from Supervisor Outside Scope of Employment Not Imputable to Employer

The California Court of Appeal in the Fifth Appellate District recently decided in *Attalla* that inappropriate text messages from a supervisor to an employee could not be imputed to the employer in a FEHA claim where the supervisor and subordinate had a pre-employment relationship and the texts were not sent in the supervisor's capacity as a supervisor.

Erik Lund was a district manager for Rite Aid in the Fresno area. Hanin Atalla met Lund in fall 2017 during her last year of pharmacy school, when she did a six week "business administrative rotation with Rite Aid" which included shadowing Lund. After the rotation, she stayed in close touch with Lund and developed a social relationship with him. From May 2017-February 2018, while in pharmacy school, she worked on a part-time basis as a pharmacy intern at Rite Aid. She later began working as a graduate intern, and in December 2018 she became an hourly staff pharmacist at Rite Aid. Lund was the supervisor of graduate interns and staff pharmacists.

While Atalla worked at Rite Aid she became close friends with Lund and viewed him as a mentor. Attalla and Lund both stated in their depositions that they had been friends before she joined Rite Aid. They often went to lunch together and texted frequently, often joking with one another in their texts, and texting about a wide range of things including food, vacation, travel, exercise, weight loss, family, and personal matters. They also texted about work.

One month after Atalla and Lund dined together to celebrate her birthday, they engaged in their final text exchange on their personal phones. Lund and Aatalla were exchanging texts about drinking wine and vodka. Lund then texted Atalla a live photo of him masturbating and a text saying "I am so drunk right now." Lund then sent another text stating, "Meant to send to wifey," followed by "Going to go die" Attalla responded, "It's ok, I deleted it before I end up in a divorce." He later sent an additional photo of his penis and Attalla asked him to stop. Lund replied "you are right" and the next day he texted her to apologize.

Atalla called in sick for work the next week. Lund asked Atalla whether she was still sick, but Attalla did not respond and blocked his number. On January 10, 2019, Attalla's counsel sent a letter to Ride Aid asserting a claim of sexual harassment. Her counsel informed Rite Aid she would not be returning to work there.

Ride Aid suspended Lund and investigated whether there were any other complaints of sexual harassment against him (there were none). Ride Aid made the decision to terminate Lund and assured Atalla's counsel that she was welcome to return to work. Atalla refused to return to work, and on January 21, 2019, Rite Aid changed Atalla's status in their system to "resignation with the possibility of re-hire" and issued her a separation notice, along with her vacation payout.

Atalla eventually filed an action in the Fresno County Superior Court against Rite Aid and Lund alleging sexual harassment, failure to prevent sexual harassment, wrongful constructive termination, discrimination and retaliation. The trial court granted summary judgment for Rite Aid, principally on the grounds that the sexual harassment arose from a completely private relationship unconnected with their employment.

The Court of Appeal affirmed, noting that while an employer is ordinarily strictly liable for harassment by a supervisor, the supervisor must be acting in his capacity as a supervisor when the harassing conduct occurs. The Court of Appeal found that the late-night text exchange in question “occurred outside the workplace and outside of work hours,” and was “spawned from a personal exchange that arose from a [pre-existing] friendship between them.” In its analysis, the Court focused on the timing of the exchange and the fact that the participants were engaged in personal pursuits that the time.

In our view, the *Attala* case is a bit of an outlier since it turned on the fact that the plaintiff and alleged harasser had a longstanding preexisting friendship before they worked together. This is not usually the case in these situations, and further if any additional acts of harassment had occurred where Lund was performing his work duties the result likely would have been different.

***Houston Community College System v. Wilson* (2022) 142 S. Ct. 1253, 1258, 212 L. Ed. 2d 303- A Board’s Censure of its own Member was Lawful**

In March 2022, the U.S. Supreme Court issued the *Houston Community College System* decision, demonstrating how the First Amendment applies to governing boards and exercising their freedom of speech. Specifically, this case is an example of how a public governing board could legally issue public censures on its own board members.

In 2013, the Houston Community College System (HCC), a public entity operating various community colleges, elected David Wilson to the Board of Trustees. Wilson often disagreed with the Board about the best interests of HCC and brought multiple lawsuits challenging the Board’s actions. By 2016, Wilson’s escalating disagreements led the Board to publicly reprimand him. Mr. Wilson continued to charge the Board in media outlets and state-court actions with violating its ethical rules and bylaws. Wilson arranged robocalls to the constituents of certain trustees to publicize his views. At a 2018 meeting, the Board adopted a public resolution “censuring” Wilson and stating that his conduct was inconsistent with the best interests of the College, and “not only inappropriate, but reprehensible.” Additionally, the Board imposed penalties which deemed him ineligible for Board officer positions during 2018.

Wilson claimed that the HCC Board’s censure violated the First Amendment of the U.S. Constitution. The Fifth Circuit concluded that a verbal “reprimand against an elected official for speech addressing a matter of public concern is an actionable first amendment claim under section 1983.” HCC appealed to the U.S. Supreme Court.

On appeal, Wilson reiterated his claim that the verbal censure he receive was a retaliatory action after the fact for his protected speech.

The Court began its analysis by stating it would give “long settled and established practice” regarding the meaning and application of the U.S. Constitution “great weight.” The Court noted that since colonial times, assemblies had the power to censure their members at the

federal, state, and local level. Thus, verbal censure is in line with centuries of a practice that has been found to be consistent with the First Amendment.

The Court next analyzed the First Amendment claim under the contemporary doctrine, which requires the individual suing to show, among other things, that the government took a material adverse action in response to the individual's speech that it would not have taken absent the retaliatory motive. The Court held that a verbal censure was not a material adverse action for two important reasons. First, Wilson was an elected official. Elected officials are generally expected to shoulder a degree of criticism about their public service and continue exercising their free speech rights when the criticism comes – in this case in the form of a verbal censure. Second, this censure was simply a form of speech that admonishes another member of the same governmental body. The First Amendment guarantees the right to speak freely on questions of government policy, so one's individual's speech cannot "be used as a weapon to silence other representatives seeking to do the same." By attempting to sue the Board and HCC for this censure, Wilson was attempting to silence the Board's proper exercise of its First Amendment rights.

The Court said its conclusion was bolstered by the fact that after receiving the verbal censure, Wilson continued to fight for what he thought was right. Indeed, Wilson had already received another verbal censure that did not come with additional disciplinary attributes. Wilson did not contest that this censure violated the First Amendment. The Court found this cut against Wilson's case because Wilson was essentially arguing that a verbal censure that also carries discipline was more material than a "plain" verbal censure. The Court implied that "discipline," such as not being able to hold certain positions, does not actually materially affect an individual's ability to speak freely and exercise their First Amendment rights.

A significant factor in the Court's analysis was that this censure was from members of a governing body against another member, that is, peer-to-peer. None of the censoring members had any amount of inordinate power over the censured member. Another significant factor the Court noted was that a verbal censure is simply a statement that reprimands the receiving individual and that the censure was itself an exercise of First Amendment Rights.

This case illustrates the latitude a governing board has to censure and punish its own members. However, the Court did mention that certain censures from a body with more power and agency, against an individual with less, may indeed amount to a First Amendment violation.

Bresnahan v. City of St. Peters 58 F.4th 381 (8th Cir. 2023) - Discipline for Former Police Officer's Shared Controversial Video Met Threshold for Asserting First Amendment Claim

While not decided by the Ninth Circuit Court of Appeals, and thus is persuasive authority only, the Eighth Circuit recently decided a First Amendment case that involves an issue that public employers have faced or will undoubtedly face at some point, i.e., a public employee's dissemination of controversial material using city-owned devices or in a situation with some nexus to the employee's employment.

In *Bresnahan*, a former police officer (Bresnahan) sued the City of St. Peters, Missouri, the Chief of Police, and City Administrator under 42 U.S.C. section 1983 alleging a violation of his First Amendment Rights. The district court dismissed Bresnahan's complaint which the U.S. Court of Appeals reversed and remanded the case to the lower court.

Bresnahan specifically alleged that St. Peters Police Department created a text messaging group to update each other about local Black Lives Matter (BLM) protests. Although this group was intended for official purposes for information and updates regarding BLM protests, the officers also shared "unrelated" content on it.

Bresnahan sent the group a video from the sitcom "Paradise PD" showing a black police officer who accidentally shot himself. The video included a media headline stating "another innocent black man shot by a cop." Bresnahan claimed the video was satire and a parody of the BLM protests and said he shared the video because he was critical of the protests.

Another officer in the group complained about the video. The next morning, the Chief ordered Bresnahan to resign. The Chief told Bresnahan that if he refused the Chief would open an investigation and recommend to the City Administrator that Bresnahan be fired. Bresnahan resigned and alleged under section 1983 he was retaliated against for exercising his first Amendment right to speech.

The City filed a motion to dismiss, which the district court granted. Bresnahan appealed, and on appeal the Eight Circuit analyzed the case utilizing the Supreme Court's *Pickering* test from its landmark decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and its later decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Taking the facts alleged in Bresnahan's complaint as true, the appellate court noted that the threshold question was whether Bresnahan spoke in his capacity as a private citizen on a matter of public concern.

The Eighth Circuit found that the video involved a matter of public concern because it referenced a police officer shooting a black man and it is widely known that BLM'S central goal is to stop police brutality. The court explained that "speech criticizing the media's coverage of a particular subject qualifies as a matter of public concern" and taken as a whole, the video shows that Bresnahan's speech involved a matter of public concern.

The Eighth Circuit also found that Bresnahan was acting as a private citizen when he sent the video. While generally speech shared with coworkers, as opposed to the press or public, is not considered speech involving a matter of public concern, it is a highly fact specific inquiry and not a bright line rule. The court reasoned that the fact that Bresnahan's coworkers were police officers is important as they regularly communicated about local protests and were "a local focal point of the BLM movement."

For these reasons, the case was reversed and remanded to the district court. The opinion expressly notes that the decision is limited to whether Bresnahan met the threshold for advancing a First Amendment claim, and did not address the merits of his claim.

Given the procedural status of the case, as well as the fact that it is not binding authority in Ninth Circuit jurisdictions, the *Bresnehan* case should not be overly relied upon. The decision is helpful, however, to help understand how a not-so-unique fact pattern may play out in a similar situation for a jurisdiction that is in the Ninth Circuit.

Kirkland v. City of Maryville, Tennessee, 54 F.4th 901 (6th Cir. 2022) - Employee's Critical Facebook Post Warranted Disciplinary Action and Did Not Violate First Amendment

The Sixth Circuit Court of Appeals also recently decided a First Amendment retaliation case that may be of interest to public employers under the Ninth Circuit's jurisdiction. While only persuasive authority, the underlying facts are those that public employers now sometimes face and may be useful guidance for public employers facing a similar fact pattern.

In *Kirkland*, a former city police officer sued after being fired for using social media to post critical statements about a county sheriff. The officer in question periodically used her Facebook account to criticize the county sheriff, i.e., the head of another law enforcement agency. Kirkland's supervisors asked her to stop because they were concerned that her posts would undermine the Department's relationship with their sister law enforcement agency. They also reprimanded her for other behavior issues.

Kirkland was undeterred and made a Facebook post claiming the sheriff excluded her from a training event because she was female and opposed his reelection. The City fired Kirkland. Kirkland responded by suing her city, alleging retaliation in violation of the First Amendment, amongst other claims. The district court granted summary judgment in the city's favor and the Sixth Circuit Court of Appeals affirmed.

As for the First Amendment retaliation claim, the Sixth Circuit utilized the *Pickering* balancing test. In so doing, the court explained that Kirkland's speech would be constitutionally protected if: (1) if she was speaking as a private citizen and not pursuant to official duties, (2) her speech was on a matter of public concern, and (3) her speech interest outweighs the City's interest in "promoting the efficiency of the public services it performs through its employees." The parties did not contest whether the statements at issue were made in Kirkland's capacity as a private citizen, so the court addressed whether her speech addressed a matter of public concern.

To determine whether the speech is a matter of public concern, the court looked to the content, form, and context of Kirkland's statement, as viewed by the whole record. The court found that Kirkland's post, suggesting sex discrimination and political retribution by an elected official was an issue of public concern as the content is something the public has an interest in hearing.

However, the court also found that under the *Pickering* test the next question was whether Kirkland's speech interest in commenting on matters of public concern weighed against the city's interest, as an employer, in executing its public services. The Sixth Circuit agreed that the city's concern that Kirkland's Facebook post threatened to undermine its police department's working relationship with the office of the county sheriff was sufficient to justify

Kirkland's termination. It is noteworthy, however, that the court did not rely on the "last straw" statement that led to her termination and noted that Kirkland had a long history of conflict and other performance issues.

While only persuasive authority, *Kirkland* may be helpful guidance where public employer's use social media accounts for postings which conflict with the employer's interests. Whether the Ninth Circuit would adopt the same approach as the Sixth Circuit is still a bit uncertain, however.

Chapter 2: Employee Leaves

Clarkson v. Alaska Airlines, Inc. 59 F.4th 42 (9th Cir. 2023) - Ninth Circuit Says A Jury Should Decide Whether Non-Military Leaves Are Comparable To Military Leaves Under USERRA

Earlier this year, the U.S. Court of Appeals for the Ninth Circuit issued the *Clarkson v. Alaska Airlines* ruling, serving employers a reminder to be careful and consistent in their treatment of employees going on leave, particularly military service employees going on military leaves with a similar duration as a different type of leave.

The Uniformed Services Employment and Reemployment Act (USERRA) says at section 4316(b)(1) that a person absent from employment due to service in the uniformed services shall be "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer" to other employees on non-military furloughs/leaves of absence.

Casey Clarkson, a commercial airline pilot and military reservist, sued his employer for violating the USERRA by not paying pilots who took short-term military leave (less than 30 days) while paying pilots who took short-term jury duty, bereavement leave, or sick leave. Clarkson's employer, Alaska and Horizon Air, moved for summary judgment, claiming that military leave is not comparable to non-military leave "as a matter of law." The Airlines reached this conclusion by considering military leaves of all lengths. Clarkson focused his analysis on only short-term military leaves. The District Court granted summary judgment for the Airlines, and Clarkson timely appealed.

The Ninth Circuit Court of Appeals first found that the district court erred by comparing all military leaves, instead of just the short-term military leaves at issue in this case. The Ninth Circuit noted that the USERRA regulation at 20 CFR Section 1002.150 lists three comparability factors: duration of leave; purpose of leave; and ability of employee to choose when to take the leave (aka control). The Ninth Circuit stated that the duration of the leave was the most important factor. It reasoned it is entirely possible that a two-day military leave may be comparable to a two-day funeral leave.

Next, the Ninth Circuit found that the issue of comparability of military and non-military leaves was a question of fact for the jury, particularly because the parties had factual disputes

relating to all three comparability factors. Regarding the duration factor, there was contradictory statistical evidence due to Clarkson pulling statistics based on short-term military leave alone, while the Airlines looked at all military leaves when compiling their data. Regarding the purpose factor, each side also reached differing conclusions leaving open factual disputes. The Airlines argued that the purpose of military leave is to allow employees to pursue parallel careers. By contrast, Clarkson argued the primary purpose of military leave is to perform a civic duty and public service. Finally, regarding the factor of control, there was again conflicting testimony on the flexibility pilots had to resolve scheduling conflicts. The Ninth Circuit denied the Airlines' motion and concluded that the factual disputes were best left to the jury, and not for the court to decide.

The *Clarkson* case serves as an important reminder that when it comes to employee leaves the USERRA only requires an employer to provide a service member equal treatment – not better treatment – but the treatment must indeed be equal. If a service member requests military leave, be sure to compare non-military leaves of similar duration to determine whether to pay the service member for the leave. In addition, be sure to carefully analyze California's military leave statutes, which also require the employer to pay the service member on leave in some instances.

Chapter 3: Employee Discipline

Rodgers v. State Personnel Board (Department of Corrections), 83 Cal. App. 5th 1 (2022) - State Agency's Skelly Letter Failed To Provide Employee Adequate Notice Of Discipline

In September 2022, the California Court of Appeal issued an important ruling in *Rodgers* that reaffirmed the importance in providing adequate due process to employees during the *Skelly* process.

One summer evening in 2017, Sergeant Steven Rodgers, a Department of Corrections and Rehabilitation (CDCR) employee, was working an evening “contraband surveillance watch” shift at the Pelican Bay Security Housing Unit (SHU). Contraband surveillance watch is a procedure for monitoring inmates suspected of hiding drugs or weapons inside their body. The inmate is physically restrained and placed in a cell under constant observation until they excrete the contraband, or 72 hours has elapsed. The restraints prevent the inmate from accessing and re-ingesting the contraband before staff can retrieve it. Each watch is divided into shifts that a sergeant supervises. At least twice during the shift, the supervising sergeant is required to help the officer ensure the restraints are secure and comfortable. Pelican Bay's policy states a *preference* that these checks occur at the beginning and end of every shift, though it is not mandatory.

At approximately 10:00 pm that night, correctional officers Angulo and Palafox began their shift and requested Rodgers to conduct the first restraint check. The officers' testimony differs as to what happened next.

Angulo and Palafox said Rodgers allegedly told them he was “too busy” at the time. At approximately 10:30 pm, Palafox again asked Rodgers to do the check, to which Rodgers told Palafox to “pencil whip” (a military term that means to forge or falsify) the form to show the check as completed. Rodgers also allegedly said if anything happened, he’d “take the hit.” The officers then contacted another Sergeant, who contacted Rodgers’ supervisor Lieutenant Vanderhoofven. The officers said they asked Rodgers again at 11:15 pm to conduct the restraint check, at which point he “became irritated” for repeatedly asking him. Around midnight, approximately two hours into the shift, Rodgers conducted the restraint check and discovered one of the inmate’s leg cuffs were not double-locked.

At around 2:00 am, Lt. Vanderhoofven visited the facility to discuss proper procedures with Rodgers after hearing Rodgers was “refusing” to conduct the check. After the Lieutenant left, Rodgers allegedly returned to the watch area and angrily asked the officers, “Which one of you mother f...ers spoke to another sergeant about this?” The next morning at approximately 5:30 am, Sergeant Reynoso arrived to take over as supervising sergeant and the officers asked him to do the check with him. When Rodgers arrived approximately 10 minutes later to do the final check and discovered it had already been completed, he became upset again and said, “What the hell, you trying to have another sergeant do my job?”

Rodgers’ version of events is different. He states he never neglected his duty to perform the restraint checks, but that he was simply too busy to perform the checks at the times the officers repeatedly asked. Rodgers was angry the officers were falsely accusing him of neglecting the restraint checks when Rodgers was imply telling them that he would conduct the checks later.

In May 2018, CDCR served Rodgers with a Notice of Adverse Action (NOAA) stating that his salary would be reduced by 10 percent for two years, effective the end of the month. The NOAA alleged Rodgers: (1) neglected his duties by “refusing to perform” the inspection at the beginning of shift; (2) treated his subordinates in a “discourteous and disrespectful” manner when he angrily, and with profane language, “confronted and intimidated” them about reporting his neglect of duty to another sergeant; and (3) “misused [his] authority” when he directed the officers to “pencil whip” their inspection documentation, thereby “instructing them to fill in inaccurate information regarding the arrest inspections on official records.”

Rodgers requested a hearing. The hearing officer largely credited Rodgers’ testimony over the officers’ testimony. The hearing officer found the allegation that Rodgers had refused to perform a timely restraint check at the beginning of the shift was unsubstantiated because Rodgers repeatedly said he would do the check later because he was tending to other duties. Palafox’s watch form corroborated Rodgers’ testimony that he performed the check approximately 45 minutes into the shift. The hearing officer concluded the document falsification allegation was unsubstantiated because he credited Rodgers’ testimony to “pencil in” the form, not “pencil whip” it.

The only specific allegation the hearing officer upheld was the discourteous confrontation charge. The hearing officer found that Rodgers had been angry and used profanity, but for a different reason than what was alleged in his NOAA. He found Rodgers as angry because

Rodgers believed the officers had falsely accused him for a neglect of duty he had not committed rather than finding Rodgers was angry because the officers had accurately reported misconduct.

Despite upholding only the discourteous confrontation allegation, the hearing officer concluded the full proposed salary reduction of 10% for two years was an appropriate penalty. The State Personnel Board (SPB) upheld the hearing officer's findings, and Rodgers timely challenged the decision in Superior Court via a petition for administrative mandamus. The Superior Court denied Rodgers' challenge and Rodgers appealed.

The Court of Appeal agreed with Rodgers that the SPB decision violated his procedural due process right to notice of the basis for the disciplinary penalty. The Court found that Rodgers was not notified that he was to be disciplined with a 10% reduction in salary for two years based on a single allegation of misconduct. Because the hearing officer found Rodgers engaged in only one of the several charges of misconduct listed in the NOAA, Rodgers lacked appropriate notice that only one charge could subject him to the full penalty proposed.

The Court rejected the SPB's argument that the penalty should be upheld because the hearing officer found that Rodgers's discourteous treatment of the officers was likely to recur and could chill the officers' willingness to report any future misconduct. The Court said the problem is not that charge of discourteous treatment; the problem was with the NOAA's description of the basis for that charge. The NOAA advised that the discourteous treatment charge was premised on an underlying neglect of duty; CDCR claimed Rodgers angrily confronted his subordinates for reporting a refusal to perform the beginning-of-shift inspection, but that is not what the hearing officer found. Instead, the hearing officer found that, having properly discharged his duty to perform the restraint inspection, Rodgers angrily confronted his subordinates because they'd wrongly accused him of shirking his duty.

The Court reiterated that it was not condoning Rodgers' behavior or saying it was not punishable. The hearing officer did find that Rodgers' decision to confront his subordinates with anger and profanity was unprofessional, discourteous, and violated CDCR's policy on treating other employees with respect. But, the issue before the Court was not whether Rodgers' committed any misconduct, it was whether he was on notice that his alleged actions could subject him to the proposed penalty. To answer that question, due process requires the Court to compare the facts alleged, to those found true after an evidentiary hearing. In the NOAA version, Rodgers engaged in grave misconduct that contributed to a culture of silence that fosters corruption. The hearing officer rejected that theory, however, and found Rodgers simply failed to keep his temper in check and treat his subordinates with respect when confronting them over a misunderstanding. Given the significant difference between the two kinds of misconduct, the Court concluded Rodgers lacked notice and his actions could subject him to the imposed penalty. The Court reversed the judgment and directed the trial court to order the SPB to set aside its decision sustaining the disciplinary action.

Rodgers underscores the need to prepare a *Skelly* notice with great care. The public agency must not only accurately state the basis for each charge, but be able to prove the basis for each charge. In addition, if the proposed penalty would be appropriate based on any one of

several charges, then the *Skelly* notice should specifically say so and offer a brief explanation as to why.

Shouse v. County of Riverside, 84 Cal.App.5th 1080 (2022, rev. denied 2/1/23) - Unsubstantiated Rumors Do Not Start The One-Year Period For Completing An Internal Investigation

In *Shouse*, a captain in a sheriff's department challenged his termination by claiming a violation of the Police Officers Bill of Rights Act's (POBRA) one-year statute of limitations for conducting an investigation. The captain in question had been a county employee for approximately 22 years. In around April of 2016, the chief in the captain's chain of command learned of a rumored intimate relationship involving the captain and a female deputy. On May 20, 2016, the chief learned of another alleged relationship between the captain and a second female deputy. A personnel investigation then revealed the captain had maintained multiple sexual relationships with female employees in violation of department policy and general orders.

On June 3, 2016, the captain received written notice that he was the subject of an administrative internal affairs investigation into allegations that he had inappropriate relationships with other department employees/subordinates. A detailed report, dated April 10, 2017, sustained allegations of the captain's improper conduct. That same day, the captain received a notice of intent to terminate, and he was terminated on April 25, 2017. The captain lost his subsequent administrative appeal, and filed a petition for writ in the superior court to overturn his termination. The superior court denied the petition and agreed with the hearing officer's finding that there was sufficient evidence to substantiate the captain's misconduct. The court also found no POBRA violations.

The captain appealed the superior court's ruling. On appeal, the captain alleged only that the Department violated his POBRA rights by failing to complete its internal investigation within one year of the discovery of his improper conduct. The POBRA contains a statute of limitations at Government Code section 3304, which states that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct."

The captain alleged that the chief should have known of his improper conduct earlier because his sexual relationships with subordinates were the subject of the department's "rumor mill." The captain claimed "there were at least a half-dozen supervisors and senior officers who were aware of allegations of misconduct involving [the captain] prior to April 10, 2016, all of whom could have, like [the chief], initiated a complaint inquiry."

The Court of Appeal rejected this argument and held that the POBRA statute of limitations does not begin based on mere rumors, but only after a department determines that actionable misconduct occurred. Here, the captain failed to identify a single individual who was

“authorized to initiate” an investigation or demonstrate that the public agency had determined that discipline should be taken prior to May 2016.

The Court of Appeal declined to “promote a policy of launching into the intimidate relationships of public safety officers on the basis of mere rumors.” The Court noted that an internal affairs investigation can have a devastating impact on the career of a public safety officer, and “should only be initiated when the officer authorized to initiate an investigation knows or has reason to know that the conduct involves actionable misconduct” and not “on the basis of unsubstantiated rumors.”

Griego v. City of Barstow, 303 Cal.Rptr.3d 379 (2023) - California Court Of Appeal Gives District Broad Discretion To Discipline A Fire Captain

Griego highlights the various factors public agencies must consider when imposing disciplinary penalties on employees.

Jesse Griego was a captain in the Barstow Fire Protection District for the City of Barstow. He also coached children’s sports teams, including the girls’ softball team at Barstow High School. In 2007, Barstow issued a memorandum to its captains directing personnel not to attend sporting events while on duty. In March 2017, a fire chief verbally reprimanded Griego for coaching while on duty. Griego expressed no regret and was later seen attending a sporting event while on duty. The fire chief thereafter issued Griego a written reprimand.

Also in early 2017, a safety officer at Barstow High School reported she suspected an inappropriate relationship between Griego and a 15-year-old student, H.S. The officer saw Griego bring H.S. lunch during school hours and H.S. drive Griego’s car. She heard students saying that H.S. was wearing Griego’s shirt, the two had adopted a cat together, and they had visited a theme park together.

The Barstow Police Department opened a criminal investigation into Griego’s actions. The City placed Griego on paid administrative leave, and Barstow High School told him to end contact with the girls’ softball team. Nonetheless, Griego continued to attend practices and games and to communicate with coaches and players, including H.S.

Barstow launched an investigation into whether Griego had violated Fire District’s Rules and Regulations regarding grounds for disciplinary action. The City’s investigator sustained 19 allegations against Griego. These allegations included, among others, that Griego: (1) sought an “intimate dating relationship” with minor H.S.; (2) defied specific directions not to coach while on duty despite multiple warnings; (3) carried a concealed handgun outside his home without a permit; and (4) filed a false court document under penalty of perjury. The handgun allegation referred to November 2017, when Griego carried a concealed gun to investigate suspicious people outside his home. A police officer arrived and asked Griego if he had a gun; Griego said yes and showed it to him. The officer asked if Griego had a concealed carry permit; Griego did not. Penal Code section 25400 prohibits carrying a concealed gun in public without a permit.

As for the perjury, in 2017 Griego's ex-wife applied for a domestic violence restraining order against him. A temporary restraining order issued in July 2017 included a direction to store any firearms with the police department or a licensed gun dealer. Yet in August 2017, Griego signed and filed a response that declared, "I do not own or have any guns or firearms." Griego later admitted he had owned guns for about two years. Regarding the false court filing, he said, "I probably didn't even read that and pay attention to that."

The Fire Chief thereafter issued a notice of intent to terminate including an explanation of why Griego's conduct violated the Fire District's personnel policies and prior incidents of discipline. After Griego's *Skelly* meeting, the Fire Chief issued a notice of termination based on 18 of the 19 sustained allegations. Griego appealed his termination through advisory arbitration. The arbitrator concluded there was sufficient evidence to sustain six of the 18 allegations against Griego. The arbitrator found insufficient evidence supported the alleged inappropriate relationship, however, as H.S. and her family testified nothing untoward had happened. The arbitrator advised reducing the penalty to a 30-day suspension.

Per City policy, the City Manager received this advisory opinion and exercised his discretion to amend, modify, or revoke the arbitrator's recommendation. The City Manager disagreed with the arbitrator and concluded the evidence demonstrated Griego indeed had pursued a relationship with H.S. The City Manager also upheld the other charges that the arbitrator had previously upheld and then terminated Griego.

Griego filed a petition for writ of administrative mandate in the Superior Court. The Court found there was sufficient evidence to sustain only three allegations, i.e., coaching on duty, carrying a concealed handgun without a permit, and filing a false court document. The Superior Court held termination was not appropriate based on these three allegations and remanded the matter for reconsideration of Griego's discipline. The City appealed the trial court's decision.

On appeal, the Court of Appeal reviewed the matter to see if the City, abused its discretion. An agency abuses discretion if it does not proceed as required by law, its decision is not supported by the findings, or its findings are not supported by the evidence.

The Court of Appeal held that termination was "well within the City's broad discretion." The Court of Appeal found that the City Manager had connected her decision to three serious, sustained allegations, namely: refusing to follow an express directive, issued multiple times, not to coach softball while on duty; carrying a concealed handgun without a permit; and lying under penalty of perjury about possessing firearms. The Court of Appeal distinguished Griego's case from another precedent in that Griego was "an experienced but defiantly insubordinate supervisor [who set] an intolerable example by repeatedly flouting direct commands from his superior." The Court concluded that the sustained allegations of Griego's misconduct demonstrated a lack of credibility, reliability, and trustworthiness, and were therefore a reasonable basis for the City's decision to sustain termination.

This case highlights that supervisory employees must set a good example for their subordinates, and that insubordination is serious misconduct. In assessing whether a disciplinary

penalty is within an agency’s discretion, the courts will consider harm to public service, circumstances surrounding the misconduct, and likelihood of its recurrence. The court found that the City Manager considered all these factors and imposed an appropriate penalty.

Chapter 4: Labor Law

SEIU Local 1021 v. City and County of San Francisco, PERB Decision 2846-M (2022) - PERB “Harmonizes” Its Test For When An Employer Must Bargain A Managerial Decision With The California Court Of Appeal’s Direction In County Of Sonoma

In Summer 2021, the City of San Francisco’s Health Officer issued an order requiring employees of businesses and governmental entities who regularly work in high-risk settings to be fully vaccinated against COVID-19 within 10 weeks of the U.S. Food and Drug Administration’s approval of a vaccine. In addition, the City created its own vaccination and face covering policy (Policy) which required all employees to disclose their vaccination status and provide proof of vaccination or proof of eligibility for an exemption. Those exempted were required to submit to COVID-19 testing at least once a week.

SEIU filed an unfair practice charge against the City with the Public Employment Relations Board (PERB or Board) regarding the Policy.

PERB’s Office of the General Counsel (OGC) analyzed SEIU’s charge and allowed SEIU to proceed with only some of its allegations. The allegations the OGC allowed SEIU to pursue included that the City violated the Meyers-Milias-Brown Act (MMBA) by: (1) failing to bargain the negotiable effects of the Policy; (2) requiring employees to sign a form consenting to discipline for failure to comply with the Policy; (3) adding a COVID-19 vaccination requirement to the minimum qualifications in job descriptions without bargaining; (4) unilaterally changing its policy on the religious exemptions to vaccination requirements; and (5) failing to inform SEIU about employees’ applications for exemptions to the Policy.

The OGC dismissed several other of SEIU’s allegations, including that the City violated the MMBA by: (1) unilaterally deciding to adopt the mandatory vaccination Policy; (2) requiring employees to disclose their vaccination status; and (3) refusing to allow employees to submit SEIU-created vaccination forms in lieu of the City’s forms. The OGC determined that the City’s decision to adopt the Policy was a managerial decision that was outside the scope of representation under PERB’s 2021 decision in Regents of UC, and therefore not subject to bargaining. SEIU appealed the OGC’s partial dismissal, and the PERB took up the matter.

The key question before PERB was whether the City’s adoption of the Policy was a management decision outside the scope of representation. The MMBA defines the scope of representation as: “[A]ll matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.”

PERB proceeded carefully in its analysis because the California Court of Appeal had determined only months earlier in *County of Sonoma v. PERB* (2022) 80 Cal.App.5th 167, that PERB had applied the wrong test to evaluate whether a management decision was subject to bargaining.

PERB reviewed several California Supreme Court precedents and harmonized PERB's method of analysis with the California Court of Appeal's analysis in *Sonoma*. First, PERB's test categorizes the type of management decision at issue into one of the following: (1) decisions that have only an indirect and attenuated impact on the employment relationship are not mandatory subjects of bargaining, such as advertising, product design, and financing; (2) decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls are always mandatory subjects of bargaining; and (3) decisions that directly affect employment, such as eliminating jobs, may not be mandatory subjects of bargaining if they involve a change in the scope and direction of the enterprise or the employer's retained freedom to manage its affairs.

Second, if the decision falls within the third category, PERB's test analyzes whether the implementation of the fundamental managerial or policy decision has a "significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." If so, then PERB determines whether "the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question."

Using its test, PERB then distinguished its 2021 decision in *Regents of the University of California* (2021) PERB Decision No. 2783-H, which held that a mandatory influenza vaccine policy was a managerial decision outside the scope of bargaining. PERB said the OGC had improperly relied upon *Regents* to determine that City's Policy was a managerial decision because SEIU might be able to overcome the holding in *Regents*. PERB directed the OGC to allow SEIU to proceed on the decisional bargaining allegations.

PERB next examined the OGC's decision to dismiss SEIU's allegation that required employees to disclose "their vaccination status under penalty of perjury" The OGC had dismissed this allegation on the grounds that PERB does not enforce laws governing employees' privacy; and questions about employees' vaccination status do not implicate employees' MMBA rights. The Board agreed with SEIU that the OGC should have reviewed this allegation as a unilateral change. Because the City had never required employees to disclose their vaccination status until after the Policy was implemented, PERB found the Policy fell within the "newly created policy" category of unlawful unilateral change.

Finally, PERB analyzed SEIU's claim that the City's decision to require employees to disclose their vaccination status constituted unlawful direct dealing with employees. In general, an employer violates the duty to bargain in good faith if it directly approaches employees to effect a change in terms or conditions of employment within the scope of representation. Further, an employer may not communicate directly with employees to undermine a union's exclusive authority to represent unit members. PERB held that SEIU's charge did not contain any allegations regarding direct dealing, and upheld the OGC's dismissal of that claim.

PERB remanded the case to the OGC to issue an amended complaint that was consistent with its decision.

Going forward, public employers should follow the test that PERB has outlined in this case for determining whether it must bargain a managerial decision and/or its effect.

Chapter 5: Retirement Law

CalPERS Circular Letter 200-014-23- Requires Agencies Provide More Information to Support Decisions on Local Safety Members' Disability Retirements

On March 15, 2023, CalPERS issued Circular Letter 200-014-23, setting forth new requirements that contracting agencies must follow when determining whether local safety members are substantially incapacitated from performance of their usual duties for the purposes of a disability retirement. Specifically, under Circular Letter 200-014-23, agencies are now required to submit additional documentation and information to CalPERS, including several newly created CalPERS forms, when certifying an application for disability retirement, industrial disability retirement, and re-evaluation for continuous eligibility for disability retirement.

For example, agencies must complete a form detailing how often the member performs various physical activities, such as interacting with others, lifting certain weights, sitting, standing, kneeling, and climbing in the course of their employment. The form also requires agencies to indicate if the member has been through the reasonable accommodation process, and if so, requires the agency to submit the reasonable accommodation documentation to CalPERS.

Agencies also must now submit a form (signed by a physician) that includes the physician's findings and diagnosis and answers specific questions regarding whether the member is substantially incapacitated. If the member is found substantially incapacitated, the physician must list the specific job duties the member is unable to perform due to incapacity, and whether the incapacity is permanent or will last longer than 12 months. The Circular Letter lists other newly required CalPERS forms as well.

Although it is not yet clear how CalPERS intends to use the additional information, CalPERS appears to require this additional information to more closely scrutinize contracting agencies' decisions regarding local safety members' disability retirement and industrial disability retirement applications. For example, many agencies rely solely on workers' compensation reports, which may contain presumptions or prophylactic work restrictions that are inapplicable under the Public Employees' Retirement Law. Government Code section 21154 provides that contracting agencies, rather than CalPERS, are responsible for determining whether local safety members (other than school safety members) are incapacitated from their duties. It is uncertain if these new requirements will change who decides whether an application is granted or how applications are processed. However, agencies will have to provide additional documentation to CalPERS supporting the underlying application and may have to obtain more independent medical examinations as a result of the changes.

Chapter 6: “Eye to the Future”: Pending California Supreme Court Decisions and California Legislation

The following chapter touches on some of the relevant California Supreme Court decisions and legislation that may have a significant impact on labor and employment laws in the public sector. While the outcome of these future appellate decisions and proposed legislation may ultimately be different than where they stand now, these cases raise some important issues we believe agencies should keep an eye on in the foreseeable future.

Bailey v. San Francisco District Attorney’s Office, George Gascon, City & County of San Francisco, S265223 - City Took Appropriate Corrective Action Responding to Employee’s Complaint Involving Racial Epithet Used By Coworker

Bailey is a pending California Supreme Court case that is on review from an unpublished decision of the First District Court of Appeal. While the underlying Court of Appeal decision is not citeable, the Supreme Court’s decision in *Bailey* may significantly impact how employers should handle discrimination complaints from co-workers to avoid liability under FEHA.

Twanda Bailey worked as an Investigation Assistant for the City of San Francisco. Baily worked next to Saras Larkin, another investigative assistant in the records room. Twanda claims that in January 2015, after a mouse ran through the records room and startled her, Larkin said “You n...ers is so scary.” Bailey was very offended and left the records room to calm down. Outside she told three co-workers about the incident but did not report it to the human resources office because she feared retaliation since Larkin had a close relationship with the HR Director.

The next day, Bailey’s supervisor overheard a conversation about the incident and asked Bailey if she reported it. When Bailey said she had not, Lopes said she would notify HR. A few days later the incident ended up being reported from the Assistant Chief of Finance, to the Chief Administrative and Financial Officer, who in turn reported directly to the District Attorney.

The Assistant Chief of Finance took Bailey’s statement and met with the HR Director and Larkin, who denied making the remark. The Assistant Chief of Finance reminded her that the word was not acceptable in the workplace.

Two months later, Bailey asked the HR Director for a copy of the report that she thought was prepared for the incident. The HR Director told her no report was prepared, and Bailey said she wanted a complaint filed, but the HR Director refused. The HR Director also told Bailey that if she discussed the incident with others, she would be creating a hostile work environment for Larkin. Bailey then went on a leave for a few weeks.

In April, Bailey received a letter from the HR department stating it had received notice of the incident and would be reviewing it. A San Francisco Police Department employee who had heard of the incident had notified the Department.

When Bailey returned from leave she claimed the HR Director treated her differently, made faces at her, and refused to speak to her. She later learned that the HR Director had vetoed separating Bailey and Larkin at work. She also felt that she was performing tasks outside her job description that were normally Larkin's. Bailey's supervisor perceived that she seemed annoyed and irritated by work requests they considered standard.

A couple months later, the HR Department notified Bailey it would not investigate the complaint because the "allegations are insufficient to raise an inference of harassment/ hostile work environment or retaliation."

Bailey later went on a six-week medical leave. She subsequently filed a lawsuit alleging causes of action under the FEHA for racial discrimination and harassment, for retaliation for having made a complaint, and for failure to prevent discrimination/harassment/retaliation.

The trial court held that "no reasonable trier of fact could reach [the] conclusion" "that her co-worker's single statement... without any other race-related allegations, amounted to severe or pervasive harassment." On appeal, the Court of Appeal explained that Bailey correctly asserted that a single racial epithet can be so offensive it gives rise to a triable issue of actionable harassment. The existence of a hostile work environment depends upon the totality of the circumstances, and a discriminatory remark may be relevant, circumstantial evidence of discrimination.

The Court of Appeal then focused on whether the single alleged racial epithet, in context, was so egregious in import and consequence as to be "sufficiently severe or pervasive as to alter the conditions of Bailey' employment. The court reasoned that precedent has similarly commented on the significant difference between a slur by a co-worker and one by a supervisor. Bailey failed to cite to any case that held that an egregious, racial epithet by a co-coworker, without more, created a legally cognizable hostile work environment. Bailey also did not make any factual showing that the conditions of her employment were so altered by the one slur by her coworker as to constitute actionable harassment. Thus, the Court of Appeal agreed with the trial court's decision that without any other race-related allegations, the co-worker's single statement did not amount to severe or pervasive racial harassment.

The Court further disagreed with Bailey's allegation that the District Attorney's Office and City failed to take appropriate corrective action. The City informed Larkin that the use of the epithet was unacceptable, and gave her a written copy of the City's Harassment-Free Workplace Policy. Larkin was required to meet with the Assistant Chief of Finance, Chief Administrative and Financial Officer who required Larkin to acknowledge the anti-harassment policy, which was placed in her personnel file. Given these facts, the Court of Appeal held that the remedial action by the DA's Office and City was sufficient.

As for her retaliation claim, Bailey alleged the City retaliated against her for reporting Larkin's racial slur as evidenced by the HR Director's "course of conduct" and on comments made by her new supervisor on her June 2015 performance review. The Court of Appeal explained that the HR Director's conduct and response to Bailey's complaints did not rise to the level of a legally cognizable adverse employment action. Bailey's assertion that she suffered

emotionally from Larkin's alleged racial slur which affected her performance, in turn resulting in improvement comments on her performance review, is not an assertion that her supervisor retaliated against her for complaining about Larkin's alleged slur. Additionally, the supervisor gave her the same overall rating, "Met expectations" that Bailey had received each of the prior two years. Thus, the Court of Appeal agreed with the trial court that the neither the HR Director's "course of conduct" nor improvement comments on Bailey's review rose to the level of an adverse employment action.

Bailey appealed and her case was selected for hearing by the California Supreme Court. The case is one to watch given the issue of whether a single racial epithet can create a hostile work environment is at issue.

Garcia-Brower v. Kolla's Inc., S269456 - Employee Terminated for Reporting Entitled Wages to Employer Did Not Amount to a Public Disclosure as Required Under California's Whistleblower Statute

Garcia-Brower v. Kolla's Inc. is another retaliation case pending before the California Supreme Court, and at issue is whether the California's whistleblower statute, Labor Code section 1102.5, subdivision (b), protects an employee from retaliation for disclosing unlawful activity when the information the employee is disclosing is already known to the person or agency. The underlying Court of Appeal decision is unpublished and not citeable pending Supreme Court review.

The plaintiff was employed as a bartender at Kolla's Night Club, in Lake Forest. On or about April 5, 2014, the plaintiff told Kolla's owner and operator, Gonzalo Sanalla Estrada, that she had not been paid wages for her previous three shifts. Estrada responded by threatening to report her to "immigration authorities," terminated her employment immediately and told her never to return.

On June 2, 2014, an employee filed a complaint with the Division of Labor Standards Enforcement (DLSE) and DLSE undertook an investigation. The investigation revealed Estrada was upset at the employee complainant for challenging him about her wages, threatened her and terminated her because she had complained. The DLSE determined respondents violated Labor Code sections 98.6, 244, 1019, and 1102.5 and ordered them to pay the complaint lost wages and civil penalties.

In October of 2017, the Labor Commissioner filed an enforcement action against both Estrada and Kolla's alleging violation of statutory provisions. The trial court determined the Labor Commissioner did not state a claim under section 1102.5, which prohibits an employer from retaliating against an employee for "disclosing a violation of state or federal regulation to a governmental or law enforcement agency". The trial court found there could be no violation here since the complainant contacted the DLSE after her termination. On appeal, the Court of Appeal upheld the trial court's judgment on section 1102.5 claim, but reversed the judgment as to the section 98.6 claim against Kolla's.

The Court of Appeal reasoned that the Labor Commissioner was correct because under the amended statute reporting a violation to Estrada instead of a government agency would be sufficient. The Court then focused on whether the Labor Commissioner adequately alleged protected activity by the complainant. However, an important element of the 1102.5 claim was missing in regarding “disclosing” or “providing information to, or testifying before, any public body.”

The Court of Appeal explained that nowhere in the complaint did the Labor Commissioner specifically allege the complainant “disclosed” the fact of her unpaid wages to Estrada. In fact, the allegations suggest that Estrada was at least aware of, if not responsible for, the non-payment of wages. The Court emphasized the legislative intent in choosing the term “disclose” rather than “report.” Estrada’s state of awareness in the Court of Appeal’s view was absolutely necessary to establish a violation of section 1102.5.

On the Labor’s Commissioner’s retaliation claim under section 98.6, the Court held that the Complainant’s conduct was protected by the statute since she was complaining about unpaid wages, and it is a crime for an employer to willfully refuse to pay agreed-upon wages. The Court further explained that Kolla’s violated the statute twice, by threatening to report her to immigration, then firing her.

The case is now pending review by the California Supreme Court.

III. LEGISLATION

We are highlighting a few bills that have been introduced that could significantly impact California employers if they become law and should be on an agency’s radar. Some or all of these bills could undergo substantial amendment as they work their way through the Legislature, or they might not be passed at all, but we are highlighting them for you here so your agencies can track them.

Assembly Bill 524 – FEHA Protection for Family Caregivers

Assembly Bill 524 (AB 524) would add “family caregiver status” to the list of protected classifications enumerated in the Fair Employment and Housing Act (FEHA), which also includes race, sex, sexual orientation, and others.

Specifically, AB 524 would amend the FEHA to prohibit discrimination and harassment against an employee on the basis of their “family caregiver status,” meaning their status as “a person who is a contributor to the care of one more family members.”

The bill defines the term “family member” broadly to include an employee’s spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or “any other individual related by blood or whose association with the employee is the equivalent of a family relationship.”

Assembly Bill 518 – Expansion of Paid Family Leave

Currently, employees who pay into the Unemployment Compensation Disability Fund may receive up to 8 weeks of wage replacement benefits in order to take time off work to care for a seriously ill family member, meaning the employee’s child, spouse, parent, grandparent, grandchild, sibling, or domestic partner.

Assembly Bill 518 (AB 518) would amend the Unemployment Insurance Code to expand the definition of “family member” to include any “individual related by blood or whose association with the employee is the equivalent of a family relationship.”

This bill follows recent legislation, which took effect on January 1, 2023, that expanded the California Family Rights Act to allow eligible employees to take leave to care for a “designated person,” meaning “any individual related by blood or whose association with the employee is the equivalent of a family relationship.” The same legislation also allows employees to take paid sick leave pursuant to the California Paid Sick Leave Law to care for a “designated person,” which means a person identified by the employee at the time the employee requests paid sick days.

Senate Bill 731 – Remote Work as a Reasonable Accommodation

Senate Bill 731 (SB 731) would amend the FEHA to authorize an employee with a qualifying disability to initiate a renewed reasonable accommodation request to perform their work remotely if certain requirements are met.

Under SB 731, a “qualifying disability” means “an employee’s medical provider has determined that the employee has a disability that significantly impacts the employee’s ability to work outside their home.” If an employee who has such a qualifying disability renews a previous request to work remotely, the employer would be required to grant that request if all of the following requirements are satisfied: (1) the employee requested and was denied remote work as a reasonable accommodation before March 1, 2020; (2) the employee performed the essential functions of their job remotely for at least 6 of the 24 months preceding the renewed request; and (3) the employee’s essential job functions have not changed since the employee performed their work remotely. However, the employer is not required to provide remote work as a reasonable accommodation if the employee can no longer perform all of their essential job functions remotely.

SB 731, if enacted, would be a significant departure from the standard interactive process in which employers engage with employees seeking a reasonable accommodation. Employers are currently not obligated to choose any particular accommodation or the accommodation preferred by the employee.



SB 1383: What it is and How it Impacts Every Jurisdiction

Thursday, May 18, 2023

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SB 1383: What it is and How it Impacts Every Jurisdiction

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SB1383: What it is and How it Impacts Every Jurisdiction

SB1383 – Short Lived Climate Pollutants, which establishes organic waste reduction requirements, affects approximately 540 jurisdictions in California. The regulation to enforce SB1383 relies heavily upon local jurisdictions to ensure it is implemented and enforced. To make sure that jurisdictions do their part, CalRecycle, the Department, imposes extensive enforcement, recordkeeping and reporting requirements, which are identified and discussed below. The Department is expected to start enforcing the provisions that relate to jurisdictions. As such, recommendations on how to prepare for the Department's enforcement are also discussed below.

Enforcing against public agencies is nothing new for the Department. The Cities of Maywood (\$21,000), Ridgecrest (\$20,000), McFarland (\$11,330), Gardena (\$70,000), Cerritos (\$82,000), and Arvin (\$5,000) all paid penalties associated with the implementation of the Source Reduction and Recycling Element.

1. High Level Overview of Key Jurisdiction Requirements under Chapter 12 of Title 14, Division 7 of the California Code of Regulations, Regarding Short-Lived Climate Pollutants.

Jurisdictions are required to do the following:

- Adopt an enforcement ordinance(s) or other enforceable mechanisms to mandate that organic waste generators, haulers, and other entities that are subject to the jurisdiction's authority comply with the requirements in Chapter 12, which includes, but is not limited to, organic waste collection services, trash container colors and labels, etc. (Cal. Code Regs., tit. 14, § 18981.2.)
- Provide containers for collection services that comply with the container colors in Article 3. (Cal. Code Regs., tit. 14, § 18984.7, subd. (a).) Jurisdictions must also place labels on containers or lids provided to generators. (Cal. Code Regs., tit. 14, § 18984.8.) The Department has model labels to assist jurisdictions in complying with this requirement. See <https://calrecycle.ca.gov/Recycle/Commercial/Organics/PRTToolkit/>.
- Annually procure a quantity of recovered organic waste products that meets or exceeds its current annual recovered organic waste product procurement target. (Cal. Code Regs., tit. 14, § 18993.1, subd. (a).) Each jurisdiction's recovered organic waste product procurement target is calculated by multiplying the per capita procurement target by the jurisdiction population. (Cal. Code Regs., tit. 14, § 18993.1, subd. (c).) The Department is required to provide notice to each jurisdiction of its annual recovered organic waste product procurement target. (Cal. Code Regs., tit. 14, § 18993.1, subd. (d).) The target is recalculated every five years. (Cal. Code Regs., tit. 14, § 18993.1, subd. (b).) Jurisdictions either have to procure recovered organic waste products for use or giveaway, require through a written agreement that a direct service provider to the jurisdiction procure the recovered organic waste products. (Cal. Code Regs., tit. 14, § 18993.1, subd. (e).)
- Have an inspection and enforcement program that is designed to ensure overall compliance with Chapter 12. (Cal. Code Regs., tit. 14, § 18995.1, subd. (a).)

- Counties, in coordination with jurisdictions and regional agencies, are required to estimate the amount of all organic waste that will be disposed of by the County and jurisdictions. (Cal. Code Regs., tit. 14, § 18992.1, subd. (a).) The Counties are also required to identify the amount of existing organic recycling infrastructure capacity and estimate the amount of new or expanded organic waste recycling facility capacity that will be need to process the estimate amount of organic waste that will be disposed. (Cal. Code Regs., tit. 14, § 18992.1, subd. (a)(3)-(a)(4).) If there is insufficient capacity, the jurisdictions that lack the capacity are required to: (1) submit an implementation schedule that includes timelines and milestones for planning efforts to access capacity; and, (2) identify facilities, operations, and activities that could be used for additional capacity. (Cal. Code Regs., tit. 14, § 18992.1, subd. (d).) Section 18992.3, subdivision (a) provides a schedule for conducting the planning activities.

- Counties, in coordination with jurisdictions and regional agencies, are required to estimate the amount of edible food that will be disposed of by commercial edible food generators, identify existing capacity at food recovery organizations, and identify the amount of new or expanded capacity that is necessary to recover the edible food estimated to be disposed of. (Cal. Code Regs., tit. 14, § 18992.2, subd. (a).) If new or expanded capacity is needed, the County is required to report in accordance with section 18992.3, and notify the jurisdiction(s) that lack sufficient capacity. (Cal. Code Regs., tit. 14, § 18992.2, subd. (d).) Section 18992.3, subdivision (a) provides a schedule for conducting the planning activities.

- Implement an edible food recovery program that includes: (1) education of commercial edible food generators; (2) increasing commercial edible food generator access to food recovery organizations and food recovery services; (3) monitoring commercial edible food generator compliance; and, (4) increase edible food recovery capacity if the jurisdiction does not have sufficient capacity to meet its edible food recovery needs. (Cal. Code Regs., tit. 14, § 18991.1.) Jurisdictions must also develop a list of food recovery organizations and maintain it on the jurisdiction's website. (Cal. Code Regs., tit. 14, § 18985.2, subd. (a).)

- Annually provide to organic waste generators information about the generator's requirements to separate materials into the appropriate containers, and other issues. (Cal. Code Regs., tit. 14, § 18985.1.)

- Procure paper products, and printing and writing paper, consistent with the requirements of Sections 22150-22154 of the Public Contract Code, which requires recycled products.

- Maintain records required for the Implementation Record. (Cal. Code Regs., tit. 14, § 18995.2.) The records must be stored in one central location that can be readily accessed by the Department. (Cal. Code Regs., tit. 14, § 18995.2, subd. (b).) If the Department requests the records they must be provided within 10 business days. (Cal. Code Regs., tit. 14, § 18995.2, subd. (c).) All required records must be included in the Implementation Record within 60-days of the creation of that record. (Cal. Code Regs., tit. 14, § 18995.2, subd. (d).) The records must be retained for five years. (Cal. Code Regs., tit. 14, § 18995.2, subd. (e).)

- Adopt ordinance(s) or enforceable mechanisms to impose penalties as prescribed in section 18997.2. (Cal. Code Regs., tit. 14, § 18997.1, subd. (b).)

- Provide a written procedure for the receipt and investigation of written complaints of alleged violations of Chapter 12. (Cal. Code Regs., tit. 14, § 18995.3, subd. (a).)

- Notify the Department in writing within 10 days of the jurisdiction granting a facility processing a jurisdiction's organic waste a waiver because the facility is unable to process the waste because of unforeseen operational restrictions imposed by a regulatory agency or unforeseen equipment or operational failure that temporarily prevents the facility from processing and recovering organic waste. (Cal. Code Regs., tit. 14, § 18984.13, subd. (a)(2).)

If a jurisdiction implements a performance-based source separated collection service that meets the requirements of Section 18998.1, subdivision (a), the jurisdiction is not subject to several requirements including: (1) collection requirements in Sections 18984.2 and 18984.3; (2) container labeling requirements in Section 18984.8, and waivers in Section 18984.11.; (3) recordkeeping requirements in Sections 18984.4, and 18984.14; (4) organic waste recovery education and outreach requirements in Section 18985.1; (5) recordkeeping requirements in Section 18985.3 except as related to edible food recovery education and outreach performed under Section 18985.2; (6) the regulation of haulers in Article 7; (7) annual reporting requirements in Section 18994.2(c)(1)-(2), (d)-(f) and (k); (8) inspection and enforcement requirements in Sections 18995.1, except for the provisions related to edible food generators and food recovery organizations and services in that section; (9) implementation record and recordkeeping requirements in Section 18995.2(f)(3)-(7) except that Implementation Records requirements in Section 18995.2(f)(11)-(13) shall only be required for inspections and enforcement related to edible food generators and food recovery organizations and services; (10) investigation of complaints of alleged violations requirements in Section 18995.3, except as it pertains to entities subject to the edible food recovery requirements of Article 10; and, (11) enforcement requirements in Section 18995.4, except as it pertains to entities subject to the edible food recovery requirements of Article 10 of Chapter 12. (Cal. Code Regs., tit. 14, § 18998.2.)

2. Prohibitions on Jurisdictions.

A jurisdiction is prohibited from implementing or enforcing an ordinance, policy, procedure, permit condition, or initiative that does any of the following.

- Prohibit, or otherwise unreasonably limit or restrict, the lawful processing and recovery of organic waste.
- Limit a particular solid waste facility, operation, property, or activity from accepting organic waste imported from outside of the jurisdiction for processing or recovery.
- Limit the export of organic waste to a facility, operation, property or activity outside of the jurisdiction that recovers the organic waste.
- Require a generator or a hauler to transport organic waste to a solid waste facility or operation that does not process or recover organic waste.
- Require a generator to use an organic waste collection service or combination of services that do not recover at least the same types of organic waste recovered by a service the generator previously had in place.

(Cal. Code Regs., tit. 14, § 18990.1.)

A jurisdiction is also prohibited from implementing or enforcing an ordinance, policy, or procedure that prohibits the ability of a generator, food recovery organization, or food recovery service to recover edible food that could be recovered for human consumption. (Cal. Code Regs., tit. 14, § 18990.2, subd. (a).)

These prohibitions cannot be enforced in a manner that affects the land use authority of a jurisdiction. (Cal. Code Regs., tit. 14, § 18990.1, subd. (c)(3).)

3. Oversight Requirements.

a. Jurisdiction Oversight Requirements.

A jurisdiction is required to have an inspection and enforcement program. (Cal. Code Regs., tit. 14, § 18995.1, subd. (a).) Every year a jurisdiction is required conduct compliance reviews of all solid waste collection accounts for commercial businesses if the jurisdiction is using the compliance methods in sections 18984.1, 18984.2, or 18984.3; and, conduct inspections of commercial edible food generators and food recovery organizations and serves; investigate complaints. (Cal. Code Regs., tit. 14, § 18995.1, subds. (a)(1)-(a)(3).) A jurisdiction is also required to conduct a sufficient number of route reviews and inspections of entities identified above. (Cal. Code Regs., tit. 14, § 18995.1, subd. (b).) A jurisdiction is required to generate a written or electronic record for each inspection, route review, and compliance review. (Cal. Code Regs., tit. 14, § 18995.1, subd. (c).)

A jurisdiction is required to set up a procedure for the receipt and investigation of written complaints that meets the requirements stated in section 18995.3. A jurisdiction is required to commence an investigation within 90 days of receiving a complaint if the jurisdiction determines that the allegations, if true, would constitute a violation of Chapter 12. (Cal. Code Regs., tit. 14, § 18995.3, subd. (c).) The jurisdiction may decline to investigate a complaint if, in its judgment, investigation is unwarranted because the allegations are contrary to facts known to the jurisdiction. (*Id.*)

Starting on or after January 1, 2024, a jurisdiction is required to take enforcement actions. (Cal. Code Regs., tit. 14, § 18996.5, subd. (a).) Specifically, the jurisdiction is required to issue a notice of violation requiring compliance within 60 days, and if the respondent does not comply, the jurisdiction is required to impose penalties. (*Id.*) A jurisdiction may expend the compliance due dates if the jurisdiction finds there are extenuating circumstances beyond the control of the respondent. (Cal. Code Regs., tit. 14, § 18996.5, subd. (b).) Extenuating circumstances are defined in the Code of Regulations and includes deficiencies in organic waste recycling capacity infrastructure or edible food recovery capacity if the jurisdiction is under a Corrective Action Plan. (*Id.*)

Jurisdictions must require residential, commercial, and industrial organic waste collection services to meet the requirements and standards in Chapter 12 as a condition of approval of a contract, agreement, or other authorization to collect organic waste. (Cal. Code Regs., tit. 14, § 18988.1, subd. (a).)

Jurisdictions are required to monitor the containers to minimize prohibited container contamination. (Cal. Code Regs., tit. 14, § 18984.5, subd. (a).) The monitoring may be done, depending upon the organic waste collection service the jurisdiction is implementing, through

waste evaluations, route reviews, or sampling of gray containers. (Cal. Code Regs., tit. 14, § 18984.5.)

If an enforcement matter is of "substantial statewide concern" (undefined) and multiple jurisdictions decide that Department enforcement may be more effective at achieving the intent of Chapter 12, the jurisdictions may file a joint enforcement referral. (Cal. Code Regs., tit. 14, § 18996.5, subd. (a).) The enforcement referral may be made for organic waste generator or generators, including a commercial edible food generator or generators, with locations, at minimum, in each of those jurisdictions. (Cal. Code Regs., tit. 14, § 18996.5, subd. (b).) If the Department fails to respond to a joint referral within 90 days of receipt, the joint referral shall be deemed denied. (Cal. Code Regs., tit. 14, § 18996.5, subd. (e)(2).)

A jurisdiction is required to impose penalties that comply with Government Code sections 53069.4 (enacting an ordinance), 25132 (prosecuting violations of county ordinances by bring an action in the name of the people of the state of California), and 36900 (prosecuting violations of city ordinances by bring an action in the name of the people of the state of California.) (Cal. Code Regs., tit. 14, § 18997.2, subd. (a).) The amounts of the base penalty authorized are specified in the Code and range from \$50 to \$500 per violation. (*Id.*)

If the Department receives a complaint about a violation that is within the enforcement authority of a jurisdiction it will refer the complaint to the jurisdiction for investigation under section 18995.3. (Cal. Code Regs., tit. 14, § 18996.8, subd. (a).)

A public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty. (Gov. Code, § 815.6.) But, A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law. (Gov. Code, § 818.2.) A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety. (Gov. Code, § 818.6.)

b. CalRecycle Oversight of a Jurisdiction.

The Department will evaluate a jurisdiction's compliance with Chapter 12. The review is based on the jurisdiction's implementation record, inspections, compliance reviews and route reviews. (Cal. Code Regs., tit. 14, § 18981.2, subds. (a)-(b).) The Department is required to notify the jurisdiction prior to conducting the evaluation and must provide its findings to the jurisdiction in writing. (Cal. Code Regs., tit. 14, § 18981.2, subds. (c)-(d).)

If the Department determines **at any time** that an ordinance or other enforceable mechanisms is inconsistent with or does not meet the requirements of Chapter 12, the Department is required to notify the jurisdiction and provide an explanation of the deficiencies. (Cal. Code Regs., tit. 14, § 18981.2, subd. (e), see also 18996.1, subd. (e).) The jurisdiction has 180 days from the date of notice of deficiencies. (Cal. Code Regs., tit. 14, § 18996.1, subd. (e).) Enforcement is required. The Department does not seem to be limited by any statute of limitations that would normally apply to a challenge to an ordinance brought under Code of Civil Procedures, section 1085 for a writ of mandate. (See e.g., 90-days in Gov. Code, § 65009, 3 years in Code Civ. Pro., § 338(a).) Although the defense of laches may apply. (*Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 601.) The

jurisdiction has 180 days from the notice to correct the deficiencies, and if the jurisdiction does not, the Department **shall** commence enforcement actions as set forth in Section 18996.2, which permits the Department to issue a notice of violation against the jurisdiction. (*Id.*) It is unknown whether the Department will use any discretion with respect to enforcement decisions.

The Department is required to enforce Chapter 12. (Cal. Code Regs., tit. 14, § 18996.2, subd. (a).) The Department enforces Chapter 12 by issuing a notice of violation to the jurisdiction that requires compliance within 90-days of the issuance of the notice. (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(1).) The Department may grant an extension for up to a total of 180 days if it finds that additional time is necessary for the jurisdiction to comply. (*Id.*) Additional extensions may be granted if the Department issues a Corrective Action Plan. (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(2), subd. (a)(3).)

The Department will only issue a Corrective Action Plan if it finds that "additional time is necessary for the jurisdiction to comply and the jurisdiction has made a substantial effort to meet the maximum compliance deadline but extenuating circumstances beyond the control of the jurisdiction make compliance impracticable." (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(2).) "Substantial effort" means that a "a jurisdiction has taken all practicable actions to comply." (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(2)(B)) Substantial effort does not include circumstances where a jurisdiction's decision-making body has not taken the necessary steps to comply with Chapter 12 including, but not limited to, a failure to provide adequate staff resources, a failure to provide sufficient funding, or failure to adopt the ordinance(s) or similarly enforceable mechanisms. (*Id.*) Because the Department makes the findings has substantial discretion in rendering a decision based largely on an elected bodies' decisions.

The jurisdiction may submit evidence as to whether a Corrective Action Plan is appropriate. (*Id.*) If a violation is not corrected within 90 days, or 180 days if the Department grants an extension, then the jurisdiction is likely to receive a notice of violation. So, a Corrective Action Plan could be a good option if the jurisdiction cannot come into compliance within the deadlines. However, under a Corrective Action Plan it is the Department that that decides the actions a jurisdiction must take to remedy violation and the compliance deadlines. (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(3).) So, if a jurisdiction does not comply within 180 days, the jurisdiction could lose its ability and discretion to decide how it will comply with the violation notice. Further, the Department includes the penalties that may be imposed in the Corrective Action Plan. (*Id.*) Compliance with the Corrective Action Plan must be achieved by no more than 24 months from the date of the notice of violation(s). (Cal. Code Regs., tit. 14, § 18996.2, subd. (a)(3).) The 90 or 180 days initial compliance period is included in the 24 months.

The Department will conduct a compliance evaluation by reviewing the jurisdiction's implementation record and by conducting inspections, compliance reviews, and route reviews. (Cal. Code Regs., tit. 14, § 18996.1, subds. (a)-(b).) The Department will provide the jurisdiction prior notice of the evaluation and will provide written findings to the jurisdiction. (Cal. Code Regs., tit. 14, § 18996.1, subds. (c)-(d).)

The Department may upon presentation of proper credentials, enter the premises of any entity subject to the Chapter 12 during normal working hours to conduct inspections and investigations in order to examine organic waste recovery activities, edible food recovery activities, and records in order to determine compliance with Chapter 12. (Cal. Code Regs., tit. 14, § 18996.4, subd. (a).)

The Department will take over a jurisdiction's prosecution of an entity if the jurisdiction fails to take enforcement action after the deadlines in a notice to violate has expired. (Cal. Code Regs., tit. 14, § 18996.3, subd. (a).) The Department will take enforcement action against organic waste generators, commercial edible food generators, haulers, and food recovery organizations and services, and non-local entities if the jurisdiction fails to enforce Chapter 12 as determined by section 18996.3 or if the jurisdiction lacks the authority to enforce. (Cal. Code Regs., tit. 14, § 18996.9, subd. (a).) The Department could also take enforcement action against the jurisdiction for a failure to comply with Chapter 12. (Cal. Code Regs., tit. 14, § 18996.3, subd. (c).) If this occurs, it is possible that the Department will find the jurisdiction out of compliance with Chapter 12.

The Department will investigate written complaints alleging violations of Chapter 12. (Cal. Code Regs., tit. 14, § 18996.8, subd. (a).) The complaints may be submitted anonymously. (Cal. Code Regs., tit. 14, § 18996.8, subd. (b).) The Department is required to investigate the complaint within 90 days if the complaint contains all the required information and if the allegations, if true, would constitute a violation of Chapter 12. (Cal. Code Regs., tit. 14, § 18996.8, subd. (c).) However, the Department may decline to investigate if in its judgment the allegations are contrary to the facts known to the Department. (*Id.*)

4. Potential Liabilities for Jurisdictions.

The penalties for violating Chapter 12 can be severe for jurisdictions. The penalties are imposed administratively. (Cal. Code Regs., tit. 14, § 18997.3, subd. (a).) The penalties are divided into three categories with the following penalty amounts:

- **Minor Violations:** This applies when the violation involves a "minimal deviation" from some aspects of a requirement. The penalties are no less than \$500 and no more than \$4,000 **per violation per day**.
- **Moderation Violations:** This applies when the violation involves a "moderate deviation" from the standards in Chapter 12. The penalties are no less than \$4,000 and no more than \$7,500 **per violation per day**.
- **Major Violations:** This applies when the violation involves a "substantial deviation" from the standards in Chapter 12 **that may also be** knowing, willful or intentional or a chronic violation by a recalcitrant violator as evidenced by a pattern or practice of noncompliance. A major violation includes a jurisdiction's failure to: (1) have an ordinance or similarly enforceable mechanism for organic waste disposal reduction and edible food recovery; (2) have a provision in a contract, agreement, or other authorization that requires a hauler to comply with Chapter 12; (3) have an edible food recovery program; (4) have any Implementation Record; (5) implements or enforces an ordinance, policy, procedure, condition, or initiative that is prohibited under the organic waste and edible food recovery standards (§§ 18990.1 and 18990.2); and, (6) submit the reports required by the organic waste and edible food recovery standards and policies (§§ 18990.1 and 18990.2.) The penalties are no less than \$7,500 and no more than \$10,000 **per violation per day**.

(Cal. Code Regs., tit. 14, § 18997.3, subd. (b).)

The Department will consider the following facts in determining the amount of the penalty for each violation.

- The nature, circumstances, and severity of the violation(s).
- The violator's ability to pay.
- The willfulness of the violator's misconduct.
- Whether the violator took measures to avoid or mitigate violations of this chapter.
- Evidence of any economic benefit resulting from the violation(s).
- The deterrent effect of the penalty on the violator.
- Whether the violation(s) were due to conditions outside the control of the violator.

(Cal. Code Regs., tit. 14, § 18997.3, subd. (c).)

For violations of the procurement requirements in section 18993.1, the penalties are calculated by dividing the jurisdiction's procurement target by 365 days to determine the daily procurement target, then determining the number of days a jurisdiction was in compliance using the daily procurement target, and then subtracting the number of days that the jurisdiction is determined to be in compliance. (Cal. Code Regs., tit. 14, § 18997.3, subd. (d).) The resulting number of days are the days that the jurisdiction is determined to be out of compliance. (*Id.*) The amount of the penalty is calculated considering the factors in subdivision (c) above. (*Id.*) The penalty amount cannot exceed \$10,000 per day. (*Id.*) Public Resources Code, section 42652.6, subdivision (a)(5)(B) establishes a scale of percentages that civil penalties are based upon: 30% of the target for January 1, 2023, 65% of the target for January 1, 2024, and 100% of the target for January 1, 2025.

The aggregate amount of all violations cannot exceed the amount authorized in Public Resources Code, section 42652.6. (Cal. Code Regs., tit. 14, § 18997.3, subd. (e).) Public Resources Code, section 42652.5, subdivision (a)(5)(A) refers to Public Resources Code, section 41850, which limits the amount to \$10,000 per day. (Pub. Res. Code, § 42652.6.)

If a jurisdiction elects to comply with the container requirements by providing a single gray container, and is in violation of the requirements for gray containers because the facility to which it sends organic waste is unable to meet the required annual average mixed waste organic content recovery rate, the jurisdiction is subject to the enforcement process in section 18996.2, which may include a corrective action plan. (Cal. Code Regs., tit. 14, § 18984.3, subd. (c).)

The Department may also commence an action to impose civil penalties by serving an accusation on the jurisdiction and a notice of informing the jurisdiction of its right to a hearing that is conducted in accordance with section 18997.6. (Cal. Code Regs., tit. 14, § 18997.5, subd. (a).) The jurisdiction may file a request for a hearing with the Department within 15 days or the right to a hearing will be deemed waived. (Cal. Code Regs., tit. 14, § 18997.5, subd. (c).)

If the hearing is waived, the Department is required to issue a penalty order in the amount described in the accusation. (Cal. Code Regs., tit. 14, § 18997.5, subd. (f).) The hearing is scheduled by the Department within 30 days of receiving a request for a hearing, and the hearing is held within 90 days of the scheduling date. (Cal. Code Regs., tit. 14, § 18997.5, subds. (d)-(e).) A written decision is issued within 60 days of the conclusion of the hearing. (Cal. Code Regs., tit. 14, § 18997.5, subd. (g).) A penalty order becomes final and effective upon its issuance and the payment is due within 30 days unless the director of the Department orders otherwise. (Cal. Code Regs., tit. 14, § 18997.6, subd. (b).) The hearing is required to be conducted pursuant to the Administrative Procedures Act, Government Code section 11400 et al. (Cal. Code Regs., tit. 14, § 18997.6, subd. (a).) The regulations for the office of administrative hearings is in California Code of Regulations, Title 1, Division 2.

The Department's hearing process must be exhausted before challenging the decision in court by way of a writ of administrative mandamus. That might include appealing the decision and/or reconsideration. Code of Civil Procedure, section 1094.6, subdivision (b) provides that a "petition shall be filed not later than the 90th day following the date on which the decision becomes final." Subdivision (e) defines a decision among other things as "revoking, denying an application for a permit, license, or other entitlement." Subdivision (f) requires the agency to provide notice to the party that the time within which judicial review must be sought is governed by section 1094.6. (*Alford v. County of Los Angeles* (2020) 51 Cal.App.5th 742, 745.) "[T]he 90-day limitations provision of section 1094.6 does not begin to run until the subdivision (f) notice is given." (*Id. citing Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1102.) Rather, the 90-day statute of limitations is tolled until such time as the subdivision (f) notice is given. (*El Dorado Palm Springs, Ltd. v. Rent Review Com.* (1991) 230 Cal.App.3d 335, 346.) Judicial review is generally limited to the evidence in the record of the agency proceedings. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057.)

Every final enforcement order issued by the Department will be displayed on its internet website, if the final enforcement order is a public record that is not exempt from disclosure. (Gov. Code, § 7924.900.)

There are some upcoming enforcement deadlines:

- A jurisdiction is required to enforce the notice provisions of section 18984.5(b), for violations of Chapter 12 occurring on or after January 1, 2024. (Cal. Code Regs., tit. 14, § 18995.4.)
- A jurisdiction is required to conduct inspections of Tier Two (in addition to Tier One) commercial edible food generators for compliance with Article 10 of Chapter 12 beginning January 1, 2024. (Cal. Code Regs., tit. 14, § 18995.1, subd. (a)(2).)

Examples of these facilities are: (1) restaurants with 250 or more seats or a total facility size equal to or greater than 5,000 square feet; (2) hotels with an on-site food facility and 200 or more rooms; (3) health facilities with an on-site food facility and 100 or more beds; (4) large venues and events; (5) state agencies with a cafeteria with 250 or more seats or a total cafeteria facility size equal to or greater than 5,000 square feet; and, (6) Local education agencies with an on-site food facility.

- A jurisdiction is required to enforce Chapter 12 pursuant to Sections 18995.4 and 18997.2 in response to violations beginning January 1, 2024. (Cal. Code Regs., tit. 14, § 18995.1, subd. (a)(5). This means that for violations occurring after January 1, 2024, the jurisdiction is required to issue a notice of violation requiring compliance within 60 days. If after 60 days, the entity is still not in compliance, the jurisdiction is required to impose penalties. A jurisdiction may be able to delay this deadline if there are extenuating circumstances such as acts of god, delays in obtaining permits and approvals, and if a jurisdiction is under a corrective action plan because of deficiencies in organic waste recycling capacity infrastructure or edible food recovery capacity.

5. Ways in Which Jurisdiction May Manage Their Liabilities.

Under this law, jurisdictions are both the regulator and being regulated. The Department will base its compliance determination in a large part of the records the jurisdiction compiles and retains. Being prepared is the best way to manage risk.

Recommendation 1: Ensure that the annual report required by California Code of Regulations, section 18994.2 (attached), and the recordkeeping requirements in sections 18981.2, subdivision (e), 18988.4, 18984.4, 18984.6, 18984.13, 18984.14, 18985.3, 18991.2, 18995.1, subdivision (f), 18995.3 subdivision (e), 18993.2, 18993.4, 18995.3, 18998.4, and 18998.3 and 18998.4 (if the jurisdiction is implementing a performance-based source separated organic waste collection service) are timely and comprehensive. Make sure the annual report and records are unambiguous. Do not leave it up to the Department to interpret the documents and data, or fill in omissions in the annual report. The next report is due August 1, 2023.

Recommendation 2: Some of the data requirements are based on reports and information submitted to the jurisdiction by others so it is important to insure that the source of this information is reliable and accurate. Conduct audits to ensure quality control. Any mistakes become your mistakes.

Recommendation 3: Start assembling the materials for the annual report on August 2 of each year, and make it a continuous obligation of the reporters for each category of information that is required to be included in the annual report. Also collect all of the documents support required for recordkeeping to comply with the Implementation Record required by section 18995.2 (attached). These include the documents required by sections 18981.2, subdivision (e), 18984.4, 18984.6, 18984.14, 18985.3, subdivision (e), 18988.4, 18991.2, 18993.2, 18993.4, 18995.1, subdivision (f), 18995.3, subdivision (e), and 18998.4 (if the jurisdiction is implementing a performance-based source separated organic waste collection service). CalRecycle has developed a Model Implementation Record Tool and a Model Performance-Based Implementation Record Tool that jurisdictions can use to assist in meeting implementation record and recordkeeping requirements. (See <https://calrecycle.ca.gov/organics/slcp/recordkeeping/>.)

Recommendation 4: Assign a person the responsibility to collect the data and documents required by the annual report **for each category** identified in section 18994.2 and to comply with the recordkeeping requirements

Recommendation 5: Have a designated central person that maintains all of the data and documents. This should be the person that would respond to an inspection by the Department.

Recommendation 6: Review the information as it is gathered so omissions can be quickly identified and questions asked while memories are fresh.

Recommendation 7: The Public Record Act applies to the document and data collected. A jurisdiction may want to review the documents and data as they are collected to determine if an exemption applies, for example, regarding confidential and trade secret information (Evid. Code, § 1060 made applicable by Gov. Code, § 7927.705), and attorney-client and attorney work product doctrine (Gov. Code, § 7927.705.) For non-police state or local agencies, “investigatory or security files” are exempt only if compiled “for correctional, law enforcement, or licensing purposes.” (Gov. Code, § 7923.600(a).) Disclosure could constitute a waiver of the exemption. (Gov. Code, § 7921.505.)

Recommendation 8: Have a process in place to conduct the waste evaluations, route reviews, and sampling of gray containers as required by section 18984.5. Consider negotiating with the jurisdiction’s solid waste hauler to conduct these reviews.

Recommendation 9: Have a written analysis of resource needs and a budget that shows funding for the resource needs particularly for staff resources.

Recommendation 10: Analyze purchase records to identify additional procurement opportunities to purchase paper, toilet paper, toilet seat covers, facial tissue, packaging, notepads, etc. that are at least 30 percent, by fiber weight, postconsumer fiber. Consider whether public outreach materials and items given the public can be made from recycled materials. Determine whether the jurisdiction’s annual recovered organic waste product procurement target exceeds the jurisdiction’s total procurement of transportation fuel, electricity, and gas for heating applications from the previous calendar year as determined by the and seek adjustments to the target.

Recommendation 11: Consider entering into an written agreement with regional transit providers or solid waste hauler’s refuse fleet that use fuels from renewable gas, a local wastewater treatment facility that co-digests food waste and uses renewable gas for on-site electricity needs, or if a local parks association uses SB 1383-eligible compost or mulch in park and trail maintenance.

Recommendation 12: Have written standardized enforcement procedures and policies, and a written process for the intake and processing of public complaints.

Recommendation 13: Identify an appeal process for violation notices that are issued by the jurisdiction.

Recommendation 14: Have a review process in place for reviewing new ordinances, policies, procedures, permit conditions, or initiatives that may affect the provisions of Chapter 12 to ensure that the jurisdiction is not implementing or enforcing an in a manner that violates sections 18990.1 and 18990.2, subdivision (a).

Recommendation 15: Consider utilizing business license information to identify all solid waste collection accounts for commercial businesses if the jurisdiction is using the compliance methods in sections 18984.1, 18984.2, or 18984.3; and, to identify commercial edible food generators and food recovery organizations and serves that the jurisdiction is required to conduct inspections of.

Recommendation 16: Consider partnering with other jurisdictions or a regional group to conduct some of the required tasks.

Recommendation: 17: Consider including a condition of approval of a contract, agreement, or other authorization for waste haulers to take over some of the recordkeeping requirements.

Section 18994.2. Jurisdiction Annual Reporting.

(a) A jurisdiction shall report the information required in this section to the Department according to the following schedule:

(1) On or before October 1, 2022, a jurisdiction shall report for the period of January 1, 2022 through June 30, 2022.

(2) On or before August 1, 2023, and on or before August 1 each year thereafter, a jurisdiction shall report for the period covering the entire previous calendar year.

(b) Each jurisdiction shall report the following, relative to its implementation of the organic waste collection requirements of Article 3 of this chapter:

(1) The type of organic waste collection service(s) provided by the jurisdiction to its generators.

(2) The total number of generators that receive each type of organic waste collection service provided by the jurisdiction.

(3) If the jurisdiction is implementing an organic waste collection service that requires transport of the contents of containers to a high diversion organic waste processing facility, the jurisdiction shall identify the Recycling and Disposal Reporting System number of each facility that receives organic waste from the jurisdiction.

(4) If the jurisdiction allows placement of compostable plastics in containers pursuant to Section 18984.1 or 18984.2, the jurisdiction shall identify each facility that has notified the jurisdiction that it accepts and recovers that material.

(5) If the jurisdiction allows organic waste to be collected in plastic bags and placed in containers pursuant to Section 18984.1 or 18984.2 the jurisdiction shall identify each facility that has notified the jurisdiction that it can accept and remove plastic bags when it recovers source separated organic waste.

(c) Each jurisdiction shall report the following, relative to its implementation of the contamination monitoring requirements of Article 3 of this chapter:

(1) The number of route reviews conducted for prohibited container contaminants.

(2) The number of times notices, violations, or targeted education materials were issued to generators for prohibited container contaminants.

(3) The results of waste evaluations performed to meet the container contamination minimization requirements and the number of resulting targeted route reviews.

(d) Each jurisdiction shall report the following relative to its implementation of waivers pursuant to Article 3 of this chapter:

(1) The number of days an emergency circumstances waiver as allowed in Section 18984.13 was in effect and the type of waiver issued.

(2) The tons of organic waste that were disposed as a result of waivers identified in Subsection (1), except disaster and emergency waivers granted in Section 18984.13(b).

(3) The number of generators issued a de-minimis waiver.

(4) The number of generators issued a physical space waiver.

(5) A jurisdiction that receives a waiver from the Department pursuant to Section 18984.12 of Article 3 of this chapter shall report the following information for each year the waiver is in effect:

(A) The number of generators waived from the requirement to subscribe to an organic waste collection service.

(e) A jurisdiction shall report the following regarding its implementation of education and outreach required in Article 4 of this chapter:

(1) The number of organic waste generators and edible food generators that received information and the type of education and outreach used.

(f) A jurisdiction shall report the following regarding its implementation of the hauler oversight requirements of Article 7 of this chapter:

(1) The number of haulers approved to collect organic waste in the jurisdiction.

(2) The Recycling and Disposal Reporting System number of each facility that is receiving organic waste from haulers approved by the jurisdiction.

(3) The number of haulers that have had their approval revoked or denied.

(g) A jurisdiction subject to article 8 shall report the following regarding its implementation of the CALGreen Building Standards and Model Water Efficient Landscape Ordinance as required in Article 8 of this chapter:

(1) The number of construction and demolition debris removal activities conducted in compliance with Section 18989.1.

(2) The number of projects subject to Section 18989.2.

(h) A jurisdiction shall report the following regarding its implementation of the edible food recovery requirements of Article 10 of this chapter:

(1) The number of commercial edible food generators located within the jurisdiction.

(2) The number of food recovery services and organizations located and operating within the jurisdiction that contract with or have written agreements with commercial edible food generators for food recovery.

(A) A jurisdiction shall require food recovery organizations and services that are located within the jurisdiction and contract with or have written agreements with

commercial edible food generators pursuant to Section 18991.3 (b) to report the amount of edible food in pounds recovered by the service or organization in the previous calendar year to the jurisdiction.

(3) The jurisdiction shall report on the total pounds of edible food recovered by food recovery organizations and services pursuant to Subdivision (h)(2)(A).

(i) A jurisdiction shall report the following regarding its implementation of the organic waste recycling capacity planning and edible food recovery capacity planning requirements of Article 11 of this chapter:

(1) A county shall report:

(A) The tons estimated to be generated for landfill disposal.

(B) The amount of capacity verifiably available to the county and cities within the county.

(C) The amount of new capacity needed.

(D) The locations identified for new or expanded facilities.

(E) The jurisdictions that are required to submit implementation schedules.

(F) The jurisdictions that did not provide information required by Article 11 of this chapter to the county within 120 days.

(2) Notwithstanding Subdivision (a), the information required by this subdivision shall be reported on the schedule specified in Section 18992.3.

(j) A jurisdiction, as defined in Sections 18993.1, shall report the following regarding its implementation of the procurement requirements of Article 12 of this chapter:

(1) The amount of each recovered organic waste product procured directly by the city, county, or through direct service providers, or both during the prior calendar year.

(2) If the jurisdiction is implementing the procurement requirements of Section 18993.1 through an adjusted recovered organic waste product procurement target pursuant to Section 18993.1(j), the jurisdiction shall include in its report the total amount of transportation fuel, electricity, and gas for heating applications procured during the calendar year prior to the applicable reporting period.

(k) A jurisdiction shall report the following regarding its implementation of the compliance, monitoring, and enforcement requirements specified in Articles 14-16 of this chapter:

(1) The number of commercial businesses that were included in a compliance review performed by the jurisdiction pursuant to Section 18995.1(a)(1). As well as the number of violations found and corrected through compliance reviews if different from the amount reported in Subdivision (k)(5).

(2) The number of route reviews conducted.

(3) The number of inspections conducted by type for commercial edible food generators, food recovery organizations, and commercial businesses.

(4) The number of complaints pursuant to Section 18995.3 that were received and investigated, and the number of Notices of Violation issued based on investigation of those complaints.

(5) The number of Notices of Violation issued, categorized by type of entity subject to this chapter.

(6) The number of penalty orders issued, categorized by type of entity subject to this chapter.

(7) The number of enforcement actions that were resolved, categorized by type of regulated entity.

(l) A jurisdiction shall report any changes to the information described in Sections 18994.1(a)(1) and 18994.1(a)(3).

Section 18995.2. Implementation Record and Recordkeeping Requirements.

- (a) A jurisdiction shall maintain all records required by this chapter in the Implementation Record.
- (b) The Implementation Record shall be stored in one central location, physical or electronic, that can be readily accessed by the Department.
- (c) Upon request by the Department, the jurisdiction shall provide access to the Implementation Record within ten business days.
- (d) All records and information shall be included in the Implementation Record within 60 days of the creation of the record or information.
- (e) All records shall be retained by the jurisdiction for five years.
- (f) At a minimum, the following shall be included in the Implementation Record:
 - (1) A copy of all ordinances or other similarly enforceable mechanisms, contracts, and agreements, as required by this chapter.
 - (2) A written description of the jurisdiction's inspection and enforcement program that it uses to comply with Sections 18995.1 and 18995.4.
 - (3) All organic waste collection service records required by Section 18984.4.
 - (4) All contamination minimization records required by Section 18984.6.
 - (5) All waiver and exemption records required by Section 18984.14.
 - (6) All education and outreach records required by Section 18985.3.
 - (7) All hauler program records required by Section 18988.4.
 - (8) All jurisdiction edible food recovery program records required by Section 18991.2.
 - (9) All recovered organic waste procurement target records required by Section 18993.2.
 - (10) All recycled content paper procurement records required by Section 18993.4.
 - (11) All inspection, route review, and compliance review documents generated pursuant to the requirements of Section 18995.1(d).
 - (12) All records of enforcement actions undertaken pursuant to this chapter.
 - (13) All records of complaints and investigations of complaints required by Section 18995.3 and compliance with the jurisdiction's inspection and enforcement requirements of Sections 18995.1.

(14) All records required by Section 18998.4 if the jurisdiction is implementing a performance-based source separated organic waste collection service under Article 17 of this chapter.

(g) All records maintained in the Implementation Record shall be subject to the requirements and applicable disclosure exemptions of the Public Records Act as set forth in Government Code Section 6250 et seq.



(MCLE Specialty Credit for Implicit Bias)

DEIB, Microaggressions, and Decentering: A Path to Cultural Shift in Organizations

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DIVERSITY, EQUITY, INCLUSION, AND BELONGING
MICROAGRESSIONS AND DECENTERING:
A Path To Cultural Shift In Organizations

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Real change toward equity requires more than just diversity programs. It often requires a paradigm shift in the way businesses are run and deep cultural change that can be extremely challenging to achieve. Recent ‘anti-woke’ movements only confirm that progress on DEIB is not without challenges and getting everyone on board may be easier said than done. The objective for DEIB has to shift from just improving representation of equity deserving groups to creating environments where all employees thrive rather than just survive.¹

I. THE WHY

The why of this work is something we have spent some time pondering, and will continue to ponder. The obvious, business-centric answer, is one we have heard of repeatedly: diverse workforces are more profitable and innovative.²

But it is not enough to have a diverse workforce. The work has to also focusing on inclusion and belonging. “Both aspects of [diversity and inclusion] are important—diversity without inclusion can result in a toxic culture, and inclusion without diversity can make a company stagnant and uncreative. Companies are starting to focus more on diversity, but many disregard the inclusion piece of the puzzle. Without a concerted effort towards both inclusion and diversity, your workforce will feel out of place and unsupported.”³ Diversity and inclusion must go together as twin, reinforcing, goals. News stories abound of “diverse” organizations with toxic cultures where usually white, usually male, management either turns a blind eye to, or worse, actively encourages the toxicity —see Charlie Rose, Bill O’Reilly, Matt Lauer, Les Moonves, Activision/Blizzard lawsuit, etc.

There is another, more important facet to the why: to have people feel seen, appreciated, and supported, for its own sake. Because it’s the right thing to do. Because this is what we all want and need in our communities, and a culture of assimilation, of refusing to accommodate the needs

¹ *The Future of Diversity, Equity, Inclusion and Belonging*, HR.com Affirmity white paper, found here: <https://www.affirmity.com/resources/future-diversity-equity-inclusion-belonging-2023/>

² *Diversity Confirmed to Boost Innovation and Financial Results*, Forbes, Stuart R. Levine and Thought Leaders Contributor Group, January 15, 2020, found here: <https://www.forbes.com/sites/forbesinsights/2020/01/15/diversity-confirmed-to-boost-innovation-and-financial-results/?sh=4b99703dc4a6>

³ *Diversity and Inclusion in the Workplace: Benefits and Challenges*, Kellie Wong, Achievers Blog, September 14, 2020, <https://www.achievers.com/blog/diversity-and-inclusion/#:~:text=According%20to%20Deloitte%2C%20diverse%20companies,percent%20in%20high%2Ddiversity%20environments.&text=A%20major%20issue%20is%20that,a%20diverse%20and%20inclusive%20culture>



and voices of people whose identities are not the same as ours, is not only not conducive to this goal, but it blatantly undermines it.

When we ask why, we do not ask this of people with marginalized identities. The *why* is obvious to Black women, disabled people, trans people – it is not just obvious, but it is their lived daily reality, the inescapable pressure of having to be twice as good for half the recognition, the crushing burden of having their actions be imputed to your entire group, or their mistakes be viewed as proof of their incompetence rather than just what they are, mistakes. For people of marginalized identities, the why is self-evident: being underestimated and underrepresented, especially at the leadership levels, is exhausting, infuriating, humiliating, and it costs them (and all of us) vitality and the ability to build wealth for themselves and their families.

Ijeoma Oluo eloquently explains the impact of microaggressions:

You know the hypercritical parent in the movies? The mom or dad who finds a way to cut you to the quick right when you are feeling happy or proud or comfortable? “Nice to see you’re finally trying,” or “That’s a lovely dress. I can’t even see how much weight you gained.” The remark that seems harmless on the surface? The small sting that comes out of nowhere and is repeated over and over, for your entire life? That is what racial microaggressions are like, except instead of a passive-aggressive parent, it’s the entire world, in all aspects of your life, and very rarely is it said with any misguided love.

Microaggressions are small daily insults and indignities perpetrated against marginalized or oppressed people because of their affiliation with that marginalized or oppressed group, and here we are going to talk about racial microaggressions—insults and indignities perpetrated against people of color. But microaggressions are more than just annoyances. The cumulative effect of these constant reminders that you are “less than” does real psychological damage. Regular exposure to microaggressions causes a person of color to feel isolated and invalidated. The inability to predict where and when a microaggression may occur leads to hypervigilance, which can then lead to anxiety disorders and depression. Studies have shown that people subjected to higher levels of microaggressions are more likely to exhibit the mental and physical symptoms of depression.⁴

But, why do this if you’re a person with all the privileges, or enough privilege that you do not need to see this or do any of the work? Why be uncomfortable, why risk being perceived as racist or misogynistic, when you mean well and all you want is to just be known as a nice person, a good person? What can we say in America to a cisgender, straight, physically and mentally able, neurotypical, in shape, well-off white man who works hard for everything he has earned, and cannot see the barriers he does not have because they literally do not exist for him, and therefore he thinks they don’t exist for anyone else? How do we get people who have no investment in this work because they do not believe it has anything to do with them, to become interested in this work and to see that this work has everything to do with them, too? To some extent, this work is a recognition that most people have more than one identity, some identities of privilege, and some

⁴ Ijeoma Oluo, *So You Want To Talk About Race*, Seal Press 2019.



of marginalization. A zero sum game, strictly hierarchical system hurts most people within the system on some level, and a lot of people more than others.

Doing this work is a recognition that the grace that we seek for our own marginalized identities, the recognition that we seek for our own individual identities in all their complexity, is deserved by all individuals. It is a recognition that our perspective of how life is, is just that: a point of view; and it is no more valid than anyone else's.

For some, Diversity, Equity, Inclusion, and Belonging (“DEIB”) work is an exercise in memorization to stay out of trouble: what do you need to remember not to say now? What about now? Oh good heavens, what about now? Maybe it's just safer not to say anything to anyone, don't pay anyone compliments, keep your head down because you're going to be blamed for it all anyway.

The problem with the blame game is that now we are using up our energy and time trying to calm down people who feel attacked, and the focus shifts away from the harm that is being perpetrated against people with marginalized identities and back on the comfort of the privileged. But, as Ruchika Tulshyan points out, the problem is not white people, it's white supremacy; the problem is not men, it's misogyny and the patriarchy. What we are dealing with is systems of oppression, but the only way to shift the paradigm is for all of us to personally take responsibility for dismantling these systems. Note that we say take responsibility, not take the blame.

Our goal is to help explain what decentering means and how to practice it, and by using this technique, to shift the focus from intent to impact. Decentering provides an access point to DEIB work that takes the gives you the space to be comfortable with your discomfort. This exercise is intended to begin the process of shifting who we're being in the world. And when we shift who we are, new actions will naturally arise, and new results follow.

DEIB conversations can be difficult, especially in the work place. We hope to give you some tools so that you can hear it when you have said or done something that silences a friend or colleague's lived experience, and instead of being defensive and shift the focus to your good intentions, or getting lost in shame or guilt, to be able to learn and grow.

Our hypothesis is that you cannot effect any real shift in an organization's culture if people are coming at it from the same point of view and in the same way of seeing and doing things that got them the results they are not satisfied with. We are not going to fix anything or cause a seismic shift in 45 minutes. What we hope to achieve is to plant a few seeds, and that some of you, hopefully many of you, will tend those seeds and let them grow. Every little bit counts.

II. THE WHAT

The trends for diversity management vary from industry to industry.⁵ While there are commonalities across the industries, there are idiosyncrasies that create differences. The common

⁵ Hamid, Aaisha. *Diversity and inclusion in the workplace: Where to start and what's next?* YouTube, uploaded by The Social Impact Show, 9 Dec. 2021, <https://www.youtube.com/watch?v=jBw8xI1x7eI>



threads: (1) people want to see more diverse representation at the organizational level; (2) more diversity professionals are being employed; and (3) increased diversity awareness at the micro- and macro-level.⁶

To appreciate the breadth of interpretations and develop a more comprehensive understanding of diversity, below are various definitions of Diversity, Equity, Inclusion, Belonging, Privilege, Unconscious Bias, and Prove-It Again Bias from various researchers, organizations, and leaders in the area.

A. Diversity

The Society for Human Resource Management (SHRM), a leading professional association, recognizes that diversity has many definitions.⁷ Generally, diversity refers to the similarities and differences among individuals accounting for all aspects of their personality and individual identity.⁸

David A. Thomas is the H. Naylor Fitzhugh Professor of Business Administration at Harvard Business School and Robin J. Ely is the Diane Doerge Wilson Professor of Business Administration at Harvard Business School. They both have extensively researched issues related to cultural diversity in organizations, leadership and organizational change. From their research, they have defined diversity as “not simply a reflection of the cosmetic differences among people, such as race and gender; rather, it is the various backgrounds and experiences that creates people’s identities and outlooks.”⁹

Marilyn Loden, a nationally recognized organizational change consultant, emphasizes the importance of an all-encompassing definition of diversity because she believed when any group is excluded, managing diversity may create division rather than inclusion. Notably, Marilyn first uttered the phrase “the glass ceiling” in the 1970s and gave the name to the concrete, cultural barriers to women’s professional success, like the biased attitudes of male managers, unequal pay and a lack of role models and emotional support for women. In 1996, she developed a model where the primary dimensions of diversity are interlocking segments of a sphere that represent the core of each individual identity while the secondary dimensions are more mutable, less visible to others around us, and more variable.¹⁰

⁶ *Id.*

⁷ SHRM’s definition of diversity is available at <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pagIntroes/introdiversity.aspx#:~:text=Generally%2C%20diversity%20refers%20to%20the,their%20personality%20and%20individual%20identity>

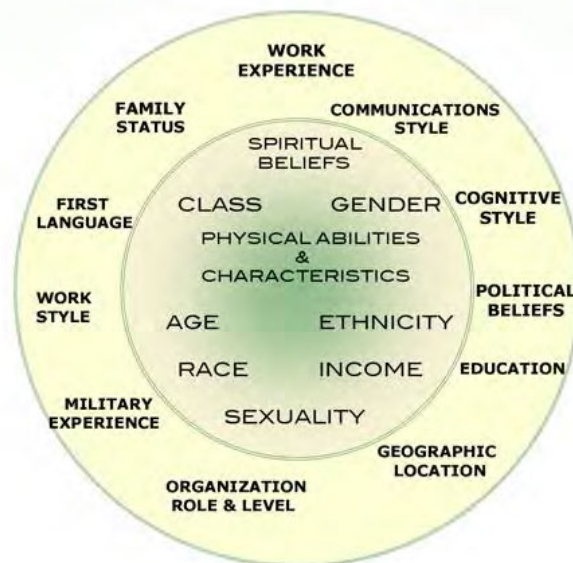
⁸ *Id.*

⁹ Saposnick, Kali, *Managing Diversity as a Key Organizational Resource: An Interview with David Thomas, Leverage Points*, no. 37, Pegasus Communications (2003), www.pegasus.com/levpoints/thomasint.html

¹⁰ Loden, Marilyn, *Implementing Diversity* (New York: McGraw-Hill, 1996), 13.



In 2010, Loden Associates updated their dimensions of diversity model to represent a global view of the primary and secondary dimensions that informs our social identities.¹¹



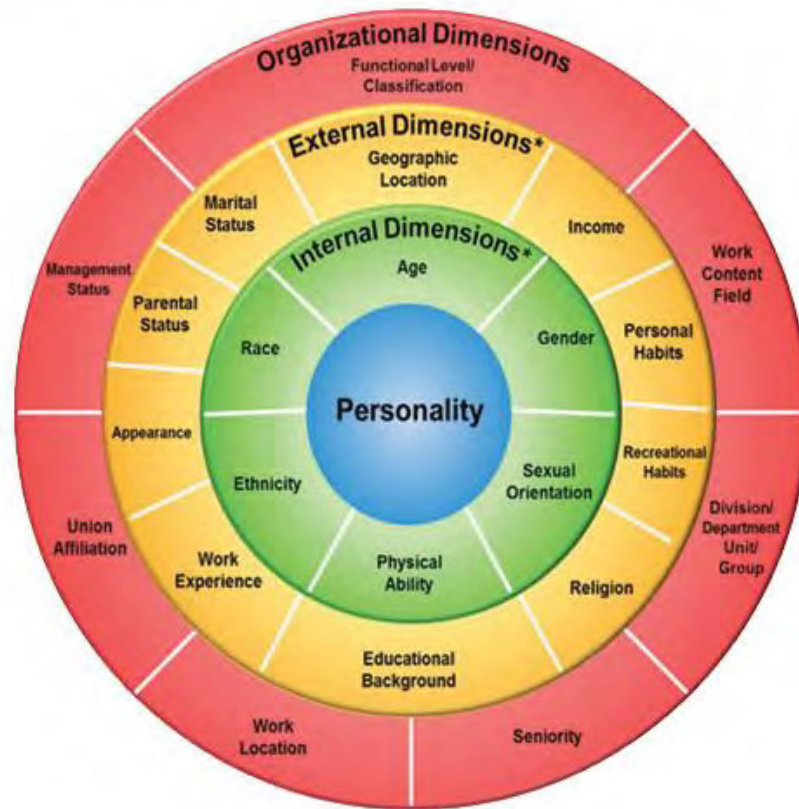
Anita Rowe, Ph.D and Lee Gardenswartz, Ph.D are pioneers in the field of Diversity and Inclusion since 1990 and human resource experts on managing workforce diversity. They embraced Loden's model of diversity but included an outermost layer that consists of

¹¹ *Primary & Secondary Dimensions of Diversity*, Loden Associates, Inc., http://www.loden.com/Web_Stuff/Dimensions.html



organizational characteristics such as union affiliation, management status, and work content or professional field.¹²

...for members by removing each person's identity from the organization.



*Gardenswartz & Rowe, *Diverse Teams at Work* (2nd Edition, SHRM, 2003)

*Internal Dimensions and External Dimensions are adapted from Marilyn Loden and Judy Rosener, *Workforce America!* (Business One Irwin, 1991)

B. Equity

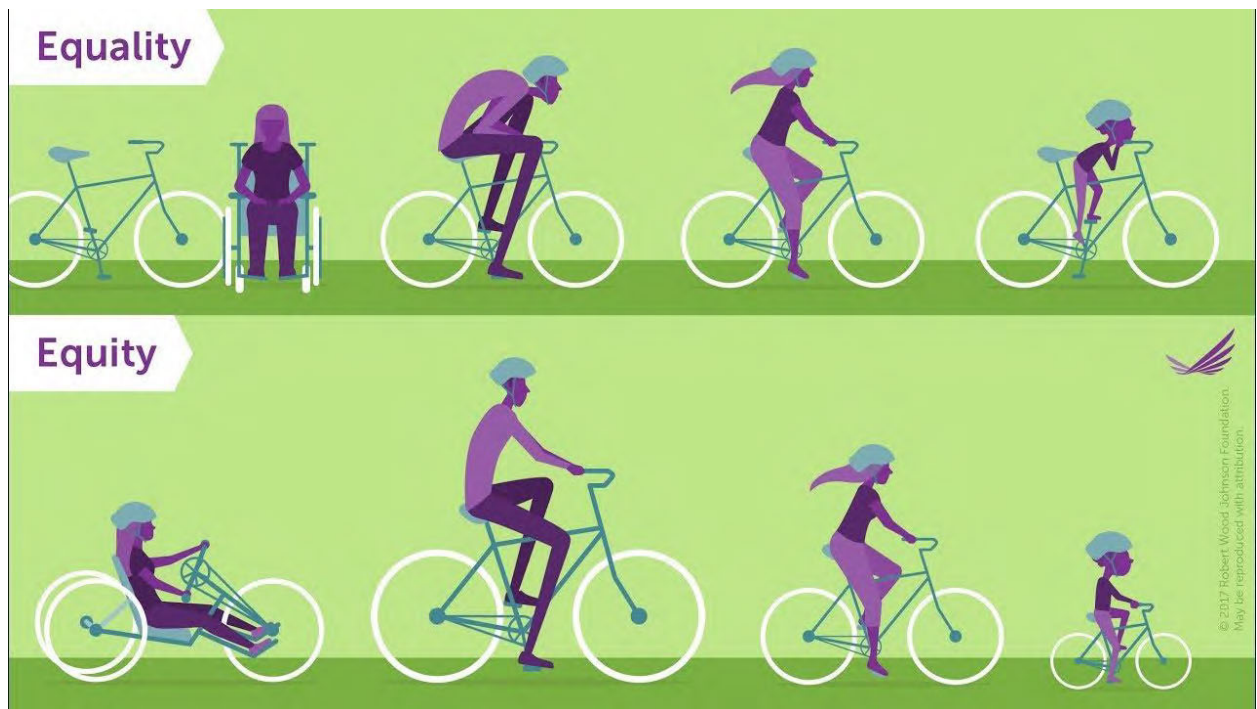
Gallup defines *equity* in the workplace as the fair treatment in access, opportunity and advancement for all individuals.¹³ Equity and equality are not the same thing. Treating everyone equally ignores the very real differences in access to training, education, and opportunities in non-dominant or underrepresented groups. There are two issues at play here. The first is that treating everyone equally may actually put some groups at a disadvantage. The second is that unconscious biases may be preventing us from evaluating and promoting people using the same metric.

¹² *Four Layers of Diversity Model*, Gardenswartz & Rowe, <https://www.gardenswartzrowe.com/why-g-r>

¹³ *Workplace Equity: The "E" in DEI and Why It Matters*, Pendell, Ryan, Gallup. <https://www.gallup.com/workplace/401573/workplace-equity-dei-why-matters.aspx>



The illustration below is helpful to understand how treating everyone equally only benefits those who are a fit for the particular treatment.¹⁴



C. Inclusion and Belonging

A Harvard-trained lawyer and founder of The Vernā Myers Company, Vernā Myers said, “Diversity is being invited to the party; inclusion is being asked to dance.”¹⁵

SHRM distinguishes diversity and inclusion as follows: “Inclusion describes the extent to which each person in an organization feels welcomed, respected, supported, and valued as a team member. Inclusion is a two-way accountability; each person must grant and accept inclusion from others.”¹⁶

Inclusion and belonging are interrelated concepts, and provide further distinction within what is commonly referred to as inclusion. Inclusion “involves efforts and behaviors that can be fostered by the organization or actually by the people in it. Belonging is something that employees

¹⁴ Source: Robert Wood Johnson Foundation.

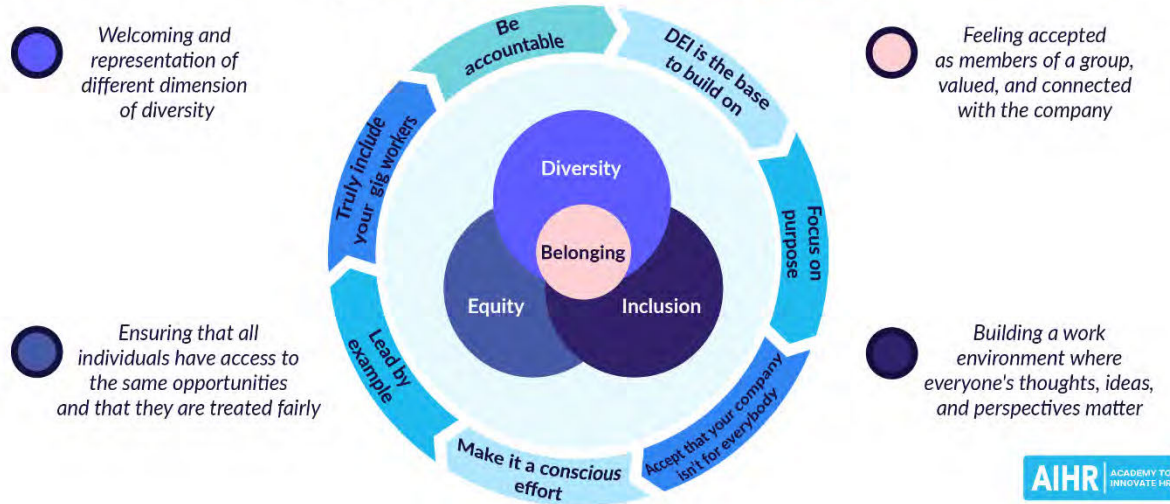
¹⁵ Myers, Vernā. *Diversity is Being Invited to the Party: Inclusion is Being Asked to Dance*. YouTube, uploaded by AppNexus, 10 Dec. 2015, www.youtube.com/watch?v=9gS2VPukB3M

¹⁶ SHRM’s definition of inclusion is available at <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pagIntros/introdiversity.aspx#:~:text=Generally%2C%20diversity%20refers%20to%20the,their%20personality%20and%20individual%20identity>



themselves feel and results from your inclusion efforts.”¹⁷ So when we refer to inclusion in this paper, depending on the context, we mean either or both of these concepts.

Diversity, Equity, Inclusion and Belonging (DEIB) at Organizations



In an inclusive environment, everyone’s uniqueness is seen and appreciated, and people feel safe being their authentic selves at work, i.e., they feel they belong. Inclusion happens when people feel they are an insider, when they experience a feeling of belonging within their organization. Once we hire people from diverse backgrounds, do they feel they belong? Are they doing meaningful work? Do they have the psychological safety and the psychological availability to contribute authentically? Are there identity threats that we are overlooking, either internally or externally, that can be addressed to provide a safer environment for all employees, which would likely lead to greater engagement and commitment to the enterprise’s success?

Think of inclusion more broadly than the categories of identities and individuals protected by equal employment laws, i.e., groups for which there is unambiguous evidence of historical discrimination.¹⁸ For example, there may be individuals in your organization who are taking care

¹⁷ *Diversity, Equity, Inclusion and Belonging (DEIB): A 2023 Overview*, AIHR; found here: <https://www.aihr.com/blog/diversity-equity-inclusion-belonging-deib/#:~:text=sense%20of%20belonging,-,What's%20the%20difference%20between%20inclusion%20and%20belonging%3F,results%20from%20your%20inclusion%20efforts>

¹⁸ Lisa Nishii, Associate Professor, School of Industrial Labor and Relations, Cornell, 2018: *Improving Engagement; Counteracting Unconscious Bias; Diversity and Inclusion at Work; Fostering An Inclusive Climate*.



of elderly parents – this is not a protected category of people, but they are often overlooked and left behind because they cannot meet strict office attendance requirements.¹⁹

It is also important to distinguish inclusion from other concepts that may be misinterpreted as inclusion, such as differentiation and assimilation.

Inclusion Framework

	Low Belongingness	High Belongingness
Low Value in Uniqueness	Exclusion Individual is not treated as an organizational insider with unique value in the work group but there are other employees or groups who are insiders.	Assimilation Individual is treated as an insider in the work group when they conform to organizational/dominant culture norms and downplay uniqueness.
High Value in Uniqueness	Differentiation Individual is not treated as an organizational insider in the work group but their unique characteristics are seen as valuable and required for group/ organization success.	Inclusion Individual is treated as an insider and also allowed/encouraged to retain uniqueness within the work group.

(Source: *Inclusion and Diversity in Workgroups: A Review and Model for Future Research*, Lynne M. Shore, Amy E. Randel, Beth G. Chung, Michelle A. Dean, Karen Holcombe Ehrhart, Gangaram Singh, San Diego State University Journal of Management, Vol. 37 No. 4, July 2011, 1262-1289.)

D. Privilege

“Privilege exists when one group has something of value that is denied to others simply because of the groups they belong to, rather than because of anything they’ve done or failed to do. Access to privilege doesn’t determine one’s outcomes, but it is definitely an asset that makes it more likely that whatever talent, ability, and aspirations a person with privilege has will result in something more positive for them.”²⁰

¹⁹ “Sandwich Generation” Caregivers and Workplace Impact, Matthew J. Gallardo, BASW, CCP, Linked In Pulse (<https://www.linkedin.com/pulse/sandwich-generation-caregivers-workplace-impact-gallardo-basw-ccp/>); *The ‘sandwich generation’ quandary was hard on baby boomers. It’s going to be harder on their kids.* Caitlin Gibson, March 11, 2020, Washington Post.)

²⁰ McIntosh, Peggy, *White Privilege” Unpacking the Invisible Knapsack*, Peace and Freedom Magazine, July/August, 1989, pp. 10-12, a publication of the Women’s International League for Peace and Freedom, Philadelphia, PA.



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Privilege isn't the presence of perks and benefits. It's the absence of obstacles and barriers. That's a lot harder to notice. If you have a hard time recognizing your privileges, focus on what you don't have to go through. Let that fuel your empathy and action.

Privilege, like unconscious bias, is specific to the society in which we live. While in the United States, we often associate privilege with white privilege when “privilege” is mentioned, but below are some additional areas of privilege:

- White Privilege
- Male Privilege & Masculinities
- Straight & Cis Privilege
- Class Privilege & Economic Inequality
- (Dis)ability and Ableism
- Language Privilege and Code Switching
- Age & Ageism
- Nationalism, Citizenship, Immigration & Geography
- Physical Appearance (Body Size, Hair, Colorism)
- Family Structure Privilege
- Christian & Religious Privilege

E. Unconscious bias

Unconscious bias is a term often used to describe associations that we hold, outside our conscious awareness and control. It refers to unconscious forms of discrimination and stereotyping based on race, gender, sexuality, ethnicity, ability, age, etc., and are specific to the society in which we live. For example, how we view the work by someone who graduated from a top tier law school v. someone who graduated from a unaccredited law school.

F. Prove-it-again bias

Research shows while men are presumed to be competent, all women, especially women of color, are expected to constantly reestablish their presence and authority at work.²¹

G. Decentering

The practice of decentering our own experience, intention, and feelings as not relevant to the conversation, and putting the focus on the impact of what we say and do on other people. This

²¹ *Be a player, hate the game: Beating sex discrimination*, Jessica Hamzelou, New Scientist, May 13, 2014 (found here: <https://www.newscientist.com/article/dn25555-be-a-player-hate-the-game-beating-sex-discrimination/>); see also, Gender Bias Learning Project, US Hastings College of the Law (found here: <https://genderbiasbingo.com/prove-it-again/#.ZCdO6-zMJb8>).



includes taking the focus off our shame and feelings of guilt we might experience for saying or doing something that is offensive or exclusionary.

H. Microaggressions

Counseling psychologist Dr. Derald Wing Sue describes microaggressions as “the everyday slights, indignities, put downs and insults that people of color, women, LGBT populations or those who are marginalized experience in their day-to-day interactions with people.”²² Ruchika Tulshyan uses the term “exclusionary behaviors” instead.²³ Ibram X. Kendi calls it abuse. “When I get commended for my perfect English, this may seem like a compliment to a white person, but for me it is a reminder that I must constantly be on guard to prove my English-speaking abilities or that I can fit into an English-speaking workplace.”²⁴

In many cases, the hidden messages in microaggressions, though often unintentional, may invalidate the group identity or experiential reality of target persons. The microaggression may communicate: You do not belong – you are inferior. Microaggressions can be behavioral (actions or symbols that display insensitivity to identity stereotypes), environmental (lack of representation and diversity) or verbal (saying something that is disrespectful or offensive to a marginalized group). Again, whether intentional or unintentional.²⁵

In dissecting microaggressions further, there are recognized categories of microaggressions that are helpful in helping us identify a microaggression. A *microassault* refers to a blatant, verbal, non-verbal, or environmental attack intended to convey discriminatory and biased sentiments.²⁶ A *microinsult* is an unintentional behavior or verbal comment that conveys rudeness or insensitivity or demeans a person’s racial heritage/identity, gender identity, religion, ability, or sexual orientation identity.²⁷ *Microinvalidations* are verbal comments or behaviors that exclude, negate, or dismiss the psychological thoughts, feelings, or experiential reality of the target group.²⁸

The City of Cambridge, Massachusetts has a useful chart illustrating common microaggressions, associated themes, related context with implicit bias, and what impact or message the microaggression sends to the recipient:

²² Sue, D. “Microaggressions: More Than Just Race.” (found here: https://www.uua.org/files/pdf/m/microaggressions_by_derald_wing_sue_ph.d..pdf)

²³ Tulshyan, R. 2022. *Inclusion on Purpose: An Intersectional Approach to Creating a Culture of Belonging at Work*

²⁴ *Id.* at p. 63.

²⁵ Sue, D., 2007, *Racial Microaggressions in Everyday Life*, Implications for Clinical Practice

²⁶ Sue, D. W., Torino, G. C., & Rivera, D. P., Capodilupo, C. M., & Nadal, K. L. 2019. *Microaggression theory: Influence and implications*. Hoboken, NJ: John Wiley & Sons

²⁷ *Id.*

²⁸ *Id.*



Microaggression	Theme	Implicit Bias/Context	Impact/Message
<p>"Where are you from?" "Where were you born?" "You speak good English."</p>	<p><i>Alien in own land</i></p>	<p>When Asian Americans and Latino Americans are assumed to be foreign- born</p>	<p>You are not American. You are a foreigner</p>
<p>"You are a credit to your race." "You are so articulate." Asking an Asian person to help with a math or science problem.</p>	<p><i>Ascription of Intelligence -</i> Assigning intelligence to a person of color on the basis of their race.</p>	<p>People of color are generally not as intelligent as Whites. All Asians are intelligent and good in Math / Sciences.</p>	<p>It is unusual for someone of your race to be intelligent.</p>
<p>"When I look at you, I don't see color." "America is a melting pot." "There is only one race, the human race." "All lives matter"</p>	<p><i>Color Blindness -</i> Statements that indicate that a white person does not want to acknowledge race.</p>	<p>Since race doesn't have an effect on me (white person) I can't see why we can't all get along.</p>	<p>Denying a person of color's racial/ ethnic experiences. You must assimilate / acculturate to the dominant culture. Denying the individual as a racial / cultural being.</p>
<p>A white man or woman clutching their purse or checking their wallet as a Black or Latinx person approaches or passes. A store owner following a customer of color around the store. Crossing the street when a person of color approaches.</p>	<p><i>Criminality –</i> Assumption of criminal status on the basis of race</p>	<p>A person of color is presumed to be dangerous, criminal, or deviant on the basis of their race.</p>	<p>You are a criminal. You are going to steal. You are poor. You do not belong. You are dangerous.</p>
<p>"Don't you want a family?" "Have you ever had real sex?" "So who is the man in the relationship?"</p>	<p><i>Heteronormativity</i></p>	<p>That people who aren't in heterosexual relationships are unable to have a family. Assumptions that they all relationships must fall along heteronormative lines.</p>	<p>Your relationship isn't real. You can't be fulfilled. You must pick a side.</p>
<p>"You're going to stay home with the kids right?" "What she's trying to say is..." "You should smile more"</p>	<p><i>Sexism</i></p>	<p>That women must fall into gendered roles from the 1950's. That male affect, presence, behavior is the standard and</p>	<p>You shouldn't be working. You're a failure as a woman. You're not good</p>



		everything else is contrary to.	enough. You're not being listening to and valued.
"You have a mental illness, but you seem so normal" "Why don't you just get out of bed and get some fresh air"	<i>Invalidation of Severity of Mental Illness</i>	That mental illness looks/behaves a certain way. General misunderstanding of the effects that mental illness can have.	You must not be hurting that much. It must not be that bad. Why can't you get over this?
"Oh! I wouldn't think you live here" "Oh you haven't been to Europe, you really should go"	<i>Classism</i>	Assuming someone doesn't live in a certain neighborhood because of how they look, talk, act. Assuming that everyone has means to travel	You don't belong. You're not going to lead a fulfilling life.
Washington Redskins Robert E. Lee High School College rooms and hallways with pictures of predominantly white heterosexual upper class males	<i>Environmental</i>	Assumes that harm cannot take place by names or visuals. Assumes that the normal or ideal students are white men of some means.	You don't belong. You're not welcome here.
"You're just being too sensitive" Eye rolling "You're always so difficult" "You're making too big of a deal of things"		Dismissive reactions that occur when bringing up that a microaggression has taken place.	

(Source: <https://www.cambridgema.gov/-/media/Files/officeofthemayor/2019/deepmicroaggressionsworksheetfilledin012619.pdf>)

Other examples include: "Why must everything be about race," "All lives matter," "Talking about race is divisive," and "Why can't we be civil even if we disagree?" All these phrases are designed to silence dissent and objection to systemic racism and other forms of systemic inequity, and to tone-police the objectors. What these phrases really mean is, I don't experience racism, I'm not racist, therefore your experience is invalid, and my comfort is more important than your oppression. These phrases invalidate the experience marginalized and underestimated²⁹ people, and at the same time reaffirm the status quo. Assimilation is the entry fee, and is also the barrier to true inclusion and belonging; assimilation is impossible when you look and sound different, and when your cultural context and your experience of life is fundamentally at odds with the dominant culture.

²⁹ "Underestimated" people is Ruchika Tulshyan's term for people we commonly refer to as marginalized.



I. Micro-affirmations

Micro-affirmations are “[a] series of related practices . . . includ[ing]: small acts which are often ephemeral and hard-to-see, events that are public and private, often unconscious but very effective, which occur whenever people wish to help others to succeed.” Put another way: “Micro-affirmations are tiny acts of opening doors to opportunity, gestures of inclusion and caring, and graceful acts of listening. [They] lie in the practice of generosity, in consistently giving credit to others—in providing comfort and support when others are in distress, when there has been a failure at the bench, or an idea that did not work out, or a public attack.”³⁰

III. THE HOW

A. Microaffirmations

To the same extent microaggressions can destroy a workplace, micro-affirmations can enhance it. Micro-affirmations are effectively the inverse of microaggressions.

Ask others for their opinions. Give congratulations on others’ achievements. Give your undivided presence. Make eye contact. Provide credit where credit is due. Publicly acknowledge the good. Smile and nod. Say hello. All these *tiny* acts inspire loyalty and confidence in others and are considered micro-affirmations. In the workplace especially, ideas are often overlooked or appropriated by others when shared by underrepresented voices in the room — echo good ideas. An example of a micro-affirmation in such scenarios can include an approach as simple as saying, “Building upon what [insert name] said...” If someone who is underrepresented or otherwise in a power of lesser privilege is interrupted, you yourself can interrupt the interruptor and request that they allow the speaker to finish their thoughts.

If micro-affirmations are sounding a lot like basic courtesy, that’s because they are, but their impact is significant in the workplace, especially in the aggregate. Micro-affirmations go beyond creating an inclusive environment. Micro-affirmations build an environment where people want to stay.

B. Decentering

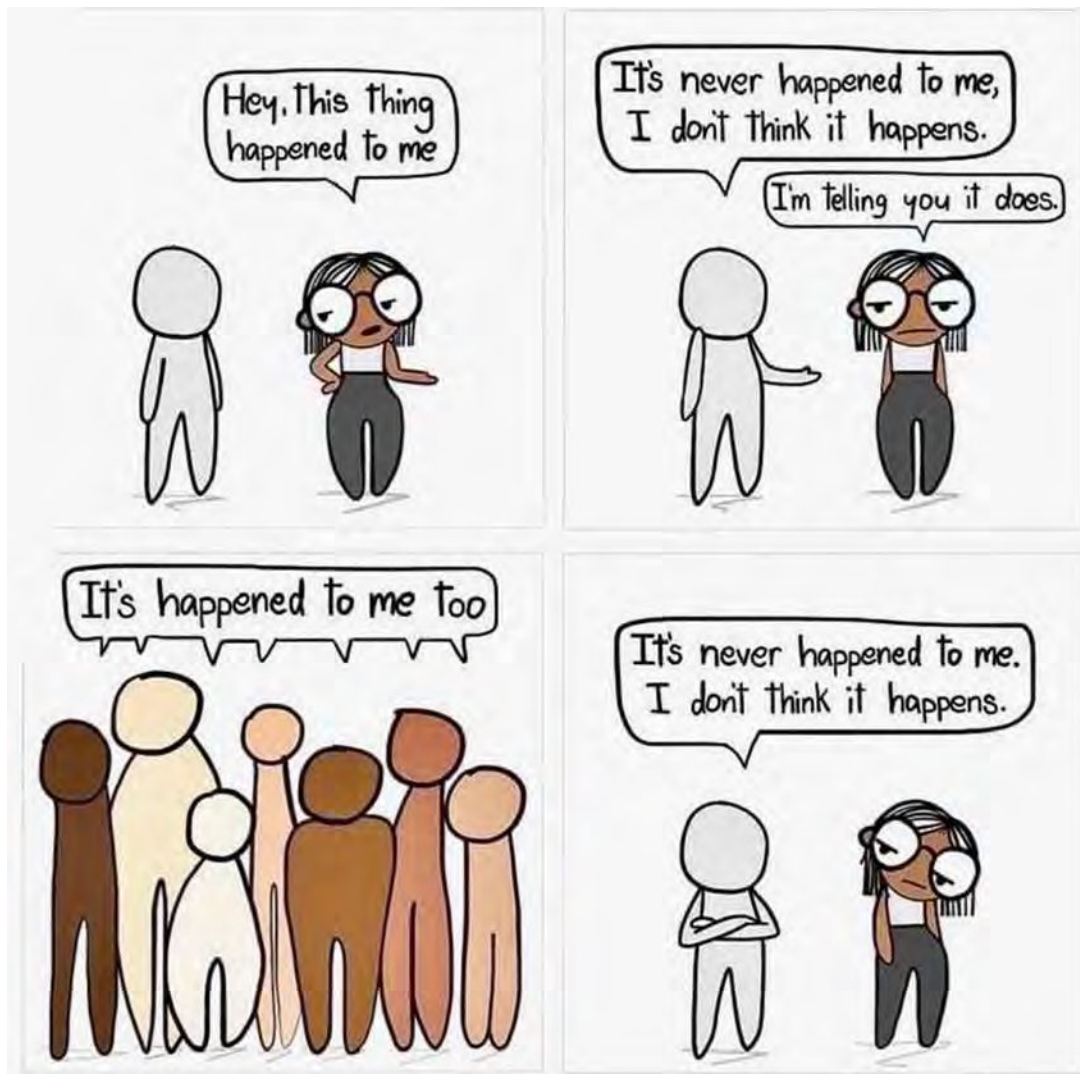
Decentering is one access to inclusion and belonging. Understanding what decentering is may be easier with examples of what it isn’t, or rather, examples of how we center our experiences in the way we listen and respond to people who are trying to describe their real experience of life. There are two components to this that we have identified so far (stay tuned, this may break down further as we practice it!): (1) When an individual shares the impact of something that was said or done that affected them, believe them. (2) Focus on the impact rather than your intent and your feelings about what happened.

³⁰ The Harriet W. Sheridan Center for Teaching and Learning at Brown University.



1. When someone shares an experience with you, hear it and believe them.

Empathy is a vehicle to an inclusive work environment. Jon Shanahan conducted a survey on this in 2018. His company's study found that 60% of the employees surveyed would take a pay cut to work for an empathetic company. 95% of these employees said that they would stay longer with an organization that could empathize with their needs, and 81% reported that they'd be willing to work extended hours for an empathetic employer. A one-size-fits-all approach to empathy is not likely to work, each organization has to adapt to its needs and the needs of the individuals who work there.



2. Focus on the impact, not your intent or feelings.

If the conduct described is your own conduct, or something you have done before or are doing now, take the focus off the feelings of shame, anger, defensiveness that it might trigger. Have your feelings, but keep them to yourself or work them out with someone who is your peer. Your intent is irrelevant, and even if it was, it is impossible to prove one way or the other if



someone is being intentionally exclusionary or if they mean well. Focusing on your intent and your feelings and your apology (including requiring forgiveness) is a way to center your experience and avoid discussing the actual issue, which is the impact of your actions. Whether you mean it or not, if you engage in microaggressions, you are having an impact on someone. Focusing on your intent invalidates the other person's experience and forces them to not only deal with the trauma of the microaggression, but also to have to cater to your feelings, and forces them in the position of having to determine your intent before they can legitimately be upset. And because they cannot know your mind, and in all likelihood your intent was innocent, that puts them in the position of their upset being invalidated, their upset is their problem.

“If you screwed up and you hurt people, your good intentions won't lessen that hurt. Don't insist that people act less hurt or offended or angry because your intentions were good.”³¹



³¹ Ijeoma Oluo, *So You Want To Talk About Race*, Seal Press 2019.



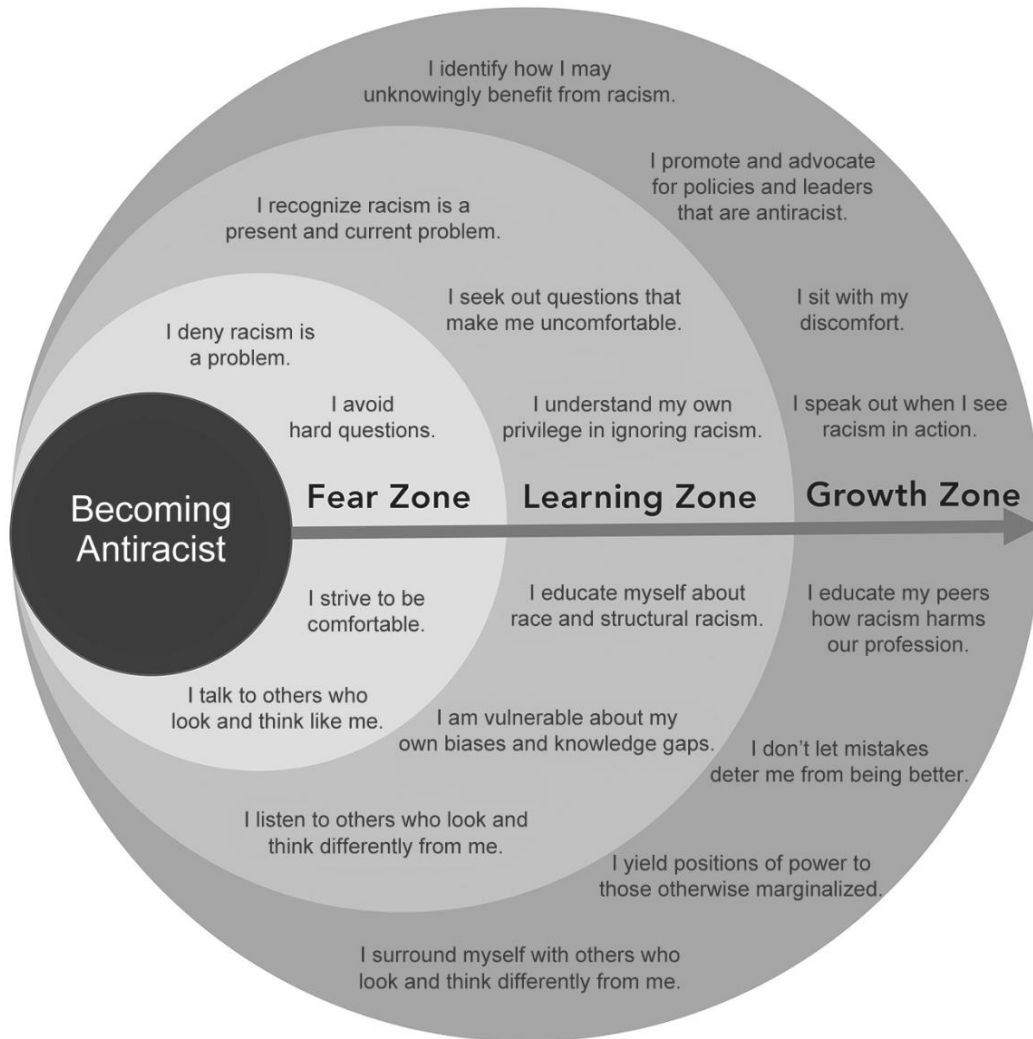
3. Use the **BRIDGE framework**³² to make it easier to have decentering conversations. Move from fear to growth.³³



The graphic below, by Andrew M. Ibrahim, was inspired by the work of Ibram X. Kendi. The graphic focuses on becoming an anti-racist, and can be used in support of the BRIDGE framework to grow from exclusion to inclusion.

³² Ruchika Tulshyan, *Inclusion on Purpose: An Intersectional Approach to Creating a Culture of Inclusion At Work*.

³³ See also, *What It Means To Center Ourselves In Conversation—And How To Practice Decentering Instead*, Emily Torres, The Good Trade, June 23, 2020 (found here: <https://www.thegoodtrade.com/features/decentering-yourself/>); How to Decenter Yourself in Conversations With Members of Marginalized Communities, The MSW online program from the Baylor University Diana R. Garland School of Social Work, June 16, 2022 (found here: <https://onlinegrad.baylor.edu/resources/how-to-decenter-yourself/>); *Why DEI And Anti-Racism Work Needs To Decenter Whiteness*, Janice Gassam Asare, Forbes, February 15, 2021 (found here: <https://www.forbes.com/sites/janicegassam/2021/02/15/why-dei-and-anti-racism-work-needs-to-decenter-whiteness/?sh=35eab6695886>); *The Social Theory of Decentering*, Ashley Crossman, ThoughtCo., October 14, 2019 (found here: <https://www.thoughtco.com/social-decentering-3026243>).



IV. CONCLUSION

The conclusion is that there is no conclusion – this is a work in progress, a journey we are all on, and will be for a while. If you are feeling unsettled, unsure, uncomfortable: great! You’re engaging. The goal posts move, they have moved since the history of humanity, and will continue to move – that’s how we move forward and improve the world.

[END OF PAPER]



General Municipal Litigation Update

Friday, May 19, 2023

Pamela K. Graham, Senior Counsel, Colantuono Highsmith & Whatley

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GENERAL MUNICIPAL
LITIGATION UPDATE
FOR
LEAGUE OF CALIFORNIA CITIES
ANNUAL CONFERENCE
SPRING 2023

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I. PUBLIC FINANCE

A. *Department of Finance et al. v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, review denied

Holding: Under Article XIII B, section 6, the State must only reimburse cities and counties for certain costs to comply with stormwater discharge permits, specifically if it is for a “new program” or “higher level of service” to abate water pollution. The State need not reimburse for costs if the permittee can levy a fee to cover those costs without voter approval. Cities cannot impose stormwater drainage fees for costs of non-development permit conditions (without voter approval). They can impose street-sweeping fees, and valid regulatory fees on developers for costs to comply with development-related conditions.

Facts/Background: Article XIII B, section 6 of the California Constitution requires the state to provide a subvention of funds to compensate local governments for the cost of a new program or higher level of service mandated by the state. It need not fund mandates, however, if local governments have authority to fund them by imposing fees. The Commission on State Mandates decides test claims for mandate reimbursement.

Cities and counties throughout the state operate municipal separate storm sewer systems (MS4s). Pursuant to the Federal Water Pollution Control Act (Clean Water Act), section 402(p), stormwater permits are required for discharges from an MS4 serving a population of 100,000 or more. The Clean Water Act created the National Pollutant Discharge Elimination System (NPDES) which is operated by the State to permit water pollutant discharges that comply with all statutory and administrative requirements. Accordingly, every 5 years, cities and counties must obtain a stormwater discharge permit from one of nine regional water boards or from the State Water Resources Control Board. This case tests whether the State is obligated to reimburse cities and counties for the very considerable costs of complying with those permits and the latest chapter of a dispute that dates to 2007.

San Diego County and its cities have been litigating the cost of that region’s 2007 stormwater discharge permit under state and federal water laws for 15 years. The 2007 permit was a renewal of a NPDES permit first issued in 1990 and renewed in 2001. The San Diego Regional Board found that, despite discharge pollutant management programs, urban runoff discharges were causing violations of water quality standards. The permit

included new or modified requirements to manage regional runoff, including street-sweeping, catch-basin cleaning, development controls to reduce runoff, education programs, and required regional coordination. San Diego County estimated the cost of compliance at \$66 million over the permit life.

In 2008, San Diego County and the cities within it filed a test claim with the Commission seeking subvention for eight challenged conditions. In 2010, the Commission on State Mandates found six of the eight permit conditions were reimbursable state mandates under 1990's Proposition 9, the Gann Limit. These conditions required permittees to provide a new program of abating water pollution, and the permittees did not have legal authority to levy a fee for the conditions since doing so required voter approval.

The State Department of Finance challenged the Commission's decision in the Sacramento Superior Court by writ of administrative mandate; the permittees cross-appealed. In a remand trial following an initial appeal, the trial court upheld the Commission's decision in its entirety and denied the petitions.

Analysis: The Third Appellate District reversed in part and affirmed in part.

First, the Court determined that Article XIII B, section 6 applied here. Under Section 6, if the state by statute or executive order requires a local government to provide a "new program" or a "higher level of service" in an existing program, it must "provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service." The appellate court agreed the conditions required permittees to provide a new program. "Permittees were providing stormwater drainage systems, and the permit required them to provide a new program of water pollution abatement services in forms which permittees had not provided before and which benefitted the public." The court explained that Section 6 requires subvention whether the new program is imposed directly by law, or as a condition of a regulatory permit required by a state agency.

Next, the Court of Appeal determined application of Section 6's subvention for "costs", which excludes expenses recoverable from sources other than taxes. The Commission and the trial court found that six of the eight challenged permit conditions were reimbursable mandates because permittees did not have authority to levy a fee for those conditions without voter approval. The other two challenged conditions — requiring the creation and implementation of a hydromodification management plan and low-impact-development requirements for certain new development — were not reimbursable

mandates because permittees could levy fees for those conditions without voter approval.

The appellate court first summarized the voter approval requirements under Prop. 218, noting it exempts “fees or charges for sewer, water, and refuse collection services.” Additionally, no part of Prop. 218, including its owner protest and voter approval requirements, applies to fees levied on real property development or fees that result from a property owner’s voluntary decision to seek a government benefit.

The Court of Appeal concluded **storm drainage fees** require voter approval under Proposition 218 and are not exempt “sewer” fees. It found it unnecessary to determine if 2017’s SB 231 (Hertzberg, D-Los Angeles) could undermine *Howard Jarvis Taxpayers Assn. v. City of Salinas*’ conclusion that Prop. 218’s provision exempting certain preexisting assessments distinguishes “sewer” from “flood control” services because the statute did not exist when the NPDES permit was granted in 2007 and was not retroactive. However, it revisited *Salinas*’ analysis, placed it on a much stronger intellectual footing, and effectively disagreed with SB 231 — “sewers” for purposes of the partial exemption from Proposition 218 for water, sewer and refuse removal fees are limited to sanitary sewers and exclude storm sewers. It also noted Prop. 218’s liberal construction requirement to disfavor government revenue authority and the 15-year delay between *Salinas* and the adoption of SB 231, suggesting the Legislature was changing, not clarifying, the law.

As to **street-sweeping**, the Court concluded this amounts to refuse collection within the meaning of Proposition 218, expanding local government’s fee authority over earlier understandings and disqualifying these costs for mandate reimbursement. The court noted there may be challenges in making such a fee proportional to the cost to serve each parcel as Prop. 218 requires, but the fact of local fee authority was enough to exempt street-sweeping from the State’s duty to fund mandates.

The **development requirements** were, perhaps unsurprisingly, exempt from Props. 218 and 26 as real estate development and permitting fees. The court read *Salinas* narrowly as to its rejection of a fee based on impervious coverage, finding such a distinction can be a valid basis for a service, permitting, or regulatory fee.

The case is bad news for State funding of expensive water-quality mandates and an exemption from Prop. 218’s voter-approval requirement for stormwater fees. It is better news for local authorities to fund street sweeping and similar water quality programs,

perhaps including catch-basin cleaning and filtration, as non-voter-approved refuse collection fees.

**B. *Cultiva La Salud, et al. v. State of California* (2023) 89
Cal.App.5th 868**

Holding: The penalty provision in the Keep Groceries Affordable Act of 2018 that deprives charter cities of sales and use tax revenue if they impose taxes on sugar-sweetened beverages and other items is unconstitutional. The penalty unconstitutionally uses the threat of crippling penalties to chill charter cities from exercising their rights under the state constitution’s home-rule provision.

Facts/Background: In 2018, the California Legislature passed the Keep Groceries Affordable Act of 2018 (Rev. & Tax. Code §§ 7284.8–7284.16). The Act prohibits charter cities, counties, and other local governments from imposing taxes, fees, or assessments on certain grocery items, including sodas and other sugar-sweetened drinks. It imposes a penalty for its violation applicable only to charter cities — the only agencies which might avoid preemption by the statute. The penalty requires the Department of Tax and Fee Administration to end its contract to collect all sales and use taxes for a charter city that imposes a tax or fee on “groceries.”

The Groceries Act was a political bargain with the soda industry. Its ban on local soda taxes for 13 years (until January 1, 2031) was in exchange for the beverage industry’s withdrawal from the 2018 ballot of a proposed initiative constitutional amendment that would have greatly restricted state and local finances (requiring a 2/3 vote for nearly all new revenues).¹ Cities’ — including Berkeley, San Francisco, Oakland and Albany — adoption of soda taxes to discourage their distribution and unhealthy consumption threatened the soda industry’s bottom line.

Cultiva La Salud (a nonprofit promoting healthy diets) and Martine Watkins (a Santa Cruz City Council member suing in her individual capacity) sued the Department challenging the Act’s penalty provision. Plaintiffs argued the penalty is unconstitutional because it seeks to override Article XI, Section 5 of the California Constitution by severely penalizing charter cities if they properly exercise their constitutional home rule

¹ An updated version of that measure has qualified for the 2024 ballot and can be viewed here: <https://oag.ca.gov/system/files/initiatives/pdfs/21-0042A1%20%28Taxes%29.pdf> (as of Apr. 14, 2023).

authority.

In Plaintiffs' view, the Legislature understood that the home rule doctrine might prevent the state from banning charter cities from taxing sugar-sweetened drinks. As a workaround, the Legislature created the penalty to discourage charter cities from testing whether soda taxes are within the home rule power, thus diminishing local authority and impairing the role of courts. Plaintiffs sought a declaration that the Groceries Act's penalty provision is unlawful, an injunction barring its enforcement, and a writ of mandate directing the Department not to implement it.

The Department argued the case was not ripe— the case should only be decided after a charter city had enacted a tax triggering the Act's penalty — after a city is brave enough to risk all its sales taxes to test this issue. The Department also argued the penalty provision only penalizes a charter city when its grocery tax “would *otherwise* be a valid exercise of the local government's constitutional powers, *in the absence of the Groceries Act.*” In other words, the penalty applies only if the Groceries Act is the sole reason for finding that the tax is prohibited. And they argued any offending language in the penalty could be severed to save the rest of the provision.

The trial court ruled in Plaintiffs' favor, first finding the case is ripe because it is a facial challenge, and it raises an important legal question that might never be answered otherwise. The court reasoned that charter cities, like Santa Cruz, may never enact a local tax on sugary beverages out of fear of facing the financial risk of the penalty provision being imposed and losing all their sales and use tax revenues. Indeed, this record shows that at least two cities immediately dropped discussion of soda taxes when this bill became law. On the merits, the court found the penalty unlawful because it only penalizes charter cities that validly exercise their constitutional rights. The Department appealed.

Analysis: The Third Appellate District affirmed.

On ripeness, the appellate court agreed with the trial court's analysis. The court found the facts were “sufficiently congealed” to allow resolution of the facial challenge to the Act. A contrary finding would provide a framework for insulating laws from judicial review: “The state could enact laws — even constitutionally suspect ones — that threaten exorbitant penalties against those who violate their terms, and because no one would likely violate these laws for fear of the penalties, no claim would ever be ripe for review.” Charter cities rely heavily on sales and use tax revenues (commonly upwards of 1/3 of

their general funds), and none wanted to risk the penalty just to challenge it in court.

On the merits, the appellate court rejected the Department's argument that the penalty is limited, applying only if the Groceries Act is the sole reason for finding a charter city's tax prohibited. The appellate court first looked at historical context for the home rule provision and the Groceries Act. The court discussed the Bradley-Burns Uniform Local Sale and Use Tax Law of 1955 prohibiting local governments (including charter cities) from levying preempted taxes. This list was extended in 1996 to cover hotel bed taxes on meals served by hotels.

The Groceries Act took inspiration from the Bradley-Burns Act. The appellate court noted that in section 7284.12 of the Act, as in the 1996 amendment to Bradley-Burns, the Legislature evidenced a concern about its ability to preempt charter cities taxes. Like the structure of the Bradley-Burns Act, the Groceries Act first prohibits local governments from enacting certain types of taxes, but then as a backstop, threatens severe penalties if these prohibitions proved ineffective. The court found that both laws "seek to prevent charter cities from enacting certain taxes, either through a direct prohibition or, if that proves ineffective, through the threat of severe penalties."

Based on this, the appellate court held section 7284.12 improperly threatens crippling penalties to chill charter cities from exercising their constitutional rights. As our Supreme Court has explained, "If a law has no other purpose ... than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it [is] patently unconstitutional." (*In re King* (1970) 3 Cal.3d 226, 235–236.) The appellate court said the Groceries Act's intentional penalty on a charter city's lawful exercise of its constitutional powers cannot stand.

The court rejected the Department's effort to limit the scope of the penalty, finding no basis for it in the statutory text or in logic. The court said that if the Legislature wanted to only penalize a charter city's tax that violates the Groceries Act, it would have said that. It didn't: "[W]e find no rational reason for concluding that the Legislature wanted to impose penalties when a charter city's tax violated the Groceries Act, but then wanted to impose no penalties when the city's tax happened to violate some other law too."

The court also found severance improper since the Department's suggested edits would have created new penalties (penalties against counties and general law cities). Severance can only be used to correct offensive language that is grammatically, functionally, and

volitionally separable, not a tool to rewrite legislative intent.

A similar debate in Sacramento may be likely soon given the California Business Roundtable's resurrection for the 2024 ballot of the proposed initiative constitutional amendment bartered for a soda tax ban in 2018. Featured in that debate will be so-called "VMT taxes" which propose to tax sprawling developments to fund the transportation improvements they require.

II. GOVERNMENT CLAIMS ACT

A. *Malear v. State of California* (2023) 89 Cal.App.5th 213

Holding: The claim presentation requirement of the Government Claims Act is met even though plaintiff sued before the public entity defendants denied his government claim, where plaintiff subsequently filed an amended complaint as of right after the claim was denied but before he served the defendants the original complaint and before they appeared in the action. This constituted substantial compliance with the claim presentation requirement.

Facts/Background: San Quentin inmate Steven Malear filed a complaint alleging that defendants State of California and California Department of Corrections and Rehabilitation failed to take reasonable action to summon medical care for prisoners. The State transferred a large number of inmates from the Chino Institute for Men to San Quintin in May 2020. The transferees were at risk of developing serious COVID-19 infections (they were over the age of 65 and/or had underlying health conditions), and although they had tested negative two weeks earlier, several inmates had COVID-19 at the time of the transfer, with some showing symptoms before leaving the transfer bus. At the time, San Quentin had no cases of COVID-19 among its prisoners. A month later, San Quentin reported over 1,400 COVID-19 cases, including Malear, and some prisoners died from the disease.

Plaintiff alleged prison employees failed to take reasonable steps to summon immediate medical care; they failed to timely screen or test transferees before introduction into San Quentin; and failed to establish a proper medical treatment plan. Plaintiff sued for a class of all current and former San Quentin inmates diagnosed with COVID-19 from the time of the transfer to the present.

Before filing suit, Plaintiff properly filed a government claim with the State. He did not, however, wait for denial of his claim, instead filing the original complaint a few weeks later. His complaint failed to allege compliance with the Government Claims Act.

Just two days after he filed his original complaint, the State Government Claims Program notified plaintiff of rejection of his claim (within the 45-day window to do so).

Malear then waited another three months — within the six months permitted under Government Code § 945.6 after rejection of his claim — before filing an amended complaint as of right. It was identical to the original, except that it included allegations of his claim and the State’s rejection of it. He then served defendants with both complaints (the original and amended).

The State demurred, arguing Malear failed to strictly comply with the claim presentation statutes. They also attacked the substantive claims, arguing immunity and that Malear failed to state sufficient facts to withstand demurrer.

The trial court sustained the demurrer without leave to amend, concluding Malear sued prematurely and could not cure this defect by filing an amended complaint after denial of the claim. In other words, the trial court required strict compliance with Government Claims presentation requirements.

Analysis: The First District Court of Appeal reversed, publishing the portion of its opinion addressing claim presentation requirements.

The Court first looked to Government Code § 945.4, which requires that “no suit for money or damages may be brought against a public entity ... **until** a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected.” If the public entity provides written notice of its rejection of a claim, any suit must be brought against the public entity no later than 6 months after the notice is personally delivered or mailed. (Gov. Code, § 945.6, subd. (a)(1).) If written notice of denial is not given, plaintiff has 2 years from accrual of the cause of action to sue. (*Id.*, subd. (a)(2).)

The State argued this language, as well as *Lowry v. Port San Luis Harbor District* (2020) 56 Cal.App.5th 211, mandate strict compliance with the presentation requirements — that presentation and denial of a government claim are jurisdictional prerequisites for suit.

The plaintiff in *Lowry* sued a harbor district the same day he applied for leave to present a late government claim. When the late claim request was rejected, he served the complaint. The trial court dismissed, finding plaintiff failed to comply with the Act because he filed a complaint before his claim was rejected.

Malear distinguished *Lowry* because Malear timely filed an amended complaint as of right. The deficient, original complaint no longer had any legal effect as either a pleading or basis for judgment, and the amended complaint properly alleged denial of his government claim and was filed and served before defendants appeared. The court held these acts were sufficient to establish substantial compliance with the claiming requirement.

The court noted appellate courts have “long found compliance with the Act even though complaints were filed prematurely,” citing *Cory v. City of Huntington Beach* (1974) 43 Cal.App.3d 131 and the Supreme Court’s more recent *State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234. Both allowed substantial, not strict, compliance, with claim presentation requirements in the absence of prejudice to the public agency defendant. *Malear* also recited *Bodde*’s pronouncement that noncompliance with the claim presentation requirement does not divest the trial court of subject matter jurisdiction. Here, the prematurity defect ceased to exist when the plaintiff filed his amended complaint, and because he did so less than 6 months after his claim was denied, the defendants “received every benefit which a provision for rejection prior to suit is intended to serve.”

Finally, the court concluded *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, does not reject the substantial compliance test for cases involving prematurity defects. *DiCampli-Mintz* involved section 915, subdivision (a), which identifies the individuals who may receive claims on behalf of a local public entity (“clerk, secretary, or auditor”), and the acceptable methods of delivery (personal or mail delivery to these individuals, or “to the governing body at its principal office”). The issue there was whether claim presentation to the wrong entity substantially complies with the Act if the party served has a duty to notify the proper statutory agent. The Court of Appeal said “yes”; the Supreme Court reversed, concluding it was uncontested the claim was never delivered, mailed, nor actually received by a “clerk, secretary, or auditor.” The Supreme Court explained that finding substantial compliance under these circumstances would create uncertainty in the claim presentation process and disserve the statute’s purpose.

Malear clarified that *DiCampli-Mintz* does not abrogate the substantial compliance doctrine in all cases, as the State argued. The requirements and purpose of section 945.4 are met on *Malear*'s facts — timely claim presentation provided the State sufficient information to investigate and act on the claim before litigation, and the State could consider its impact on fiscal planning to avoid similar liabilities in the future. Importantly, *Malear* noted the litigation did not begin in earnest until the Plaintiff served the amended complaint on the State, when its investigation of the claim was complete.

The court declined to speculate on the merits of *Malear*'s action, simply noting it presents a novel theory of public entity liability under Government Code section 845.6 and finding the allegations sufficient to withstand demurrer.

Malear is narrow. It makes clear that substantial compliance depends upon the facts and the particular Government Claims Act presentation requirements at issue. The takeaway is that public agencies should themselves strictly comply with the Act and demur when a plaintiff's noncompliance may prejudice the agency's defense.

III. ELECTIONS

A. *Lathus v. City of Huntington Beach* (9th Circuit 2023) 56 F.4th 1238

Holding: A volunteer member of a municipal advisory board is the “public face” of the elected official who appointed her to the body and may be fired for purely political reasons. The appointing elected official's dismissal of the volunteer member for her failure to immediately denounce a violent group with whom she had appeared did not violate the First Amendment.

Facts/Background: Huntington Beach City Councilperson Kim Carr appointed Shayna Lathus to the city's Citizen Participation Advisory Board (“CPAB”) after Lathus lost a 2018 election for a Council seat. Under the Municipal Code, each councilperson appoints one member to the 7-person CPAB and may remove that member without cause. The CPAB's is to “provide citizen participation and coordination in the City's planning processes, with an emphasis on addressing issues faced by low- and moderate-income households.”

After her appointment, Lathus was photographed at an immigrants' rally standing near individuals whom Carr believed to be Antifa members. Carr instructed Lathus to publish a statement on social media denouncing Antifa. Lathus did so, believing her CPAB title depended on it. She made a public statement condemning violence and discussing the importance of civic engagement, but didn't specifically mention Antifa. Carr found the statement insufficient, and removed Lathus from CPAB, explaining "those that do not immediately denounce hateful, violent groups do not share my values and will not be a part of my team."

Lathus sued the City for retaliation for exercising her First Amendment rights to free speech, association, and assembly, and claiming that Carr's demand for a public statement amounted to unconstitutionally compelled speech. In addition to damages, Lathus sought reinstatement.

The trial court granted a motion to dismiss. Citing *Blair v. Bethel School District*, 608 F.3d 540 (9th Cir. 2010), the trial court found that Carr was permitted to consider the political ramifications not only when she appointed Lathus, but also when she removed her.

Analysis: The Ninth Circuit affirmed, identifying the critical issue as whether Lathus was effectively a "political extension" of Carr on the CPAB. Because Lathus was effectively Carr's "public face" on the CPAB, it affirmed.

The Court noted that Lathus's activity was protected by the First Amendment. The Court distinguished *Blair*, where an elected school board removed a member from the post of vice president after he publicly criticized the school superintendent. The Court found no First Amendment violation as Blair "retained the full range of rights and prerogatives" of an elected board member, and his fellow board members were likewise exercising their right to replace Blair with someone that represented the board majority's views. Here, Lathus' volunteer status did not by itself strip her of First Amendment protection. Her dismissal was not simply the result of a political leadership election.

However, the Court found *Blair* instructive in its holding that government officials' First Amendment rights are not absolute. For example, the 9th Circuit noted an appointed public official can be removed for engaging in otherwise protected First Amendment activity if political affiliation is an appropriate requirement for effective performance of his or her office. The Court considered whether Lathus' CPAB service fit this description.

Examining the Municipal Code, the Court noted the CPAB advises on matters of policy and solicits public input, and each member is appointed and removable by one councilmember. The CPAB members also speak to the public and other policymakers for the appointing councilmember. In other words, Lathus was Carr’s “public face” on the board, and the public was entitled to assume that she spoke for Carr. Also, because CPAB was a conduit between the community and Council on issues regarding low- and middle-income housing and development, a councilperson was entitled to an appointee who represents her views and priorities. Because Lathus could undermine Carr’s credibility and goals, she could be dismissed for lack of political compatibility.

On the claim of compelled speech, the Court reasoned the same. Lathus argued that a coerced statement about her rally attendance was a condition to keeping her position. But, for the same reasons, the Court said an elected official can compel the public speech of her representative where that speech will be perceived as the elected official’s own. “Just as Carr was entitled to political loyalty from her appointee to the CPAB, she was also entitled to compel that appointee to espouse her political philosophy.”

The opinion has been criticized for its potential impact on citizen participation advisory boards, who now have to face the choice between serving their communities or suppressing their own views. Of course, on the other side of the coin, this was nothing more than an individual political appointment and removal, not official government action or an impediment to Lathus expressing her views as an individual.

B. *Law Office of Carlos R. Perez v. Whittier Union High School District* (2023) 87 Cal.App.5th 463

Holding: A law firm was entitled to collect its “cost of work product” under the California Voting Rights Act (CVRA) with respect to a demand letter resulting in a school district changing from at-large to district Board elections, even though the law firm only identified prospective, not retained, plaintiffs and the law firm paid for the work product costs.

Facts/Background: Under the CVRA’s safe harbor procedure, a prospective CVRA plaintiff may notify a political subdivision by demand letter before filing suit to challenge an at-large election system. If the political subdivision declares its intent to change to a district-based election system within a 45-day cure period (and does so within 90 days),

the “prospective plaintiff” who gave notice “may within 30 days of the ordinance’s adoption, demand reimbursement for the cost of the work product generated to support the notice.” Generally, these include attorney fees and costs for demography services, capped at \$30,000 (adjusted for inflation since 2017) for all prospective plaintiffs.

On September 2, 2018, the Perez law firm sent a letter to Whittier Union High School District demanding conversion from at-large to district elections of trustees. The law firm provided statistical evidence to support its claim that voting within the District was racially polarized and at-large elections disadvantaged Latino voters. Within the safe harbor period, the Trustees enacted Resolution No. 1819-11 proposing to convert to districts. After conducting public hearings on how to redraw its districts, the District officially adopted the change in February 2019.

The Perez firm immediately sought \$30,000 for its fees and other costs relating to the demand letter, which included time spent by the lawyers communicating with its client on case strategy, legal research, and meetings with expert demographer Jesus Garcia, as well as costs of purchasing GIS data and software licenses.

The District sought to avoid fees, arguing that the Perez firm had not identified a client for whom they threatened suit and the statute did not allow recovery of the expert’s expenses.

The firm petitioned for writ of mandate. The trial court denied the petition, finding section 10010 allows fees to a “prospective plaintiff” who has formally retained counsel. Here, there was no evidence the law firm actually represented anyone, nor that a prospective plaintiff incurred the costs and fees of the demand letter. In other words, for the \$15,000 demographer expense, “the law firm did not pass the cost onto a prospective plaintiff **who paid the expense** and then was entitled to reimbursement.” (Emphasis by Court of Appeal.) The law firm later sought attorney fees and costs under CCP section 1021.5, which the trial court also denied because the firm did not prevail on the petition or obtain a favorable judgment.

Analysis: The Second District reversed.

First, it found the trial court had applied an overly restrictive interpretation of the CVRA’s “prospective plaintiff” requirement. Section 10010 is satisfied by the law firm having likely clients — it need not name an individual who had formally retained the

firm. In the trial court, the firm provided evidence that no fewer than four community leaders, including Perez’s wife, were willing to sue if the District did not comply with the demand letter. The Court said this was enough — “prospective” “is a term of anticipation, not certainty.” The Court contrasted this to a situation where the law firm “dreamed up a legal claim for a hypothetical client.” Thus, the work was done for a “prospective plaintiff” for purposes of the CVRA.

Second, the appellate court concluded the “cost of work product” for which a prospective plaintiff is entitled to reimbursement is not limited to out-of-pocket expenditures by the prospective plaintiff, but also includes costs an attorney advances. The Court found nothing in either the language or intent of the CVRA to require that a plaintiff actually incur the cost for the statute to require reimbursement. The court explained that the allocation between lawyer and client of who pays costs, and when, is “a matter of free contract.” Lawyers may choose to bear costs on contingency. And attorneys’ fees may be awarded, even though the plaintiff was either never obligated to pay fees or could defer them to the end of litigation. “In these situations, nothing would be gained by requiring the lawyer to force the client to pay the costs merely to obtain reimbursement of those costs.” Such limitation, the Court said, would turn the CVRA on its head. It is “a remedial statute designed to equalize the voting power of disenfranchised minority communities that traditionally lack socioeconomic resources.” The Legislature could not have intended to require poor clients to front substantial costs before receiving section 10010’s benefits.

The appellate court remanded determination whether attorney’s fees are recoverable as costs of work product, and whether the firm was entitled to fees under section 1021.5.

While the constitutionality and application of the CVRA remains subject to challenge in federal and state courts, agencies with an at-large election system remain susceptible to CVRA demand letters, with the concomitant obligation to reimburse a prospective plaintiff for his work product costs. Cities should calendar all deadlines that flow upon receipt of a CVRA demand letter, and remember that while reimbursement of fees is statutorily mandated, it remains the plaintiff’s duty to prove those costs with detailed evidence.

C. **Clark v. Weber (9th Circuit 2022) 54 F.4th 590**

Holding: California’s recall procedure does not violate the 14th Amendment’s one-person, one-vote principle, nor the right to vote for a candidate of choice. The recall law’s requirement that an incumbent receive majority vote to remain in office, whereas a successor can be elected with mere plurality, does not violate the one-person, one-vote requirement. That the recalled officer is not permitted to appear as a successor candidate on the recall ballot does not violate a voter’s right to vote for a candidate of his or her choice.

Facts/Background: Article II of the California Constitution governs recalls. Until recent statutory amendments,² a recall ballot typically posed two questions. First, whether the official should be removed from office, followed by the option to choose “yes” or “no”. If a majority votes “yes,” the official “shall be removed from office upon the qualification of his successor” under Elections Code § 11384. The second question asks voters to choose a successor from a list of candidates. Pursuant to Article II, § 15(c), the official subject to recall may not be a candidate in the recall election. When the recall vote is successful, the candidate receiving the most votes on question two will be the successor, even if he or she wins by only a plurality.

A.W. Clark filed a § 1983 challenge to the September 2021 recall election for Governor Newsom, claiming the process violated his 14th Amendment due process and equal protection rights by denying him an equally weighted vote and his right to vote for his candidate of choice. Clark intended to vote “no” on the first questions, but wanted to vote for Governor Newsom as the successor candidate.

The district court denied Clark’s motion for preliminary injunction, and the Ninth Circuit affirmed. The recall election proceeded on September 14, 2021, when a majority of the voters answered “no” on question one, defeating the effort to remove Governor Newsom. Because Clark sought both prospective relief and nominal damages, the court found this did not moot the case.

Following the recall election, Secretary of State Weber moved to dismiss, which the trial granted for the same reasons it had denied preliminary relief. Clark appealed.

² Elections Code, § 11382, effective January 1, 2023 (Ch. 790, Stats. 2022).

Analysis: The Ninth Circuit affirmed.

First, the Court agreed that the recall procedures do not violate the 14th Amendment's one-person, one-vote requirement. Clark argued that voters who support the incumbent only get to vote once, whereas voters who favor the incumbent's removal can cast two votes ("yes" on the recall, and then a vote on the successor). The Court rejected this since even those who vote "no" on the recall can still select their preferred successor from the list of qualified candidates. "[A]ll voters enjoyed an equal right to vote on both questions, and all votes cast on each question were afforded equal weight."

The Court likewise rejected Clark's assertion of vote dilution based on the majority removal requirement, as contrasted with the plurality successor threshold. The Court clarified that the ballot election process is essentially two separate, simultaneous elections. The first determines whether the incumbent is removed from office; the second chooses a successor. But every vote, according to the Court, is weighted equally in each election, and "the right to equal representation is not violated simply because the two elections require different vote thresholds or because one election is decided by a plurality vote."

The Court also found unpersuasive Clark's challenge to Article II, § 15(c) based on his inability to choose a candidate of his choice. Applying *Burdick v. Takushi* (1992) 504 U.S. 428, the Ninth Circuit found prohibiting an incumbent from running in a recall election does not severely restrict the right to vote. The Court analogized this to California's term limits on state officials, upheld in *Bates v. Jones* (9th Cir. 1997) 131 F.3d 843. There, the Court held term limits do not amount to a severe restriction on the right to vote because they were a "neutral candidacy qualification, such as age or residence" and made "no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender."

The restriction on a recall's successor candidates is similarly neutral. In fact, the Court found Article II, § 15(c)'s restrictions less burdensome than term limits since it only bars an incumbent for one election. Too, the Court found California asserted a sufficient interest in maintaining the efficacy of its recall procedure: it "prevent[s] the anomalous result that an officer recalled by a majority would be immediately returned to office by a slim plurality." The provision thus prevents an endless cycle of recall elections.

Clark also argued Article II, § 15(c) conflicts with California’s later-enacted Proposition 14 (the Top Two Candidates Open Primary Act), which he contended invalidated § 15(c)’s plurality vote by requiring only two candidates for congressional and statewide office appear on the ballot, ensuring a winner by majority vote. The Ninth Circuit found the district court had not abused its discretion to refuse supplemental jurisdiction over the state law claim since there was no issue of federal constitutional law cognizable under § 1983.

Clark received support from legal academics, including Berkeley Law Dean Erwin Chemerinsky and Law Professor Aaron S. Edlin, who argued that because Newsom could receive far more votes than any other candidate but still be removed from office, the structure is not only unfair to the governor, but to voters alike. They envisioned a scenario in which, if Newsom were recalled, a candidate winning the plurality of votes on the second question received fewer votes than a minority of people voting not to support the recall in the first question.

IV. OPEN GOVERNMENT

A. *Travis v. Brand* (2023) 14 Cal.5th 411

Holding: The standard for fees under Government Code section 91003(a) of the Political Reform Act is different for prevailing plaintiffs and prevailing defendants. A prevailing defendant cannot recover fees absent a showing the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.

Facts/Background: Redondo Beach residents approved Measure G in 2010 to authorize a \$400 million redevelopment of the City’s King Harbor and Pier. The City made an exclusive agreement for the project with private developer CenterCal Properties, LLC. Project opponents labelled the project “Walmart by the Sea” and qualified an initiative (Measure C) to place zoning restrictions on the project. Voters approved Measure C on the March 7, 2017 ballot.

These events triggered lawsuits, including one for injunctive relief against Measure C supporters for failing to disclose the entities supporting the measure as the Political Reform Act requires. These included a PAC, Rescue Our Waterfront, formed primarily to support Measure C. Other supporters were the Mayor and a Councilmember who allegedly controlled the PAC.

The trial court ruled for defendants after a bench trial, finding the PAC was a general-purpose committee under Government Code section 82027.5 — not primarily formed to support Measure C — and that neither the Mayor nor the Councilmember had significant control or influence over the PAC. The trial court awarded defense costs and fees under Government Code section 91003(a) of almost \$900,000, finding the action was frivolous, unreasonable, and groundless and filed solely to stifle defendants’ free speech.

The Second District Court of Appeal affirmed, holding that section 91003(a) grants trial courts discretion to award fees and costs “to a plaintiff or defendant who prevails.” According to the appellate court, a single standard applies equally to prevailing plaintiffs and defendants. Section 91003(a) allows the court discretion to award fees and costs “to a plaintiff or defendant who prevails.” It rejected two decisions — *People v. Roger Hedgecock for Mayor Com.* (1986) 183 Cal.App.3d 810 and *Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562 — requiring a prevailing defendant show an action is frivolous, unreasonable, or without foundation to recover fees.

Analysis: Resolving this split of authority, the California Supreme Court adopted the asymmetrical standard of *Hedgecock* and *Boatwright*.

Plaintiff argued it must be harder for a prevailing defendant to collect fees to serve the purpose of the Political Reform Act. A contrary rule would chill private enforcement of the Act. The Supreme Court agreed. The Court analogized, first, to fee standards under Title VII of the Civil Rights Act prohibiting employment discrimination. In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), the fee statute was also silent on the applicable standard. *Christiansburg* emphasized that a private plaintiff in a Title VII action is the chosen instrument of Congress to vindicate the statute’s purpose, and a fee to a prevailing plaintiff is assessed against a violator of the law. These justifications do not apply equally to a prevailing defendant. Instead, allowing defendants to recover their fees simply because a plaintiff does not prevail would undercut Congress’ efforts to promote enforcement of the statute and deter employment discrimination. The Court thus added a necessary finding the claim was frivolous, unreasonable, and groundless. It also noted application of the *Christiansburg* standard to FEHA in *Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97, to achieve the same policy goals.

These same justifications promote an asymmetrical standard for fees under the Political

Reform Act. The Court discussed how the Political Reform Act is vitally important to California’s republican form of government. The financial disclosure requirements seek to ensure a better-informed electorate and to prevent corruption. The Court noted that one of the Act’s objectives is that “adequate enforcement mechanisms should be provided to public official and private citizens in order that this title will be vigorously enforced.” (citing Gov. Code, § 81002, subd. (f).) And one method of enforcement is through private actions for injunctive relief. Thus, voters intended it would be “robustly enforced to promote the important public policy of transparency.”

Both *Hedgecock* and *Boatwright* adopted the *Christiansburg* standard to encourage private enforcement of the Political Reform Act. They reasoned that a rule allowing the routine award of attorney fees to prevailing defendants could discourage all but the most airtight claims. In fact, an asymmetrical rule was even more warranted under the Political Reform Act than other statutes since the actionable wrong is the adulteration of the political process.

This Court applied the *Christiansburg* standard for these same reasons: “[a] rule subjecting unsuccessful plaintiffs to substantial financial risk in Political Reform Act cases, where the plaintiff often will have suffered no particularized harm, would discourage all but a few from seeking to enforce laws vital to ensuring transparency in the political process.” A non-prevailing plaintiff is guilty only of bringing an unsuccessful suit. The Court found no overriding equitable reason to award fees to a prevailing defendant in a Political Reform Act action unless the lawsuit “was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.”

We may continue to see application of this asymmetrical fee standard beyond Title VII, FEHA, and now Political Reform Act cases. It has been applied in other contexts where private enforcement is encouraged — the Clean Water Act, Real Estate Settlement Procedures Act, ADA, Endangered Species Act, and Voting Rights Act. The Court affirmed that it makes no difference whether a fee provision’s text treats the parties alike. Identifying the proper standard to guide the trial court’s discretion depends instead on a construction of the statute in conjunction with the purpose of the statutory scheme.

**B. *Freedom Foundation v. Superior Court of Sacramento County*
(2022) 87 Cal.App.5th 47**

Holding: (1) The exemption to disclosure under the Public Records Act for agency records related to activities governed by the Dills Act relating to collective bargaining by the State is not limited to documents revealing an agency’s deliberative processes. The exception also covers any records that reveal the agency’s impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategies for an agency’s participation in collective bargaining. (2) Public documents are in an agency’s “possession” if it actually possesses them, or has the right to control the records either directly or through another. Mere access to another’s records is not enough.

Facts/Background: In January 2020, Freedom Foundation submitted a PRA request to CalHR seeking documents relating to the total number of state employees paid by the State in each month in 2018 and 2019, and for each collective bargaining unit / labor organization, the number of employees paid by the State and amount of pay and union dues or representation fees withheld by the State from employees’ pay. It filed a second PRA seeking detailed personal information for each employee in specified bargaining units (e.g., job classification, employee identification numbers, pay rate/salary, email address and work location). CalHR declined to disclose documents, arguing they were protected under the Ralph C. Dills Act and Government Code section 6254, subd. (p)(1) [now § 7298.405]. CalHR also responded that CalHR does not control State Controller’s Officer (SCO) data, which the plaintiff must get from SCO.

Freedom Foundation filed a petition for writ of mandate and complaint for declaratory and injunctive relief seeking to compel Department of Human Resources (CalHR) to disclose the records. CalHR opposed, submitting declarations explaining how and why its labor relations division obtains custom reports of statewide data from SCO to evaluate bargaining proposals, develop strategies for collective bargaining, and inform and advise the Director of Labor Relations, and explaining its limited access to SCO information.

The trial court denied the petition and complaint, finding the information on CalHR’s evaluations, opinions, strategy, and bargaining positions is confidential. The court found persuasive that the raw data petitioner sought was not maintained separately from collective bargaining strategy documents. The court concluded CalHR was not required to create a separate document, and had no obligation to search SCO’s database for

responsive documents.

Freedom Foundation sought an appellate writ (the sole means of appellate review under the Public Records Act), arguing the collective bargaining exemption under Gov. Code § 6254, subdivision (p)(1) [§ 7298.405] is limited to information that reveals an agency's deliberative processes. They also argued CalHR was obligated to search SCO's database in response to the records requests.

Analysis: The appellate court denied relief on all grounds.

First, the court rejected Freedom Foundation's argument it sought aggregate data, not all of which revealed CalHR's deliberative process. Section 6254, subdivision (p)(1) [§ 7298.405] exempts from disclosure "records of state agencies related to activities governed by" the Dills Act "that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy." (Emphasis by Court of Appeal.) Petitioner argued this list all falls within deliberative processes, and that each listed item should be interpreted relative to the first. In other words, that "deliberative" modifies each item in the list. The appellate court disagreed.

The court looked to the statute's words and context, construing the PRA broadly to effectuate its purpose to further public access to information, but also deferring to the Legislature's clearly expressed intent to exclude or exempt information. The court found section 6254, subdivision (p)(1) [§ 7298.405] unambiguous — it is not limited to documents which reveal an agency's deliberative processes, but also covers any records that reveal the agency's impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategies. Thus, if a record implicates any of the listed items as part of an agency's participation in collective bargaining, it is exempt. The court explained that to depart from this literal reading of a clearly worded statute would violate the separation of powers.

Freedom Foundation argued that at a minimum, they were entitled to redacted documents revealing only the aggregate information sought. While public agencies are generally required to produce portions of documents not subject to exemption, the court explained that they are under no obligation to attempt "selective disclosure" of records that are not reasonably segregable. Even if other information could be redacted from the document over which CalHR asserted the collective bargaining privilege, disclosing that

information would still reveal CalHR’s research and evaluations conducted pursuant to the Dills Act.

Finally, CalHR was not required to search SCO’s databases. In evaluating CalHR’s potential “possession” of these documents, the court explained section 6253(c) [§ 7922.535] covers both actual and constructive possession. An agency has constructive possession of records if it has the right to control the records, either directly or through another. Here, SCO had actual possession of the database information. CalHR had no power or authority to manage, direct, or oversee that information. The court found CalHR’s mere ability to access the SCO database was not enough. Such a rule would effectively transform any privately held information that a state or local agency has contracted to access into a disclosable public record.

V. MISCELLANEOUS

A. *Kirk v. City of Morgan Hill (2022) 83 Cal.App.5th 976*

Holding: A Morgan Hill City ordinance requiring the theft or loss of a gun to be reported within 48 hours is not preempted by a state law requiring missing guns be reported within 5 days. Local governments may impose stricter gun regulations than state law, and the City ordinance does not conflict with the more permissive state standard for one can comply with both.

Facts/Background: As part of the Safety for All Act of 2016 (Prop. 63), Penal Code section 25250, subdivision (a) requires notification when a gun is lost or stolen to “a local law enforcement agency in the jurisdiction in which the theft or loss occurred.” The owner or possessor of the gun must report theft or loss within 5 days of when they knew or reasonably should have known the firearm was stolen or lost. A first offense is subject to a \$100 fine; a second, a \$1,000 fine; and a third, up to a 6-month jail term. (Pen. Code § 25265.)

Morgan Hill adopted its own reporting requirement in 2018. It requires a reporting to the Morgan Hill Police Department of a missing or stolen gun within 48 hours. This requirement applies if the gun owner lives in Morgan Hill or the loss occurs there. A reporting violation is a misdemeanor punishable by up to 6 months in jail, or a \$1,000 fine. The City staff supported a shorter reporting period since early notification allows police to more readily identify stolen weapons during their investigations, and therefore

reduces the chance those weapons will be used in future crimes.

Plaintiff Kirk and the California Rifle & Pistol Association sought declaratory relief action that State law preempted the City ordinance. The Giffords Law Center to Prevent Gun Violence defended the City.

The trial court found no preemption, granting the City summary judgment.

Analysis: The Sixth District Court of Appeal affirmed.

The appellate court first noted that cities have broad authority to make and enforce their own laws under the California Constitution. While local laws must not conflict with state laws, local legislation conflicts with statute only if it duplicates or contradicts state law, or if it intrudes in an area the Legislature has intended to occupy completely.

“Duplication” means that the local law must be coextensive with the state law — in other words, both laws must impose the same requirement or prohibition. Since the Morgan Hill law imposes a more stringent requirement —two days reporting period, instead of five — the appellate court found the laws are not duplicative. The court rejected plaintiffs’ theory that duplication resulted since a criminal conviction for violating the ordinance would bar prosecution for violation of the state law on double jeopardy grounds. Not so, the court said, since it is possible to violate the ordinance without violating state law (i.e., by reporting violation on day three). Duplication only occurs where the ordinance covers no new ground — and here it does since it mandates a shorter reporting period.

Nor does the ordinance contradict state law. The court noted that a person who obeys the ordinance’s command to report a missing gun within 48 hours will not violate Penal Code § 25250’s five-day rule. And the 48-hour requirement does not otherwise obstruct the purpose of the state law, which is to ensure prompt reporting of missing firearms. A shorter reporting period is, of course, consistent with this purpose.

Finally, the court found there was no indication the local law intrudes on an area the electorate intended to completely occupy by initiative. The statute expresses no intent to occupy the field of gun regulation. Nor did the court find implied intent to do so. It noted that the California Supreme Court has already recognized significant local interests in firearm regulation. While the Legislature has preempted certain areas of gun regulation

— like licensing requirements and the manufacture, possession, and sale of imitation firearms — it has generally allowed local regulation of gun control. And the state concern reflected in the statute is merely that local law enforcement authorities be promptly notified of a lost or stolen gun. The statute, according to the court, is “entirely tolerant of local regulation furthering its purpose by requiring even earlier notification.”

The City hailed the victory as progress toward more restrictive local regulations for gun safety. The City’s ordinance also requires the safe storage of firearms and a ban on ammunition magazines that can hold more than 10 rounds, which were not tested in the lawsuit. We will continue to see an abundance of litigation on state versus federal handgun regulations, in light of the U.S. Supreme Court’s decision last year in *New York State Rifle and Pistol Association v. Bruen*, 142 S.Ct. 2111 (June 23, 2022) establishing a new standard for evaluating firearms regulations under the Second Amendment. Those cases have focused to date primarily on the constitutionality of California’s 1999 Unsafe Handgun Act (litigating the propriety of restricting chamber load indicators, magazine disconnect mechanisms, and microstamping). E.g., *Renna et al. v. Bonta et al.*, 20-CV-02910 (S.D. Cal., filed Nov. 10, 2020); *Boland et al. v. Bonta et al.*, 23-55276 (9th Cir., filed March 7, 2023).

B. *Trujillo v. City of Los Angeles* (2022) 84 Cal.App.5th 908

Holding: A CCP 998 settlement offer automatically expires when a trial court orally grants the offeror’s summary judgment motion. Plaintiff’s acceptance of the City’s CCP 998 offer after the trial court orally granted summary judgment to the City, but before judgment was entered, was inoperative.

Facts/Background: Plaintiff Trujillo sued the City of Los Angeles for a dangerous condition of a sidewalk. Trujillo tripped on an uneven sidewalk in a residential area while jogging. The City had not received any complaints or requests for repair of that sidewalk section. In September 2020, the City moved for summary judgment, asserting it was not a “dangerous condition” because the differential in elevation between the two sidewalk squares was trivial.

The court set a hearing on the summary judgment motion. A few days earlier, the City made a 998 offer to settle the case for \$30,000 — plaintiff had not responded to it at the time of the hearing and was still within the statutory 30 days to accept. A 998 offer is

generally open for 30 days unless unequivocally rejected or formally revoked; if not accepted by the end of the 30-day period, it is deemed rejected by operation of law.

At the hearing, the court orally granted the City's motion, and the hearing ended by 3:18 p.m. The court then issued a minute order including its oral ruling. Immediately after the hearing, at 3:22 p.m., plaintiff's counsel emailed the City purporting to accept the 998 offer. Plaintiff's counsel then filed the executed offer with the court just 7 minutes later. The City objected to plaintiff's belated attempt to accept its 998 offer after the court had orally granted the City summary judgment.

Two months later, the trial court entered judgment for the City, implicitly ruling that plaintiff's acceptance of the City's 998 offer was inoperative. Plaintiff filed a motion to compel the trial court to enter judgment on the 998 offer. The trial court denied the motion. The court said it orally issued a ruling granting the City's motion for summary judgment on the merits, that its oral ruling reflected a determination that plaintiff's action lacked merit, and that ruling terminated plaintiff's power to accept the City's offer. Accordingly, plaintiff's purported acceptance of the 998 offer did not form a valid compromise agreement. Plaintiff appealed.

Analysis: The Second District Court of Appeal affirmed.

The appellate court considered when, if at all, a trial court's grant of summary judgment terminates an outstanding 998 offer. The parties offered multiple rules: (1) when the summary judgment hearing commences; (2) when the court orally rules; (3) when the court memorializes its oral ruling in a minute order; (4) when the court enters judgment; or (5) only when the statutory 30 days expire.

The court looked to section 998's text and purpose. First, the statute states an offer may be made "prior to the commencement of" trial or arbitration "of a dispute to be resolved by arbitration." Because the sole purpose of trial is also to resolve disputes, a section 998 offer may only be made when a dispute remains to be resolved. Citing in *Blair v. Pitchess* (1971) 5 Cal.3d 258, the appellate court explained a grant of summary judgment resolves **all disputes** in a case, providing such a ruling preclusive effect in future litigation. So, no 998 offer is operative after a grant of summary judgment.

Second, the appellate court found section 998's purpose supports this result. Section 998 is intended to encourage the early settlement of disputes, such that parties can eliminate

the costly uncertainty inherent in litigation. According to the court, “[i]f a party has the option of accepting a settlement offer **even after** a court has resolved the dispute the litigation presents, then that party has no incentive whatsoever to accept that offer before the court does so.” A rational party would just wait and see how the court rules — and then accept the offer to “resurrect its defunct claims.” This would discourage early settlement, undermining section 998’s purpose. Because a dispute is resolved and the outcome of the litigation becomes certain and known when a trial court orally grants summary judgment, that is when an outstanding 998 offer lapses.

The Court rejected the contention that a summary judgment ruling must be written, not oral, to extinguish a 998 offer since CCP section 437c allows oral rulings. So, too, it rejected the argument that the court must first enter judgment or a minute order as these steps take time to complete. The Court also declined to accept that commencement of a summary judgment hearing was enough — it is the grant of the motion that resolves the dispute and terminates a 998 offer. All of these proposals would promote gamesmanship, not advance early settlement.

Because plaintiff did not communicate her acceptance of the 998 offer until after the trial court orally granted summary judgment to the City, the acceptance was not effective.

C. *Brianna Bolden-Hardge v. Office of the California State Controller, et al.* (9th Circuit 2023) 63 F.4th 1215

Holding: The district court improperly dismissed plaintiff’s complaint challenging the State Controller’s Office’s refusal to allow a religious addendum to the public-employee loyalty oath set forth in the California Constitution. She adequately stated claims under Title VII of the Federal Civil Rights Act and the California Fair Employment and Housing Act, and she should have been granted leave to amend her claims under the Free Exercise Clause of the federal and state constitutions.

Facts/Background: When Brianna Bolden-Hardge was offered a position at the California Office of the State Controller, she was asked to take California’s loyalty oath. Art. XX, § 3 of the California Constitution requires all public employees, except those “as may be by law exempted,” to swear or affirm to “support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic” and to “bear true faith and allegiance” to those constitutions.

As a devout Jehovah's Witness, Bolden-Hardge objected to the oath because it would violate her religious beliefs by requiring her to pledge primary allegiance to the federal and state governments rather than to God and to affirm her willingness to engage in military action despite her pacifist convictions. She requested an accommodation from the Controller's Office to sign the oath with an addendum specifying that her allegiance was first to God, and that she would not take up arms. The Controller's Office rejected this proposal, rescinding the job offer. Bolden-Hardge returned to a lower-paying job at the California Franchise Tax Board, which permitted her addendum.

Boden-Hardge sued the Controller's Office and the California State Controller in her official capacity, alleging their refusal to allow her proposed addendum to the loyalty oath violated Title VII for failure-to-accommodate her religion and disparate impact, FEHA for failure to accommodate, and the federal and state Free Exercise Clauses. She sought declaratory relief and damages (for all but the state Free Exercise claim). The State defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.

The federal district court granted the motion, denying leave to amend.

Analysis: The Ninth Circuit reversed.

The Court held plaintiff had standing to seek damages. As pleaded, she lacked the actual and imminent threat of future injury to seek prospective relief, though she could seek to cure this defect by amendment. Generally, a plaintiff lacks standing when there is no indication of a continued wish to work for that employer; were plaintiff to allege she sought reinstatement with the Controller's Office, prospective relief would be available. Plaintiff could seek damages against the Controller's Office under Title VII, which abrogates states' sovereign immunity, and FEHA, which subjects state employers to damage claims. As pleaded, she could not pursue damages for her Free-Exercise claim since § 1983 does not provide a cause of action to sue state entities or state officials in their official capacities. But, the Court held she should have been permitted leave to amend to seek damages from the State Controller in her individual capacity. Because plaintiff had standing to seek damages under Title VII and FEHA, the Court had jurisdiction to consider the merits of those claims.

Title VII and FEHA forbid an employer from denying an applicant a job because of

religion. Both statutes require employers to accommodate job applicants' religious beliefs unless doing so would impose an undue hardship. A burden-shifting test applies to both statutes. In essence, the employee must first plead a prima facie case of failure to accommodate religion. If the employee is successful, the employer can show it was nonetheless justified in not accommodating the employee's religious beliefs or practices, or that it could not reasonably accommodate the employee without undue hardship.

The Court held plaintiff pleaded a prima facie case of failure to accommodate religion under both statutes. She adequately alleged she held a bona fide religious belief that conflicted with the "faith and allegiance" component of the loyalty oath. The Controller's Office argued the loyalty oath does not require its takers to pledge loyalty to government over religion, and so there is no conflict. The Court disagreed. The burden to allege a conflict with religious beliefs is fairly minimal. The Court noted the apparent rationale for the oath requirement is to ensure that if an oath taker's religion ever comes in conflict with the federal or state constitutions, religion must yield. The Court said there is clearly an actual conflict: "[i]f an employee cannot claim 'first loyalty to God,' she must, by implication, owe first loyalty to something else — here, the federal and state constitutions."

The Court rejected the Controller's Office's argument undue hardship should be presumed. This, the Court said, is a triable affirmative defense. Defendants sought to apply a presumption for **private** employers, immunized from liability for failure to accommodate if accommodating the employee's religious beliefs requires the employer to violate federal or state law. (*Sutton v. Providence St. Joseph Med. Ctr.* (9th Cir. 1999) 192 F.3d 826). The Court declined to extend this to public employers for policy reasons: "[T]o exempt the Controller's Office from a federal accommodation requirement **solely** because the requested accommodation would violate state law would essentially permit states to legislate away any federal accommodation obligation, raising Supremacy Clause concerns." (Original emphasis.) And here, there was no evidence that allowing the requested addendum to the loyalty oath would in fact violate State law considering other agencies were willing to do so.

The Court also held that plaintiff adequately pleaded disparate impact. On the first prong of the test requiring a showing of a significant disparate impact on a protected class or group, the Controller's Office argued statistics are strictly necessary. The Court disagreed. A plaintiff need not support a claim with statistics at the pleading stage if the disparate impact is obvious. The Court accepted as true Bolden-Hardge's allegation that

other Jehovah's witnesses share her belief, and thus the oath requirement would impact all or substantially all Jehovah's Witnesses seeking government employment.

Moreover, at the pleading stage, the Court held the Controller's Office did not show it was entitled to a business necessity defense. The Controller's Officer argued the loyalty oath is a business necessity because public employees must be committed to working within and promoting the fundamental rule of law while on the job. The Court recognized this defense might be proven later, but this was not apparent from the complaint or judicially noticeable documents. And could be questioned given the State's alleged practice of exempting some employees from the oath's requirement.

Of course, the Ninth Circuit's decision simply revives this lawsuit which will continue on remand. The Ninth Circuit acknowledged the Controller's Office may have viable defenses. Due to the nature of the claims, summary judgment seems unlikely.



What to do When First Amendment Auditors Come to Town

Friday, May 19, 2023

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Introduction

On November 3, 2020, two men wearing tactical vests and armed with a handgun stood outside a ballot box and filmed voters dropping off ballots in front of the Arapahoe County administration building in Littleton, Colorado. Alarmed county staff approached the men and asked them what they were doing while others called the police. In response to the county staff's questioning, the men identified themselves as "First Amendment auditors," and upon further questioning by police officers, the men conveyed that they had the legal right to film people outside a government building, and further that they possessed the right to carry firearms under Colorado's open carry law. The men recorded their encounter with police and County staff. Ultimately the police decided not to cite or otherwise detain the two individuals because they did not actively prevent any voters from delivering their ballots.¹

Instances of the above, known colloquially as "First Amendment audits," are an increasingly prevalent phenomena that involves members of the public who call themselves citizen journalists and/or First Amendment auditors and who typically attempt to provoke a response or otherwise test local government officials. The practice refers to individuals who travel to publicly-accessible areas on public property, including within local or municipal offices, and then film their encounters with public employees. The self-proclaimed goal of these auditors is to test whether the government is abiding by the strictures of the First Amendment by leaving them be; if an official detains, cites, harasses, or otherwise restricts or arrests the auditor, the local entity is deemed to have "failed" the audit. These filmed encounters usually wind up on social media including YouTube and Facebook with the stated goal being to raise awareness about violations of the law and holding the government accountable, while concurrently encouraging members of the public to express their disdain for the public employees who have been filmed.

Because auditors often behave provocatively and seek confrontation not only with police but also try to engage with municipal employees at all levels, and because the ramifications of a "failed" audit can result in unwanted social media attention, negative press coverage, and even civil liability, municipalities in recent years have sought guidance in enacting both constitutionally permissible and practical rules to mitigate against the undesired consequences of these encounters.

This paper will (i) provide a brief overview of the history and practice of First Amendment auditing, (ii) examine whether and to what extent filming activity by First Amendment auditors is protected by the First Amendment, (iii) discuss what restrictions may

¹ "Men filming voters in Littleton were 'first amendment auditors,' police say." The Littleton Independent (Nov. 3, 2020). Accessible at: <https://littletonindependent.net/stories/men-filming-voters-in-littleton-were-first-amendment-auditors-police-say,315954>.

be imposed by localities seeking to regulate auditor activity, (iv) briefly review a few sample regulations currently employed by existing jurisdictions to address the issue, and (v) provide practical advice regarding both implementing said regulations as well as training employees and staff in the best practices for handling a First Amendment audit.

I. What are First Amendment Auditors?

First Amendment auditing can arguably trace its roots back to the beating of Rodney King in 1991. George Holliday, a Los Angeles plumber, had then recently obtained a new Sony handheld camcorder. Upon being awakened in the morning by the sounds of sirens and helicopters, he grabbed his camcorder and went onto his balcony to film the fateful encounter between four police officers and Mr. King; the shocking footage was later sent to a local news station. Following acquittal of the officers on charges of use of excessive force, the 1992 Los Angeles riots erupted bringing to the forefront of the public mind important and longstanding racial, governmental, and social issues.

Since the beating of Rodney King, the proliferation of consumer-grade recording technology has only multiplied the number of persons who can video government misconduct exponentially; indeed, the ubiquity of cell phones and their video capability has practically transformed every single member of the public into an auditor who can capture instances of government abuse into videographic form—often instantly uploaded into the cloud or livestreamed. The permanent and sometimes powerful nature of these recordings is lauded by proponents of First Amendment auditors, who argue that First Amendment auditors play a pivotal role in keeping the government accountable and transparent to the public. A recent example of such accountability includes the recording of the murder of George Floyd in 2020 by four police officers in Minneapolis; the footage of the killing subsequently launched global protests against historic racism and police brutality, including the Black Lives Matter movement.

Today First Amendment auditing can be described as a form of citizen journalism or citizen activism that seeks to test and thereby protect certain constitutional rights, including the right to be physically present in a public space and the right to photograph or video record government officials on government property in action (or inaction). As their name implies, auditors cite to the First Amendment as providing the constitutional bulwark supporting these rights; other implicated constitutional rights include the Fourth and Fifth Amendments, or even the Second Amendment, such as when auditors enter public spaces armed. The typical auditor practice involves travelling to spaces open to the public—including local governmental offices such as city clerk offices, post offices, police stations, and libraries—and then openly filming or photographing those environs and any persons within them. Auditors often refuse to self-identify or explain what they are doing, and auditors frequently intend to provoke a police response in order to record instances of police or governmental wrongdoing, or otherwise depict public employees in an unfavorable light.²

That auditors frequently seek to incite confrontation or aggression through harassing or argumentative behavior stems from another motivation besides the asserted protection of individual liberties: namely, to obtain popularity and money flowing from social media

² See Cardine, Sara. “1st Amendment auditors make police walk the line between enforcement, constitutionality.” Los Angeles Times (July 16, 2022).

views.³ As reported by an increasing number of news organizations, the rising popularity of First Amendment auditor videos has led to a “ruthless competition” among auditors, thereby leading to attempts to create more dramatic videos in order to attract more clicks, subscribers, and advertising revenue for the video uploaders.⁴ A vivid or violent interaction between an auditor and government officials can result in a video generating millions of views on YouTube and also thousands of donations to the auditor, which have led some auditors to describe auditing as their “form of business”.⁵

These dramatic interactions between auditors and government personnel may result in drastic consequences for a local municipality. Indeed, if a particularly evocative interaction makes it onto social media, it can result in hordes of auditors and “cop-watchers” descending onto a local city—which is what occurred following an arrest of an auditor for allegedly trespassing in a government building in Leon Valley, Texas. The resulting video generated social media attention and thus led to more auditors arriving days later. The ensuing confrontations led to arrests, including one incident in which an individual tried to bait law enforcement by carrying fake rubber guns into another government building.⁶ The resulting arrests of the various protestors and auditors have led to multiple lawsuits against the City of Leon Valley and its officers via 42 U.S.C. § 1983 actions.⁷ This problem of confronting potentially disruptive individuals is further compounded with the increasing frequency of school shootings and other terrorism-related events in recent years, which may lead to tensions between public employees who are seeking to protect the health, safety and welfare of the public, and First Amendment auditors who refuse to self-identify and/or behave provocatively.⁸

II. Is Video Recording Speech?

A threshold question to the potential regulation of any First Amendment auditor activity, which at its core involves filming publicly accessible spaces on government property and/or filming public employees in the course of their duties, is whether filming counts as speech, and therefore, does the First Amendment apply?

The majority view and the modern trend among Circuit Courts of Appeal including the Ninth Circuit is that filming is speech, or, at a minimum, necessary predicate activity to speech and therefore is protected activity under the First Amendment.⁹ The minority and

³ Epstein, Kayla and Selk, Avi. “What is 'auditing,' and why did a YouTuber get shot for doing it?” Washington Post (Feb. 15, 2019).

⁴ Sommer, Will. “The Insane New Path to YouTube Fame: Taunt Cops and Film It.” The Daily Beast (Jan. 24, 2019) (discussing First Amendment auditor activity in Texas, including Leon Valley).

⁵ *Ibid.*

⁶ *Ibid.* (describing the Leon Valley incidents). For additional examples, see “Viral video of Ohio police causes outrage, crashes phone line.” WKBN, 2 News and Living Dayton, (Mar. 14, 2018).

⁷ See, e.g., *Miller et al. v. Salvaggio et al.* (W.D. Texas April 7, 2022), 2022 WL 1050314 (granting municipal defendants’ motion to dismiss).

⁸ See Thomas, Judy. “They roam public buildings, making videos. Terrorism experts say they may be dangerous.” Kansas City Star (Jan. 22, 2019).

⁹ See, e.g., *Animal Legal Defense Fund v. Wasden* (9th Cir. 2018) 878 F.3d 1184, 1203;

outdated view is that filming is mere conduct and therefore is not entitled to the full panoply of protections afforded by the First Amendment.¹⁰

A. Majority View: Recording is Speech

The majority of jurisdictions that have considered the question have found that the First Amendment fully protects the right to photograph and the right to record matters of public interest.

The Ninth Circuit squarely addressed the question in *Animal Legal Defense Fund v. Wasden* (“Wasden”), which concerned an animal rights advocacy organization’s challenge against Idaho’s “Ag-Gag” statute criminalizing a person from entering a private agricultural production facility and making an audio or visual recording of the facilities’ operations without the owner’s consent.¹¹ Idaho’s statute was in response to a secretly-filmed expose going viral on the internet, depicting Idaho dairy workers torturing and otherwise mistreating cows.¹² At issue in the challenge was whether the Recordings Clause of the Idaho statute regulated speech and therefore was protected by the First Amendment.

The Ninth Circuit held that the statute prohibiting audio and visual recordings directly regulated speech and was a “classic” example of an impermissible content-based restriction.¹³ Idaho’s arguments seeking to distinguish the act of recording as mere conduct and not speech were “easily” disposed of, because such arguments were “akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not.”¹⁴ In other words, those steps integral in the speech-making process were entitled to equivalent protection as the speech (here, the film or photograph) itself.¹⁵ Thus the act of recording or creating the video could not be disaggregated from the video; they concerned the same expressive activity. The Ninth Circuit also emphasized that the act of recording a video was expressive in of itself, explaining that:

[D]ecisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score.¹⁶

The decision in *Wasden* followed several other similar decisions by the Ninth Circuit, all of which refused to create a distinction between what some have urged is “pure” speech—such as an essay or a piece of art—from the process of creating them—such as writing or

see also *Glik v. Cunniffe*, 655 F.3d 78, 79–81 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3rd Cir. 2017); *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

¹⁰ See, e.g., *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 182 (3d Cir. 1999) (dicta); *D’Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1544 (D.R.I. 1986), aff’d, 815 F.2d 692 (1st Cir. 1987).

¹¹ *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018).

¹² *Id.* at 1189.

¹³ *Id.* at 1203.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

painting.¹⁷ And, a subsequent decision in *Askins v. U.S. Department of Homeland Security* reaffirmed and reiterated the logic of *Wasden*.¹⁸ There, in an action by border policy advocates against the Department of Homeland Security, the Ninth Circuit overturned the lower court ruling and found that the advocates had stated a valid First Amendment claim. These auditors were taking photographs from public lands and recording activities occurring at the port of entry; they were then detained and their photographs were destroyed.¹⁹ The Ninth Circuit held that the First Amendment’s scope of protection included the right to record law enforcement officers engaged in the exercise of their official duties in public places.²⁰

The majority of other Circuit Courts of Appeal who have considered the issue have endorsed or adopted the same position as the Ninth Circuit, including the First Circuit²¹, Third Circuit²², Seventh Circuit²³, and Eleventh Circuit.²⁴ And, although the Supreme Court has not expressly considered the issue, recent Supreme Court jurisprudence espouses similar logic as adopted by the majority view.²⁵

B. Minority View: Recording is Conduct

Although the modern trend and the majority of jurisdictions including the Ninth Circuit see filming as speech protected under the First Amendment, a few courts outside California have recognized the argument that the act of taping or video recording amounts to

¹⁷ *Ibid.*; *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (reversing summary judgment in suit involving arrest of citizen filming public protest march, as there was a “First Amendment right to film matters of public interest”); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010) (determining that the tattooing *process* is purely expressive activity protected by the First Amendment).

¹⁸ *Askins v. U.S. Department of Homeland Security*, 899 F.3d 1035, 1044 (9th Cir. 2018).

¹⁹ *Id.* at 1045.

²⁰ *Id.* at 1044.

²¹ *Glik v. Cunniffe*, 655 F.3d 78, 79–81 (1st Cir. 2011) (Holding that there exists a constitutionally protected right to videotape police officers in public and stating that “[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’”).

²² *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3rd Cir. 2017) (“Recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public.”).

²³ *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech.”).

²⁴ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”).

²⁵ See *Citizens United v. Federal Election Com’n*, 558 U.S. 310, 336 (2010) (iterating that various laws enacted to control or suppress speech may “operate at different points in the speech process,” but are all still nevertheless invalid, including laws impounding proceeds on receipts or royalties, requiring costs after speech occurs, or requiring a permit at the outset).

mere conduct and lacks the “expressive” attribute necessary to fall under the First Amendment’s protective umbrella.

For example, in *D’Amario v. Providence Civic Ctr. Auth.* the District Court for Rhode Island dismissed a complaint by a freelance commercial photojournalist who was prohibited from taking photos at a concert hosted at a public civic center, finding that their First Amendment rights were not directly implicated because recording “does not partake of the attributes of expression; it is conduct, pure and simple.”²⁶ And, an older decision in the Third Circuit specifically found that a prohibition on members of the public from videotaping public meetings was permissible where spectators were allowed to take physical notes and other forms of audio recording, as a ban on filming does not directly implicate the First Amendment where alternate forms of recording the public proceedings were permitted.²⁷ And, finally, a somewhat more recent decision by the District Court in New Jersey recognized the existence of the argument that the act of photographing, in the abstract, is not sufficiently expressive and therefore not within the scope of First Amendment protection even when the subject of the photography is a public servant, but ultimately the Court declined to rule on the issue.²⁸

Notwithstanding the existence of limited authority to the contrary, practitioners are advised that most (if not all) courts, including the Ninth Circuit, will likely continue to find that video recording is a form of expression entitled to protection under the First Amendment.

III. Regulating Speech on Government Premises

In assessing municipal regulations and policies under the First Amendment it is essential to understand the First Amendment jurisprudence at play. In order to assess the scope of the First Amendment’s limitation on governmental authority,²⁹ it requires an examination of the forum classification doctrine that the Supreme Court has created for reviewing regulations of expressive conduct in a public space.³⁰

The forum classification doctrine is a system of categorizing spaces, and then determining the rules accorded to the specified category. Forum classification is crucial because the level of scrutiny and the leeway afforded to the government differ based upon the type of forum being regulated.³¹ Thus, the classification of the forum at issue is key to

²⁶ *D’Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1544 (D.R.I. 1986), aff’d, 815 F.2d 692 (1st Cir. 1987).

²⁷ *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 182 (3d Cir. 1999) (Recording of planning commission meeting was not an “expressive” activity fall under First Amendment protection; rather, “the alleged constitutional violation consisted of a restriction on [Plaintiff’s] right to receive and record information”, which instead was a restriction on a right of access).

²⁸ *Pomykacz v. Borough of W. Wildwood*, 438 F. Supp. 2d 504, 513 (D.N.J. 2006).

²⁹ *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

³⁰ See e.g., *Askins v. U.S. Department of Homeland Security*, 899 F.3d 1035, 1044 (9th Cir. 2018) (employing forum classification system to review government’s restrictions on individuals’ right to take photographs in a public space).

³¹ *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); see also *PMG Int’l Div., LLC v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002); *Hopper v. City of Pasco*, 241

assessing the likelihood that a municipality’s limitation on a person’s right to record in a public space can withstand a First Amendment challenge.

A. Types of Fora

Courts first examine whether a public forum is at issue. A traditional public forum is a place such as a park, public street or sidewalk, where people have traditionally been able to express ideas and opinions in public to the public. Even if a forum is not a traditional public forum, the courts next look to whether the government has opened a nonpublic forum to expressive activity and if so whether it has done so in a manner to create a designated public forum or a limited public forum. The terms under which these fora may constitutionally operate differ significantly, meaning that forum classification may be the deciding factor as to whether the government’s restrictions on a forum survive scrutiny under the First Amendment.

A designated public forum is created when the government intentionally opens (or “designates”) non-traditional areas for First Amendment activity pursuant to policy or practice.³² Examples of situations where courts have found a designated public forum include: state university meeting facilities where the university has an express policy of opening the facilities to registered student groups; school board meetings where the state statute provides for open meetings; a municipal auditorium and a city-leased theater where the city dedicates the property to expressive activity; and the interior of a city hall where the city opens the building to display art and does not consistently enforce any restrictions.³³

When the government opens a nonpublic forum for expressive activity, instead of creating a designated public forum, it may instead create a limited public forum. To establish a limited public forum when the government opens a nonpublic forum to First Amendment activity, it must have a clear and evenhandedly enforced policy that states the restrictions on the forum such as limiting it to certain activities or topics.³⁴ Examples of situations where courts have found a limited public forum include: public library meeting rooms where policy limits it to certain uses, and public school property where policy limits use to particular groups.³⁵ The government is not required to indefinitely keep a designated public forum or a limited public forum open, but so long as it remains open, the forum must comply with the requisite standards for its classification.³⁶ In short, with a limited public forum the government deliberately opens the forum only for limited uses and topics with clear written limitations. Finally, in certain limited circumstances, government-owned and controlled

F.3d 1067, 1076 (9th Cir. 2001).

³² See *Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788, 800, 803 (1985); *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45-46 (1983).

³³ *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Joint Sch. Dist. v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 174 (1976); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 555 (1975); *Hopper*, 241 F.3d at 1075-6.

³⁴ *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1049 (9th Cir. 2003).

³⁵ *Faith Center Church v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007) (abrogated on other grounds by *Winter v. Natural Res. Def. Coun.*, 129 S.Ct. 365 (2008)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102, 106 (2001); *Arizona Life Coalition v. Paisley*, 515 F.3d 956, 969 (9th Cir. 2008).

³⁶ *Perry*, 460 U.S. at 46.

property falls outside the scope of the Free Speech Clause and the forum classification doctrine. These are instances where the government has not opened a forum to general discourse, but rather, engages in its own speech—government speech—wherein it is entitled to “speak for itself” and “select the views it wants to express.”³⁷ Examples of government speech include city’s acceptance of privately funded monument for its public park³⁸ and a state’s specialty license plates program.³⁹

B. Standard Of Review

The classification of the forum can be pivotal in determining whether government policies or regulations pass constitutional muster. This is because in a traditional public forum and a designated public forum restrictions are subject to an exacting review standard—strict scrutiny—where content-based restrictions are constitutional only if they are the least restrictive means for achieving a compelling government interest.⁴⁰ Content-neutral restrictions in a traditional public forum and a designated public forum are subject to the time, place, and manner standard where they must be narrowly tailored to serve a significant government interest and must leave open ample alternatives for communication.⁴¹ Thus, in these two fora, First Amendment activities generally may not be prohibited. By contrast, in a nonpublic forum or limited public forum, the government is given more leeway and its regulations need only be reasonable and viewpoint neutral to pass constitutional muster.⁴² Only viewpoint neutrality—not content-neutrality—is required for regulations of a nonpublic or limited public forum.⁴³ For a regulation to be content-neutral the government must not make any distinctions based on the topic of the speech. By contrast, viewpoint neutrality allows the government to distinguish based on the topic but it may not favor one view over another view on the same topic such as allowing speech in favor of government policies but prohibiting speech that is critical of government policies.

Given the different standards of review, it is crucial to determine whether a non-traditional public forum that has been opened to expressive activity is operating as a designated public forum or a limited public forum. In making this classification, courts typically examine the terms on which the forum operates,⁴⁴ critically examining the actions and policies of affiliated government actors.

The more consistently enforced and selective restrictions are, the more likely the forum will be deemed a limited public forum.⁴⁵ By contrast, where restrictions are not

³⁷ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009).

³⁸ *Id.*

³⁹ *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–2246 (2015).

⁴⁰ *Perry*, 460 U.S. at 46; *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

⁴¹ *Perry*, 460 U.S. at 46.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Hopper*, 241 F.3d at 1074–75.

⁴⁵ *Id.* at 1076–78; *Cornelius*, 473 U.S. at 804–05; see also *Perry*, 460 U.S. at 47; *Lehman v. Shaker Heights*, 418 U.S. 298, 302–04 (1974); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

enforced, or if exceptions are haphazardly permitted, the forum is more likely to be deemed a designated public forum.⁴⁶

A table summarizing the standard of review for evaluating government restrictions on First Amendment activity within different types of fora is presented below.

Forum Classification	Standard of Review
Traditional or Designated public forum	<ol style="list-style-type: none"> 1. Viewpoint based restrictions are prohibited. 2. Content-based restrictions are subject to strict scrutiny. The government must show that the regulation is necessary to serve a compelling government interest and narrowly tailored. 3. Restrictions on the time, place, and manner of speech are permissible, so long as these restrictions are (i) content-neutral, (ii) narrowly tailored to serve a significant government interest, and (iii) leave open ample alternative channels of communications.
Limited or Non-public forum	<ol style="list-style-type: none"> 1. Viewpoint based restrictions are prohibited. 2. Restrictions on protected speech or expression are permissible so long as they are (i) viewpoint neutral, and (ii) reasonable in light of the purpose served by the forum.

C. Reviewing and Classifying Public Property

On a practical level, conducting a review of the public property managed by a municipality under the federal court’s classification doctrine may seem a confusing task to local officials, particularly since a municipality may have a variety of property interests and responsibilities; these interests may comprise different forms of property management activities, including where the municipality leases office suites from private landlords or possesses lesser forms of property interests.

Nevertheless, some pragmatic guidance is offered to assist in the performance of this review: first, municipalities should consider that they may have defined what “Public Property” consists of under its own Municipal Code, which should therefore be initially consulted. Second, for those areas under the municipality’s control, the entity should review what oversight authority the entity has, including the power to create rules of conduct. Finally, in classifying public property, the municipality should start the inquiry by looking to whether the space has been opened up to the public at large and/or has a history of being used for expressive kinds of activity. The factual history as to how the property has been used over the years will be highly relevant to the assessment, as well as any existing written policies, as courts have found both written policies and historical practices as relevant in

⁴⁶ *Hills*, 329 F.3d at 1049.

discerning a locality's intent as to whether it opened up a space for public expression.⁴⁷ In such an assessment, common sense should not be left at the door; simply because a municipality may permit a member of the public to have a meeting with public employees within an office or behind a planning counter does not constitute "opening up" a space to public expression.⁴⁸

For example, even though spaces such as City Hall and government offices may be publicly accessible, that alone does not automatically render it a public forum under First Amendment jurisprudence.⁴⁹ Rather, if a municipality controls buildings "operated[] for the purpose of conducting the business of the... municipal[ity]" and there is also "no suggestion that the [building] has been 'opened for use by the public as a place for expressive activity' ", then access alone by the public does not necessarily render the location a public forum or a limited public forum.⁵⁰

When moving forward to characterize different locales and buildings, consider whether a government entity would be required to allow traditional speech in the location; for example, could protestors gather in an employee's office and demonstrate? This should provide a useful rule of thumb when starting a review of properties under a municipality's control.

D. Related Issues to Regulating First Amendment Auditor Activity

Aside from the forum classification analysis, other related issues regularly arise and are implicated when considering the nature and extent a municipality may limit First Amendment auditor activity on its property. These include (1) the ability to prevent or control "loitering" on government property, (2) the rights of other private citizens on government property who are being recorded and who are attempting to conduct business that may be more "private" in nature, and (3) "sensitive" locations on government property. These issues are briefly addressed below.

1. Loitering

A similar line of regulations that attempt to prevent "loitering" have already been subject to extensive judicial review and therefore provide elucidation as to the ability of municipalities to regulate auditor conduct on similar grounds, *i.e.*, whether it is permissible to preclude an auditor from sitting around in various public settings and filming individuals. Although helpful, this line of cases tend to demonstrate the difficulties with controlling such

⁴⁷ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (examining government practices and policies to determine government charity drive is not a public forum).

⁴⁸ *Id.*, 473 U.S. at 805–806 (emphasizing the importance of allowing the government "wide discretion" in controlling its work space and refusing to find that rules permitting limited expression as opening up the space); *see also Helms v. Zubaty*, 495 F.3d 252, 257 (6th Cir. 2007) (county's "open-door policy" was not evidence to create a public forum for expressive activity in the reception area outside of county offices).

⁴⁹ *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 966 (9th Cir. 2002) (abrogated on other grounds).

⁵⁰ *Id.*

activity because filming or photographing falls more squarely within the protections of the First Amendment.

“Loitering” is typically defined as staying in one location without an intended purpose. The seminal case on this issue is the Supreme Court’s decision in *City of Chicago v. Morales*.⁵¹ There, several individuals were charged with violating Chicago’s gang loitering ordinance, which required a police officer, when observing a person whom he reasonably believed to be a gang member loitering in a public place with more than one persons, to order them to disperse. Despite the somewhat targeted nature of the ordinance, the Supreme Court struck down the statute under the “vagueness” doctrine, explaining that the term “loiter” as used in the ordinance—“to remain in any one place with no apparent purpose”—was unconstitutionally vague.⁵² As the Court explained, this is because it is difficult to imagine how any citizen of the City of Chicago standing in a public place with a group of people would know if he or she had an “apparent purpose”.⁵³

The *City of Chicago* decision demonstrates the inherent difficulties when attempting to regulate auditor activity via loitering: if a regulation attempts to preclude “loitering”, it may fail due to the difficulties in defining the conduct.

2. Private Citizens on Public Property

Another issue arises when other private citizens, conducting business on government property, feel uncomfortable when being videotaped by others. Such persons may resort to asking government employees to intervene, or desist from coming onto public property altogether.

Such problems are not easily resolved as, generally speaking, it is legal to video record a private citizen so long as they do not have a reasonable expectation of privacy.⁵⁴ Persons in public places are typically found not to possess such a reasonable expectation from being video recorded.⁵⁵ However, assessment of the factual setting is critical here as visiting a mental health or a juvenile probation facility may indeed carry with it an expectation of privacy.

3. Sensitive Government Locations

Another topic worth clarification concerns “sensitive” areas of government buildings that a municipality may wish to allow the public some form of limited access.

⁵¹ 527 U.S. 41 (1999).

⁵² *Id.* at 42.

⁵³ *Id.*

⁵⁴ For example, under California’s Constitution which provides an inalienable right to privacy to individuals (Cal. Const. Art. 1, § 1), the right only protects an individual’s “reasonable” expectation of privacy. *Ibarra v. Superior Court* (App. 2 Dist. 2013) 158 Cal.Rptr.3d 751.

⁵⁵ See, e.g., *Vo v. City of Garden Grove* (App. 4 Dist. 2004) 9 Cal.Rptr.3d 257 (City ordinance requiring CyberCafe owners to maintain video surveillance did not violate privacy rights where, among other things, customers had no reasonable expectation of privacy in light of wide use of surveillance equipment in public places).

With respect to barring or restricting access, the Supreme Court has unequivocally recognized that municipalities may of course wholly prevent any public right of access to certain locations or areas, because similar to a private owner of property, the government also has the power “to preserve the property under its control for the use to which it is lawfully dedicated.”⁵⁶ Although not dependent on having a characteristic relating to public safety, classical examples of such property over which the government can fully restrict access to include critical infrastructure such as water storage facilities, electric plants, airports, and public utilities.

With respect to limited access, the forum classification doctrine discussed above for potentially “sensitive” locations would apply. The government should therefore consider if it wants to clearly define and mark which areas are public priority and which are off limits to members of the public.

IV. Example Existing Regulations

Several localities have adopted ordinances that are specifically designed to address First Amendment auditor and similar activity. These ordinances and other practical considerations are discussed below.

A. City of Portland’s Regulations—PCC § 3.18.020.

Prior to 2017 the City of Portland experienced an upward trend of public frustration against government officials, with these angry outbursts frequently occurring in city office buildings. The Portland City Council accordingly determined that there was a need to codify a set of rules of conduct which would inform the visitors on city property about the expectations and acceptable behavior permitted. Thus, in 2017 Portland passed PCC section 3.18.020 to address the increasingly disruptive behavior.

Portland’s “Rules of Conduct” as codified under PCC section 3.18.020 are designed to apply to the nonpublic forums generally on city property and attempt to expressly regulate behavior and conduct rather than speech or other expressive activities. Key to the City’s ordinance was first differentiating between areas designated for or allowing public expression versus areas which do not allow as such. From there, the City adopts viewpoint neutral ordinances aimed at regulating conduct. For example, subsection (B)(4) states that:

No person shall engage in activity that disrupts or interferes with: the normal operation or administration of City business at City Property; lawful use by City employees and authorized users at City Property; or City permitted activities.

Similarly, subsection (B)(3) prevents access by persons to “secured areas” of the public, which are defined as those areas closed off to the public and further defined elsewhere in the ordinance. And Portland’s ordinance empowers its employees who are designated as a “Person-in-Charge” of the city property to give reasonable directions—defined as being otherwise reasonably related to the protection of the health, welfare, or safety of persons, or

⁵⁶ *Perry*, 460 U.S. at 46.

prevention of damage to property, or to preserve the peace or prevent the disruption of City operations—to persons on city property.⁵⁷

The focus of these rules was to ensure the non-disruption or non-interference of the City’s business needs, while simultaneously empowering designated personnel within the City to manage and challenge misbehavior. Thus, employees would know which persons they should call or seek help from when confronted by individuals who might be disrupting city functions, such as overly provocative auditors.

B. Municipal Association of South Carolina’s Model Policy

The Municipal Association of South Carolina (“MASC”) has also promulgated a limited model policy expressly designed to address public access to, and video and audio record on, municipal properties.⁵⁸ This policy, like the Portland ordinance, defines and creates different areas on the property open to public, including “limited access areas” which are generally not open to nor occupied by the public. Included within such a definition are employee offices and employee workspaces.

And, like the Portland ordinance, MASC’s model policy also is designed to try to differentiate between “conduct” rather than activities that are more squarely considered expression. For example, the model policy prohibits the disruption or interference with the normal operation or administration of municipal business, or the obstruction or blocking of rights of way, and the municipality is empowered to create minimum standing or separation areas in order to prevent the recording of private, personal, confidential, or sensitive information.

Of note, neither of these policies have been subject to a legal challenge; however, both jurisdictions report that the policies have been effective in regulating auditors within their communities.

V. Practice Pointers When Confronted by a First Amendment Auditor.

In drafting or analyzing the legal adequacy of a filming or photographic ordinance (or one regulating activities frequently observed in First Amendment audits, including speech and provocation), attorneys should begin with the assumption that this activity implicates the full protection of the First Amendment. From there, the analysis should focus on the forum being regulated. If the forum is a public one (as it will be in the majority of situations), the critical point is to tailor the ordinance to the specific conduct and government interest(s) the regulation is addressing. For a public forum, municipalities will also need to draft content-neutral regulations except in the rare instances where the regulation is supported by a compelling governmental interest.

While not exhaustive, the following is a list of tips a practitioner should consider for assessing the legal soundness of a First Amendment auditor or similar regulation concerning the filming or videotaping of persons on government property (and similar activities, such as

⁵⁷ PCC § 3.18.020(b)(5).

⁵⁸ The Model Policy is accessible at: <https://www.masc.sc/policy-regarding-public-access-and-video-and-audio-recording-municipality-property>.

confronting a municipal employee), as well as advice on instructing public employees on the appropriate manner of behavior:

1. Consider creating guidelines for the government's property to establish the nature of the public forum involved. In other words, define what areas are open to the general public versus areas only open to employees, like personal offices, workstations, waiting rooms, secure locations, and so on.
2. Consider adopting guidelines for conduct that regulate only "time, place, and manner"—and not the content.
3. Craft the guidelines to address and protect cognizable and practical interests the municipality wants to protect—for example, preventing interference with the ability to do the public's work, or protecting against the invasion of privacy rights protected by law, like minors or health care.
4. Ensure that the guidelines call out the nature of the public property in a way that is visible or accessible to both the public and municipal personnel.
5. Ensure that employees are educated in the guidelines.
6. Ensure that the rules in the guidelines are applied in an even-handed manner and are not only employed against specific persons or speech.
7. Provide contact information to municipal personnel to ensure they know who to contact when situations develop.

In addition, municipalities should endeavor to ensure that employees specifically are trained in the following to facilitate a constructive or even positive encounter with First Amendment auditors:

- (a) Employees should know the general legal authority and understand what conduct is or is not generally permissible.
- (b) Employees should endeavor to stay calm and rational during an audit.
- (c) Employees should deflect or defuse inflammatory statements and not get angry.
- (d) If regulations apply to specific behavior or to the forum that a person is in, employees should clearly articulate them and direct the person to the rules.
- (e) Employees should always assume an audit video will end up on YouTube or other social media platforms.
- (f) Employees should have information on-hand to reach local counsel should the need arise.

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(MCLE Specialty Credit for Competence Issues)

Impaired Colleague? Addressing Attorney Competency, the Warning Signs, and Getting Help

Friday, May 19, 2023

Lita Abella, Sr. Program Analyst, Office of Professional Competence,
Lawyer Assistance Program, The State Bar of California

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2023 Annual City Attorney's Spring Conference

The attached document was submitted by Lita Abella, The State Bar of California, Lawyer Assistance Program and is Formal Opinion No. 2021-206 prepared by The State Bar of California Standing Committee on Professional Responsibility and Conduct (COPRAC).

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2021-206**

ISSUES: What ethical obligations does a lawyer have when the lawyer or a lawyer in that lawyer’s law firm has violated, is violating, or will violate California’s Rules of Professional Conduct or the State Bar Act in the course of representing a client as a result of the lawyer’s possible mental impairment.

DIGEST: This opinion addresses mental impairments that impede a lawyer’s fitness to competently and diligently engage in the practice of law in accordance with the rules and State Bar Act. A lawyer’s impairment does not excuse that lawyer’s compliance with the rules and the State Bar Act. An impaired lawyer’s conduct can also trigger obligations for the impaired lawyer’s subordinates, supervisors and other colleagues who know of the impaired lawyer’s conduct. These ethical obligations may include, but are not limited to, communicating significant developments related to the lawyer’s conduct to the client and promptly taking reasonable remedial action to prevent or mitigate any adverse consequences resulting from an impaired lawyer’s actions. The required scope of each lawyer’s action depends on the nature of the client’s representation, the severity of the impaired lawyer’s unethical conduct, whether the client has been harmed or will be harmed by the impaired lawyer’s conduct, the nature of the lawyer’s impairment, the size of the law firm and the resources available, and each lawyer’s position within the firm.

AUHORITIES

INTERPRETED: Rules 1.1, 1.2, 1.3, 1.4, 1.4.1, 1.6, 1.7, 1.10, 1.16, 5.1, 5.2 and 8.4 of the Rules of Professional Conduct of the State Bar of California.¹

Business and Professions Code sections 6068, subdivisions (e)(1) and (n), and 6103.5, subdivision (a).

STATEMENT OF FACTS

Impaired Lawyer is a senior partner and successful trial lawyer, who is a rainmaker for the law firm. Impaired Lawyer is the lead counsel on a litigation matter for Impaired Lawyer’s longtime

¹ Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

Client. Litigation has been ongoing in Client's matter for more than two years and trial is scheduled to begin in 150 days. Impaired Lawyer has been the primary point of contact with Client and is expected to try the case if it proceeds to trial.

Subordinate Lawyer is a fifth-year associate assigned to assist with Client's matter and has been a part of Client's litigation team since the inception of the case. Thus far, Subordinate Lawyer has only communicated with Client on a limited basis.

Over the last several months, Subordinate Lawyer has observed significant changes in Impaired Lawyer's behavior and has become concerned about Impaired Lawyer's ability to competently and diligently represent Client. Impaired Lawyer has often appeared confused concerning Client's matter, has missed client meetings without explanation, has failed to promptly respond to Client inquiries, and, when responding to such inquiries, has discussed facts and strategies that obviously do not apply to Client's matter. Impaired Lawyer did not recognize these problems and was argumentative with Client when Client raised them.

At a recent hearing on the opposing party's motion for summary judgment ("MSJ"), Impaired Lawyer attempted to argue against the motion on Client's behalf, but appeared frazzled and confused, citing facts and law to the court that were not applicable to Client's matter. Recognizing the problem, the court allowed Subordinate Lawyer, who had drafted the opposition brief, to step in and argue Client's position. Opposing party's MSJ was ultimately denied. After the denial, opposing counsel communicated a written settlement offer to Impaired Lawyer. Impaired Lawyer ignored the offer and failed to communicate the offer to Client. Subordinate Lawyer recently learned of the offer through a follow-up letter from opposing counsel, which mentioned that no response was received from Impaired Lawyer by the deadline provided, so the offer had expired.

Thereafter, Subordinate Lawyer raised ethical concerns about Impaired Lawyer's conduct directly with Impaired Lawyer. Subordinate Lawyer said that Impaired Lawyer's recent conduct demonstrated that Impaired Lawyer is no longer competent to handle the role of lead counsel for Client and that continuing to do so would violate the duties of competence and diligence owed to Client. Subordinate Lawyer also said that Impaired Lawyer's failure to communicate with Client, both about the settlement offer and the lawyer's own impairment, violated the duty to communicate with Client. Subordinate Lawyer expressed concern that continuing the representation without addressing those ethical issues would result in harm to Client.

In response, Impaired Lawyer denied having any problems, mentioning only that Impaired Lawyer was currently handling a large case load and dealing with a contentious divorce. Impaired Lawyer insisted that no mistakes had been made on Client's matter and that no staffing changes were necessary to ensure competent representation of Client. Impaired Lawyer denied that any ethical violations had occurred, and admonished Subordinate Lawyer for suggesting otherwise. Impaired Lawyer further instructed Subordinate Lawyer not to raise any concerns with Client, since doing so could cause Client to lose confidence in the firm's

representation, potentially resulting in financial and reputational harm to Impaired Lawyer and the firm.

Scenario #1: Impaired Lawyer and Subordinate Lawyer are employed at Big Firm, an 850-lawyer international law firm. Big Firm has both an executive committee and a risk management committee.

Scenario #2: Impaired Lawyer and Subordinate Lawyer work in Impaired Lawyer's small firm, where Subordinate Lawyer is Impaired Lawyer's only employee.

DISCUSSION

This opinion addresses mental impairments that impede a lawyer's fitness to competently and diligently engage in the practice of law in accordance with the rules and State Bar Act.² Mental impairment can be temporary or permanent and can vary in severity. It can result from a disease or illness that impacts mental faculties, such as mental illness, depression, anxiety or dementia; stress; lack of sleep; alcoholism;³ problematic substance use; or traumatic life events.⁴ A mental impairment, standing alone, does not raise ethical issues. "It is not the impairment that concerns the regulation and disciplinary system but only the effect, if any, on the lawyer's fitness and ability to practice law."⁵ The Committee recognizes that there could be some tension between a lawyer's ethical obligations under the rules and the State Bar Act, and substantive law regarding employment, disability and privacy, among other legal rights. This

² Lawyers are not immune from normal and short-term variations in efficiency, moods, energy, confidence, and decision-making that are common in everyday life. General low points within such normal fluctuations likely do not constitute a form of impairment within the meaning of this opinion, so long as a client's interests are not threatened. See ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation Study (2016); National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practice Recommendations for Positive Change* (August 2017).

³ ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys* (2016) ("Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations.").

⁴ See American Bar Association ("ABA") Formal Opinion No. 03-429 (June 11, 2003), fn. 2, for discussion of mental impairments that affect lawyers; ABA Formal Opn. No. 03-431 (August 8, 2003) at 1; D.C. Bar Ethics Opn. No. 377 (2019) at 1; see also Virginia State Bar Legal Ethics Opn. 1886 (December 15, 2016) at p. 2 and authorities cited at fns. 4-6; ABA/Bloomberg, *Lawyers' Manual of Professional Conduct* (2020) 101:3301 Practice Guides, *Misconduct and Discipline, Disciplinary Process, Impairment* at p. 1.

⁵ ABA/Bloomberg, *Lawyers Manual of Professional Conduct* (2020) 101:3301 Practice Guides, *Misconduct and Discipline, Disciplinary Process, Impairment* at p. 1.

opinion is limited to addressing ethical obligations, but lawyers and law firms should be aware of other laws that may apply to these difficult situations.

A. Responsibilities of the Impaired Lawyer

A lawyer's impairment does not excuse the lawyer from complying with the rules and the State Bar Act. An impaired lawyer has the same ethical obligations as other lawyers. ABA Formal Opn. No. 03-429 at p. 2; Virginia State Bar Legal Ethics Opn. 1886 (2016) at p. 3. "Simply stated, mental impairment does not lessen a lawyer's obligation to provide competent and ethical representation." ABA Formal Opn. No. 03-429 at p. 2. A lawyer's mental impairment may, however, prevent or inhibit a lawyer from recognizing and/or appreciating the existence or extent of the impairment and its effect on the lawyer's performance of legal services. *Id.* at p. 3 (citing Bailley, *Impairment, The Profession and Your Law Partner* (1999) 11 No. 1 Prof. Law. 2 at p. 2).

1. Competence and Diligence

A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence or diligence.⁶ Rule 1.1(a). "Competence" means to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of the service in question. Rule 1.1(b).⁷ Rule 1.0.1(h) defines "reasonably" when used in relation to conduct by a lawyer as the conduct of a reasonably prudent and competent lawyer. Competence specifically includes both mental and emotional components. Rule 1.1(a)(ii). "Thus, if Attorney's mental or emotional state prevents her from performing an objective evaluation of her client's legal position, providing unbiased advice to her client, or performing her legal representation according to her client's directions, then Attorney would violate the duty of competence." Cal. State Bar Formal Opn. No. 2003-162 at p. 3 (citing *Blanton v. Womancare* (1985) 38 Cal.3d 396, 407-408 [212 Cal.Rptr. 151]; *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765 [232 Cal.Rptr. 250]; Cal. State Bar Formal Opn. No. 1984-77; and Los Angeles County Bar Assn. Formal Opn. No. 504 (2001)). A lawyer is also obligated to perform legal services with "reasonable diligence," meaning that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer. Rule 1.3(b).

⁶ Specific intent is not required to find a violation of rule 1.1; "[o]nly a general purpose or willingness to commit the act or permit the omission is necessary." *King v. State Bar* (1990) 52 Cal.3d 307, 313 [276 Cal.Rptr. 176] (decided under former rule); *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 178 (decided under former rule 3-110).

⁷ ABA Model Rule 1.3, Comment [5], which was not adopted by California, states that attorney competence includes anticipating events or circumstances that may adversely affect client representation. By planning ahead for the orderly disposition of his or her law practice, an attorney can ensure that clients will continue to be represented without significant interruption in the event the attorney dies or becomes incapacitated.

Here, Impaired Lawyer’s proposed course of conduct involves, at a minimum, reckless, grossly negligent or repetitive violations of the duties of competence and diligence. (See rule 1.3(a).) Impaired Lawyer has recently failed to perform competently both in court and in dealings with the client. Moreover, Impaired Lawyer has been unable to recognize any misconduct, or any possibility that it might call for a change in the staffing or organization of the case. While bristling at the suggestion that something is wrong, Impaired Lawyer has implied that a contentious divorce and a heavy case load are to blame for any potential issues in Impaired Lawyer’s performance.⁸ Whether the lawyer’s performance is due to impairment or personal problems, however, it does not excuse failing to meet obligations to the client.⁹

2. Communication with the Client

Competent representation includes the lawyer’s obligation to communicate with the client. *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782 [1 Cal.Rptr.2d 684]; *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 491. Rule 1.4(a)(1) requires lawyers to promptly inform the client of any decision or circumstance with respect to which disclosure and the client’s informed consent is required by the rules or the State Bar Act. Rule 1.4(a)(2) further requires that a lawyer reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation. A lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the client’s representation. Rule 1.4(b); see also *Lysick v. Walcolm* (1968) 258 Cal.App.2d 136 [65 Cal.Rptr. 406] [A lawyer must disclose all facts and circumstances necessary to enable the client to make free and intelligent decisions regarding the subject matter of the representation.].

Rule 1.4(a)(3) and Business and Professions Code section 6068(m) require lawyers to keep their clients reasonably informed about significant developments relating to the representation, which includes promptly complying with reasonable requests for information and providing

⁸ A heavy caseload does not generally excuse or mitigate an attorney’s failure to perform diligently and competently. *Blair v. State Bar* (1989) 49 Cal.3d 762, 780 [263 Cal.Rptr. 641]; *Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101 [245 Cal.Rptr.628] [“[O]ffice workload and scheduling problems do not generally serve to substantially mitigate misconduct.”]; see also ABA Model Rule 1.3, Comment [2] [“A lawyer’s workload must be controlled so that each matter can be handled competently.”].

⁹ “[E]ven in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his clients’ interests.” *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [213 Cal.Rptr. 236]; *Gary v. State Bar* (1988) 44 Cal.3d 820, 824 [244 Cal.Rptr. 482] – alcohol problem; *Snyder v. State Bar* (1976) 18 Cal.3d 286, 293 [133 Cal.Rptr. 864] – mental and emotional strain. However, serious personal problems, including marital difficulties or financial pressures, can interfere with the attorney’s performance of his or her professional responsibilities and result in a violation of the lawyer’s duty of competence under rule 1.1, and could mandate withdrawal under rule 1.16(a)(3). Tuft et. al, *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2019) Ch. 6-A Sources Duty of Competence.

copies of significant documents when necessary to keep the client so informed.¹⁰ Rule 1.4(a)(3). What constitutes a “significant development” depends on the purpose of the representation, the sophistication of the client, client expectations, and other relevant factors. Rule 1.4, Comment [1].

Rule 1.4.1 and Business and Professions Code section 6103.5 both require a lawyer to promptly communicate to the client all amounts, terms, and conditions of any written offer of settlement made to the client. Further, an error potentially giving rise to a legal malpractice claim, which could include the failure to communicate a settlement offer to client, is a significant development and creates a conflict relating to the representation that must be communicated. Rule 1.4(a)(3); see also Cal. State Bar Formal Opn. No. 2019-197 (discussing duty to communicate a lawyer’s error).

Here, Impaired Lawyer has failed to communicate the opposing party’s written settlement offer to Client before it expired in violation of rules 1.4(a)(2) and 1.4.1(a)(2), and Business and Professions Code section 6103.5(a), and continues to refuse to do so. The facts also demonstrate a pattern of conduct in which Impaired Lawyer has repeatedly ignored Client’s reasonable requests for information in violation of rule 1.4(a)(3). Finally, Impaired Lawyer has barred any communication with Client about Impaired Lawyer’s own ability to continue to represent Client effectively, even though that issue would clearly be significant to Client. These ongoing violations may cause harm to Client. However, Impaired Lawyer does not acknowledge these mistakes, let alone appreciate their potential impact on Client and Client’s matter.

3. Personal Interest Conflict

“A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk that lawyer’s representation of the client will be materially limited by . . . the lawyer’s own interests.” Rule 1.7(b). A conflict under rule 1.7(b) may only be waived by informed written consent of the client if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; [and] the representation is not prohibited by law” Rule 1.7(d)(1)-(2).

An impaired lawyer’s personal interest conflict, if one exists, does not always prohibit the representation of the client by other lawyers of the firm. The personal interest conflict is not imputed to other lawyers of the firm unless the conflict presents a significant risk of materially limiting the representation of the client by the other firm lawyers. Rule 1.10(a)(1).

¹⁰ Failure to communicate with a client regarding important matters is grounds for State Bar discipline. *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 127 [202 Cal.Rptr. 349]; *Spindell v. State Bar* (1975) 13 Cal.3d 253, 260 [118 Cal.Rptr. 480].

Here, Impaired Lawyer has ordered Subordinate Lawyer not to communicate with Client concerning the issues that Subordinate Lawyer has identified because Impaired Lawyer did not want to risk the economic harm that would result were Client to terminate the firm. As discussed above, these issues include violations of several rules of professional conduct, such as the duty to communicate with the client and the duty to render competent and diligent representation. Impaired Lawyer's decision to place Impaired Lawyer's personal, economic, and reputational interests ahead of Client's interest to receive competent and ethical representation reflects an impermissible conflict of interest, because there is a significant risk that the representation of Client will be materially limited. Because this conflict has not been disclosed in writing and client consent has not been sought, continued representation is not permissible under rule 1.7(b).¹¹

Other lawyers in the impaired lawyer's law firm are not necessarily prohibited from representing the Client provided the Impaired Lawyer's conflict does not present a significant risk of materially limiting their representation. Rule 1.10(a)(1). While analysis of this issue is fact dependent, the Impaired Lawyer's personal interest conflict may be imputed to other lawyers in the firm if their interests in avoiding malpractice liability,¹² a fee dispute with the Client, or reputational harm would prevent them from being able to adequately communicate with the Client regarding the Impaired Lawyer's prior misconduct, or otherwise present a significant risk of materially limiting their representation of the Client. Similarly, imputation may be appropriate where the other lawyers prefer to hide the Impaired Lawyer's prior misconduct as a result of their relationship with the Impaired Lawyer and their desire to obtain future client referrals and business from the Impaired Lawyer.

4. Termination of Representation

A lawyer shall not continue to represent a client if the lawyer: (1) "knows or reasonably should know" that the lawyer's actions during the representation of a client *will* result in violation the rules or the State Bar Act (rule 1.16(a)(2)); and/or (2) "the lawyer's mental or physical condition renders it *unreasonably difficult* to carry out the representation effectively." (Rule 1.16(a)(3), italics added.) Under either of these circumstances, the lawyer must withdraw from representing the client in accordance with rule 1.16(a). A lawyer may, but is not required to, withdraw from representing a client if the lawyer: (1) believes "the continuation of the representation is *likely* to result in a violation of [the rules] or the State Bar Act" (rule 1.16(b)(9)); and/or (2) "the lawyer's mental condition renders it *difficult* for the lawyer to carry out the representation effectively" (rule 1.16(b)(8)). (Italics added.) Thus, in situations where a lawyer has a mental condition that actually or potentially impairs the provision of legal services,

¹¹ Under the facts presented in this opinion, consent to this conflict may not be permissible under rule 1.7(d)(1) or (d)(2).

¹² See Cal. State Bar Formal Opn. 2019-197 at pp. 3-4 (addressing duty to disclose the material facts potentially giving rise to any legal malpractice claim against the attorney).

the distinction between mandatory and permissive withdrawal is whether the impaired lawyer *will* or is *likely* to violate the rules or the State Bar Act,¹³ as well as the degree of difficulty the lawyer faces in continuing the representation.¹⁴

Here, under rule 1.16(a)(2), Impaired Lawyer reasonably should know that continued representation of the client in the manner that Impaired Lawyer proposed will result in ongoing violations of the rules and the State Bar Act. In addition, under rule 1.16(a)(3), without changes in the staffing of the case, Impaired Lawyer's condition will render it unreasonably difficult for Impaired Lawyer to carry out the representation effectively. For both reasons, Impaired Lawyer's failure to end Impaired Lawyer's representation of Client when required could be a further violation of the rules subjecting Impaired Lawyer to discipline.

B. Responsibilities of Other Lawyers

When an impaired lawyer is "unable or unwilling to deal with the consequences of his [or her] impairment," firm lawyers and the impaired lawyer's supervisors who know of the impaired lawyer's conduct have an obligation to take steps to protect the client and ensure that the impaired lawyer complies with the rules and the State Bar Act. ABA Formal Ethics Opn. No. 03-429; 19 Law. Man. Prof. Conduct 380 (2003). The other lawyers owe responsibilities to the affected client, the impaired lawyer, and the firm. Although a lawyer's paramount obligation is to take steps to protect the interests of the client(s), other ethical obligations cannot be ignored. *Id.* at p. 4.

Each lawyer in a firm has an independent ethical obligation to protect the interests of the firm's clients. Generally, when a client retains a law firm, the client's relationship extends to all attorneys in the firm.¹⁵ "Every attorney, including an associate . . . , must exercise professional

¹³ Rule 1.16(a)(2) imposes a *duty* to withdraw where there is a *prospective* violation of another rule of professional conduct (e.g., rule against representing conflicting interests) or a provision of the State Bar Act. This rule does *not* mandate withdrawal for *past violations* (although past violations may result in disqualification by court order). Withdrawal is mandatory only where continued employment "*will result*" in ethical violations (i.e., where it is *reasonably clear* that the rules will be violated). Withdrawal is permissive, not mandatory, where such violations are merely "likely" (rule 1.16(b)(9)). Tuft et. al, *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2019) Ch. 10-B.

¹⁴ "An attorney who is physically or mentally unable to serve the client effectively must withdraw. (Rule of Professional Conduct 1.16(a)(3).) These unfortunate situations range from alcohol and drug problems to terminal illnesses." Younger, *Younger on California Motions* (2d. ed. 2019) § 17:4.

¹⁵ See Cal. State Bar Formal Opn. No. 2014-190 [accepting "the basic premise that all attorneys in a law firm owe duties – including ethical duties – to each of the firm's clients. What will differ, however, among attorneys is what steps those attorneys must take to discharge those duties."] (citing Cal. State Bar Formal Opn. No. 1981-64 [opining that all attorneys employed by a legal services program owe identical professional responsibilities to clients of the program] and several California cases in the legal malpractice context). See also *Blackmon v. Hale* (1970) 1 Cal.3d 548, 558 [83 Cal.Rptr. 194] [finding that

judgment in the best interest of his clients and must take steps which are necessary to assure competent representation for his client[.]” Los Angeles County Bar Assn. Formal. Opn. No. 383 (1979). The duties discussed herein are generally limited to lawyers with knowledge of the impaired lawyer’s misconduct, but managerial lawyers are also responsible for ensuring that the firm has policies and procedures in place giving reasonable assurance that all lawyers in the firm comply with the rules and the State Bar Act. An impaired lawyer’s failure to fulfill ethical responsibilities and/or take appropriate action to protect a client does not excuse other lawyers who know of the impaired lawyer’s conduct and relevant facts from fulfilling their own professional responsibilities, including taking reasonable remedial measures to protect the client.

Multiple factors may affect the duties of lawyers to act in the face of a colleague’s impairment, including, but not limited to: the impaired lawyer’s actions or inactions; the nature of the client matter; the urgency of the situation; the nature, severity and permanence of the lawyer’s impairment; the size of the firm and the resources available; and the role within the firm of each non-impaired lawyer who knows of the impaired lawyer’s actions and the relevant circumstances.¹⁶ Those obligations are clearest with respect to subordinate and managerial lawyers with knowledge of the impaired lawyer’s conduct.¹⁷

Reasonable remedial action should be determined on a case-by-case basis, considering the nature and seriousness of the misconduct and the nature and immediacy of its harm. Rule 5.1, Comment [6]. Remedial actions may include notifying another lawyer within the firm who has supervisory or managerial responsibilities, confronting the impaired lawyer, notifying the client, ending impaired lawyer’s representation of the client or adjusting the impaired lawyer’s responsibilities as appropriate under the rules and the State Bar Act, and referring the client to new counsel to handle the matter. See rules 1.4, 1.4.1, 1.7 and 1.16; and Business and

a reasonable client would believe he was being represented by a partnership, rather than an individual partner, where the partners held themselves out to the public and to the client as a partnership]; Cal. State Bar Formal Opn. No. 1981-64 [stating that attorneys of a private law firm share responsibilities with their firm for representation of their clients].

¹⁶ See D.C. Bar Ethics Opn. 377 (2019) [“Depending on the nature, severity, and permanence (or likelihood of periodic reoccurrence) of the lawyer’s impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to the clients of the firm.”].

¹⁷ California did not adopt ABA Model Rule 8.3 or any rule which requires a lawyer to report another lawyer to the State Bar of California if the lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects. Therefore, California lawyers may, but are not required to, report another lawyer’s misconduct to the State Bar of California. San Diego County Bar Assn. Formal Opn. No. 1992-2; Los Angeles County Bar Assn. Formal Opn. No. 440 (1986) [attorney should consider seriousness of other lawyer’s offense and potential impact on public and the profession].

Professions Code sections 6068(m) and 6103.5. The details of these forms of remediation are discussed more fully below.

1. Responsibilities of Subordinate Lawyer

Rule 5.2(a) requires a lawyer to comply with the rules and the State Bar Act “notwithstanding that the lawyer acts at the direction of another lawyer or other person.” A subordinate lawyer does not, however, violate the rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s “reasonable resolution of an arguable question of professional duty.” Rule 5.2(b). Under this rule, a supervisory lawyer and a subordinate lawyer are each independently responsible for fulfilling their own ethical obligations. Rule 5.2, Comment; see *In re Maloney & Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-797 [associate attorney disciplined along with supervising partner for misrepresentations misleading the court and failing to obey a court order]. When an ethical question “can reasonably be answered only one way the duty of both lawyers is clear and both are responsible for performing it.” Rule 5.2, Comment. Where the question can reasonably be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable courses to select, and the subordinate may abide by that resolution. *Id.* “If the subordinate lawyer believes that the supervisor’s proposed resolution of the question of professional duty would result in a violation of [the rules] or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.” Rule 5.2, Comment.

Under these principles, a subordinate lawyer may not follow an order to engage in conduct when there is no reasonable argument that such conduct is ethically permissible. Moreover, if the ethical violation is ongoing, the subordinate has an obligation to take reasonable remedial measures to try to correct the violation and to protect the client from harm. The subordinate lawyer may consider communicating with other supervisory lawyers within the firm about these issues. Depending on the circumstances, such other lawyers may include, among others, in-house ethics counsel, members of the firm’s executive committee or risk management committee, a partner in charge of the client matter(s) at issue, or, in smaller or less structured firms, any senior colleague whom the lawyer trusts to take a constructive view of the problem. See rule 5.2, Comment; see also Los Angeles County Bar Assn. Formal Opn. No. 383 (1979) [“When an associate attorney has concluded that a partner in the firm has committed malpractice or is incompetent with respect to the handling of a client’s affairs, the matter should be brought to the attention of the partnership in an effort to agree upon a course of conduct with regard to the client which will insure competent representation.”].¹⁸ Where the subordinate reasonably believes that notifying other lawyers within the firm would be ineffective, or in an emergency situation where consultation is not feasible, a subordinate lawyer should take such action as may be required to preserve the client’s rights. See Los Angeles County Bar Assn. Formal Opn. No. 348 (1975) (construing former rule).

¹⁸ See also Tuft et. al, *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2019) Ch. 6-B, § 6:153.2.

In a situation where the only supervisory lawyer is the impaired lawyer and the question of professional judgment as to the lawyers' responsibilities under the rules and the State Bar Act can reasonably be answered in only one way, the subordinate lawyer must take necessary remedial measures to protect the client, which will normally involve communicating to the client any material information about the lawyer's conduct that impacts the client's interest as required by rule 1.4.¹⁹

In Scenario #1, Subordinate Lawyer works for Big Firm, which has both an executive committee and a risk management committee. Here, Subordinate Lawyer communicated Subordinate Lawyer's professional judgment concerning Impaired Lawyer's actions and the handling of Client's matter to Impaired Lawyer directly. Given that the question of professional judgment can only be answered one way and Impaired Lawyer's response would result in violations of the rules or the State Bar Act, Subordinate Lawyer may not follow Impaired Lawyer's instruction to take no further action, and must instead act in accord with Subordinate Lawyer's independent duties to Client. If it is reasonable to do so, Subordinate Lawyer may seek to fulfill that obligation by communicating with one or more of the unimpaired supervisory lawyers at Big Firm, including members of the executive or risk management committees. By appropriately reporting Subordinate Lawyer's concerns internally to an unimpaired supervisory lawyer at Big Firm, Subordinate Lawyer triggers the responsibilities of the unimpaired supervisory lawyer or lawyers under rule 5.1.

Internally reporting Impaired Lawyer's actions to an unimpaired lawyer with supervisory authority does not fully discharge Subordinate Lawyer's duties. Subordinate Lawyer continues to owe Client an independent set of ethical obligations which requires Subordinate Lawyer to ensure that the ethical concerns have been addressed. If the supervisory lawyer adopts remedial measures which represent a reasonable resolution of the ethical questions that Subordinate Lawyer has raised and reasonably protects Client moving forward, then Subordinate Lawyer has satisfied that obligation to Client. Rule 5.2, Comment. If Subordinate Lawyer concludes, however, that Big Firm's resolution of the matter is not a reasonable resolution of the underlying ethical issues, Subordinate Lawyer may be obligated to pursue

¹⁹ See also Los Angeles County Bar Assn. Formal Opn. No. 383 (1979) ["[I]f the associate and the partnership cannot agree on a method of providing competent representation to the client and protecting the client from any adverse effect of past malpractice, the disagreement regarding representation or the impairment to the client's interest as a result of the incompetent lawyer's actions must be thoroughly disclosed to the client, notwithstanding an objection by the partnership, for the client's resolution, and the decision of the client shall control the action to be taken."] While this Committee does not agree with this Los Angeles County Bar Association opinion to the extent it states the disagreement between the associate and the firm must be disclosed to the client, to the extent that they are material, the lawyer's misconduct, the consequences, and proposed remedial actions must be discussed with the client to allow the client to make an informed decision regarding continued representation. Rule 1.4.

further measures, including contacting Client directly. See, for example, rules 5.2(a), 1.1, and 1.4.

In Scenario #2, Subordinate Lawyer does not have an unimpaired supervisory lawyer to communicate with about Impaired Lawyer's actions and resulting consequences to Client's representation. Impaired Lawyer has denied there is any problem, has refused to communicate necessary information to Client, and has refused to consider stepping away from Client's matter. Under these circumstances, and because Impaired Lawyer refuses to answer the question of professional judgment in a reasonable way, Subordinate Lawyer must act in accordance with Subordinate Lawyer's duties to Client and take timely reasonable remedial measures despite Impaired Lawyer's insistence that such actions not be taken.

Here, Subordinate Lawyer will need to communicate to Client the significant developments and other information reasonably necessary to permit Client to make informed decisions regarding the ongoing representation. Rule 1.4(a)(2)-(3) and (b). Subordinate Lawyer should maintain the privacy and other legal rights of Impaired Lawyer²⁰ when communicating with Client, unless Impaired Lawyer authorizes his private information to be shared. Rule 1.4(d) ("A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law."). This may necessitate communicating to Client only that Impaired Lawyer is unable to continue as counsel on Client's matter, focusing on the facts of Impaired Lawyer's conduct specific to Client's matter and avoiding any disclosure of Impaired Lawyer's personal and private information. For example, Subordinate Lawyer should disclose to Client that Impaired Lawyer failed to timely communicate the settlement demand, the details of the offer, and the impact it may have on Client's matter. Subordinate Lawyer should also disclose that Impaired Lawyer was unable to effectively argue before the court on behalf of Client's opposition to the MSJ. In the latter example, even though Subordinate Lawyer was able to step in and successfully argue the MSJ, Impaired Lawyer's conduct during the hearing is a significant development related to the representation or information that is reasonably necessary to permit Client to make informed decisions regarding the ongoing representation under rule 1.4.²¹

²⁰ See ABA Formal Opn. No. 03-429 at p. 6 ("In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer."); D.C. Ethics Opn. 377 (2019) (When a lawyer with a significant impairment leaves the firm, "[m]anagerial and supervisory lawyers should be careful to disclose only necessary and material information to the clients, balancing truthful disclosures with the impaired lawyer's privacy rights under the substantive law.").

²¹ The inability of the Impaired Lawyer to competently present legal arguments at the summary judgment motion hearing is relevant information that would reasonably cause a client to consider terminating the representation. See ABA Formal Opn. No. 481 at p. 4 (a lawyer must inform a client regarding a "material error" committed by the lawyer in the representation; "[a]n error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.").

Subordinate Lawyer should further advise Client how Subordinate Lawyer believes Client's matter could be handled as a result of these developments. This may include Subordinate Lawyer's recommendation to Client that Subordinate Lawyer is competent and able to continue handling Client's case. If Subordinate Lawyer does not have sufficient learning and skill to take over the representation, Subordinate Lawyer may suggest to Client that Subordinate Lawyer can continue to provide competent representation by associating with or, where appropriate, professionally consulting with another lawyer. Subordinate Lawyer may also recommend referring the matter to another lawyer whom the Subordinate Lawyer reasonably believes is competent. Rule 1.1(c). A decision on any matter that will affect Client's substantive rights, including who serves as lead counsel for Client, must be discussed with Client, and Client's decision will be controlling.²²

In order to help fulfill Subordinate Lawyer's obligations to Client, Subordinate Lawyer may consider seeking confidential guidance about professional responsibilities from the Ethics Hotline at the State Bar of California,²³ the ethics hotlines of local bar associations where available, or appropriate legal ethics advisors within or outside of a lawyer's firm.²⁴ Subordinate Lawyer may also consider speaking confidentially with an appropriate mental health professional, the State Bar of California's confidential Lawyer Assistance Program ("LAP"),²⁵ or a lawyer mentor for additional insight.

²² *Heller Ehrman v. Davis Wright* (2018) 4 Cal.5th 467, 479 [229 Cal.Rptr.3d 371] (citing *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385]; Code of Civil Procedure section 284; rule 1.2, Comment [1] (citing *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156]); see also rules 1.2 and 1.16(a)(4).

²³ State Bar of California Ethics Hotline: <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Hotline>.

²⁴ See Cal. State Bar Formal Opn. 2019-197 (addressing lawyer's ethical obligations when lawyers in a law firm consult with outside counsel concerning matters related to the firm's representation of a current client). However, there is no "advice of counsel" defense in State Bar Court matters. Despite facts showing that a lawyer's conduct was consistent with information or counsel received from an ethics hotline or ethics advisor, the State Bar Court can still find that lawyer culpable of ethical misconduct. In an appropriate case, these facts could form a basis for a finding of "good faith" or other mitigating circumstance, but that will not defeat a finding of culpability. See, e.g., *Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 ("It may also be observed that no employee of the State Bar can give an attorney permission to violate the Business and Professions Code or the Rules of Professional Conduct"); see also rule 5.2(a) ("A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.").

²⁵ The State Bar of California's LAP does not provide legal advice, but can discuss the problem, provide a free and confidential professional mental health assessment, and provide direction to the caller as to available services. LAP also offers professional monitoring to satisfy specific monitoring or verification requirements. A Support Lawyer Assistance Program is also offered for lawyers who are interested in weekly group meetings and the support of a qualified medical professional. See <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>.

2. Responsibilities of Lawyers with Managerial or Supervisory Authority

A lawyer who, individually or together with other lawyers, possesses managerial or supervisory authority in a law firm must make reasonable efforts to ensure that the firm's lawyers comply with the rules and the State Bar Act. Rule 5.1 (a)-(b). A lawyer who possesses managerial authority within a law firm where the impaired lawyer practices or who has direct supervisory authority over that lawyer is responsible for the other lawyer's violations of the rules and the State Bar Act, if the supervisory lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved, or knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. Rule 5.1(c).²⁶ A lawyer's failure to supervise other lawyers can result in attorney discipline. *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 368-369; *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 335-336.

In accordance with rule 5.1, firms should have enforceable policies and procedures in place to ensure that all lawyers within the firm comply with the rules and the State Bar Act. Rule 5.1, Comments [1] and [4]. Such policies and procedures will vary depending on the size of the firm, its structure, and the nature of its practice. Rule 5.1, Comment [2]. Each firm should consider whether compliance with rule 5.1 requires it to have policies and procedures addressing situations where non-compliance could result from a lawyer's mental impairment, so that the steps to be taken in response to the impairment are in place and known by all lawyers of the firm before an issue arises.²⁷

If permitted by applicable law, a firm should consider including in its policies a requirement that conditions continued employment or partnership on an impaired lawyer's seeking and receiving appropriate assistance, such as medical care, counseling, or therapy, where the impairment is impeding the lawyer's ability to competently represent the client(s). Firms should also consider including procedures that encourage firm lawyers to report to the appropriate personnel concerns of a lawyer's impairment adversely affecting representation of client(s), perhaps facilitated through a hotline or by designating a neutral firm representative who does not supervise or manage subordinate lawyers. See rule 5.1, paragraph (a) and Comments [1], [2], and [4]; see also D.C. Bar Ethics Opn. 377 (2019). Anonymous reporting within a law firm and

²⁶ Rule 5.1, Comment [8]: "Paragraphs (a), (b) and (c) create independent bases for discipline. [Rule 5.1] does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside of the law firm. Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these rules."

²⁷ D.C. Bar Ethics Opn. 377 (2019) at p. 2 [A written policy regarding impairment is not required in order to comply with Rule 5.1; however, "even if a written policy is reasonably determined to be unnecessary, firms and agencies may want to have a written policy to provide consistency in the guidance available to lawyers and other firm or agency personnel."].

anti-retaliation policies and practices could encourage lawyers, particularly subordinate lawyers, to report any concerns they may have about their superiors and other colleagues without the fear of any backlash.²⁸

Lawyers cannot diagnose the cause or extent of a colleague's mental impairment, but when alerted to a specific instance of unethical conduct stemming from an impairment, reasonable remedial action must be taken to eliminate any ongoing violation and to avoid or mitigate any consequences that affect a client's interests.²⁹ In order to evaluate what is "reasonable remedial action" under rule 5.1(c)(2), a lawyer would likely need to investigate the colleague's perceived impairment to evaluate the accuracy of the report(s); the severity and duration of the impaired lawyer's unethical conduct; whether the lawyer's conduct can be resolved or improved; and whether the lawyer's condition renders it difficult or unreasonably difficult for the impaired lawyer to carry out legal representation effectively. ABA Formal Opn. No. 03-429 at 3.³⁰ The law firm may also need to closely supervise the conduct of the impaired lawyer and assess whether the other client matters being handled by the impaired lawyer have been affected by the colleague's impairment. See rules 5.1(b)-(c) and 8.4(a). This may entail identifying and auditing the other client's files where the impaired lawyer is involved to ensure no violations of the ethics rules have occurred and to avoid or mitigate any consequences of the impaired lawyer's conduct. *Id.* The investigating lawyers should be careful to not reveal the impaired lawyer's private information or impair any other legal rights when speaking with the other lawyers or staff within the firm as necessary to investigate the lawyer's condition and resulting impact.

In some situations where the impairment does not materially affect the lawyer's work, accommodations may be possible for the impaired lawyer, so long as reasonable steps have been taken to prevent or mitigate any resulting consequences and assure compliance with the rules and the State Bar Act. See ABA Formal Opn. No. 03-429 at p. 4. For example, "an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents." *Id.* "If a lawyer's mental impairment can be accommodated by changing the

²⁸ While outside the scope of this opinion, we note that subordinate lawyers may also be protected from retaliation under applicable law. (See, e.g., Cal. Labor Code § 1102.5.)

²⁹ "Because lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist. Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (e.g. patterns of memory lapse or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines)." ABA Formal Opn. No. 03-431 (2003).

³⁰ The ABA's Model Rule 1.16(a)(2) differs from rule 1.16(a)(3) because it requires withdrawal if "(2) the lawyer's physical or mental condition *materially impairs* the lawyer's ability to represent the client." (italics added for emphasis). The ABA's ethics opinions cited herein use the "materially impair" standard, while California uses the "unreasonably difficult" standard for mandatory withdrawal and the "difficult" standard for permissive withdrawal.

lawyer's work environment or the type of work that the lawyer performs, such steps also should be taken." North Carolina State Bar Formal Ethics Opn. 8 (2013); see also Virginia State Bar Ethics Opn. 1886 (2016) at p. 4. However, "if such episodes of impairment have an appreciable likelihood of recurring, lawyers who manage or supervise the impaired lawyer may have to conclude that the lawyer's ability to represent clients is materially impaired." ABA Formal Opn. No. 03-429.³¹

Under Scenario #1, knowledge by an unimpaired supervisory or managerial lawyer of Impaired Lawyer's actions will trigger the obligations of the supervisory or managerial lawyer under rule 5.1(c)(2), requiring the supervisory lawyer to take reasonable remedial action to avoid or mitigate any resulting consequences. Before acting, a supervisory or managerial lawyer ought to review Big Firm's policies and procedures which should address these situations.

As described above, a prompt and comprehensive investigation should be conducted to evaluate the reported misconduct, its impact on all client matters and appropriate remedial actions. Absent exigent circumstances requiring that a client be notified immediately, Big Firm should investigate any reports of misconduct to confirm the accuracy of the report and the extent of any misconduct before communicating with Client regarding the misconduct. Under these facts, a change in lead counsel is necessary because of Impaired Lawyer's violations and is another significant development that must be communicated to the client under rule 1.4, along with other significant information such as the expired settlement offer.

After completing a reasonable investigation, Big Firm can make suggestions to Client as to how it believes the case should be re-staffed and any other necessary actions that it believes should be taken as a result of these significant developments. Big Firm may have sufficient internal resources available to assign a competent new lawyer or lawyers within Big Firm to replace Impaired Lawyer on Client's case in consultation with Client.

CONCLUSION

A mental impairment that impedes a lawyer's ability to competently and ethically provide legal services as required under the rules and the State Bar Act triggers ethical obligations not just for the impaired lawyer, but also for other lawyers working on the relevant client matters and supervisory or managerial lawyers who know of the conduct. Although it may be possible to reduce or eliminate the impact of an impairment through internal procedures, often

³¹ "The firm's paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients." ABA Formal Op. No. 03-429.

communication to the client may be required and representation by the impaired lawyer may need to end, resulting in the firm's re-staffing or withdrawal from the representation. The available resources and options to remedy this type of situation may differ from firm to firm and will depend on the particular facts and circumstances, but the lawyers' duties and ethical responsibilities remain the same.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.



Speakers' Biographies



Lita Abella

Lita Abella is a native of Southern California. Lita earned a Juris Doctor from Western State University College of Law in Orange County in 2004. While in law school, Lita was a law clerk for the Riverside District Attorney's Office, the Office of the Attorney General, and certified mediator for the Superior Court of Orange County. Lita is a Senior Program Analyst at the State Bar of California, where she conducts outreach and is a MCLE presenter for the Lawyer Assistance Program (LAP). LAP assists law students, bar exam applicants, and attorneys with substance use and mental health issues. Prior to that, Lita worked as an investigator in the Office of Chief Trial Counsel where she investigated and assisted in the prosecution of attorneys for misconduct. She has been with the State Bar for 10 years. Beginning in 1980, Lita served with the Los Angeles Police Department for 20 years, breaking many glass ceilings as a female and minority. She worked various assignments including but not limited to patrol, Internal Affairs, narcotics, and vice. She was a court-qualified narcotics expert during her years in law enforcement and attained the rank of lieutenant. Lita was a fitness instructor for 20 years and is currently a health and wellness consultant. She is nationally certified by the Athletic and Fitness Association of America. She is also a business owner for the past 23 years. Lita has served on many boards and committees within many organizations and entities. For the past seven years, she has been a Library Commissioner with the City of Azusa. She is a proud mom of a newly licensed attorney!



Elizabeth Tom Arce

Liz is an accomplished advocate with experience litigating a wide array of labor and employment cases in state and federal trial and appellate courts. Liz has successfully represented employers in matters ranging from single plaintiff lawsuits to wage and hour class and collective actions. Her litigation experience includes numerous successful summary judgment motions, defeating class certification, and decertifying collective actions. Liz's litigation practice also includes handling matters in arbitration and before administrative agencies where she has been effective at obtaining favorable results for the firm's clients. When she is not defending litigation matters, Liz advises employers on a wide range of diverse employment matters such as wage and hour, disability accommodations, public safety, employee discipline, disability retirements, and anti-discrimination, harassment and retaliation laws. At the center of her employment counseling practice is auditing employer policies and practices for compliance with wage and hour laws such as the Fair Labor Standards Act. Liz is also a dynamic trainer who is motivated by her commitment to the firm's clients and her passion for employment law. She draws from her litigation experience during her presentations to educate and encourage employers to take preventative measures to reduce exposure to liability and costly litigation. In addition to presenting to the firm's consortiums, Liz also frequently speaks at regional, statewide and national conferences on a variety of employment-related topics.



Lawrence Chan

Lawrence Chan is a shareholder with Stradling Yocca Carlson & Rauth and works exclusively in the area of public finance. Mr. Chan has acted as bond, disclosure and underwriter's counsel in connection with city, county, school district, and special district financings throughout the State, including serving as bond counsel on more than \$3.0 billion of lease revenue bonds for the State Public Works Board over the last five years. Mr. Chan has extensive experience with general fund-backed financings, land-secured, general obligation and utility revenue financings, and commercial paper programs. Mr. Chan graduated from the University of California, Los Angeles with a bachelor of arts degree in Political Science, and obtained his J.D. from the University of Southern California Gould School of Law. Mr. Chan can be reached at (949) 725-4095 or lchan@stradlinglaw.com.



Michael Colantuono

Michael has specialized in municipal law since 1989. He is certified by the California State Bar as a Specialist in Appellate Law and is also President of the California Academy of Appellate Lawyers, an association of about 125 of the most distinguished appellate lawyers in California. He has argued 16 cases in the California Supreme Court and appeared in all six of the California District Courts of Appeal, as well as trial courts around the State. He serves on the California Judicial Council's Appellate Advisory Committee. Michael has expertise in a broad range of areas of concern to local governments in California, including constitutional law, land use regulation, open meetings, elections, municipal litigation, conflicts of interest, public utilities, LAFCO issues, inverse condemnation, cannabis regulation, and a wide range of public finance issues involving taxes, assessments, fees and charges. Michael is perhaps California's leading expert on the law of local government revenues, briefing 18 cases on that subject in the California Supreme Court since 2004. The Daily Journal named him a California Lawyer of the Year in inverse condemnation law for his win in *City of Oroville v. Superior Court* (2019) 7 Cal.5th 1091, government's first win in that court in this subject area in decades. California Chief Justice Ronald M. George presented him with the 2010 Public Lawyer of the Year Award on behalf of the California State Bar. Two successive Speakers of the California Assembly appointed him to the Board of Trustees of the California Bar. His fellow Trustees elected him Treasurer and President of the Bar and the California Supreme Court appointed him as Chair of the Board of Trustees.



Derek Cole

Derek Cole is a co-founder and partner of Cole Huber LLP. His practice focuses on municipal law and litigation.



Patricia Curtin

Patricia Curtin is a Director with Fennemore Wendel in the Walnut Creek office. She has more than three decades of experience in local government and land use law representing both public and private sector clients. Patricia's practice includes serving as special legal counsel to various cities, counties and special districts. She serves as legal counsel to over 12 Geologic Hazard Abatement Districts (GHADs). She counsels GHADs and represents property owners, cities, and counties in forming, annexing into and operating GHADs. On the private side, she assists clients in processing and obtaining approvals for complex master planned and mixed-use projects, market rate and affordable housing projects, logistic centers, hotels and resorts, and educational and medical facilities. Patricia has presented and written extensively on land use topics, including co-authoring State and Local Government Land Use Liability (Thomson Reuters) and served as a Planning Commissioner in her home town for over 10 years.



Eric Danly

Eric Danly has served as the Petaluma City Attorney since December 5, 2005, and since July 1, 2013 in an in-house capacity. Eric reports directly to the City Council and oversees the City Attorney's Office consisting of, in addition to the City Attorney, two assistant city attorneys and a legal assistant. Prior to joining Petaluma in-house Eric was a partner in the Meyers Nave law firm and managing partner of its Santa Rosa office. Eric also served as Cloverdale City Attorney, General Counsel to the Monterey County Housing Authority Development Corporation, Clearlake City Attorney and Assistant City Attorney for Pinole. Eric has delivered numerous presentations on open meetings and records law, and ethical and other laws applicable to public agency officials. He served on the League of California Cities committee that authored the organization's first published guide to the California Public Records Act, entitled "The People's Business – A Guide to the California Public Records Act." He was appointed to serve on the City Attorney's Department's standing committee on the Public Records Act when the committee was formed in September, 2009 and served on the committee through April, 2016. Along with his colleagues on the Public Records Act Committee, Eric helped author updates to The People's Business: A Guide to the Public Records Act, which were published 2010, 2011, 2014, and the Second Edition to The People's Business, which was published in 2017. While serving on the Public Records Act Committee Eric and his colleagues provided annual updates on the Public Records Act for the Municipal Law Handbook, in addition to providing support to Cal Cities lobbyists on Public Records Act issues and recommendations to the Legal Advocacy Committee on requests for amicus support in public records cases. Currently Eric serves as the President of the City Attorneys' Department of Cal Cities. His President duties include serving as liaison to the Legal Advocacy Committee. Eric has also previously served as Chair of the Attorney Development and Succession Committee, and on the Legal Advocacy, Municipal Law Handbook, and Nominating Committees within the City Attorneys Department of Cal Cities. Eric received a BA in Interdisciplinary English from Stanford University in 1990, and his JD from University of California, Hastings College of the Law with a public law concentration in 1998. He has been practicing law representing public agencies since 1999.



Christine Davi

Christine Davi has worked for the City of Monterey in the City Attorney's Office for more than 17 years, and she has served as the City Attorney for 11 years. Prior to the City of Monterey, Davi worked for the City of Salinas as a Sr. Deputy City Attorney. She previously practiced civil litigation in the private sector representing public agencies, and was a Deputy District Attorney with the Fresno County District Attorney's Office, Family Support Division. She holds a law degree from California Western School of Law and a degree in Communications from the University of California, San Diego, with minors in Spanish Literature and Political Science.



Dana Dean

Ms. Dean is a member of Hanson Bridgett, LLP's Real Estate and Environment Section in both the Land Use and Real Estate Litigation groups. She has practiced real estate and land use law, focusing on litigation and land use development for nearly two decades. Ms. Dean has worked throughout California on matters that involve sustained, long range advocacy efforts, detailed analyses, and extensive communications with governing entities, interested community groups, developers, and property owners. With an emphasis on commercial and industrial development, Ms. Dean represents landowners, project developers, and community groups alike at city and county levels during all stages of development permitting, with a focus on CEQA. She also represents clients in interactions with state agencies, such as BAAQMD, BCDC, CalRecycle, DTSC, and the State Lands Commission, and federal agencies, such as U.S. EPA and U.S. Army Corps of Engineers, in permitting matters and related entitlement processes. Her extensive body of work includes traditional projects and cutting-edge developments in alternative energy, carbon sequestration, resource recovery, and water-related planning. Ms. Dean is also elected to the Solano County Board of Education, where she has served for the past 10 years. She is Past President of California County Boards of Education (CCBE). She has served on the Board of Directors of the California School Boards Association (CSBA), the CSBA Legislative Committee, and the CSBA Education Legal Alliance Steering Committee. She serves as a conference presenter on issues of public process and governance and as an expert witness in governance-related litigation. Before joining Hanson Bridgett, Ms. Dean founded and managed The Law Offices of Dana Dean from 2003-2022.



Deborah Fox

Deborah Fox is the Chair of Meyers Nave's statewide First Amendment and Trial & Litigation Practice Groups. She is one of California's foremost experts on First Amendment issues, particularly those affecting the public sector, and has a unique expertise with cases involving the convergence of First Amendment, land use, and zoning laws and regulations. Outside the courtroom, Deborah provides daily guidance to clients as they address a myriad of legal issues. Deborah's practice includes trial and appellate work in state and federal courts, as well as administrative hearings and other proceedings before regulatory agencies. She has handled a wide range of litigated matters, including those that involve First Amendment issues, land use, zoning, housing, general plans, coastal issues, CEQA, inverse condemnation, environmental claims, federal preemption, public records, elections and ballot initiatives, and civil rights claims for violations of substantive and procedural due process and equal protection. Her complex litigation experience includes multi-party and multi-district cases, civil litigations that are intertwined with pending criminal actions, and matters that require managing, researching, reviewing and interpreting extensive electronic information. Deborah's cases frequently involve issues that attract intense media attention and public scrutiny, including matters of first impression. For example, she is defending counties, cities and public officials throughout California in federal and state court litigation challenging Shelter In Place Orders, Public Health Orders and Reopening Plans related to the coronavirus pandemic. Plaintiffs in these cases are churches, gyms, nail salons, restaurants, wine bars, brew pubs, lodging establishments, and other businesses challenging various restrictions that are placed on the operation of their organizations. These cases also include defending local government entities in class actions that request the refund of business and licensing fees, permits and taxes paid by organizations that are closed or are operating under various restrictions. Deborah has obtained precedent-setting victories at both the district and appellate court levels. Deborah is also defending California cities and counties that have passed hazard pay ordinances in response to the coronavirus pandemic for full-time and/or part-time employees of various businesses including groceries, restaurants, pharmacies, and farms.



Elena Gerli

Elena Gerli is a Partner with Aleshire & Wynder, and serves as the City Attorney for Suisun City, Assistant City Attorney for the cities of La Cañada Flintridge and Rancho Palos Verdes, and legal counsel for the Puente Hills Habitat Preservation Authority. She is the Vice President of the City Attorneys Association of LA County Board. Elena is the founder and co-chair of the firm's DEI committee, and has obtained two certificates from Cornell on the topic of DEI in the workplace.



David Gonzalez

David Gonzalez is an associate attorney with Aleshire & Wynder, LLP. He works extensively in complex civil litigation involving civil rights claims, and labor and employment issues. David leads at the intersection of social justice and culture change by drawing from his professional, academic, and personal experiences. He holds a Senior Certified Professional designation with the Society of Human Resource Management, a Master of Science in Leadership & Management with a focus on Human Resource Management, and a Master of Business Administration.



Pamela K. Graham

Pamela Graham is Senior Counsel and a member of Colantuono, Highsmith & Whatley's litigation practice group. She also leads its public safety defense group. Pamela's practice covers a wide range of public law litigation, including municipal finance and public revenues, labor and employment law, land use and CEQA, cannabis regulation and enforcement, and police liability defense work. Pamela has broad litigation experience in both state and federal courts, handling all phases of litigation from case assessment through appeal. She has served on Cal Cities' Editorial Board for the Municipal Law Handbook for two terms, serves on the Cal Cities Municipal Finance Committee, and also serves on the Los Angeles Bar Association's Editorial Board for its L.A. Lawyer publication. Throughout her 20-year legal career, Pamela has advocated pro bono for children's rights, working on countless adoption and education rights matters.



Beth Hummer

Beth Hummer focuses her practice on litigation concerning environmental contamination and real estate. Her experience as a former chemist and environmental regulator adds an understanding of complex science and engineering to her representations of public agencies and landowners. Beth has handled major environmental contamination cases throughout California, especially matters related to groundwater contamination and alleged violations of CERCLA. She has worked on some of the highest-profile environmental cases in the state of California, including handling discovery regarding the science of Chromium VI contamination in Hinkley, California and MTBE contamination of California ground water aquifers. She has represented clients in state and federal courts in California, as well as before the Second District Court of Appeal, and in bench and jury trials. Prior to attending law school, Beth worked as an environmental regulator with the California Integrated Waste Management Board (now Cal-Recycle) regulating solid waste landfills. She also was an R&D chemist developing capillary gas chromatography phases for J&W Scientific (now a division of Agilent). Beth's well-rounded scientific training also includes her undergraduate degree in biology.



Bill Ihrke

Bill Ihrke is a Partner at Rutan & Tucker, LLP in the Government and Regulatory Practice Group. He currently serves as the City Attorney for La Quinta and Cerritos, and has served and continues to serve multiple cities as special counsel or as their counsel to the successor agencies to former redevelopment agencies. In representing these entities, Bill regularly attends public meetings and advises governing bodies and staff on all aspects of public agency law, including the Planning and Zoning Law, Subdivision Map Act, California Environmental Quality Act (CEQA), Affordable Housing and RHNA compliance, Ralph M. Brown Act (open meeting law), Public Records Act, Political Reform Act and Fair Political Practices Commission ("FPPC") regulations, Federal and State labor and employment law (including prevailing wage requirements), real estate law, contract law (including bid-construction, design-build and DBOM models of contracting), parliamentary procedure, code enforcement and implementation of post-redevelopment legislation and case decisions. He has provided the Land Use and CEQA Litigation Update several times for the City Attorney Conferences sponsored by the League of California Cities.



Andrew Jared

Mr. Jared is Senior Counsel at Colantuono, Highsmith & Whatley, P.C. He has served as City Attorney for the Cities of Chico and South Pasadena. He serves as General Counsel for the Goleta Water District. He received his J.D. from Pepperdine University, a Masters of Science in Environmental Management from the University of London, and a B.A. in Geography from UCLA. He specializes in issues related to land use and public contracting.



Randi Johl

Randi Johl brings over 20+ years of experience and leadership in municipal government. She has served cities and special districts throughout the State of California in various capacities, including as a law clerk in a municipal law firm, a legal analyst, a legislative affairs director and a city clerk. Randi specializes in legislative platforms, elections, and community engagement. Randi has led a variety of community-oriented projects including a \$20 million annual sales tax measure, a pandemic related economic recovery and reopening plan, and a citywide race, equity, diversity and inclusion initiative. Randi serves as the Legislative Director for the California City Clerks Association, and Board Member for the League of California Cities and Institute for Local Government. She's worked with various legislators and stakeholders on key pieces of legislation affecting open government, public records, elections, and districting matters related to the California Voting Rights Act. Randi is a past president of CCAC and past Legislative Committee Chair for the International Institute of Municipal Clerks. She has served on various committees and task forces including Governance, Bylaws, and Policy. Most recently, Randi served as co-chair of Cal Cities' Advancing Equity Committee. Randi is a regular presenter at local government conferences and seminars. Randi received her juris doctor, cum laude, from Trinity Law and Graduate School and currently serves as the Legislative Director/City Clerk for the City of Temecula and Executive Director of the City's Race, Equity, Diversity and Inclusion Commission.



Doug Johnson

Dr. Douglas Johnson is President of National Demographics Corporation. Since 1979, NDC has assisted cities, counties, school districts and other California local governments with voting rights analysis, the transition between at-large and by-district election systems, and with post-Census redistricting projects. NDC has completed over 450 such projects, including 215 redistricting projects in 2021/2022 and providing demographic assistance to over 85% of California cities that made the transition from at-large to by-district elections. Dr. Johnson often also works as an expert witness in federal and California voting rights act-related lawsuits. NDC is a sponsor of the League of Cities and the City Clerk Association, and Dr. Johnson has been a featured speaker at numerous meetings of the California League of Cities, the Arizona League of Cities and Towns, the California School Board Association, the California Special Districts Association, the National Conference of State Legislatures, and other organizations. He has been quoted in hundreds of news articles and is cited as an expert commentator on national news networks, public television, public radio, and in hundreds of newspaper articles.



Michael Lawson

City Attorney of Hayward since 2008; previously City Attorney of the cities of East Palo Alto, Oakland, and Berkeley. JD from University of California, Davis, King Hall School of Law; BA in Journalism from California State University Hayward/East Bay.



Jeffrey Masey

A transactional, public agency attorney who has been with the City of Sacramento since 2013. Currently serving in the role of issuer's counsel for the City of Sacramento.



Cindie McMahon

Cindie McMahon is the City Attorney for the City of Carlsbad. She began her legal career with the San Diego Superior Court as a research attorney and then entered the municipal law field by serving as a Deputy City Attorney first at the City of Escondido and then at the City of Carlsbad. She subsequently became a chambers attorney for the Court of Appeal in San Diego where she served for almost 15 years before returning to the City of Carlsbad. She is currently a member of the Cal Cities Legal Advocacy Committee and a former member of Municipal Law Handbook committee.



Joseph Montes

Joe has been at Burke, Williams & Sorensen since he was a summer clerk in 1993. He currently serves as the City Attorney for Alhambra, San Marino and Santa Clarita.



Amara L. Morrison

Amara is a partner in Fennemore Wendel's land use practice group and assists clients with entitlements related to residential, mixed use, office, industrial and hotel uses. Amara has extensive experience in all aspects of land use law, including compliance with CEQA, the Permit Streamlining Act, the Subdivision Map Act and affordable housing laws including density bonus and SB 35. Amara was previously an assistant city attorney for the cities of Walnut Creek and Livermore and uses her extensive public agency experience toward her work as general counsel for various Bay Area transportation agencies.



Zaynah Moussa

Zaynah N. Moussa is the City Attorney for the City of Vernon. Zaynah has represented public agencies for over 15 years and joined Vernon in 2013 as part of the City's implementation of good governance and reform measures. As an in-house City Attorney, Zaynah provides legal and practical advice to City officials and staff on a broad range of issues such as open meeting laws, public contracting, conflicts of interest, prevailing wages, public records, labor and employment, collective bargaining, and elections, with a focus on transparency and best practices. Prior to joining Vernon, Zaynah was a litigator representing law enforcement agencies in high-profile civil rights and personnel cases. Zaynah obtained her J.D. from Loyola Law School and a B.A. from the University of Southern California, graduating cum laude. Zaynah is active in professional and community organizations including the League of California Cities' Attorney Development and Succession Committee, the City Attorneys' Association of Los Angeles County, and CASA (Court Appointed Special Advocates). As a working mom and a first-generation attorney of Mexican-American and Lebanese descent, Zaynah is committed to supporting diversity and representation in the legal profession.



Iman Novin

Iman has over 14 years of experience in the multifamily development sector with a focus in mixed-income and transit-oriented development. Prior to starting Novin Development, Iman worked at MidPen Housing as Director of Acquisitions and at BRIDGE Housing as a Project Manager in both northern and southern California. While at MidPen, Iman lead acquisition efforts across the Bay Area, closing new deals and managing broker and investor relationships. While at BRIDGE, Iman helped secure entitlements and LEED ND certification for MacArthur Transit Village, a 675-unit master plan community in Oakland among other successful investment and development projects. Prior to BRIDGE, Iman worked in the real estate and planning divisions of Centre City Development Corporation (CCDC, now Civic San Diego) on redevelopment and affordable housing policy initiatives within the Downtown San Diego Redevelopment Project Area, as well as with Keyser Marston Associates (KMA) in their San Diego office. Iman is active locally serving on the Walnut Creek Planning Commission and Board of Directors of the Trinity Center and Chamber of Commerce. Iman also serves on the Contra Costa County Council on Homelessness as the Affordable Housing Chair. Iman is on the boards of various non-profit service providers, housing advocacy organizations and emerging developers including Berkeley Food and Housing, SF Yimby and Santa Cruz Veterans Memorial Building Board of Trustees. As an elected CADEM delegate in Assembly District 16, Iman endorses legislation and pro-housing candidates at the State level. Iman holds degrees in Structural Engineering and Urban Studies and Planning from the University of California, San Diego with honors. In his free time Iman enjoys spending time with his family, mountain biking, cooking, learning Persian sitar, snowboarding, working on his PropTech company ProforMap.com and advocating for Iranian American engagement in US politics and for Women's Rights in Iran as the Northern CA Chair of the Iranian-American Democrats of California (IADC) (iademca.org).



Neil Okazaki

Neil serves as Deputy City Attorney/Police Legal Advisor for the City of Corona. He previously served over 16 years in much of the same capacity for the City of Riverside. In addition to providing legal advice to public safety departments on administrative, operational and employment matters, Neil has completed 18 jury trials, 12 binding arbitrations, 14 non-binding arbitrations, and two state administrative hearings. He is currently the immediate past president of the Riverside County Bar Association and serves on the Board of Directors of the Civil Rights Institute of Inland Southern California.



Rene Alejandro Ortega

Rene Alejandro Ortega is a Partner with Shute, Mihaly & Weinberger, LLP. He has over 19 years of experience practicing law. He joined the Firm as a Partner to complement the Firm's City Attorney & General Counsel Services. Prior to joining the firm, Rene served as Chief Deputy City Attorney for the City of San Jose advising several city departments, including Housing, Public Works, Parks, Planning, and Airport (SJC) departments. As Chief Deputy, Rene oversaw the work of a dozen attorneys which covered a wide range of disciplines ranging from public works, parks and recreation law to public financing. Significantly, Rene worked closely with the City of San Jose Housing Department on various housing programs, including the development of the City's "tiny home" communities, which required working collaboratively with the City's Public Works Department. Rene also worked closely with the City's Public Works Department on prevailing wage and associated compliance-related issues resulting from the \$1.4 billion modernization of the San Jose-Santa Clara Regional Wastewater Facility (RWF) as well as the RWF Digester and Thickener Facilities upgrade. He advised the Parks Department as they expanded the encampment management team from a 2-person team to a team of over two dozen dedicated professionals in various disciplines to address homeless encampments in the city's public areas. René also helped negotiate several agreements with state agencies for implementing recreational and beautification public works projects throughout the City. Prior to serving the City of San Jose, Rene served as counsel to a diverse client base of utilities, power-generating companies, developers, manufacturers, and individuals before state and municipal regulating bodies on a range of complex and diverse contract, land use, real estate, property tax, administrative, enforcement, public utility, and environmental matters. René has worked with and advised several municipal agencies both as in-house counsel as well as representing clients coming before municipal boards and commissions since 2003.



Joseph "Seph" Petta

Joseph "Seph" Petta is a Partner at Shute, Mihaly & Weinberger, LLP, where he advises municipalities, special districts, and community groups in environmental, land use, and public law matters. Seph serves as a Deputy City Attorney for the City of Half Moon Bay and as General Counsel for the Ladera Recreation District, and previously served as Assistant City Attorney for the City of Cupertino. His practice focuses on the California Environmental Quality Act, general plan and zoning law, and public lands law. Seph was named a Northern California Super Lawyer "Rising Star" in 2022.



Alana Rotter

Alana Rotter is a certified appellate specialist adept at handling appeals and writ petitions for public entities. Clients and their lawyers seek her out for her clear writing, thorough research, and efficiency. Alana also collaborates on cases in the trial court, where she assists with dispositive motions and preserving issues for appeal. Ranked by Chambers as an “Up and Coming” appellate litigator and by SuperLawyers as among the "Top 100" lawyers in Southern California, Alana clerked for Judge Kermit Lipez of the United States Court of Appeals for the First Circuit and graduated from Yale Law School.



Eric Salbert

Eric Salbert is a Senior Associate with Alvarez-Glasman & Colvin and is a member of the firm's litigation practice group. He represents municipal entities in various civil litigation matters, including lawsuits involving civil rights claims, eminent domain and inverse condemnation matters, CEQA and NEPA actions, and various other tort claims in both state and federal court. Since publication of the Ninth Circuit's decision in *Martin v. Boise*, Mr. Salbert has gained substantial experience representing municipal clients in pre-litigation matters and lawsuits alleging the violation of civil rights arising out of the management of public properties where unhoused individuals reside.



Deepa Sharma

Deepa Sharma serves as the Assistant City Attorney to the City of Piedmont, and provides litigation and advisory services to public agency clients throughout California. Deepa has extensive experience advising clients and litigating in the areas of land use, planning and zoning, inverse condemnation, CEQA, municipal taxation, elections, and constitutional law issues such as due process, equal protection, and the First Amendment. She is also experienced in advising public agency clients on rent stabilization issues, and the implementation of California's new housing laws.



Geoffrey S. Sheldon

Geoff is the Chair of the firm's Public Safety Practice Group, and he is also one of the firm's seasoned litigators. Geoff regularly provides advice and counsel and representation to firm clients on a wide array of matters, including matters involving the Peace Officers Bill of Rights Act, the Firefighters Bill of Rights Act, the Fair Labor Standards Act, the California Labor Code, Title VII of the 1964 Civil Rights Act, the Fair Employment and Housing Act, the Americans with Disabilities Act, the Confidentiality of Medical Information Act, the Military and Veterans Code, the Uniformed Services Employment and Reemployment Rights Act, the California and United States Constitutions, the California Public Records Act and similar claims. Geoff is an expert in defending firm clients in traditional employment litigation as well as class and collective action lawsuits involving thousands of employees. He has successfully represented firm clients in FLSA collective actions through trial and appeal, and he has successfully defeated class certification in many of these lawsuits. Geoff has also successfully handled class actions alleging violations of the FEHA brought by the DFEH and individual employees. Geoff's litigation practice extends to handling federal and state writs, injunctions and appeals. He has successfully argued cases in front of the California Court of Appeal, the Ninth Circuit Court of Appeals and the California Supreme Court. As a member of Litigation Practice Group Executive Committee, Geoff helps establish the firm's litigation policies and best practices. As the Chair of the firm's Public Safety Practice Group he oversees the firm's extensive public safety practice. In addition to help establishing best practices for service to the firm's public safety clients, Geoff routinely assists public agency clients and law enforcement and fire service executive associations with matters such as personnel management, investigation and discipline, unfair labor practices, grievances, medical and other types of leaves of absence, fitness for duty and disability accommodation, and public safety retirement issues. Geoff frequently conducts trainings for firm clients, and he conducts internal investigations for certain clients.



Heather Stroud

Heather has been the City Attorney for South Lake Tahoe since October 2018. Previously, she was a Deputy City Attorney for the cities of Carlsbad and San Diego. Before attending law school at the University of Colorado, Heather was a land use planner for Boulder County and worked for a landscape architect in Vermont.



Alene Taber

Ms. Taber has worked for more than 35 years in the environmental and land use profession. Before becoming a lawyer, Ms. Taber was a city planner for the City of Carson and the Southern California Association of Governments, and a senior manager at the South Coast Air Quality Management District ("SCAQMD"). She was a certified planner by the American Institute of Certified Planners ("AICP") from 1990 until 2014. While at the SCAQMD she managed the permitting and enforcement of facilities in the four county region that emitted large quantities of volatile organic compounds ("VOCs") (e.g., aerospace, printing operations, spray painting, composting), public facilities (e.g., ports, airports, electrical generation, natural gas, and sanitation districts), and operations that emitted fine particulates (PM10). She was responsible for the development of 12 regulations and worked on 7 air quality management plans. During her tenure at the SCAQMD, she also oversaw the CEQA and socio-economic teams, and worked with colleagues on all types of transportation models, EMFAC updates, dispersion modeling, air toxic modeling, socioeconomic modeling, health risk assessments modeling, and models for CEQA assessments. As a lawyer, Ms. Taber represents citizen groups, manufacturers, property owners and public agencies on land development and environmental issues, such as CEQA, NEPA, groundwater contamination, soil gas vapor problems, air toxics, greenhouse gas emissions, and air quality matters (such as rule compliance, rulemaking, and violation notices). She appears before local public agency boards, hearing boards, and judicial bodies. She is admitted to practice in all of the U.S. district courts in California, the Ninth Circuit, and the U.S. Supreme Court, and is a member of the D.C. Bar.



Yecenia Vargas

Yecenia Vargas is an Associate in Aleshire & Wynder's Orange County office. She serves as the Assistant City Attorney for the cities of Perris and Cypress and serves as Assistant General Counsel for Palmdale Water District. Ms. Vargas handles a broad range of legal matters, focusing her practice on labor and employment, code enforcement, contracts, and land use. She regularly advises clients on labor and employment issues including those involving COVID-19. Ms. Vargas was recognized by the Hispanic National Bar Association as a Vision in Action Scholar for her academic achievements and her efforts to provide mentorship.



Holly O. Whatley

Holly Whatley is a Shareholder of the firm and is a leader in the firm's litigation practice, focusing on complex public law disputes, including class action defense of public agencies, municipal finance issues, election law, utility ratemaking issues, Local Agency Formation Commissions (LAFCOs) matters, and California Public Records Act disputes. She currently serves as Independent Legal Counsel to the County of Los Angeles Citizens Redistricting Commission and the San Diego County Independent Redistricting Commission and also serves as General Counsel to San Diego County LAFCO.



Susana Alcalá Wood

Susana Alcalá Wood was appointed by the Sacramento City Council to serve as City Attorney on March 19, 2018. An attorney specializing in Municipal law, Susana has worked for multiple cities throughout California. Just before her appointment, Susana was serving as the Assistant City Attorney for the City of Stockton from November 2013 to March 2018 where her responsibilities included advising several Council Committees and Citizen advisory commissions. She was also the principal Legal Advisor to the Stockton Police Department. Prior to her work at the City of Stockton, Susana served as the City Attorney for Modesto for 8 years, where she was the primary legal advisor to the City Council and City Manager. While at Modesto, Susana guided the City Council and staff through their historic Charter amendment shift from an at large council election system to a by-district election system. Susana also oversaw and directed hundreds of investigations involving allegations of harassment, discrimination, and related complaints involving city staff, department heads, and city management. Susana actually worked for the City of Sacramento before as a Supervising Deputy City Attorney from April 2001 to June 2006 where she supervised the Code Enforcement and the Advisory Sections. As the Code Enforcement Supervisor, Susana directed a team of lawyers and support staff and spearheaded all code enforcement, criminal prosecutions, blight and nuisance abatement activities for the Office and advised and trained all city enforcement staff on strategies, code compliance and administrative abatement procedures. During her tenure, the City brought its first gang abatement civil suit. Susana also supervised the Advisory Section where she oversaw and directed the work of the advisory lawyers as they provided general governmental advice to all City Departments. Susana worked as a Deputy City Attorney for the cities of Stockton and El Monte . As a deputy she was responsible for advising multiple departments on addressing blight, deteriorated and dangerous housing, nuisance conditions, drug, red-light, and gang activity. Susana began her career with the City of El Monte in 1988 while still in law school when she was hired as a law clerk. Upon passing the California Bar exam in 1991, she was appointed as a Deputy City Attorney. PROFESSIONAL AFFILIATIONS Ms. Alcalá Wood is on the Board of Directors for the International Municipal Lawyers Association, which enables her to learn from and work collaboratively with her counterparts across the Country, and as City Attorney to one of the 50 largest cities in the nation, she participates in the Top 50 group that meets regularly to discuss serving the legal needs of large metropolitan cities. She was also just elected to serve on the Board of the CalCities City Attorney's Department where her primary focus will be on advancing the Diversity, Equity and Inclusion efforts of the organization. Throughout her career she has worked on many committees serving to advance the profession of municipal lawyers and has provided various training and speaking capacities to organizations and public agencies throughout the state on the topics of Local Government Law. EDUCATION Ms. Wood received her Bachelor of Arts in Philosophy-Ethics and Public Policy in 1987 from the University of California at Santa Barbara and received her Juris Doctorate from Whittier College, School of Law at Los Angeles in May 1991.

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