

The logo for Renne Public Law Group (RPLG) features the letters 'RPLG' in a bold, blue, serif font, centered within a white rectangular box. The background of the entire slide is a photograph of a classical building with white columns and a blue sky with light clouds.

RPLG

Renne Public Law Group®

The Law of Police Reform in California

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Police reform remains a front-and-center issue.

- Every year, the Legislature has passed multiple bills on this issue.
- Significant changes on the local level, including:
 - Amendments to use-of-force policies
 - Changes to procedures for discipline and evaluation
 - Shifts in the services that law enforcement provides to their communities
- It is the role of public agencies to facilitate the development of effective reforms and navigate their implementation.
- City Attorney role in police reform matters especially fraught because we wear multiple hats

Agenda

- Six Pillars of police reform:
 1. Addressing mental health and substance abuse
 2. Police Culture – warrior vs. guardian
 3. Use-of-force policies
 4. Transparency
 5. Oversight
 6. Discipline
- We will be focusing on 3-6 because they are most legally imbued

Structure of Analysis

- We examine each core area of police reform along the following dimensions:
 - A. Legal foundations
 - B. Practical considerations
 - C. New legislation
 - D. Proposals for future reform

Use-of-Force: Legal Foundations & Practical Considerations

Use-of-force policies provide standards governing when and how officers can apply force in the course of their duties

MMBA: court has implied that may not be subject even to effects bargaining (*San Francisco Police Officers' Assn. v. San Francisco Police Com.* (2018) 27 Cal. App. 5th 676).

Two main components in earlier reform legislation (SB 230-2019); (AB 392 (2019):

- **Proportionality:** whether uses of force are proportional to the risks to officers and the public.
- **De-escalation:** preventing conflict escalation and ideally resolving conflicts without the use of force.

- **AB 26 (Holden):** bolsters officers' legal duty to report colleagues' excessive uses of force.
- **AB 481 (Chiu):** provides that law enforcement agencies must obtain approval from the agency's governing body prior to taking certain actions relating to the use of military equipment.
- **AB 490 (Gipson):** prohibits law enforcement agencies from using restraints or transportation techniques that could result in positional asphyxia.
- **AB 48 (Gonzalez):** limits and provides standards for law enforcement agencies' use of certain projectiles or chemical agents in responding to public gatherings.
- *Legislative reforms have left in place stand-your-ground language (Pen. Code § 835).*

Law Enforcement Reform Study Group (LERSG)

Catherine Fisk, Joseph Grodin, Thelton Henderson, John True, Barry Winograd and Ronald Yank

LERSG Proposals:

- If a public entity chooses to bargain with a police union over use-of-force policy, the public should be notified in advance of the time and place of any such negotiations and have a right to attend.
- In arbitration and civil service disciplinary proceedings involving use of force, arbitrators/hearing officers with appropriate training should be assigned from a list of officers approved by a government agency.
- No term of a law enforcement officer contract should be interpreted to prevent modification of a use-of-force policy during the term of the agreement.

- **In 2018**, State law made significant changes around the confidential treatment of peace officer personnel records (**Senate Bill 1421**)
- **In 2021**, Governor Newsom signed **Senate Bill 16 (Skinner)**, which expands upon SB 1421's changes and makes other notable transparency changes.

Transparency: New Legislation

Existing Law Following Senate Bill 1421 in 2018

Treated peace officer personnel records as confidential and precluded discovery absent a *Pitchess* hearing, subject to certain exceptions for records relating to:

- Specified incidents involving ***discharge of a firearm***
- ***Sexual assault***
- ***Perjury***
- ***Misconduct***
- ***Use of force resulting in death or great bodily injury (GBI)***

Made the above-described records subject to PRA, with redaction as required.

Changes & Additions Caused By Senate Bill 16 in Fall 2021

Added the following exceptions for records relating to **sustained findings involving:**

- ***Use of force that is unreasonable or excessive***
- ***Where an officer failed to intervene against another officer using unreasonable or excessive force***
- ***Unlawful arrests and unlawful searches***
- ***Agency's or oversight agency's finding that peace officer engaged in conduct involving prejudice or discrimination against protected classes***

Also requires disclosure of records relating where officer **resigns before investigation is completed**

Changes & Additions Caused By Senate Bill 16 in Fall 2021

- Provides that the following are **not** covered by attorney-client privilege:
 - **Disclosure of factual information** provided by a public entity to its attorney
 - Factual information discovered by any **investigation by the public entity's attorney**
 - Attorney **billing records** that do not relate to active and ongoing litigation do not disclose information for purpose of legal consultation between public entity and its attorney
- Expands authorization to **redact** records to preserve **anonymity of victims and whistleblowers**
- Requires disclosure **at earliest possible time** and no later than **45 days** from date of request, except as specified
- Requires **retention** of all **complaints and related reports & findings** currently in agency's possession as specified

Transparency: New Legislation

Existing Law	Changes & Additions Caused By Senate Bill 16 in Fall 2021
<ul style="list-style-type: none">• Authorizes agency to delay release of records involving <i>discharge of firearm or use of force</i> during an active criminal investigation	<ul style="list-style-type: none">• Expands authorization to delay release of records during an investigation of officers for:<ul style="list-style-type: none">• <i>Sexual assault</i>• <i>Dishonesty</i>• <i>Prejudice and discrimination</i>• <i>Wrongful arrests</i>• <i>Wrongful searches</i>
<ul style="list-style-type: none">• Requires a court to exclude from trial information re: <i>complaints concerning peace officer conduct</i> that is more than <i>5 years older</i> than the subject of the litigation	<ul style="list-style-type: none">• <i>Deletes this provision</i>

Transparency: New Legislation

Existing Law	Changes & Additions Caused By Senate Bill 16 in Fall 2021
<ul style="list-style-type: none">Requires law enforcement agency to <i>make record of any misconduct investigations</i> and requires a peace officer seeking employment with an agency to give <i>written permission</i> to hiring agency to view file	<ul style="list-style-type: none">Requires hiring agency to <i>request and review the misconduct investigation file(s) <u>prior</u> to hiring officer.</i>Requires peace officers to <i>immediately report all uses of force by the officer</i> to their agency

LERSG Proposals:

- Public hearings on bargaining proposals with police unions and on agreements/MOUs before the agreement is ratified.
- Disciplinary records and arbitration and civil service decisions involving law enforcement officers should be maintained on a publicly accessible database, subject to disclosure under the Public Records Act.
- All arbitrations and civil service appeals on discipline of law enforcement officers must be open to the public.

Scope: Many larger cities have strengthened or adopted new oversight mechanisms.
Three general types:

- **Auditor Model:** investigators charged with monitoring police department functions and issuing recommendations for reform; no additional process.
- **Commission/Board Model:** separate citizen agency that reviews misconduct complaints and investigations conducted by police departments.
- **Hybrid Model:** systems that incorporate both the monitoring functions of the auditor model and the public review functions of the commission/board model.

Structure of oversight has significant legal and policy implications

MMBA: courts have held most aspects of public safety reform a managerial prerogative and MMBA excludes police officer issues from PERB's jurisdiction, but...

In 2019, PERB finds that MMBA's exclusion of peace officers applies only to cases involving officers, not unions. (Orange County Deputy Sherriffs, PERB Decision 2657-M)

County of Sonoma (2021): PERB finds that County violated MMBA by failing to meet and confer over many aspects of ballot measure giving oversight body (IOLERO) disciplinary and investigatory authority.

- Independent investigations
- Access to disciplinary records
- Right to receive confidential information
- Right to subpoena records
- Right to direct access to evidence
- Review BWC footage
- Interview witnesses and investigators
- Review prior complaints
- Sit in on investigative interviews

Reform is aimed at procedures for evaluating officer misconduct and imposing discipline

MMBA: standards for disciplinary proceedings are within the scope of representation; must meet and confer over modifications.

POBOR: rights/protections dictate scope of permissible disciplinary efforts...

Gov. Code § 3303 Rights

- The right to have an interrogation occur at a reasonable hour when an officer is on duty, unless the seriousness of the investigation requires otherwise. (Gov. Code § 3303(a).)
- The right to obtain any materials (e.g., written reports or recordings) from an initial interrogation prior to any subsequent interrogations. (Gov. Code § 3303(g).)
- The right to not be interrogated by more than two individuals at one time. (Gov. Code § 3303(b).)
- The right to have an officer's personnel file remain free of notes or reports that are deemed confidential. (Gov. Code § 3303(g).)
- The right to be informed of the nature of the investigation prior to being interrogated. (Gov. Code § 3303(c).)
- The right to have a representative present at all times during an interrogation where the interrogation is likely to result in punitive action. (Gov. Code § 3303(i).)

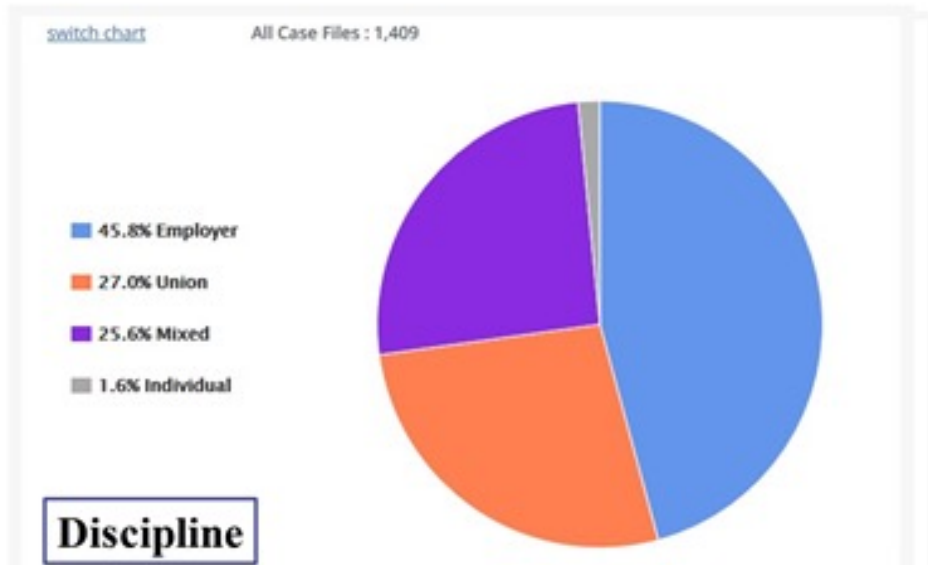
Gov. Code § 3304 Rights

- One year statute of limitations for the agency to investigate officer disciplinary matters, absent an applicable statutory exception.
- Administrative appeal for “punitive actions.”
 - A recommendation for discipline, even if purely advisory, may constitute punitive action under POBOR because it could lead to “adverse employment consequences.” (*Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1223.)
 - The administrative appeal must be in the form of an evidentiary hearing before a neutral factfinder. (*Morgado v. City and County of San Francisco* (2017) 13 Cal.App.5th 1, 7.)

- **SB 16 (Skinner):** in addition to new exceptions to § 832.7's confidentiality, SB 16 requires an agency hiring a peace officer to review a file containing records relating to any misconduct the officer has engaged in prior to hiring that officer.
- **SB 2 (Bradford):** among other things, prohibits persons from serving as peace officers if they have been convicted of specified felonies, have engaged in certain misconduct, have had their certification denied or revoked by the Commission on Peace Officer Standards and Training, or had their name listed on other decertification indexes due to misconduct.
- Sen. Bradford **introduced SB 1088 in February 2022** to provide that procedural violations of POBOR with no substantive effect are not grounds for reversing or modifying officer discipline (derived from LERSG proposal).

Arbitration Outcomes

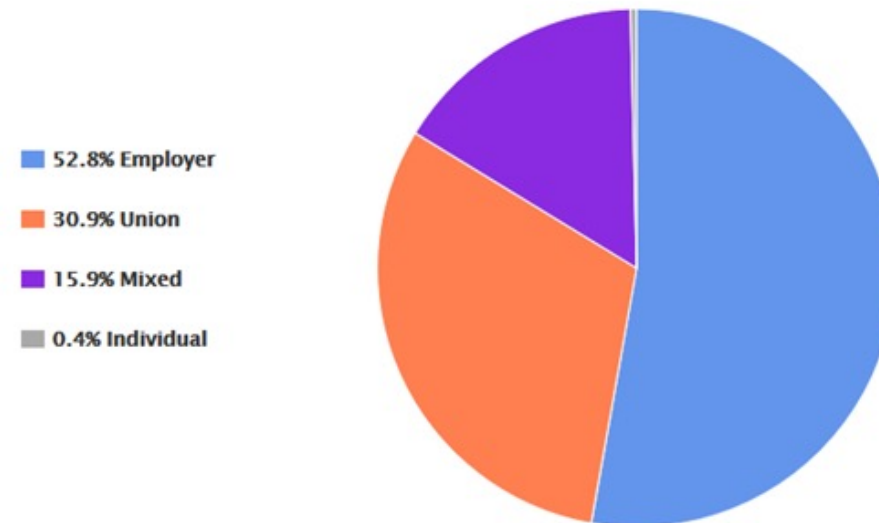
HOW ARBITRATORS RULE (from BNA)



HOW ARBITRATORS RULE (in actuality)

- Cumulative statistics from Westlaw's Labor Arbitration Information System.

Cases	Management		Union		Split	
	%	Count	%	Count	%	Count
All Cases	50%	60535	30%	37067	18%	21647
Discipline Cases	49%	21840	23%	10130	28%	13002
Non-Discipline Cases	50%	38695	35%	26937	11%	8645
Federal Cases	43%	7496	28%	5110	14%	2399



Oregon

SB 1604 (2020) Restricts arbitration award from ordering disciplinary action that differs from disciplinary action imposed by law enforcement agency if:

1. arbitrator makes finding that misconduct occurred consistent with agency's finding of misconduct; and
2. disciplinary action imposed by agency is consistent with provisions of discipline guide incorporated into agency's disciplinary policies by collective bargaining agreement.

Arbitrators still free to determine that a finding of misconduct by the employing agency was wrong.

Washington

SB 5055 (2021) creates a roster of specialized police grievance arbitrators to hear police officer disciplinary appeals.

Arbitrators appointed by Public Employment Relations Commission (PERC) and must meet certain qualifications. They are assigned by PERC in alphabetical rotation.

No other forum for police disciplinary appeals or arbitration is allowed. Police union collective bargaining agreements must use arbitrators from the roster.

Not clear whether this will result in better arbitration outcomes.

LESRG Proposals

- Permit introduction of evidence of past complaints and discipline in arbitration and civil service disciplinary proceedings.
- Prohibit consideration of the absence of a written rule when a charge concerns serious misconduct worthy of summary action.
- Allow adverse inferences to be drawn for an officer's investigation delay or failure to use video equipment.
- In determining an appropriate remedy, evidence of disparate treatment on the basis of a protected category by the officer should be considered an aggravating factor.
- Toll back pay while disciplinary proceedings are pending.
- Arbitrators should issue reasoned written decisions within fixed period of time.
- Where officer dismissed after showing of misconduct, no reinstatement unless officer rectifies problematic behavior
- Require consideration of the public's interest when considering whether reinstatement is warranted.

Advisory Arbitration:

- Results in an advisory recommendation that isn't binding on the parties
- Allows officers to make their case before a neutral third party without necessarily undercutting local disciplinary decisions



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DISCUSSION

