

Los Angeles Lawyer

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EARN MCLE CREDIT

**Government
Agency
Regulatory
Exemption**

page 26

**Police Child
Welfare Checks**

page 10

**“Made Whole”
Insurance**

page 13

PLUS

**Navigating
Statements
of Decision**

page 16

After #MeToo

Los Angeles lawyers Morin I. Jacob (right) and Paul D. Knothe provide an overview of new legislation in California to insure reduction of sexual harassment occurrences in the workplace

page 20

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CONTENTS



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FEATURES

20 After #MeToo

BY MORIN I. JACOB AND PAUL D. KNOTHE

In the wake of the #metoo movement, the California Legislature has been swift to respond with a variety of new measures to ensure compliance with workplace anti-harassment regulation

26 Zoned Out

BY JUNE S. AILIN

State and other government agencies operating on the state's behalf are often exempt from local real estate development regulations

Plus: Earn MCLE credit. MCLE Test No. 295 appears on page 29.

DEPARTMENTS

7 President's Page

LACBA unveils new programs, and much more

BY RONALD F. BROTH

9 Barristers Tips

The "Collaboration Generation" will make good family lawyers

BY ALISON SPIRITO

10 Practice Tips

The role of law enforcement in child welfare checks

BY CARLY SANCHEZ AND DANIEL POLLACK

13 Practice Tips

Insurance settlement under the Made Whole Doctrine

BY MICHAEL CHILDRESS AND NINELI SARKISSIAN

16 Practice Tips

Guidance on navigating the statement of decision process

BY ROBERT A. ROTH

32 By the Book

The Forensic Unreliability of the Shaken Baby Syndrome

REVIEWED BY PAULA MITCHELL

36 Closing Argument

What trial lawyers can learn about demurrers from *Moneyball*

BY HONORABLE RICHARD L. FRUIN

01.20



Judge Michael D. Marcus (Ret.)

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FROM THE CHAIR

Children, their vulnerability, and every community's responsibility to protect them from harm, are leitmotifs of this issue of *Los Angeles Lawyer*. Carly Sanchez and Daniel Pollack discuss the constitutional and statutory boundaries of the authority of police officers and

social workers to enter homes to conduct child welfare checks when notified that a child is at risk of abuse. They discuss the urgency for public authorities to carefully balance the policies limiting welfare-check authority against tragic consequences that can follow when officers or social workers are too shy about intervening.

Paula Mitchell reviews *The Forensic Unreliability of the Shaken Baby Syndrome* by Randy Papetti. Papetti's book scrutinizes an area in which law enforcement and the courts may have been too eager to find and punish alleged child abuse. Surprisingly, a not uncommon diagnosis of "shaken baby syndrome" or "abusive head trauma" is often based on assumptions, circular reasoning, and the mere absence of other explanations. The result is some parents suffering the loss of their child plus severe, and not infrequently unjustified, punishment for the child's death.

The Mitchell review and the Sanchez-Pollack article are must reading for lawyers practicing in areas addressing child protection. They are highly worthwhile for everyone concerned about society's responsibilities to its most helpless citizens.

Of special interest in the wake of the recent fires throughout the state is the article by Michael Childress and Nineli Sarkissian on how federal common law Made Whole Doctrine may be applied in California where the question is unsettled as to who, insurer or insured, has priority to the funds disbursed when an insured suffers damages due to the tortious act of a third party

Four nitty-gritty practice-oriented articles round out the January issue. The Honorable Richard Fruin presents statistics demonstrating the impact of recently enacted "meet and confer" requirements before the filing of demurrers, motions to strike, and motions for judgment on the pleadings, which have reduced court delays and helped avoid costly pretrial filings and appearances.

At the other end of the litigation road, Robert Roth offers the clearest, most comprehensive guide I have ever seen to obtaining a statement of decision, that indispensable item in any case that has any prospect of going up on appeal.

Focusing on transactional practice, June Ailin provides a fascinating guide to what happens when one governmental jurisdiction (e.g., a school district) wants to develop land it owns in ways impacted by land use ordinances of another entity within which the proposed development will be located. Morin Jacob and Paul Knothe summarize new legislation (some already effective, some effective January 1, 2020) enacted in response to the #metoo movement and offer guidance for employers in avoiding liability under the new laws.

Finally, Los Angeles County Bar Association President Ron Brot's President's Page column introduces several innovative projects, including one that sounds especially useful—the new Networking and Referral Program—and that will provide far-from-DTLA folks enriched chances to form practice-enhancing and business-enhancing communities.

Like LACBA as a whole, we at *Los Angeles Lawyer* are here for you. ■

Tyna Thall Orren is the 2019-20 chair of the *Los Angeles Lawyer* Editorial Board. She is an appellate attorney and a partner in the firm of Orren & Orren in Pasadena, California.

LACBA Unveils New Programs, and Much More



HAPPY NEW YEAR. I wish all of you who are a part of our Los Angeles County Bar Association family a happy, healthy and prosperous new year.

Six months into my term as president, I believe more than ever that this is a great time to be a member of LACBA and a great time to serve as president.

Through the efforts of our practice sections, committees, and staff, we have made great strides in putting the county back in the County Bar. Active members, leaders, and future leaders have emerged from throughout Los Angeles County. By emphasizing LACBA programming and projects both in downtown Los Angeles and in other parts of the county, we have reinstilled a sense of our bar community throughout our geographic boundaries from Lancaster to Long Beach and from Pomona to the Pacific.

We have embraced the opportunity to collaborate with our colleagues throughout the county to better serve the lawyers of Los Angeles County, those in need of legal services, and the greater Los Angeles community. Diversity and inclusion continue to be prominent on our agenda. The initial day-long LACBA Diversity and Inclusion Conference held at Loyola Law School was a huge success and set a high standard for the future. Soon after that, we engaged our affiliate and affinity bar leaders from throughout Los Angeles County to consolidate our efforts in order to better serve our member constituency and meet the needs of those who require our help. The message for that spirited conference was a call to action, and the result was a consensus for immediate action with a clearly designated list of priorities.

Our bar association must grow in new directions. After months of hard work, the Membership Task Force submitted its report with a specific and robust implementation plan that will receive LACBA's full support over the next six months. We have made a good beginning, but our work is far from done. We will continue to ask our members and future members what they want from LACBA and we will act decisively in response to what we hear.

To more fully represent the lawyers of Los Angeles County, we have also reached out to individuals and groups who are not presently active in LACBA. For example, we have made efforts to engage the lawyers who practice in government agencies throughout the county. I have personally met with officials in the leadership of a number of these offices and will continue to explore avenues for government lawyers to become a more significant part of our LACBA family.

Our financial challenges have been well publicized. We have used the last six months to drill down on how we can achieve financial stability and sustainability. With the help of our

Financial Task Force, an outside consultant, and aggressive planning by our executive director and his staff, we have charted a new course for financial responsibility. Our financial reports since July 1 have been encouraging. By implementing the new plan and diligently adhering to its requirements, LACBA will achieve the objective of financial stability and sustainability.

Unfortunately, attaining new financial responsibility will come at a cost. We value tradition and appreciate the contributions made by those who have served those traditions so well, but difficult times require difficult decisions. With deep appreciation, we remain grateful to all who have helped LACBA sustain in the past, even if it is time to move forward in a new direction for the future.

We are firmly dedicated to serving the needs of our members. The holidays sometimes present difficulties and temptations that often lead to unanticipated trouble and, in some instances, tragic consequences. Lawyers are not exempt. To this end, LACBA has established a Lawyer Assistance Program that offers lawyers a safe place to seek help for problems with alcohol, substance abuse, and mental or emotional issues. I am deeply grateful to the members and staff who have turned my dream of helping our members who may have these issues into a reality for the benefit of those in need.

In a further effort to respond to what our members want, and in response to the overwhelming interest by newer lawyers and those who practice either solo or in a small firm setting, LACBA is also unveiling a new Networking Referral Program. Our diverse practice areas are a rich resource and this new referral program will take advantage of the countless referral opportunities arising from members within our array of practice sections and committees. These networking and referral meetings will be held throughout the county, affording all members, regardless of location, a new and unique opportunity to network and participate in referrals with other members of the association.

There is more, much more, that LACBA now offers and will offer to our members in the future. Our Strategic Planning Committee has made great strides and will build on the progress we have made. The future is bright. As we continue to keep our focus on the benefits of membership throughout the county, there is much more to anticipate in the next six months. The limitations of this column do not allow me to explain more at this time, but there is more. You are welcome to join in and see for yourselves all that LACBA can offer to you. I know you will not be disappointed. Don't be left behind. Join us. ■

The 2019-20 president of the Los Angeles County Bar Association, Ronald F. Brot is a founding partner and chairman of Brot Gross Fishbein and a noted family law attorney. He is a past chair of LACBA's Trial Lawyers Section (now the Litigation Section) and Family Law Section, among others.



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The “Collaboration Generation” Will Make Good Family Lawyers

MILLENNIAL ATTORNEYS LOOKING to find their fit in the legal profession should consider careers in family law, particularly in mediation and collaborative divorce, which are consensual dispute resolution processes aiming to keep divorces civil, private, and out of court. These processes are often more efficient, cost-effective, and supportive of families’ diverse legal, emotional, and financial needs than traditional litigation. They empower families to be autonomous decision makers and promote sustainable settlement agreements.

In collaborative cases, each spouse hires a collaboratively trained attorney. Many couples also choose to hire a neutral forensic accountant, a child specialist, and/or mental health professionals to help resolve roadblocks to resolution. The hallmark of the collaborative process is the “disqualification agreement,” signed by the clients and professionals committing to follow collaborative principles and acknowledging that if the case does not settle, all professionals are disqualified from participating in litigated proceedings. Collaborative professionals work in teams to help families resolve their divorce issues.

In mediation, a neutral third party—the mediator—helps spouses resolve divorce disputes. The mediator does not advocate for either party, take positions, or make decisions but rather facilitates negotiations so spouses can make decisions on their own terms.

Many values common to millennials make them naturally suited to these consensual dispute resolution processes within the family law framework. Indeed, the “Collaboration Generation” title captures the millennial spirit. Millennials overwhelmingly choose collaboration over competition. In fact, 88 percent of millennials say they prefer to work in a collaborative work culture rather than a competitive one.² Millennials have been trained to be teammates from childhood. They grew up with team sports, clubs, group projects, play dates, and organized recreational activities.

Family law is a good practice area for many millennial attorneys because, ultimately, millennials are motivated by meaning. Notably, 77 percent of millennials say their ability to excel in a job is contingent upon deriving meaning from it.³ Subscribing to the concepts of “doing well by doing good”⁴ and “purpose beyond profit,”⁵ millennials believe their work is the vehicle by which they will make the world a better place.

One of the most meaningful practice areas for attorneys, family law is rooted in relationships, children, love, loss, and goals for the future. Its practitioners help people through some of the most difficult times of their lives. The opportunity to see tangible results for clients will resonate with a lot of millennial lawyers since they are highly concerned with the ethics and social responsibility of the products and services they consume. Divorcing people in the most dignified, cost-effective, and peaceful way possible is socially responsible. While there is no sugarcoating divorce, spouses choosing a collaborative process or mediation generally come out

looking better and feeling better than their litigation counterparts. While mediation and the collaborative process allow spouses to discuss their problems in private meetings, spouses in litigation air their dirty laundry in public court filings and hearings.

Millennials are also digital pioneers, evidenced by a study in which about 50 percent of them reported they would give up their sense of smell to keep one technology item.⁶ Litigation regularly requires clients and their attorneys to be physically present in court, but collaborative and mediation cases can often be resolved through use of tech tools like Zoom and Slack. Moreover, mediation and collaborative divorce offer attorneys more workplace flexibility. Office attendance is considered unnecessary by 69 percent of millennials, and 89 percent prefer to choose when and where they work rather than a 9 to 5 office job.⁷

Millennial attorneys should explore careers in family law consensual dispute resolution as it is a meaningful practice area fostering creative problem solving, congruent with millennial values and preferences. These processes will gain in popularity as increasing numbers of millennial attorneys and clients enter the market. ■

¹ Millennials (often referred to as “Generation Y” or “echo boomers”) are people born from 1981-1996. (Michael Dimock, *Defining generations: Where Millennials end and Generation Z begins*, Pew Research Centers (Jan. 17, 2019), <https://www.pewresearch.org/>). They are the largest generational group in the U.S. labor force today (Richard Fry, *Millennials are the largest generation in the U.S. labor force*, Pew Research Centers (Apr. 11, 2018), <https://www.pewresearch.org/>). They have also been deemed the “Collaboration Generation.” (Collaboration Generation: The Rise of Millennials in the Workplace, Staples, <https://www.staplesadvantage.co.uk/get-inspired/collaborative-working/collaboration-generation-the-rise-of-millennials-in-the-workplace> (last viewed Dec. 5, 2019)).

² Rob Asghar, *What Millennials Want in the Workplace (And Why You Should Start Giving It To Them)*, FORBES (Jan. 13, 2014), available at <https://www.forbes.com/sites/robashghar/2014/01/13/what-millennials-want-in-the-workplace-and-why-you-should-start-giving-it-to-them/#2ec52d044c40>.

³ Shankar Ganapathy, *Ten Millennial Personality Traits that HR Managers Can't Ignore*, MindTickle! (Sept. 1, 2016) <https://www.mindtickle.com/blog/new-hire-onboarding/10-millennial-personality-traits-hr-managers-cant-ignore> [hereinafter Ganapathy].

⁴ American Bar Association, *A Millennial explains how law firms can attract and keep his generation of lawyers* (June 2018) <https://www.americanbar.org/news/abanews/publications/youraba/2018/june-2018/a-millennial-explains-how-law-firms-can-attract-and-keep-his-gen>.

⁵ Merkur, *Millennials and their quest for purpose beyond profit: Businesses at risk of losing top talent, according to Deloitte's global annual survey* (Jan. 21, 2016) <http://www.corporatenews.lu/en/archives-shortcut/archives/article/2016/01/millennials-and-their-quest-for-purpose-beyond-profit-businesses-at-risk-of-losing-top-talent-according-to-deloitte-s-global-annual-survey>.

⁶ McCANN, *THE TRUTH ABOUT YOUTH 6* (2011), http://www.mccannworldgroup.de/fileadmin/mrmmccann/mwg/pdf/McCann_Truth_About_Youth.pdf.

⁷ Ganapathy, *supra* note 3.t

Alison Spirito is a millennial family law attorney at the law firm of McGaughey & Spirito. She serves on the LACBA Barristers/Young Attorneys executive committee where she is also a liaison to LACBA's Family Law Section.

The Role of Law Enforcement in Child Welfare Checks

ON JUNE 3, 2018, THE TABLOID NEWS website TMZ reported: “Janet Jackson calls cops to do welfare check...on 1-year-old son.”¹ The article stated: “Law enforcement sources tell us Janet made the call to Malibu authorities late Saturday night, asking cops to check in on her son...who was with her estranged husband, Wissam Al Mana, at the Nobu Hotel. We’re told police did, in fact, check in—but found no one to be in danger.”²

Welfare checks are not criminal investigations. Nationwide, child welfare checks are routinely conducted by police officers who have reason to suspect that a child may be in imminent danger of abuse and neglect or require access to immediate medical aid. Some parents consent to allow law enforcement officers access to their home and their children to conduct welfare checks. When parents refuse to provide consent for child welfare checks, police officers must balance the protections afforded by the Fourth Amendment with child safety.

The Fourth Amendment of the U.S. Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and provides that “no [w]arrants shall issue, but upon probable cause.” The Fourth Amendment applies to the states through the Fourteenth Amendment.³ Naturally, warrant requirements are implicated only if a search or seizure occurs.

The U.S. Supreme Court has upheld warrantless searches of vehicles as reasonable if they are undertaken pursuant to a police officer’s “community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”⁴ This type of search is commonly referred to as the “community caretaking doctrine.” However, the Court emphasized that there is a “constitutional difference between searches of, and seizures from houses and similar structures and from vehicles,” which “stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in ‘plain view’ of evidence, fruits, or instrumentalities of a crime, or contraband.”⁵

Police welfare checks of residences without a warrant generally are permissible if police officers have reasonable grounds to believe an inhabitant inside a residence is in imminent danger.⁶ Though the laws vary somewhat from state to state, many states have policies similar to the one codified in California’s Penal Code,⁷ which requires law enforcement agencies to develop and implement written policies and procedures regarding best practices for conducting welfare checks when the inquiry is motivated by concerns that the person may be a danger to him- or herself or others.⁸ In order to make reasonable decisions, law enforcement

must have reliable information about what is going on inside a home.

Police and Child Protective Services

Child protection often demands that law enforcement and social services work effectively together. It is not possible to provide an exhaustive list of circumstances in which a welfare check would be required because each instance must be carefully evaluated, with the law and applicable child protection standard of care as the principal considerations.

Police welfare checks of residences without a warrant generally are permissible if police officers have reasonable grounds to believe an inhabitant inside a residence is in imminent danger.

For example, if a child is being abused or neglected, it is often necessary to remove the child from that home immediately, without court intervention. Approximately 20 states give social workers authority to remove children without a court order, but 46 states give such authority to police officers.⁹ Even when social workers can remove children without police assistance, most still request law enforcement presence because parents are less likely to react violently if police are present.¹⁰

In cases in which the child does not appear to be in imminent danger and there is no need for immediate removal, does it still seem prudent to check on the child to make sure that the child is safe? Reports of child abuse are often vague because the reporting party may not know what is occurring in the house. If the reporting party heard screaming, followed by a child crying, it may not be clear whether removal is appropriate. The social workers would seek to check on the child to ensure the child’s safety. Parents can consent to allow social workers to enter their home and interview or inspect their children, though abusive and neglectful parents often refuse to give such consent. In these instances, social workers do not have the authority to force entry into homes to ensure that the children are receiving proper

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care. Thus, social workers turn to police for help in obtaining a child welfare check, but the police may or may not be able to gain access to the home and the child without a warrant.

Under the “community caretaking” exception to the Fourth Amendment, police may enter a home without a warrant if the officer has an objectively reasonable belief that a person within a home is in immediate need of aid.¹¹ In determining whether an officer acted reasonably in entering a home under the community caretaking function, one must look to the “reasonable inferences he is entitled to draw from the facts in light of his experience.”¹² The scope of the exception often depends on the nature of the underlying offense.¹³

In varying circumstances, courts have upheld warrantless entries by police to conduct child welfare checks. Because there is relatively little case law in California on this issue, the law in other states can be helpful in ascertaining when such entries have been found acceptable. In *State v. Bittner*, a South Dakota case, the defendant stabbed officers who had entered his home after a call regarding domestic violence.¹⁴ After the stabbing, witnesses told police officers at the scene that a baby was inside the house.¹⁵ Officers entered the home to search for the child.¹⁶ While in the home, the officers found and recovered the knife that had been used to stab other police officers.¹⁷ The court held that it was reasonable for officers to believe that a child may be in need of emergency aid or in danger when two officers had been stabbed in the defendant’s home and that the warrantless entry was justified.¹⁸ In *in re Dawn O.*, a California appellate case, a young child reported to officers that she was locked out of her home and indicated that she may have siblings inside the home.¹⁹ Upon entry, officers found two small children, including an infant in a crib, in the home alone.²⁰ Again, the court held that the warrantless entry was reasonable in order to ensure the safety of any children who may have been within the home.²¹

Courts have upheld warrantless entries in cases in which anonymous callers provided detailed information regarding child abuse and a potential emergency situation.²² Courts also have upheld warrantless entries in cases in which there appears to be a child inside in need of medical attention.²³ Warrantless searches are not permitted in cases in which law enforcement has reason to know or suspect that a child is already deceased, as there is no emergency under those circumstances.²⁴

The police officers’ decision whether to enter a home to check on a child without a warrant is a difficult one to make. The officers are required to use their best judgment on a case-by-case basis. It is therefore incumbent upon the social workers who receive the referrals regarding potential abuse and neglect to make sure that the officers are aware of the relevant facts that may help them determine whether a child is likely to be in danger in the home. Law enforcement may be in danger, or, alternatively, subject to liability, if the social workers do not provide them with the information available prior to entering the home.

Delayed Access

The following case is instructive on the issue of police and social worker access for child welfare checks.²⁵ Two-year-old Gail C. lived alone with her pregnant mother who suffered from severe mental health disorders, including schizophrenia and bipolar disorder. Gail’s mother stopped taking her medications when she learned that she was pregnant with her second child, and her mental health subsequently deteriorated significantly. She told several people that she planned to give birth at home by herself. The woman’s family grew concerned that Gail was not being properly cared for by her mother and called Child Protective Services repeatedly. When social workers arrived at the home to check on Gail, Gail’s mother refused to let them inside and denied them access to Gail. On several occasions, the social workers contacted law enforcement and requested that officers perform a child welfare check on Gail. The officers were also unsuccessful in gaining access to the home to check on Gail. Although Gail’s family had stated that they believed she was being neglected, the police did not have enough information to conclude that she was at risk of immediate harm or in need of medical attention.

Thus, the child was left to fend for herself for several months, during which time her mother gave birth at home. Neighbors alerted Child Protective Services that the mother no longer looked pregnant but said they could not hear either a new baby or Gail in the home. By this time, Child Protective Services had given up on contacting law enforcement for assistance, reasoning that they had not been helpful in performing child welfare checks in the past. Finally, four months after Gail’s family first began calling Child Protective Services, a neighbor flagged down a passing police officer to report a horrible odor emanating from the apartment where Gail resided with her mother. The officer determined

that the odor smelled like a dead body and, believing others in the home needed immediate aid, forced entry into the home and found Gail cuddling the body of her deceased sibling, whom he described as “mummified.” The county paid more than \$1 million to Gail for, among other things, its failure to continue contacting police after it knew that Gail’s mother was no longer pregnant.

This case is just one tragic example of what can happen when social workers fail to share enough information with police officers who are assisting them with child welfare checks. Had the social workers fully communicated the seriousness of Gail’s mother’s mental health problems or called again once they knew Gail’s mother had given birth, the officers may have felt justified in entering the home without a warrant, and Gail’s damages could have been mitigated or prevented altogether. It is critical for workers from both entities to share all information in their possession so that social workers and law enforcement can work together to determine whether a warrantless entry is appropriate.

Qualified Immunity

If police determine that it is necessary to enter a home to perform a child welfare check under circumstances that do not actually warrant such an intrusion, qualified immunity may apply. Section 1983 of the Civil Rights Act creates a private cause of action against government officials when they violate any constitutional right.²⁶ To prevail in a Section 1983 cause of action, plaintiffs must prove that they were deprived of a constitutional right, and that the person who deprived them of that right was acting under color of law.²⁷ Generally, qualified immunity affords police officers some leeway to make reasonable mistakes in the course of performing their duties. Qualified immunity shields government officials from standing trial in Section 1983 lawsuits unless their conduct has violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁸ To ascertain whether qualified immunity applies, the court must decide preliminarily “whether the facts, taken in the light most favorable to the plaintiff, demonstrate a constitutional violation.”²⁹ If so, the court must then determine whether the right was clearly established.³⁰ In other words, whether, in the specific context of the case, “it would have been clear to a reasonable officer that his conduct was unlawful.”³¹

A police officer cannot be granted qual-

ified immunity for a demonstrably illegal search. The U.S. Supreme Court has held that a qualified immunity analysis “must be undertaken in light of the specific context of the case, not as a broad general proposition.”³² In *Mullenix v. Luna*, the Court wrote:

We have repeatedly told courts... not to define clearly established law at a high level of generality.” The dispositive question is “whether the violative nature of particular conduct is clearly established.” This inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition.” Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine... will apply to the factual situation the officer confronts.”³³

Accordingly, whether a police officer is entitled to qualified immunity for alleged improper conduct during a welfare check is often a mixed question of fact and law.

Balancing the privacy interests provided in the Fourth Amendment and children’s protection from abuse and neglect is challenging and fraught with uncertainty. While

courts cannot condone law enforcement officials routinely conducting warrantless searches in the name of preventing child abuse, the need to ensure that children are safe in their homes is a paramount concern. Courts have tried to marry these two conflicting needs with the community caretaking exception to the Fourth Amendment, and both social services and law enforcement need nuanced instruction on exactly when child welfare checks are warranted to save children from extreme harm. Nonetheless, when reasonable mistakes are made, police officers are protected from liability under the qualified immunity doctrine.³⁴ ■

¹ Staff, *Janet Jackson calls cops to do welfare check... on 1-year-old son*, TMZ (June 3, 2018), <https://www.tMZ.com/2018/06/03/janet-jackson-calls-police-welfare-check-1-year-old-son-eissa-estranged-husband-wissam>.
² *Id.*

³ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴ *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

⁵ *Id.* at 442.

⁶ *See Brigham City v. Stuart*, 547 U.S. 398, 403-04 (2006); *Michigan v. Fisher*, 558 U.S. 45 (2009)

⁷ *See, e.g., ARIZ. REV. STAT. TIT. 13. CRIM. CODE §13-3601N* (“When a peace officer responds to a call alleging that domestic violence has been or may be committed, the officer shall determine if a minor is present. If a minor is present, the peace officer shall conduct a child welfare check to determine if the child is safe and the child might be a victim of domestic

violence or child abuse.”)

⁸ PEN. CODE §11106.4:

(a) Every law enforcement agency shall develop, adopt, and implement written policies and standard protocols pertaining to the best manner to conduct a ‘welfare check,’ when the inquiry into the welfare or well-being of the person is motivated by a concern that the person may be a danger to himself or herself or to others. The policies shall encourage a peace officer, prior to conducting the welfare check and whenever possible and reasonable, to conduct a search of the Department of Justice Automated Firearms System via the California Law Enforcement Telecommunications System to determine whether the person is the registered owner of a firearm.

(b) For purposes of this section, “reasonable” as used in subdivision (a) means that the officer could conduct the firearm registry check without undue burden on the execution of the officer’s other duties, that there are no exigent circumstances demanding immediate attention, and that the peace officer has access to, or can reasonably ascertain, relevant identifying information.

⁹ DONNA PENCE & CHARLES WILSON, *THE ROLE OF LAW ENFORCEMENT IN THE RESPONSE TO CHILD ABUSE AND NEGLECT* (1992), available at <https://www.childwelfare.gov/pubPDFs/law.pdf>.

¹⁰ *Id.*

¹¹ *Mincey v. Arizona*, 437 U.S. 385, 392 (1978).

¹² *People v. Ray*, 21 Cal. 4th 464, 477 (1999).

¹³ *Welsh v. Wisconsin*, 466 U.S. 740, 751 (1984).

¹⁴ *State v. Bittner*, 359 N.W. 2d 121, 123 (S.D. 1984).

¹⁵ *Id.* at 126.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 126-27.

¹⁹ *In re Dawn O.*, 58 Cal. App. 3d 160, 162 (1976).

²⁰ *Id.*

²¹ *Id.* at 163-64.

²² *See State v. Boggess*, 115 Wis. 2d 443 (1983) (the reporting party provided the first and last names of the children and gave specific information regarding injuries that the children sustained); *State v. Frink*, 42 Ore. App. 171, 176-77 (Ct. App. 1979) (the reporting party stated that a child was being “shot up with drugs”).

²³ *See Wooten v. State*, 398 So. 2d 963 (Fla. Dist. Ct. App. 1981) (the reporting party witnessed a man shake, yell at, and strike a thirteen-month old baby before taking the child into his apartment).

²⁴ *People v. Draper*, 196 Colo. 450 (1978).

²⁵ *Gail C.*, a minor by and through her guardian ad litem, *Marla C. Mahoney v. County of Riverside*, et al. No. RIC1804569, (Riverside County Superior Ct., 2018).

²⁶ *See Owens v. City of Independence*, 445 U.S. 622, 651-52 (1980).

²⁷ 42 U.S.C. §1983.

²⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

²⁹ *Curley v. Klem*, 298 F. 3d 271, 277 (3d Cir. 2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

³⁰ *Couden v. Duffy*, 446 F. 3d 483, 492 (3d Cir. 2006).

³¹ *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

³² *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

³³ *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal citations omitted).

³⁴ Qualified immunity does not apply to state law causes of action, e.g., CIV. CODE §52.1, which authorizes actions against those who interfere or attempt to interfere by threat, intimidation, or coercion with the exercise of California or federal constitutional or statutory rights. Such causes of action are generally subject to the government claims statutes and state immunities, however.



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Insurance Settlement Under the Made Whole Doctrine

WHEN AN INSURED SUFFERS DAMAGES due to the tortious acts of a third party and the insurer compensates the insured—wholly or partially—for those damages, who has priority to the funds disbursed by the third party, the insured or the insurer? Like the answers to most legal questions—it depends. Although the precise answer to this question is unsettled in California, the federal common law Made Whole Doctrine and contractual language between the insured and insurer have created a road map through which one may be able to determine a concrete answer. Case law also made a distinction between the remedies available for personal injury claims versus property damage claims. It is important to note that in personal injury actions, the insurer may not directly assert his or her claims against the tortfeasor on its own behalf, whereas, the same rule does not apply to property damage claims.

Before delving into the legal analysis of the Made Whole Doctrine, it is crucial to understand the fact patterns in which this doctrine may be applied. The doctrine is applied in a scenario in which a tortious act by a third party has caused an insured to suffer damages. As such, prior to or in anticipation of litigation against the third party, the insured is paid from his or her claim through the insurer, either wholly or partially, in accordance with the contract between the insured and the insurer. When the third party is held liable for tortious acts either through a settlement agreement or a jury verdict, the doctrine is triggered. The question then arises as to which of the two—the insured or insurer—has priority to be made whole through the funds paid by the liable third party.

An example of such fact pattern is when an insured's property is destroyed by a wild fire due to tortious acts of the electrical company in the area. The first step is for the insured to report this claim to his or her insurer and request to be compensated for the loss incurred while seeking damages from the liable third party.

When such loss is incurred, there are generally two scenarios that are presented depending on the type of loss. One scenario is the case in which the loss is a definite amount and determined at the outset of the claim for which the insurer can make the insured whole and subsequently pursue his or her subrogation right from the third party.

The second scenario may be the case in which the loss is not readily calculated, or the loss may be ongoing. For example, the insured may have suffered property damage, ongoing smoke damage, and/or damages that resurface after a period for which the exact amount cannot be determined. In this second scenario, the insured will ideally be made whole by the third party. It is inevitable, however, that the insurer will pursue his or her right of reimbursement or subrogation for funds already paid to the

insured, but the question remains as to when does this right attach.

Made Whole Doctrine

Under federal common law Made Whole Doctrine, an insurance company may not subrogate a claim until the insured has been fully compensated.¹ Following this decision, the court in *Chandler v. State Farm Mutual Automobile Insurance Co.* further reinforced and recognized that California follows the Made Whole Doctrine.²

The Made Whole Doctrine is premised upon the notion that

In California, both the subrogation rights and reimbursement rights of the insurance company fall within the rubric of subrogation.

as between the insurer and insured, it is reasonable to place the burden for any nonrecovery of damages on the insurer who has been paid to bear the loss and is better able to bear the loss.³ The Made Whole Doctrine also acts to safeguard an insured's priority of compensation for his or her loss, such that when the tortfeasor has a fixed amount of assets, it is fair that the insured has the priority of rights to collect the full amount of compensation before the insurer may seek to collect from the tortfeasor.⁴ The insurer may enforce a subrogation claim—despite the insured's not being fully compensated—only when the insurer has paid the policy limit.⁵

When an insurance company pays out a claim on a first-party insurance policy to its insured, the insurance company is subrogated to the rights of its insured against any tortfeasor who is liable to the insured for the insured's damages. Subrogation is the insurer's right to be put in the position of the insured, in order to recover from third parties who are legally responsible to the insured for a loss paid by the insurer. Subrogation has its source in equity and arises by operation of law (legal or equitable subrogation).⁶

The Made Whole Doctrine dictates when the insurer's right to subrogation attaches. It limits the insurer's reimbursement right in situations in which the insured has not recovered his or her "entire debt."⁷ The rule precludes an insurer from recovering any third-party funds paid to the insured until the insured has "been fully compensated for [his or] her injuries...."⁸ The general rule

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is that an insurer who pays a portion of the debt owed to the insured is not entitled to subrogation for that portion of the debt until the debt is fully discharged.⁹ Until the creditor has been made whole for his or her loss, the subrogee may not enforce a claim based on the respective rights of subrogation.¹⁰

It should be noted that subrogation and reimbursement are used interchangeably. As explained by a leading commentator on insurance law, there is a technical difference between subrogation and reimbursement.¹¹ Subrogation refers to the right of the insurance company to step into the shoes of the insured and assert the insured's rights against the third party.¹² Reimbursement refers to the right to receive payment back of what has been expended by the insurance company.¹³ That same commentator, however, acknowledges that those terms are often used interchangeably in the cases.¹⁴ In California, both the subrogation rights and reimbursement rights of the insurance company fall within the rubric of subrogation. Thus, both of those rights are limited by the Made Whole Doctrine.

Contract Language

Since only the parties' expectations are at stake in contract law, the parties are free to contract for specific types of remedies upon breach, and even when the parties do not bargain for a particular measure of damages, only the parties' expectations are taken into account when fashioning a remedy for breach.¹⁵ This means that parties are sometimes not fully compensated for all harm caused by a breach, but, on the other hand, contract damages provide for a certain amount of predictability in commercial arrangements.¹⁶ It is certainly true that "predictability about the cost of contractual relationships plays an important role in our commercial system."¹⁷

The contract between the insured and the insurer is another source that may provide the answer to the question as to who has priority over the funds. Priority over funds can also arise out of the contractual language of the insurance policy (conventional subrogation). The subrogation provisions of most insurance contracts typically are general and add nothing to the rights of subrogation that arise as a matter of law.¹⁸ "It is a general equitable principle of insurance law that, *absent an agreement to the contrary*, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for [his or] her injuries, that is, has been made whole."¹⁹

In *Travelers Indemnity Co. v. Ingebretsen*,²⁰ the parties executed a specific sub-

rogation agreement that provided:

In consideration of and to the extent of said payment the undersigned hereby assigns and transfers to the said Company all rights, claims, demands and interest which the undersigned may have against any party through the occurrence of such loss and authorizes said Company to sue, compromise or settle in the name of the undersigned or otherwise all such claims and to execute and sign releases and acquittances in the name of the undersigned.

The appellate court concluded that the insured's assignment to the insurance company of "all rights" "to the extent of payment" gave the insurance company priority to any recovery obtained by the insured.²¹

The more recent cases, however, require that the contractual provision that intends to vitiate this rule must "clearly and specifically [give] the insurer a priority out of proceeds from the tortfeasor regardless whether the insured was first made whole."²² Thus, there is authority regarding the language in an insurance policy that grants the insurance company "all rights of recovery to the extent of its payment" overriding the common law Made Whole Doctrine.²³ The precise language of such, however, must be present in the contract. Absent clear contractual language to the contrary the proceeds first go to the insured. Cases have found contractual language to be in favor of the insurance companies in the past but recent cases require clear and specific language so as a practice pointer counsel should carefully review the policy language especially older policies.

Property Damage vs. Personal Injury

As mentioned, subrogation places the insurer in the shoes of his or her insured to the extent of the payment. The courts have made a distinction between an insured's property damage claims and personal injury claims. In personal injury actions, the insurance company may not assert its subrogation claim directly against the third party tortfeasor on its own behalf.²⁴ Moreover, the insurance company may not seek to "gang-press" a policyholder's personal injury attorney into service as a collection agent by suing the attorney to pay it any judgment or settlement proceeds from the third party that passes through the attorney's hands.²⁵ Thus, to preserve its right of subrogation, the insurance company must either interplead itself into any action brought by the insured against the third party tortfeasor or wait to seek reimbursement under the language of its policy from its insured to the extent

that the insured recovers money from the third party.²⁶

The Made Whole Doctrine also plays a role in dictating the process of interpleading by the insurer. When the insurance company does not interplead itself into the underlying action, the insurance company's rights to recover any payments received by its insured are limited.²⁷ The doctrine states:

When an insurer does not participate in the insured's action against a tortfeasor, despite knowledge of that action, the insurer cannot recover any funds obtained through settlement of the action unless the full amount received exceeds the insured's actual loss. Furthermore, the insured need not account to the nonparticipating insurer "for more than the surplus remaining in his hands, after satisfying his loss in full and his reasonable expenses incurred in the recovery."²⁸

Thus, when an insurer elects not to participate in the insured's action against a tortfeasor, the insurer is entitled to subrogation only after the insured has recouped his or her loss and some or all the associated litigation expenses incurred in the action against the tortfeasor.²⁹

Practice Pointers

In order to avoid confusion, misinterpretation and/or misrepresentation at the time of settlement with the third-party tortfeasor or after a jury verdict against the tortfeasor, the insured and the insurer may elect to negotiate how the recovery will be allocated between the insured and the insurer. In determining who has priority to the funds, it is crucial to recognize that there are three different options available for the practitioners to pursue.

The first option is for the insured and insurer, at the initial claims stage, to negotiate as to who has priority and on what basis. Within this option, there are three different possibilities the insured and the insurer can each utilize. One is for the parties to adopt the terms of the Made Whole Doctrine and make the insured whole before the insurer can recover. The second possibility is for the insurer to recover his or her loss first, and before the insured. The third possible way through which the funds can be divided is on a pro rata basis. This last way allows the parties to recover based on their share of loss. It should be noted that it is also important to negotiate the terms for payment of costs and attorneys fees in the underlying litigation.

The second option is that the insurer, as part of the settlement, takes an assignment of the subrogation right and is paid through

the associated assignment. Finally, the third option is that the insured can, while the claim payout with the insurer is still pending, file his or her own lawsuit against the tortfeasor, reach a settlement, and recover from that settlement for the loss.

Although case law has created a road map in determining who has priority to the funds, it remains a matter that is to be analyzed on case-by-case basis. This is largely because most contracts between insurers and insureds contain general subrogation provisions that trigger the common law Made Whole Doctrine. Thus, unless specifically stated in the original contract, the insured is to be made whole before the insurer is subrogated or reimbursed the funds that the insurer paid for the claim on behalf of the insured. As noted, one can elect to negotiate the terms of the contract to avoid any confusion or misrepresentation. ■

¹ California Dep't of Toxic Substances Control v. City of Chico, 297 F. Supp. 2d 1227, 1236 (E.D. Cal. 2004) (holding that a subrogation action was not ripe when the insurer made only a partial payment to the insured.)

² Chandler v. State Farm Mut. Auto. Ins. Co., 596 F. Supp. 2d 1314, 1318 (C.D. Cal. 2008).

³ Bush v. Richardson, 484 S.E. 2d 490, 494 (W. Va. 1997); Waukesha County v. Johnson, 320 N.W. 2d 1, 3 (Wis. App. 1982); Garrity v. Rural Mut. Ins. Co., 253 N.W. 2d 512, 514 (Wis. 1977); 16 COUCH ON INSURANCE §§223.136 (3d ed. 2000) [hereinafter COUCH].

⁴ Schonau v. Geico Gen'l Ins. Co., 903 So. 2d 285, 287 (Fla. App. 2005); Garrity v. Rural Mut. Ins. Co., 253 N.W. 2d 512, 514 (Wis. 1977).

⁵ Chandler, 596 F. Supp. 2d at 1320.

⁶ Progressive W. Ins. Co. v. Superior Ct., 135 Cal. App. 4th 263, 272-73 (2005).

⁷ 21st Century Ins. Co. v. Superior Ct., 47 Cal. 4th 511, 519 (2009).

⁸ *Id.*

⁹ Sapiano v. Williamsburg Nat'l Ins. Co., 28 Cal. App. 4th 533, 536-37 (1994).

¹⁰ *Id.*

¹¹ 16 COUCH, *supra* note 3, §222:2, at 222-10 – 222-14.

¹² *Id.* at 222-11.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 517 (1994).

¹⁶ *Id.* at 515.

¹⁷ Foley v. Interactive Data Corp., 47 Cal. 3d 654, 683 (1988).

¹⁸ Progressive W. Ins. Co. v. Superior Ct., 135 Cal. App. 4th 263, 272-73 (2005).

¹⁹ *Id.* at 274 (emphasis in original).

²⁰ Travelers Indem. Co. v. Ingebretsen, 38 Cal. App. 3d 858, 865 (1974).

²¹ Progressive, 135 Cal. App. 4th at 274, citing Travelers, 38 Cal. App. 3d at 865-66.

²² Progressive, 135 Cal. App. 4th at 274.

²³ *Id.*

²⁴ *Id.* at 272-73.

²⁵ *Id.*

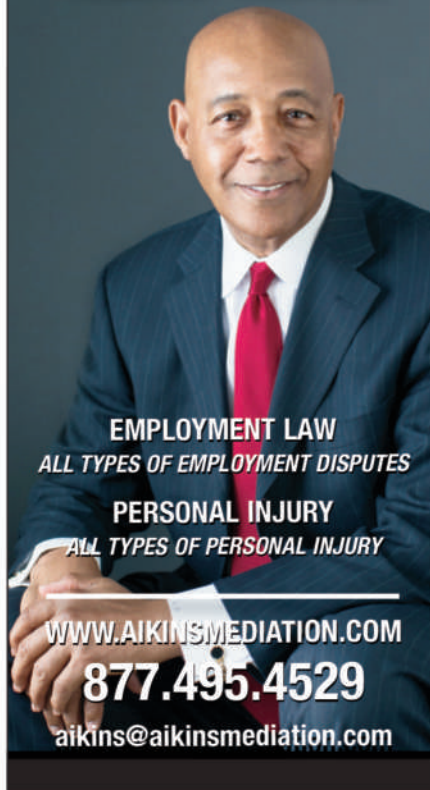
²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*


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Guidance on Navigating the Statement of Decision Process

WHEN THE RESULT OF A BENCH TRIAL goes up on appeal, the most influential factor on the appellate outcome is the trial court's statement of decision. Yet, otherwise sophisticated trial attorneys routinely miss opportunities to use the statement of decision process to influence decision-making, buttress victories, or isolate appealable errors. Properly obtaining a statement of decision is a meticulous process fraught with pitfalls. Appellate specialists frequently see both procedural and tactical errors in this phase of the trial court endgame. Given the complexities of the statement of decision process, appellate guidance on how to navigate this intricate phase can put clients in the strongest position possible for an impending appeal.

Without a statement of decision, a reviewing appellate court will construe all factual conflicts in favor of the trial court's judgment or appealable order and will additionally indulge any favorable inference that can reasonably be derived from the record.¹ The result can be a highly fictional version of the facts that does not reflect the trial court's actual reasoning. Even findings and reasoning stated by the trial court on the record through verbal remarks at a hearing or in a written tentative decision are routinely ignored, unless confirmed in a formal statement of decision.²

When a statement of decision is not requested, appellate courts ignore the trial court's tentative rationale for two reasons. First, there is a presumption that the trial court might theoretically have changed its reasoning, but not the result, between the time of a tentative decision and the time judgment is entered.³ The second reason is out of a sense of fairness to the trial judge. The statement of decision process gives the trial court an opportunity, prior to any appeal, to address objections, ambiguities, and omissions that are brought to its attention, as well as to reconsider the merits in light of these factors.⁴

In contrast, when a statement of decision is issued, it is regarded as the trial court's formal record of the factual and legal basis for its decision.⁵ Potential assumptions and inferences are disregarded as to reasoning and findings disclosed in the statement of decision.⁶ Instead, through its statement of decision the trial court provides formal findings "explaining the factual and legal basis for its decision as to each of the principal controverted issues."⁷ The trial court decision is ordinarily held to those reasons on appeal.

Statement of Decision Availability

Under Code of Civil Procedure Section 632, a statement of decision may be requested "upon the trial of a question of fact by the court."⁸ While this standard could be broadly interpreted, case law has significantly narrowed the circumstances under which litigants are entitled to a statement of decision as a matter of right.⁹ Fundamentally, the case law distinguishes between a trial and the proceedings on a motion. In most instances, no statement of decision is required to support an order following a motion, even if the motion involves an evidentiary hearing and is itself appeal-

able.¹⁰ However, it never hurts to request a statement of decision because the trial court may issue one even when it is not required.¹¹

When there has been no trial, some courts have held that a statement of decision may still be required on request, under limited circumstances.¹² The exception is based on a balancing of 1) the importance of the issues at stake and 2) whether effective appellate review can be accomplished without findings.¹³ Upon request, a statement of decision is also mandated by statute or court rule for certain proceedings short of a full trial.¹⁴ Certain statutes similarly require a "statement of reasons," which may be similar, but not equivalent, to a statement of decision.¹⁵

Since a statement of decision is only required "upon the trial of a question of fact by the court," some cases have held that no statement of decision is required when there are no disputed facts, the legal posture of the case does not require deciding questions of disputed fact, or only pure questions of law are presented.¹⁶

Tentative Decision

Under California Rules of Court, Rule 3.1590(a), the court is required to announce a nonbinding tentative decision before rendering a judgment or a statement of decision. Although a tentative decision may purport to decide issues in the case, it is merely an informal statement of the views of the trial judge and does not constitute a statement of decision.¹⁷ The tentative decision will sometimes be used by appellate courts to support a judgment but "may never be used to impeach the order or judgment."¹⁸

The duty for a trial court to issue a tentative decision prior to the formal statement of decision is mandatory.¹⁹ Nevertheless, in practice, trial courts sometimes ignore this requirement. This occurs when submission is followed by the trial court's issuance of a document titled "statement of decision" before the time for requesting a statement of decision has expired, or when it issues a final order after submission, skipping the tentative decision requirement altogether.²⁰ These practices improperly deprive the requesting party of the opportunity to make proposals and objections.²¹ Such procedural errors are potentially reversible if the lack of findings results in prejudice.²² While trial courts may be resistant to being admonished to do more work, counsel should be forceful in insisting that the trial court properly adhere to the required procedure. Otherwise, counsel risks waiving important clients' rights.

Procedural Stages

Many attorneys believe they have fulfilled their responsibilities by timely informing the trial court, without further elaboration, that they want a statement of decision. While a timely request is

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essential, the request is in fact only the beginning of a multistage process. Taking action during some or all of these stages may be essential to preserving clients' rights.

Timely Request. The precise deadline for requesting a statement of decision is determined under two alternative standards, depending on the length of the trial. If a trial is completed within one calendar day or takes less than eight hours over multiple days, a statement of decision must be requested before submission.²¹ Otherwise, the right to a statement of decision is waived.²⁴

For purposes of calculating whether eight hours have elapsed, within the meaning of Section 632, "the time of trial means the time that the court is in session, in open court, and also includes ordinary morning and afternoon recesses when the parties remain at the courthouse."²⁵ In some instances, time the trial court spent on the case outside of the courtroom, such as reviewing transcripts or exhibits, might be considered in calculating the eight-hour requirement, but this consideration should not be relied on unless the record is very clear as to how much time the court spent on such tasks.²⁶ Trial is not complete until 1) the court orders the matter submitted or 2) either the final paper (e.g., post-trial brief) is filed or final arguments are heard, whichever is later.²⁷

For trials of more than one calendar day and more than eight hours, a more forgiving deadline applies. A request for a statement of decision must be made within 10 days after the court announces its tentative decision.²⁸ The ten-day period runs from service of a written tentative decision, and the deadline for filing the request is extended for mailing or other forms of service pursuant to Code of Civil Procedure Section 1013.²⁹ Failure to timely request a statement of decision within the 10-day period (or as extended by service) is a waiver, and the daunting inferred findings doctrine will govern appellate review.³⁰ Issuance of a final judgment or order after a tentative decision is issued, but before time has expired to request a statement of decision, is error.³¹

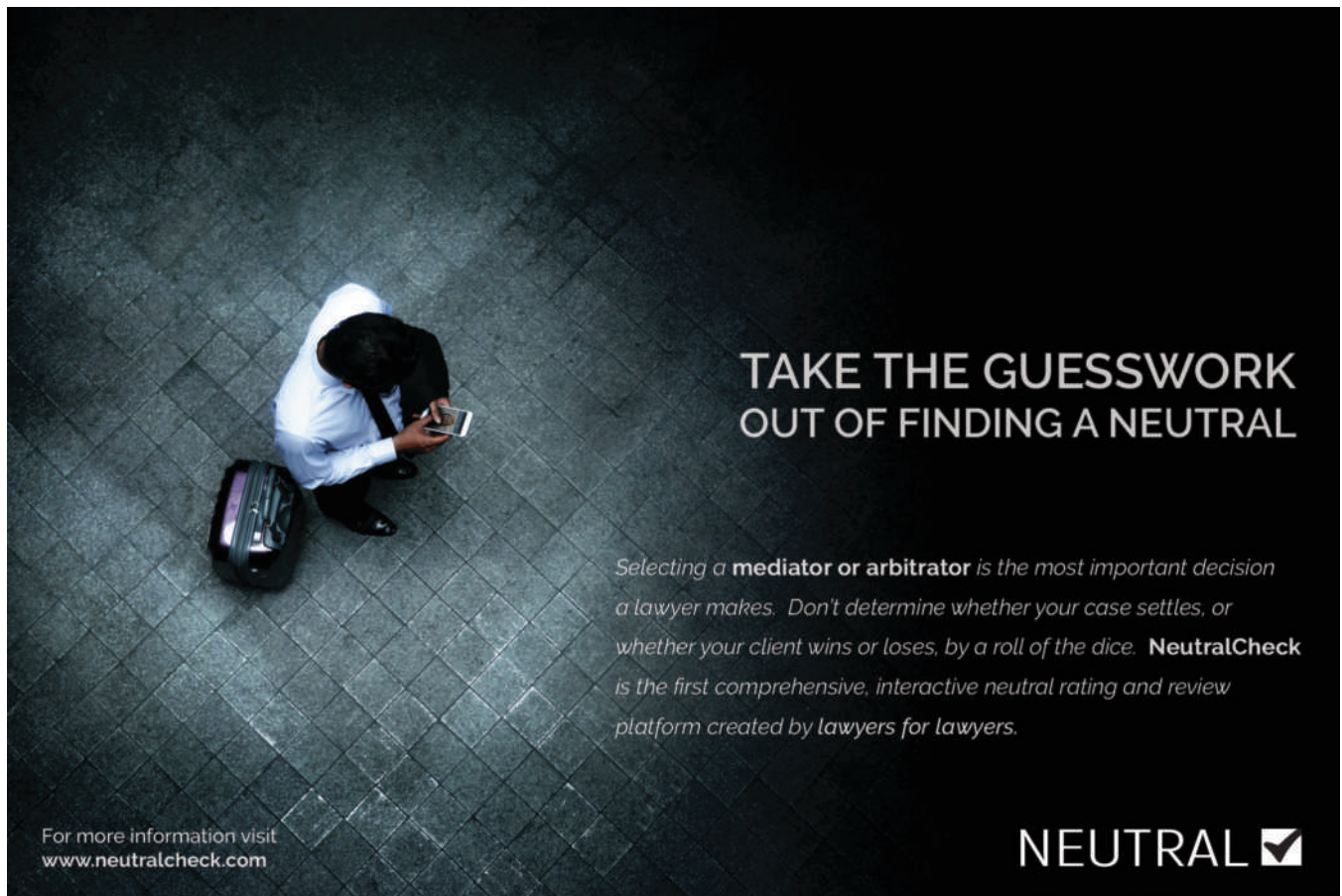
Under unusual circumstances, appellate courts have sometimes found limited exceptions to the general rule that failure to timely request findings is a waiver.³² Time for filing a request for a statement of decision, as well as other statement-of-decision deadlines, can be extended by the trial court for good cause.³³ Regardless of these deadlines for requiring the trial court to issue a statement of decision, a trial court is authorized to issue a statement of decision sua sponte.³⁴

Specifying Issues and Requesting Findings. Counsel not only must timely request

a statement of decision but also should specify for which controverted issues the party seeks a statement of decision.³⁵ The request can include proposing additional findings not covered in the tentative decision.³⁶

The trial court is not required to make express findings of fact on every controverted factual issue in the case, so long as the statement of decision sufficiently disposes of all basic issues in the case.³⁷ The statement of decision must fairly disclose the trial court's determinations as to the ultimate facts and material issues in the case.³⁸ All that a trial court is required to do is provide an explanation of the factual and legal basis for its decision on the principal controverted issues for which findings are requested.³⁹ That is, the trial court need only make findings on ultimate facts, which are relevant and essential to the judgment and closely and directly related to court's determination of the ultimate issues in the case.⁴⁰ An "ultimate fact," on which findings must be made, as distinguished from a mere "evidentiary fact" as to which findings need not be made, is "such as an element of a claim or defense, without which the claim or defense must fail."⁴¹ A detailed discussion of specific evidentiary facts is ordinarily not required.⁴²


Given these competing standards, counsel must find a middle ground when specifying issues and requesting findings. Cases



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commonly disapprove of “interrogating the judge” through overly long, burdensome requests for a statement of decision and sometimes allow trial courts to ignore requested findings presented in this manner.⁴³ On the other hand, failure to ask for findings on a controverted issue may result in a waiver. While no precise rule can be stated for striking the proper balance, certain guidelines are helpful.

The request for a statement of decision should be crafted with an eye toward the three basic sources of appellate reversals: errors of fact, errors of law, and errors of process.⁴⁴ These analytical points are useful in guiding counsel’s approach to the statement of decision process, regardless of whether a client is attacking the tentative decision or seeking to safeguard the tentative result.

Errors of fact refer to more than simply “getting the facts wrong.” They also include questions of whether the facts are sufficiently proven, are grounded in admissible evidence, support all elements of a prima facie case, and rise to the level of “substantial evidence” on all essential factors. Errors of law can include whether the proper substantive legal standard has been selected, whether that test has been correctly construed, and whether the governing principles have been appropriately applied. Errors of process involve procedural irregularities that undermine the fairness of the proceeding. Keeping such principles in mind, counsel should craft the request for statement of decision with a focus on addressing the controverted and pivotal issues of their case and not get bogged down on tangential issues or venting dissatisfaction regarding the trial court’s weighing of evidence.

Proposals for Content. Within ten days of a request for a statement of decision, any party can submit proposed findings.⁴⁵ The request for findings and the proposed findings can be combined in a single document. Some cases suggest that even a losing party, under a tentative decision, should submit proposed favorable findings on important issues, especially when findings on specific evidentiary facts are sought, to facilitate appellate review of whether those proposed findings should have been accepted or rejected.⁴⁶

Proposals for the content of the statement of decision can be an opportunity for a prevailing party to safeguard a victory by addressing omissions and ambiguities in the tentative decision and perhaps gently prodding the trial court to modify its reasoning to a more defensible posture.⁴⁷ A proposed statement of decision can save a judge significant effort, and many courts

will adopt counsel’s proposed statement of decision in its entirety, if it reasonably reflects the tentative decision’s reasoning process. Under California Rules of Court, Rule 3.1590(f), the trial court is authorized to assign preparation of the statement of decision to prevailing counsel, further elaborated below. Even when it is not solicited, many trial courts will sign a draft promptly submitted by prevailing counsel before the court begins undertaking the burden of preparing the statement of decision itself.

Preparing Initial Statement of Decision. Under California Rules of Court, Rule 3.1590(c)(4), the trial court may provide that its tentative decision will automatically become a statement of decision absent a request for additional findings. Alternatively, the trial court may designate that a statement of decision be prepared either by the court or by a party.⁴⁸ For trials taking less than one day or eight hours, the trial court is authorized to make its statement of decision orally; otherwise it must be in writing.⁴⁹ The practice of designating the trial transcript as the statement of decision in non-short cause matters has been disapproved and construed as an improper refusal to issue a statement of decision.⁵⁰

Objections. Once a statement of decision has been prepared, a party has the opportunity to file objections and seek clarification of omissions or ambiguities in the document.⁵¹ Ambiguities or omissions can also be addressed by certain post-trial motions, which have longer deadlines than a request for statement of decision.⁵² Failure to bring omissions and ambiguities in a proposed statement of decision to the trial court’s attention may result in waiver of any resulting error and allows the appellate court to infer necessary findings if supported by the record.⁵³ A party’s proposed statement of decision is not considered equivalent to objections and can be deemed a waiver if not accompanied by specific objections to the draft statement of decision.⁵⁴

While failure to object may result in waiver and appellate affirmance, the trial court’s failure to provide appropriate clarifications, when properly requested, can also require reversal.⁵⁵ The objection process allows losing litigants to force the trial court to explain its rulings in a meaningful way and facilitates effective appellate review.⁵⁶ Trial courts are authorized to order a hearing on objections.⁵⁷ More commonly, trial courts will rule on objections without a hearing.

Common Pitfalls

The applicable rules appear to contemplate that a separate judgment, in addition to the statement of decision, or a combined

“statement of decision and judgment” be prepared.⁵⁸ (The term “judgment” is generally deemed to include appealable orders.⁵⁹) Requiring entry of an express judgment or order provides clarity regarding when the period for filing notice of appeal is triggered, and it is firmly established that a statement of decision itself is not normally considered to be appealable or trigger appeal deadlines.⁶⁰

However, trial counsel should be aware that a statement of decision will sometimes be deemed a final, appealable order when no formal judgment or order has been entered after the statement of decision.⁶¹ There are unpublished cases when appeals have been dismissed as untimely by treating a statement of decision as the final order. To eliminate any ambiguity regarding when appellate deadlines start running, trial counsel should always be sure that a formal order or judgment is prepared and entered relatively soon after the statement of decision is finalized.⁶²

The statement of decision is an essential tool for safeguarding effective appellate review of bench trials. Counsel should be attuned to the many junctures at which they have the ability to influence the statement of decision process and consider consulting with experienced appellate counsel before—not after—this pivotal document is created. The statement of decision process is complex and sometimes confoundingly complicated but crucial to effective review. For appellate purposes, a statement of decision may only be as good as the process that goes into it, so it is best to approach the process with an eye toward the dynamics expected in a prospective appeal. ■

¹ *Orange County Water Dist. v. Alcoa Global Fasteners, Inc.*, 12 Cal. App. 5th 252, 311 (2017).

² *See, e.g.*, *In re Marriage of Boblitt*, 223 Cal. App. 4th 1004, 1029 (2014); *FLIR Sys., Inc. v. Parrish*, 174 Cal. App. 4th 1270, 1284 (2009).

³ *FLIR Sys.*, 174 Cal. App. 4th at 1284.

⁴ *In re Marriage of Boblitt*, 223 Cal. App. 4th at 1029; *Shaw v. County of Santa Cruz*, 170 Cal. App. 4th 229, 268 (2008).

⁵ *A.G. v. C.S.*, 246 Cal. App. 4th 1269, 1282-83 (2016).

⁶ *See In re Marriage of Fong*, 193 Cal. App. 4th 278, 294 (2011).

⁷ *CIV. PROC. CODE* §632; *A.G. v. C.S.*, 246 Cal. App. 4th at 1282-1283; *In re Marriage of Fong*, 193 Cal. App. 4th at 293-94; *Morris v. Thogmartin*, 29 Cal. App. 3d 922, 927-930 (1973).

⁸ *CIV. PROC. CODE* §632.

⁹ *Maria P. v. Riles*, 43 Cal. 3d 1281, 1294 (1987); *Fair v. Bakhtiari*, 195 Cal. App. 4th 1135, 1148 (2011).

¹⁰ *Hjelm v. Prometheus Real Estate Group, Inc.*, 3 Cal. App. 5th 1155, 1178 (2016); *In re Marriage of Fong*, 193 Cal. App. 4th at 293-94.

¹¹ *LAOSD Asbestos Cases*, 25 Cal. App. 5th 1116, 1121 (2018); *In re Marriage of Feldman*, 153 Cal. App. 4th 1470, 1497 (2007); *Gruendl v. Oewel P’ship, Inc.*, 55 Cal. App. 4th 654, 660 (1997); *Khan v. Superior Ct.*, 204 Cal. App. 3d 1168, 1173 n.4 (1988).

¹² Gruendl, 55 Cal. App. 4th at 659-61 (amendment of judgment under estoppel or alter ego theory). *See also* Metis Dev. LLC v. Bohacek, 200 Cal. App. 4th 679, 688 (2011) (motion to compel arbitration).

¹³ *Id.*

¹⁴ *See, e.g.*, CAL. R. OF CT. 3.1591, 4.575; CIV. PROC. CODE §§631.8, 663, 1291; FAM. CODE §§2127, 3654; PROB. CODE §962.

¹⁵ *See, e.g.*, CIV. PROC. CODE §§ 437c(g), 639(d)(1); FAM. CODE §§3087, 4056, 4332; PEN. CODE §1272.1.

¹⁶ Estate of Garrett, 159 Cal. App. 4th 831, 839-40 (2008); Kroupa v. Sunrise Ford, 77 Cal. App. 4th 835, 842 (1999).

¹⁷ Shaw v. County of Santa Cruz, 170 Cal. App. 4th 229, 268 (2008).

¹⁸ *Id.*; Burbank-Glendale-Pasadena Airport Auth. v. Hensler, 233 Cal. App. 3d 577, 591 (1991).

¹⁹ Armstrong v. Picquelle, 157 Cal. App. 3d 122, 127 (1984).

²⁰ *See, e.g.*, Miramar Hotel Corp. v. Frank B. Hall & Co. of California, 163 Cal. App. 3d 1126, 1129 (1985).

²¹ *Id.*; Whittington v. McKinney, 234 Cal. App. 3d 123, 127 (1991).

²² F.P. v. Monier, 3 Cal. 5th 1099, 1109, 1116 (2017).

²³ CIV. PROC. CODE §632.

²⁴ Cima-Sorci v. Sorci, 17 Cal. App. 5th 875, 891 (2017); Gorman v. Tassajara Dev. Corp., 178 Cal. App. 4th 44, 61-62 (2009).

²⁵ In re Marriage of Gray, 103 Cal. App. 4th 974, 980 (2002).

²⁶ Gorman, 178 Cal. App. 4th at 63; Kearn v. Bd. of Med. Quality Assurance, 189 Cal. App. 3d 1040, 1051 (1986).

²⁷ CAL. R. OF CT. 2.900; Social Serv. Union v. County of Monterey, 208 Cal. App. 3d 676, 680 (1989).

²⁸ CIV. PROC. CODE §632.

²⁹ Staten v. Heale, 57 Cal. App. 4th 1084, 1087 n. 4 (1997); In re Marriage of McDole, 176 Cal. App. 3d 214, 219 (1985).

³⁰ In re Marriage of Arceneaux, 51 Cal. 3d 1130, 1133-34 (1990); A.G. v. C.S., 246 Cal. App. 4th 1269, 1281 (2016).

³¹ F.P. v. Monier, 3 Cal. 5th 1099, 1116 (2017).

³² *See, e.g.*, Saks v. Charity Mission Baptist Church, 90 Cal. App. 4th 1116, 1149 (2001); In re Marriage of Ramer, 187 Cal. App. 3d 263, 271 (1986).

³³ CAL. R. OF CT. 3.1590(m).

³⁴ Ochoa v. Anaheim City School Dist., 11 Cal. App. 5th 209, 235 (2017); In re Marriage of Rising, 76 Cal. App. 4th 472, 476 n.7 (1999).

³⁵ CIV. PROC. CODE §632.

³⁶ CAL. R. OF CT. 3.1590(d), (e).

³⁷ Ermoian v. Desert Hosp., 152 Cal. App. 4th 475, 500 (2007).

³⁸ Jackpot Harvesting, Inc. v. Applied Underwriters, Inc., 33 Cal. App. 5th 719, 739 (2019); Ribakoff v. City of Long Beach, 27 Cal. App. 5th 150, 163 (2018).

³⁹ Ribakoff, 27 Cal. App. 5th at 163.

⁴⁰ R. E. Folcka Constr., Inc. v. Medallion Home Loan Co., 191 Cal. App. 3d 50, 53 (1987); Kuffel v. Seaside Oil Co., 69 Cal. App. 3d 555, 565 (1977).

⁴¹ People v. ConAgra Grocery Prods. Co., 17 Cal. App. 5th 51, 82 (2017).

⁴² Thompson v. Asimos, 6 Cal. App. 5th 970, 983 (2016).

⁴³ Yield Dynamics, Inc. v. TEA Sys. Corp., 154 Cal. App. 4th 547, 558 (2007) (32 questions); People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 525 (1984) (75 questions).

⁴⁴ Callaghan's Appellate Advocacy Manual, §8:02 (1995).

⁴⁵ CAL. R. OF CT. 3.1590 (c)(4), (e).

⁴⁶ In re Marriage of Falcone & Fyke, 203 Cal. App. 4th 964, 982 (2012); McAdams v. McElroy, 62 Cal. App. 3d 985, 993-94 (1976).

⁴⁷ Khan v. Superior Ct., 204 Cal. App.3d 1168, 1173 n.4 (1988) (even when the court issues an oral statement of decision in a one-day matter, counsel can submit a written proposed statement of decision that fills in gaps, which upon signing renders the oral reasoning a non-binding tentative decision).

⁴⁸ CAL. R. OF CT. 3.1590(c)(3).

⁴⁹ CIV. PROC. CODE §632.

⁵⁰ Whittington v. McKinney, 234 Cal. App. 3d 123, 129 (1991).

⁵¹ CAL. R. OF CT. 3.1590(g); CIV. PROC. CODE §634.

⁵² CIV. PROC. CODE §634.

⁵³ In re Marriage of Arceneaux, 51 Cal. 3d 1130, 1133-1134 (1990).

⁵⁴ Bay World Trading, Ltd. v. Nebraska Beef, Inc., 101 Cal. App. 4th 135, 140 (2002).

⁵⁵ Schwan v. Permann, 28 Cal. App. 5th 678, 696 (2018); Central Valley Gen. Hosp. v. Smith, 162 Cal. App. 4th 501, 531-532 (2008); In re Marriage of Weinstein, 4 Cal. App. 4th 555, 571 (1991).

⁵⁶ Estate of Reed, 16 Cal. App. 5th 1122, 1128 (2017).

⁵⁷ CAL. R. OF CT. 3.1590(k).

⁵⁸ CAL. R. OF CT. 3.1590(f).

⁵⁹ CAL. R. OF CT. 8.104(e).

⁶⁰ Alan v. American Honda Motor Co., Inc., 40 Cal. 4th 894, 901 (2007); In re Marriage of Campi, 212 Cal. App. 4th 1565, 1571-72 (2013).

⁶¹ Alan v. American Honda Motor Co., Inc., 40 Cal. 4th 894, 901 (2007); Hernandez v. Rancho Santiago Cmty. Coll. Dist., 22 Cal. App. 5th 1187, 1192 (2018); Estate of Reed, 16 Cal. App. 5th 1122, 1126 (2017).

⁶² *See* CAL. R. OF CT. 3.1590(f), (l).



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by Morin I. Jacob and Paul D. Knothe

AFTER #MeToo

Reducing sexual harassment on the job demands strong policies, diligent training, and accountability

In 2006, activist Tarana Burke established the foundations of the #metoo movement by writing of her experience in which she felt that she had failed a young girl who reported a sexual assault to her. Burke did not feel prepared to assist the girl and sent her to see another counselor. Burke regretted not telling the girl, “me too.”¹ Then, 11 years later, in the wake of numerous stories of sexual misconduct by disgraced Hollywood mogul Harvey Weinstein, actress Alyssa Milano used her platform on Twitter and revived the hashtag #metoo to bring attention to the movement Burke had started, and the movement went viral.² Stories of sexual misconduct in the workplace dominated the news in a way they had not since the 1990s.

The EEOC issued its first guidelines defining sexual harassment, in two types, in 1980. One type, commonly known as quid pro quo harassment, involves unwelcome sexual advances, requests for sexual favors, or verbal or physical conduct of a sexual nature in exchange for economic benefit. The second type, hostile work environment, concerns when harassing conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”³

The U.S. Supreme Court first acknowledged that Title VII of the Civil Rights Act of 1964 prohibits these types of sexual harassment in the 1986 case *Meritor Savings Bank, FSB, v. Vinson*.⁴ The court further held that to be actionable, hos-

tile work environment sexual harassment must be sufficiently severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment.

Coinciding with the #metoo movement, the EEOC saw an increase in charges alleging sex-based harassment from 12,428 in fiscal year 2017 to 13,055 in fiscal year 2018.⁵ The California Department of Fair Employment and Housing reported that it received 683 complaints and issued an additional 3,698 right-to-sue letters regarding sexual harassment in 2017.⁶

In 2018, the California Legislature took action to respond to the renewed urgency of the sexual harassment problem in the #metoo era, passing several new statutes that took effect on January 1,

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2019 and 2020.

Senate Bill 1300 (SB 1300), which passed by relatively slim margins of 41 to 33 in the assembly and 25 to 10 in the senate, made several changes to the Fair Employment and Housing Act (FEHA) that will impact the resolution of sexual harassment cases. Government Code Section 12923, created by SB 1300, set forth five legislative declarations regarding its intent as to the application of the state's harassment laws.

First, citing Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift*

evidence of discrimination.¹⁰

Fourth, the legislature declared that the standard for sexual harassment should not vary by the type of workplace and the fact that a particular occupation may have had a characteristically greater frequency of sexually related commentary in the past is irrelevant, i.e., it is no defense to say that your industry has always allowed "locker room talk."¹¹ This subdivision does, however, permit courts to consider the nature of the workplace when engaging in or witnessing prurient conduct, and commentary is integral to the performance

Employers are also required to post the Department of Fair Employment and Housing's poster on discrimination in employment, which includes information on the illegality of sexual harassment, and a poster developed by the Department regarding transgender rights in a prominent and accessible location in the workplace.¹⁷

Employers should remember that the law establishes a floor with respect to acceptable conduct in the workplace—multiple cases make clear that the law does not create a "civility code" for the employment relationship.¹⁸ However, employers

While the #metoo movement has shined a newly bright light on an old problem and while some of the legal particulars, especially with respect to litigation and settlement, have been tweaked, the fundamentals are essentially the same.

Systems, the legislature declared:

[T]he plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."⁷

Some commentators interpret this provision as lowering the bar for what will qualify as actionable harassment.

Second, Section 12923 clarifies that a single incident can create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work environment or created an intimidating, hostile, or offensive working environment.⁸ The legislature condemned the ruling in *Brooks v. City of San Mateo*, in which former Judge Alex Kozinski inexplicably found that a forcible touching of the plaintiff's breast did not rise to the level of "severe or pervasive."⁹

Third, section 12923 gives legislative affirmation to the California Supreme Court's decision in *Reid v. Google*, rejecting the "stray remarks" doctrine and holding that the existence of a hostile work environment depends upon the totality of the circumstances, and that a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision-maker, may be relevant, circumstantial

of the job duties (e.g., the adult entertainment industry.) The legislature declared its disapproval of any language to the contrary in *Kelley v. Conco Companies*.¹²

Finally, the legislature expressed its view in Section 12923 that "[h]arassment cases are rarely appropriate for disposition on summary judgment."¹³ In so doing, the legislature cited with approval the dictum in *Nazir v. United Airlines, Inc.* that hostile working environment cases involve issues "not determinable on paper."¹⁴ Given this new provision, employers' counsel should speak candidly with their clients as to whether a motion for summary judgment (MSJ) is worth the expense in any given harassment case. For their part, employees' attorneys would be well advised to cite this language in nearly all MSJ opposition memoranda. As before the #metoo movement went viral, the three main tools for reducing incidents of sexual harassment in the workplace are policy, training, and accountability.

Employer Requirements

Employers are required to have a policy prohibiting sexual harassment.¹⁵ Department of Fair Employment and Housing regulations require that employers develop a written policy that, inter alia, prohibits employees and nonemployees from discriminating, harassing, or retaliating based on any protected status, and protects applicants, volunteers, independent contractors, and employees from being subjected to prohibited conduct.¹⁶

can and should require more than the bare minimum from their employees. If an employer's policy requires employees to treat each other with courtesy, respect, or, yes, "civility," this could provide a solid ground for discipline up to and including termination of an employee whose boorish or sexist conduct may not yet have risen to the level of "severe or pervasive" in the eyes of the courts, before it escalates.

Should employers institute policies that prohibit employees from engaging in dating or sexual relationships with each other? Given the amount of time the modern economy requires people to spend at work, prohibition simply is not realistic in many cases. However, such relationships between peers do carry some risk of harassment liability, as behavior that was once welcome can become unwelcome. Employers should do their best to remain aware of these relationships and consider whether it is necessary to put romantic partners in separate work groups. However, there is greater potential for exposure when there is a power differential between the participants in a sexual relationship. In a very high-profile example of the risks of such relationships, McDonald's replaced its CEO, Steve Easterbrook, because of a consensual relationship with a subordinate in violation of company policy.¹⁹

It is mandatory under California state law for employers with five or more employees to provide sexual harassment training that covers 14 designated topics. This training must include questions that assess

learning, skill-building activities to assess understanding and application of content, and hypothetical scenarios about harassment with discussion questions.²⁰

New statute SB 1343, passed unanimously by both the senate and the assembly, amends Government Code sections 12950 and 12950.1 to expand these training requirements. These sections previously required employers with 50 or more employees to provide at least two hours of sexual harassment training to all supervisory employees within six months of becoming supervisors, and once every two years. Under the amended law, employers who employ five or more employees, including temporary or seasonal employees, must provide at least two hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every two years thereafter. The amended statute also requires the Department of Fair Employment and Housing to develop or obtain one-hour and two-hour online training courses on the prevention of sexual harassment in the workplace and to make these courses available on the departmental website. Clean-up legislation pushed back the onset of these obligations until calendar year 2020.²¹

New Government Code Section 12950.2, passed as part of SB 1300, provides that employers “may also” provide bystander intervention training that includes information and guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. On the face of the statute, it does not appear that providing bystander training would count toward meeting an employer’s obligations under Section 12950.1.

Additionally, relevant to a vital slice of the Los Angeles County economy, AB 2338, governing talent agencies, adds provisions to the Labor Code requiring that sexual harassment prevention and reporting materials be provided to artists within 90 days of agreeing to representation.²² Before a work permit can be issued to an age-eligible minor, both the minor and his or her parent or legal guardian must complete training in sexual harassment prevention, retaliation, and reporting services.²³

Because sexual harassment training is mandatory, employers must provide it whether it is effective or not. Of course, to reduce exposure to liability, firms are better off if the training works. Unfortunately, this is easier said than done. In

2016, the EEOC published a report that concluded, “[e]mpirical data does not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment.”²⁴

Social science researchers and legal scholars have studied harassment training to evaluate the different types of training and their effectiveness. This research suggests that risk aversion, common to lawyers and human resources professionals, may have caused harassment training to stagnate, as employers opt to play it safe with training that is designed primarily to comply with statutory requirements, as opposed to attempting to change employee behavior. This research suggests that training that explains the harms suffered by victims of harassment may be more effective in reducing harassment than training explaining policy in detail.²⁵

#Metoo Backlash

As with any social change, there has been backlash to the #metoo movement. A recent LeanIn survey indicates that male managers fear putting themselves at risk of exposure to harassment claims if they meet with women individually, casually, or over a meal or drinks.²⁶ Vice President Mike Pence garnered significant news coverage for stating that he does not eat meals alone with women other than his wife. This can expose employers to discrimination liability, as this practice tends to exclude women from informal bonding and networking opportunities that can be critical to bona fide career development.²⁷ Facebook COO and LeanIn founder Sheryl Sandberg wrote in a February 6, 2018, Facebook post, “As for the Pence rule—if you insist on following it, adopt a revised version. Don’t want to have dinner alone with a female colleague? Fine. But make access equal: no dinners alone with anyone. Breakfast or lunches for all. Or group dinners only, nothing one-on-one. Whatever you choose, treat women and men equally.”²⁸

Supervisory employees have the responsibility to prevent harassment, discrimination, and retaliation. This obligation does not arise only when employees complain—supervisors must also report conduct they have observed or overheard. Supervisors should take action when they learn of conduct that violates the employer’s policy, whether or not the victim calls it “harassment” or files a formal complaint.

Management should initiate a prompt and thorough investigation. Depending on the circumstances, it may be prudent to retain the services of an outside, independent investigator. Plaintiffs’ attorneys

can be expected to attack the independence of the investigator on the grounds that he or she is being paid by the employer. Nevertheless, an investigator’s credibility is his or her stock in trade, and most reasonable people understand that investigators, like everyone else, have bills to pay and cannot work for free. Further, the purpose of an investigation is fact-finding: The employer may find evidence to support the termination of a harasser, evidence to defend itself against a harassment suit, or neither. The investigator should not make conclusions as to whether sexual harassment under the law occurred; an employer may be comfortable with an investigator making findings as to whether the conduct violated the employer’s policy.

Many sexual harassment investigations can be conducted quickly because there are few witnesses to interview beyond the complaining employee and the alleged harasser. In other cases, there will be other witnesses and documents to review. In the digital age, digital communications such as e-mail, text messages, and Slack may be critical sources of evidence. The investigator should prepare a report, which the employer should review thoroughly. If the investigation reveals conduct that violates the employer’s policy, whether or not the conduct also violates the law, the employer should take appropriate disciplinary action, up to and including termination.

California employers should be aware that the California Supreme Court has held that the federal *Faragher-Ellerth* doctrine is unavailable under the FEHA. The *Faragher-Ellerth* doctrine provides a complete affirmative defense to harassment claims when the employer has exercised reasonable care to prevent and correct promptly any harassing behavior, and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. However, California employers may limit damages in FEHA sexual harassment suits by proving the affirmative defense of avoidable consequences when the employee has unreasonably failed to take advantage of measures available under the employer’s policy and reasonable use of the employer’s procedures would have prevented at least some of the harm that the employee suffered.²⁹

Senate Bill 1300 also establishes that an employee who is alleged to have engaged in harassment may be held personally liable for retaliation against persons who have opposed practices forbidden by

the FEHA or being a witness in such an action.³⁰ In addition, SB 1300 prohibits employers from conditioning a raise, bonus, or continued employment on an employee's agreeing to sign a release of a claim or right under the FEHA. This provision does not apply to negotiated settlements to resolve underlying claims that have been filed in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process.³¹

Governing such negotiated settlements, the legislature also passed SB 820, codified as new Code of Civil Procedure Section 1001. This statute voids any settlement agreement entered into on or after January 1, 2019, that prevents disclosure of factual information about claims of sexual assault, sexual harassment, or harassment or discrimination based on sex. This provision goes to one of the animating ideas of the #metoo movement: when victims speak out, other victims are emboldened to tell their stories.

It is worth emphasizing that this provision does not simply void that provision of an agreement; if the employee is prevented from disclosing factual information, the entire agreement is void. This legislation could have the effect of pre-

cluding many settlements, especially when the facts are in dispute. An employer who feels he or she is wrongly accused may prefer to litigate to clear his or her name rather than enter into a settlement that would allow the plaintiff to publicize "factual" information that would be damaging to the employer's reputation. Although the legislation does not expressly ban non-disparagement clauses, in many cases a non-disparagement clause would be futile, as the factual allegations are themselves damaging to the reputation of the accused.

Further, except when a public entity or public official is a party, Section 1001 enables a claimant to request a provision that shields his or her identity and all facts that could lead to its discovery. Other changes to the FEHA will also affect the disposition of sexual harassment cases: AB 9 extends the statute of limitations from one year to three,³² and AB 51 prohibits conditioning any benefit of employment on agreeing to submit disputes to arbitration, which is perceived as a forum more favorable to employers.³³

While the #metoo movement has shined a newly bright light on an old problem and while some of the legal particulars, especially with respect to litigation and

settlement, have been tweaked, the fundamentals are essentially the same. Policy, training, and accountability remain the keys to reducing the occurrence of sexual harassment in the workplace. ■

¹ Cassandra Santiago & Doug Criss, *An activist, a little girl and the heartbreaking origin of "Me too,"* CNN (Oct. 17, 2017), <https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html>.

² Alyssa Milano, "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet." Twitter (Oct. 15, 2017), https://twitter.com/Alyssa_Milano/status/919659438700670976.

³ 29 C.F.R. §1604.11.

⁴ Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

⁵ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGES ALLEGING SEX-BASED HARASSMENT (CHARGES FILED WITH EEOC) FY 2010 - FY 2018, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last viewed Nov. 23, 2019).

⁶ DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, 2017 ANNUAL REPORT 10 (Aug. 30, 2018), <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/08/August302018AnnualReportFinal.pdf>.

⁷ GOV'T CODE §12923(a), quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 26 (1993).

⁸ GOV'T CODE §12923(b).

⁹ *Brooks v. City of San Mateo*, 229 F. 3d 917, 921 (2000).

¹⁰ GOV'T CODE §12923(c), citing *Reid v. Google, Inc.*, 50 Cal. 4th 512 (2010).

¹¹ GOV'T CODE §12923(d).

¹² *Id.*, citing *Kelley v. Conco Cos.*, 196 Cal. App. 4th 191 (2011).

¹³ GOV'T CODE §12923(e), citing *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243 (2009).

¹⁴ GOV'T CODE §12923(e), citing *Nazir*, 178 Cal. App. 4th at 286.

¹⁵ GOV'T CODE §12950.

¹⁶ 2 CAL. CODE REG. §11023(b).

¹⁷ GOV'T CODE §12950(a).

¹⁸ *See, e.g., Pantoja v. Anton*, 198 Cal. App. 4th 87, 92 (2011); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).

¹⁹ Danielle Wiener-Bronner, *McDonald's CEO Steve Easterbrook is out for "consensual relationship with an employee,"* CNN (Nov. 4, 2019), <https://www.cnn.com/2019/11/03/business/mcdonalds-ceo-steve-easterbrook-steps-down/index.html>.

²⁰ GOV'T CODE §12950.1.

²¹ S.B. 778, 2019-20 Leg. Sess. (2019).

²² LAB. CODE §1700.50.

²³ LAB. CODE §1700.52.

²⁴ EQUAL EMPLOYMENT OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016).

²⁵ Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 517 (2018) [hereinafter Tippet].

²⁶ Working Relations in the #MeToo Era: Key Findings, Lean In <https://leanin.org/sexual-harassment-backlash-survey-results> (last viewed Nov. 25, 2019).

²⁷ Tippet, *supra* note 25, at 513.

²⁸ Sheryl Sandberg, post on Facebook (Feb. 6, 2018), from cite in FRANK MINITER, THE ULTIMATE MAN'S SURVIVAL GUIDE TO THE WORKPLACE (Simon & Schuster 2019), available at <https://www.facebook.com/sheryl/posts/10159854933800177>.

²⁹ State Dep't of Health Services v. Superior Ct., 31 Cal. 4th 1026, 1044 (2003).

³⁰ GOV'T CODE §12940(j)(3)(B).

³¹ GOV'T CODE §12964.5.

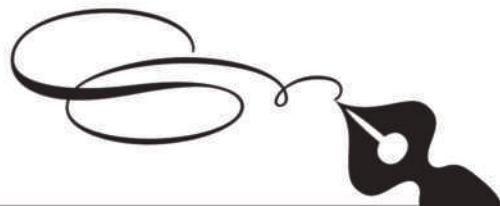
³² GOV'T CODE §12960(e).

³³ GOV'T CODE §12953; LAB. CODE §432.6.

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by **JUNE S. AILIN**

ZONED OUT

Regulatory exemption of government agencies may be complicated by jurisdictional and other factors

California real estate developers are well aware that they must comply with the zoning ordinances, development regulations and building code of the city or county in which a project is located. However, what if the “developer” is a government entity? Is there any sort of comity between government entities when it comes to real estate development regulations? That depends on what sort of government agencies are involved and what the project is.

There is case law holding that the state and other government agencies operating on the state’s behalf at a local level were not subject to local regulation. In *Hall v. City of Taft*,¹ the California Supreme Court held that school districts are agencies of the state for purposes of the local operation of the state school system. For that reason,

regulation of school construction was found to have been preempted by the state and was not subject to local regulation. In *Town of Atherton v. Superior Court*,² the court of appeal, citing *Hall*, reached the same conclusion with regard to the siting of schools.

In response to the *Hall* and *Town of Atherton* decisions, the California Legislature adopted Government Code sections 53090 to 53095. The legislature’s intent in enacting these statutes was to strengthen local planning authority by giving cities and counties control over zoning and building restrictions.³ Subdivision (a) of Government Code Section 53091 states the general rule: “Each local agency shall comply with all applicable building ordinances and zoning ordinances of the county or city in which the territory of the local

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agency is situated.” Section 53090(a) defines “local agency” as “an agency of the state for the performance of governmental or proprietary function within limited boundaries.” Note that this definition does not include cities and counties. The other sections of the statutory scheme set forth exceptions to the general rule.

School districts are called out specifically for several exemptions. A school district is not required to comply with city or county zoning ordinances unless the zoning ordinance makes provision for the location of public schools and unless the city or county has adopted a general plan. How-

ever, if the school district has coordinated with the city or county regarding the siting of schools, by the vote of two-thirds of the members of the school board, a city or county zoning ordinance can be rendered inapplicable to school construction.⁴

Paradoxically, cities and counties are not obligated to respect and follow each other’s land use regulations. Cities and counties are not included in the definition of “local agency” found in Section 53090(a) and, as a result, are not bound by the general rule of Government Code Section 53091(a).

action in superior court for judicial review to determine whether it was arbitrary and capricious. If the court finds the action was arbitrary and capricious, the school board’s decision will be declared to be of no force and effect, and the zoning ordinance will be applicable to the school district’s project.⁹

Local building codes do not usually apply to construction of classroom buildings because their design and construction are overseen by the State Division of Architecture. However, the Division of the State Architect may delegate that responsibility to a city or county if it finds the

city or county has an adequate inspection program. To the extent school construction can impact off-site infrastructure, however, school districts must comply with local regulations. Government Code Section 53097 provides a school district must comply with city and county ordinances regulating drainage improvements and conditions, as well as road improvements and conditions, including complying with ordinances providing for review of plans for onsite improvements that affect drainage, road conditions, or grading, and must give consideration to the specific requirements and conditions of city or county ordinances relating to the design and construction of offsite improvements. A school district can choose not to submit plans for review, but if it makes that choice, the city or county is not liable for injuries or property damage caused by the school district’s failure to comply with requirements for review of plans.¹⁰

What qualifies as a classroom building is not always entirely obvious. Not surprisingly, in *People ex rel. Cooper v. Rancho Santiago College*,⁶ the court of appeal found that a swap meet located in a community college parking lot is a non-classroom facility and could not be exempted from local land use controls. But in *City of Santa Cruz v. Santa Cruz City School Board of Education*,⁷ the court of appeal found an athletic field was a classroom facility and could be exempted from local land use controls that related to lighting for the athletic field.⁸

A school board that votes to exempt itself from zoning ordinances must notify the city or county of its action within 10 days after the action is taken. If the city or county objects, it may commence an

the school district to be subject to the city’s ordinance regulating encroachments into air space above city streets, the statute had to clearly waive that immunity. The court of appeal concluded sovereign immunity had not been waived with respect to the city’s particular ordinance. Other exceptions to the general rule of Government Code Section 53091(a) focus on water and electric utility uses, in recognition of the fact that physical constraints can limit options for the location of facilities required for certain aspects of providing these utilities. In creating these exceptions, the legislature sought to strike a balance between the value of local zoning control and the state’s interest in efficient storage and transmission of water.¹²

Section 53091(e) provides: Zoning ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation, storage, treatment, or transmission of water, or for the production or generation of electrical energy, facilities that are subject to Section 12808.5 of the Public Utilities Code, or electrical substations in an electrical transmission system that receives electricity at less than 100,000 volts. Zoning ordinances of a county or city shall apply to the location or construction of facilities for the storage or transmission of electrical energy by a local agency, if the zoning ordinances make provision for those facilities.

This exemption, sometimes referred to as the “absolute exemption,” applies automatically, without the need for any specific findings or the adoption of any resolution. Note the exception to the exemption for the location or construction of facilities for storage or transmission of electrical energy. These facilities are within the scope of the general rule of Section 53091(a), unless some other exemption applies.

Government Code Section 53096, sometimes called the “qualified exemption,” provides the exemption for projects that fall into the exception to the absolute exemption: Notwithstanding any other provision of this article, the governing board of a local agency, by vote of four-fifths of its members, may render a city or county zoning ordinance inapplicable to a proposed use of property if the local agency at a noticed public hearing determines by resolution that there is no feasible alternative to its proposal. The governing board may not render a zoning ordinance inapplicable to a proposed

use of property if the local agency at a noticed public hearing determines by resolution that there is no feasible alternative to its proposal. The governing board may not render a zoning ordinance inapplicable to a proposed

use of property if the local agency at a noticed public hearing determines by resolution that there is no feasible alternative to its proposal. The governing board may not render a zoning ordinance inapplicable to a proposed

use of property if the local agency at a noticed public hearing determines by resolution that there is no feasible alternative to its proposal. The governing board may not render a zoning ordinance inapplicable to a proposed

MCLE Test No. 295

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1. A school district is an agency of the state for purposes of the local operation of schools.
True.
False.
2. As a general rule, a local agency must comply with the applicable building and zoning ordinances of the city in which the local agency's land is located.
True.
False.
3. "Local agency" does not include a city or a county, so cities and counties do not have to comply with each other's building and zoning ordinances.
True.
False.
4. A school district must comply with all city and county zoning ordinances.
True.
False.
5. A school district can opt out of compliance with city or county zoning ordinances with respect to any of its facilities.
True.
False.
6. Which of the following local agency facilities are not within the scope of the absolute exemption from local regulations?
A. Facilities for the production, generation, storage, treatment, or transmission of water.
B. Facilities for the production or generation of electrical energy.
C. Facilities for the storage or transmission of water or electrical energy.
7. School districts must comply with local regulations regarding drainage and road improvements.
True.
False.
8. A school district cannot avoid liability for the design of drainage and road improvements by submitting plans to the city or county for review.
True.
False.
9. A local agency can always avoid compliance with local zoning and building regulations by the vote of 4/5 of its governing body's finding compliance would make any type of project infeasible.
True.
False.
10. On judicial review of a resolution finding compliance with local regulations would make a project infeasible, applicable standard of review with respect to the infeasibility finding is:
A. clear and convincing evidence.
B. substantial evidence.
C. abuse of discretion.
11. A local agency that plans to acquire property outside its jurisdiction must seek a determination that its project is consistent with the general plan of the jurisdiction in which the property is located.
True.
False.
12. If a local agency does not obtain a finding that an extra-jurisdictional project is consistent with the general plan of the other jurisdiction, the local agency is prohibited from proceeding with the project.
True.
False.
13. Large electrical transmission poles are within the scope of the absolute exemption from compliance with local regulations.
True.
False.
14. Large electrical transmission poles are within the scope of the qualified exemption from compliance with local regulations.
True.
False.
15. A local agency that relies on the qualified exemption from compliance with local regulations has 30 days in which to inform the jurisdiction whose local regulations are being avoided that it has taken action to exempt itself from those regulations.
True.
False.
16. The jurisdiction whose regulations are being avoided by a local agency relying on the qualified exemption has no recourse to challenge the exemption.
True.
False.
17. A school district can opt out of compliance with zoning ordinances for classroom buildings if it coordinates with the city or county with regard to the siting of schools.
True.
False.
18. A school district cannot opt out of compliance with zoning ordinances with respect to non-classroom buildings.
True.
False.
19. Only school facilities that are within an enclosed building are classroom facilities.
True.
False.
20. A school district that opts out of compliance with zoning ordinances with respect to non-classroom facilities does not have to inform the city or county in which those facilities are located.
True.
False.

MCLE Answer Sheet #295



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3. True False
4. True False
5. True False
6. A B C
7. True False
8. True False
9. True False
10. A B C
11. True False
12. True False
13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False

use of property when the proposed use of the property by the local agency is for facilities not related to storage or transmission of water or electrical energy, including, but not limited to, warehouses, administrative buildings or automotive storage and repair buildings.

The breadth of the first sentence is dramatically restricted by the double negative of the second sentence. As this section currently reads, this qualified exemption applies only to facilities related to storage or transmission of water or electrical energy. The local agency must notify the city or county of its action to rely on the qualified exemption within 10 days after the action is taken. If the city or county objects, it may commence an action in superior court for judicial review to determine whether the local agency's decision was arbitrary and capricious.¹³

In *City of Lafayette v. East Bay Municipal Utility District*,¹⁴ the court of appeal was called upon to interpret Sections 53091(e) and 53096. East Bay Municipal Utility District (EBMUD) was the water provider to customers in Alameda and Contra Costa counties, including the City of Lafayette. Property was owned by EBMUD in the city on which it had long operated a filter plant. That property was zoned for single-family residential use but designated "public use" in the city's general plan, which allowed nonresidential use with a land use permit. The existing facilities on the site included filter beds, water storage tanks, equipment, sheds or yards, pumping plant, warehouses, chemical buildings, and an office building.¹⁵

Due to population growth and increased demand for water, EBMUD needed additional facilities. After a search for another location, it concluded the filter plant site in Lafayette would be the best location. When EBMUD applied for a land use permit, the city denied the permit due to public opposition.¹⁶ In response, EBMUD adopted two resolutions under sections 53091 and 53096, finding the additional facilities were exempt from the city's land use regulations because they were facilities for the transmission and storage of water and no other site was feasible.¹⁷

The trial court found the facilities proposed to be added to the Lafayette site were not facilities for the production, generation, storage and transmission of water within the meaning of the exception found in Section 53091. In addition, the trial court found the proposed facilities—warehouses, administrative buildings, and automotive storage, and repair buildings—were not eligible for the infeasibility exception

under Section 53096.¹⁸ This decision was affirmed on appeal.

Looking first to Section 53091, the court of appeal concluded the facilities EBMUD wished to add at the Lafayette site were not exempt from the city's zoning and building ordinances. The project "is a facility for the storage of materials and equipment necessary for maintenance and repair of aqueducts, pipelines, filter plants and reservoirs."¹⁹ Thus, finding that the site served as a support facility, the court stated:

[I]t does not actually perform the function of generating, transmitting or storing water. We think that the absolute exemption of section 53091 was intended to be limited to facilities *directly and immediately* used to produce, generate, store or transmit water. Only those indispensable facilities must be geographically located at the unfettered discretion of a water district—that is, without the burden of city and county zoning regulations—in order to assure the imperative of efficient and economical delivery of water to customers. In section 53091 we perceive an intention to distinguish between the essential components of a water storage and transmission system, and those support facilities proposed in the...project, with only the former granted absolute immunity from local control."²⁰

For the same reason, the court of appeal held that the facilities did not qualify for the exemption under Section 53096 for facilities related to the storage or transmission of water, finding that the exemption applied only to facilities that have "a 'connection with' and are in fact integral to the proper operation of particular storage and transmission functions of water districts."²¹ While the project included a mix of facilities, some of which were related to the storage or transmission of water and others of which were not, the court concluded the inclusion of nonexempt facilities compelled application of the city's zoning and building ordinances. Otherwise, local agencies could escape local zoning and building regulations by including in an otherwise nonexempt project a small component that was directly related to the storage or transmission of water, thereby defeating the legislature's intent to strengthen local control.²²

More recently, in *City of Hesperia v. Lake Arrowhead Community Services District*,²³ the court of appeal reached a similar conclusion with regard to a solar power project that a community services district sought to build outside its juris-

dition for the purpose of obtaining more favorable electric rates on power it used to pump water. The district provides water and wastewater treatment services to customers located in the Lake Arrowhead area. The district sought to participate in a program that allows government agencies that use electric power to generate power by renewable means, upload that power to the electric grid, and pay a lower rate for the power they use.²⁴

The district owns a 350-acre parcel of undeveloped land in the City of Hesperia that it uses for wastewater treatment. The district entered into a contract with a private company, SunPower, to build and operate a six-acre solar power generation facility on part of the district's parcel.²⁵

Hesperia has an ordinance that regulates the location of solar farms. A conditional use permit (CUP) is required, and the solar farm cannot be within 660 feet of certain uses, including major highways and land zoned for agricultural or residential use.²⁶ The site on the 350-acre parcel that the district had chosen was within 660 feet of a major highway and land zoned for agricultural and residential use, thus running afoul of the setback requirements.²⁷

When the district conferred with Hesperia about its solar project, the city responded that a general plan amendment, a zone change, and a CUP would be required.²⁸ Rather than comply with the city's zoning ordinance, the district adopted a resolution approving the solar project that included a finding that the project was within the scope of the absolute exemption and also a finding that there was no alternative location for the solar project and therefore the district was availing itself of the qualified exemption as well.²⁹

Hesperia filed a petition for writ of mandate, alleging that the solar project was not within the scope of the district's powers, that the project was not within the scope of the qualified exemption, and that the district board's finding that the project was not feasible if the district had to comply with the city's zoning ordinance was not supported by substantial evidence. The trial court concluded the solar project was within the scope of the district's authority. However, because the solar project was not essential to the district's provision of water and wastewater service, the trial court found the project was not within the scope of the absolute exemption and the administrative record did not contain substantial evidence to support the finding required for the qualified exemption.³⁰

The district appealed.³¹ Relying on the analysis in the *City of Lafayette* case and the legislative history of the statutes, the

court of appeal affirmed the judgment. The court of appeal found the fact that the district was not authorized to provide electrical power to its customers did not prevent it from relying on the absolute exemption. The language of the statute bases the availability of the exemption on the nature of the facilities to be constructed, not on the purpose of the local agency relying on the exemption.³² However, because the project involved the transmission of electricity from the solar project to Edison's power grid, the project fell into the exception to the absolute exemption.³³

The district argued that treating this project as one involving the transmission of electronic energy "would prohibit any electrical energy facility from qualifying for the Absolute Exemption [under Section 53091(e)], as there must always be some mechanism to convey the electrical energy produced or generated for use."³⁴ The court of appeal was not persuaded by this argument because the qualified exemption under Section 53096(a) still remained for projects that fell within its limitations.³⁵ It also rejected the district's argument that the exception to the absolute exemption was only intended to apply to large transmission poles in residential neighborhoods.³⁶

The court of appeal held that the solar project was not exempt under Section 53096(a) because the record did not contain substantial evidence that the project would be infeasible if not exempted from the city's zoning ordinance. Section 53096 (c) defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." In the absence of case law specific to this statutory scheme, the court of appeal relied on case law regarding feasibility in the context of the California Environmental Quality Act.³⁷

The district's findings regarding feasibility focused on the fact that the property it owned in Hesperia was the only place it could put the solar farm and that it would have to incur costs to redesign and relocate the project from the specific site it had chosen on that property to some other location on the property that complied with the city's zoning ordinance. Neither the findings nor the record reflected any analysis of the cost differential between alternative sites for the project.³⁸ The district's resolution to avail itself of the qualified exemption was thus an abuse of discretion for purposes of Code of Civil Procedure Section 1094.5(b).³⁹

While the appeal was pending, the district applied for a general plan amendment, zone change, and CUP for the solar project.

The city denied those applications. In an effort to bolster its argument that the project was infeasible at any other location, the district asked the court of appeal to take judicial notice of documents reflecting these actions, but the court of appeal rejected this request.⁴⁰

Paradoxically, cities and counties are not obligated to respect and follow each other's land use regulations. Cities and counties are not included in the definition of "local agency" found in Section 53090(a) and, as a result, are not bound by the general rule of Government Code Section 53091(a). In addressing whether a county's failure to follow a city's building code was negligence per se, the California Supreme Court concluded it was not, because the county was an arm of the state and not a local agency subject to Section 53090.⁴¹ This exemption from local regulations as between cities and counties applies whether the particular use is governmental or proprietary.⁴²

The legislature has, however, given some attention to whether governmental projects outside the developing entity's jurisdiction are consistent with the general plan of the affected jurisdiction. Before a city, county, or other local agency acquires property in another jurisdiction for a public project, the agency intending to acquire the property is supposed to seek a determination from the planning agency of the county or city in which the property is located that the project for which the property is being acquired is consistent with the city's or county's general plan.⁴³ If there is no response to the request within 40 days, the project is deemed consistent with the general plan. If the acquiring entity is a local agency (defined as not including the state, a city, or a county), and the city or county planning agency disapproves the project, the local agency can overrule the objection.⁴⁴ However, there is no penalty for noncompliance with this statutory provision or for proceeding with the project notwithstanding an adverse determination by the affected jurisdiction's planning agency.

This paradoxical difference in treatment of cities and counties as compared with entities implementing state policy will have to await the attention of the legislature at some future date. ■

¹ Hall v. City of Taft, 47 Cal. 2d 177, 181 (1956).

² Town of Atherton v. Superior Ct., 159 Cal. App. 2d 417, 421-22 (1958).

³ City of Lafayette v. East Bay Mun. Util. Dist., 16 Cal. App. 4th 1005, 1013, 1017 (1993).

⁴ GOV'T CODE §53094.

⁵ Id.

⁶ People ex rel. Cooper v. Rancho Santiago Coll., 226

Cal. App. 3d 1281, 1285-86 (2017).

⁷ City of Santa Cruz v. Santa Cruz City Sch. Bd. of Educ., 210 Cal. App. 3d 1 (1989).

⁸ Although not related to a school district, it is also worth noting that a circus leasing property on a state university campus is subject to local regulations. Bd. of Trs. of Cal. State Univ. v. City of Los Angeles, 49 Cal. App. 3d 45 (1975).

⁹ GOV'T CODE §53094.

¹⁰ GOV'T CODE §53097.

¹¹ Los Angeles Unified Sch. Dist. v. City of Maywood, Nos. B238629, B238630 (Second Dist. Ct. of Appeal Feb. 19, 2013). The California Supreme Court denied a request for publication of this opinion.

¹² Id. at 1013-14.

¹³ GOV'T CODE §53096(b). However, a county community services area cannot override local ordinances. See GOV'T CODE §25212.2(a).

¹⁴ City of Lafayette v. East Bay Mun. Util. Dist., 16 Cal. App. 4th 1005 (1993).

¹⁵ Id. at 1009.

¹⁶ Id. at 1009-10.

¹⁷ Id. at 1010-11.

¹⁸ Id. at 1011.

¹⁹ Id. at 1013.

²⁰ Id. [emphasis in original].

²¹ Id. at 1015.

²² Id. at 1015-17.

²³ City of Hesperia v. Lake Arrowhead Cmty. Svcs. Dist., 37 Cal. App. 5th 734 (2019).

²⁴ Id. at 741.

²⁵ Id. at 742-43. The administrative record reflected a desire on the part of SunPower to contract with other local agencies to install solar power generation facilities elsewhere on the Hesperia property.

²⁶ Id. at 741-42.

²⁷ Id. at 742.

²⁸ Id.

²⁹ Id. at 743-44.

³⁰ Id. at 744-46.

³¹ Id. at 746. The city did not cross-appeal on the question whether the district had the authority to build the solar project.

³² Id. at 753-54.

³³ Id. at 755-59.

³⁴ Id. at 756-57.

³⁵ Id.

³⁶ Id. at 757-58.

³⁷ Id. at 760-65.

³⁸ Id. at 764-65.

³⁹ Id. at 762.

⁴⁰ Id. at 766. The city and the district entered into a tolling agreement with respect to potential litigation by the district challenging the city's denial of the district's application for a general plan amendment, a zone change, and a conditional use permit. The tolling agreement has expired. The district has not commenced litigation challenging the city's denial of the district's applications.

⁴¹ Akins v. Sonoma County, 67 Cal. 2d 185, 194 (1967); see also County of Los Angeles v. City of Los Angeles, 212 Cal. App. 2d 160, 164-66 (1963).

⁴² Id. at 166-67; 68 Ops. Atty. Gen. 114 (1985).

⁴³ GOV'T CODE §56402. A project is consistent with the general plan if, considering all of its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. Perfect conformity is not required, but the project must be compatible with the general plan's objective and policies. San Francisco Tomorrow v. City and County of San Francisco, 229 Cal. App. 4th 498, 513 (2014). A court must defer to a consistency finding unless no reasonable person could have reached the same conclusion. Orange Citizens for Parks & Recreation v. Superior Ct., 2 Cal. 5th 141, 155 (2016).

⁴⁴ GOV'T CODE §56402.



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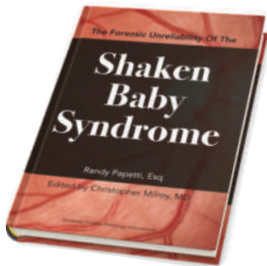
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The Forensic Unreliability of the Shaken Baby Syndrome



By Randy Papetti, Esq.
Academic Forensic Pathology
International, March 2018
\$150, 340 Pages

MOST ATTORNEYS AND JUDGES grow weak in the knees at the thought of having to read and understand a pediatric neuroradiology report. Delving into the cause of an infant or toddler's fatal head injury is not something any lawyer or judge or law clerk undertakes with glee. However, in criminal cases where the stakes could not be higher for a parent or childcare provider, it is a critical and necessary undertaking if justice is to be served.

The Forensic Unreliability of the Shaken Baby Syndrome by Randy Papetti is essential reading for anyone who needs to understand the forensics of pediatric head injuries and the reliability of the science underlying Shaken Baby Syndrome (SBS), lawyers and judges alike. Papetti is uniquely qualified to explain the unreliability—for legal purposes—of the diagnosis of Shaken Baby Syndrome, in terms jurists understand. He is not a physician nor medical researcher; he is a trial lawyer with experience litigating these forensically difficult cases and a talent for explaining the history, evolution, and unreliability of the SBS diagnosis. Papetti's message is as important as it is urgent: the scientifically controversial medico-legal diagnosis, first called Shaken Baby Syndrome, and now also referred to as Abusive Head Trauma (AHT), is deeply flawed, unreliable, and urgently requires greater judicial oversight.

Thousands of parents and caregivers have been sent to prison for child abuse and murder in cases where the prosecution's theory was based on SBS/AHT. Put simply, child abuse is often assumed and SBS diagnosed in cases where a child experiences a life-threatening head injury that cannot be readily explained by a contemporaneous traumatic event, such as a serious car accident or a significant fall witnessed and described by others. But that assumption is not the same as scientific proof.

By way of illustration, Papetti explains a scenario that often appears in SBS/AHT cases when a child experiences a head injury from an accidental fall, such as from a bunk bed or playground equipment or in a shower, and the child cries but appears lucid and uninjured aside from perhaps a bump on the head. A day or two or three later, the child becomes gravely ill and unresponsive and is rushed to the hospital. Under the SBS/AHT hypothesis, it is not possible for a child to experience a lucid interval for a day or more after a head injury that later proves fatal. Once the child is rushed to the hospital for treatment,

child abuse is assumed and SBS/AHT is "diagnosed"—often by self-described "child abuse experts"—because there is no evidence of a severe traumatic event immediately preceding the child's loss of consciousness.

Adding to the confusion and controversy, parents and caregivers in these cases not only endure the painful loss of a beloved child, they inevitably and understandably feel guilt over something so tragic happening while the child was in their care. When they try to explain to hospital staff and law enforcement officials that they attempted to revive the child by jostling or "shaking"

The author lays out a clear-eyed assessment of the unreliability of the Shaken Baby Syndrome/Abusive Head Trauma diagnosis for legal purposes and for use in criminal convictions.

him or her, they are unwittingly providing statements that are later used against them as "confessions." In many cases, at that point the prosecution has what it needs to get a conviction. It is too often—shockingly—just that simple. As this scenario illustrates, the evidence used to prosecute these cases often is not scientific at all. Papetti explains that the SBS/AHT diagnosis is based on circular reasoning: it is assumed based on the absence of another, acceptable explanation for the child's injury. He further explains that a finding of "child abuse" in these cases is not supported by medical science, nor is a caregiver's explanation about trying to revive a child by shaking or jostling him or her scientific evidence.

Innocent Explanations

Tragically, accidental falls that result in a fatal head injury and a child's death do happen. There are a number of innocent explanations for the types of head injuries frequently diagnosed as SBS/AHT, including household or playground falls and natural disease processes such as birth-related subdural hemorrhage that becomes chronic. Papetti lays out clearly and concisely the existing literature and explains that research and studies are effectively and increasingly dismantling the myths underlying the SBS/AHT diagnosis, including the myth that lucid intervals following accidental short falls do not occur.

Even though many clinical and forensic beliefs in SBS/AHT

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are not reliable, prosecutors still regularly rely on that diagnosis and use it to powerful effect in the courtroom. As Papetti explains, that is because the SBS/AHT diagnosis continues to be well-accepted among many in the medical community. Jurors convict based on the SBS/AHT hypothesis because they often perceive the state's evidence as vested with immense institutional credibility and scientific reliability, sometimes referred to as "white hat bias" because prosecutors are perceived as wearing the white hat in adversarial courtroom proceedings.

However, things are beginning to change. As the flaws in the SBS/AHT hypothesis are becoming more apparent through credible, peer-reviewed studies, courts are beginning to more closely scrutinize the science in these cases and the reliability of the SBS/AHT diagnosis. In some cases, courts are overturning convictions on the ground that they were not based on expert testimony shown to be sufficiently reliable. On October 29, 2019, for example, a court in Mississippi overturned Joshua Clark's conviction on the ground that the trial court had not adequately ensured that an expert's testimony about SBS/AHT was reliable. Clarke had been alone with the child victim and three other small children for several hours when the victim's mother returned home to find her child "limp and lifeless." At trial, the prosecution's medical expert testified that the child had been shaken violently and Clarke was convicted. On appeal, Clarke's attorney pointed to a recent Swedish study¹ which found that no high-quality studies supporting SBS exist, that there are no studies based on independently witnessed or videotaped evidence of SBS, and the studies that do exist carry a high risk of bias due to circular reasoning. The report further states that existing SBS/AHT studies are based primarily on assessments of "child protection teams" who widely assume that a child has been violently shaken when certain types of injuries are observed.

Papetti discusses the reliability and importance of the Swedish study, which was comprehensive and carried out over a two-year period. He urges judges and attorneys to read and understand its findings. SBS/AHT cases are fraught with peril and extremely difficult to litigate. To be sure, criminal child abuse does occur. It is the job of law enforcement to prosecute these cases. Once charges are filed, however, the desire for vengeance when child abuse is even suspected is particularly acute; children are vulnerable. Children are to be protected, not abused. That is

why there is an added onus on courts to act as responsible gatekeepers when considering whether to permit jurors to consider evidence of the SBS/AHT diagnosis, which is so fraught with peril and, as Papetti explains, unreliable for legal purposes.

For these reasons, it is critical that judges and attorneys handling these cases understand the science, or lack thereof, underlying the SBS/AHT diagnosis. *The Forensic Unreliability of the Shaken Baby Syndrome* is a valuable contribution to the existing literature because it is accessible and effectively lays out the history, literature, and science needed to assess the medical evidence presented in these difficult cases.

Papetti's book is a great resource for anyone in search of a comprehensive and well-researched overview of the SBS/AHT hypothesis. He sets forth an easy-to-follow history of the way the SBS diagnosis was originally hypothesized, how it made its way into the courtroom, and why it continues to be the basis of convictions today. He also explains how the SBS/AHT debate came to be so polarized, with proponents arguing that there is no scientific controversy surrounding the debate, while critics

maintain that the science is so flawed that it is "more an article of faith than a proposition of science."

Boston Nanny Case

The author tells the story of the pendulum swing that saw SBS reaching its zenith in 2001 around the time of the nationally televised Boston nanny case involving British au pair Louise Woodward, and he explains that the pendulum began to swing back when studies increasingly showed that SBS is inconsistent with biomechanical studies and that a child can have a lucid interval, even after sustaining a fatal head injury caused by an accidental fall.

In what is perhaps Papetti's most valuable contribution, he lays out a clear-eyed assessment of the unreliability of the SBS/AHT diagnosis for legal purposes and for use in criminal convictions. He explains that SBS was accepted as evidence in case after case, even before being validated. For years, he says, the legal system failed to recognize advances in the medical and scientific literature that undermined SBS/AHT. Papetti's real point, and his most urgent message, is that the reliability of SBS, which is undeniably based on scientifically controversial evidence, has yet to be adequately addressed

in the courts. Papetti's book is a clarion call for that to change.

The appendix in the back of *The Forensic Unreliability of the Shaken Baby Syndrome* is by itself a reason to read this book. It is an invaluable resource to anyone struggling to understand the medical evidence and terminology in a given case in order to assess the reliability, or lack thereof, of an SBS/AHT diagnosis. It includes an overview of infant anatomy and helpful illustrations that explain head injuries in easy-to-understand terms.

Child abuse is not an easy topic. The loss of a child is a horrific thing. Papetti's book attempts to explain the SBS/AHT diagnosis in a manner that will assist jurists and medical professionals alike, with a goal of avoiding compounding the unbearable loss of a child by wrongfully convicting the child's parent or caregiver of abusing the child and causing his or her death. Papetti accomplishes what he set out to do. His contribution to the existing literature will undoubtedly pave the way for better justice in these difficult cases. ■

¹ Mans Rosén et al., *Shaken Baby Syndrome and the Risk of Losing Scientific Scrutiny*, 106 ACTA PAEDIATRICA 1905 (2017).

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What Trial Lawyers Can Learn About Demurrers from *Moneyball*

IN HIS BOOK *Moneyball: The Art of Winning an Unfair Game*, author Michael Lewis describes a statistical system using player on-base percentages rather than hitting percentages to identify undervalued baseball players for selection in the player draft. The book inspired the successful *Moneyball* movie starring Brad Pitt. In the movie, Brad Pitt’s character Billy Beane, general manager of the Oakland Athletics baseball team, pushes back against the biases of his scouting staff in focusing on hitting percentages. “Do I care how a player gets on base?” Beane exclaims, making the point that a player can get on base either by hitting safely or by not swinging at pitches outside the strike zone.

Should a lawyer care about how a demurrer is decided—whether in the courthouse by the judge at a law-and-motion (L&M) hearing or when an attorney in a telephone call persuades the opposing attorney what a judge will do if required to decide a contemplated demurrer?

The California Legislature has given lawyers that choice. Four years ago, the legislature enacted a new requirement for demurrers challenging the sufficiency of a complaint: before filing a demurrer, the attorney for the defendant is required first to meet and confer “in person or by telephone” with plaintiff’s attorney to discuss “whether an agreement can be reached that would resolve the objections to be raised by the demurrer.”¹ This requirement was extended to motions to strike (StM) and motions for judgment on the pleadings (JOPs) two years later.² Have the new statutes reduced the number of demurrer hearings? Absolutely.

I preside in a civil department in Stanley Mosk Courthouse, one of 41 judges with an individual calendar (IC) assignment. Case inventories for the IC judges jumped during the court budget crisis of 10 years ago. Today, each IC judge carries an average of 500 cases. My practice has been to tabulate the motion hearings in my courtroom every year. For my statistics, I counted motions to strike and JOPs as demurrers because the legal standards for deciding these motions are the same. Moreover, when a motion to strike was filed with a demurrer—a usual practice—I counted the two motions as one demurrer. Year after year, I watched as the number of demurrer hearings climbed alarmingly, peaking at 208 demurrers in 2015. Then the number of demurrer hearings started to fall. Demurrer hearings last year were half the number in 2015. My demurrer hearing statistics over six years are:

Year	L&M Dem/Days	JOP/ StM
2013		158
2014	202	176
2015	198	208
2016	195	129
2017	193	114
2018	203	110

The only variable I can discern is the “in person or by telephone” meet-and-confer requirement imposed by statute for the filing of a demurrer. It is likely that the demurrers that were not filed

because of the new meet-and-confer requirement—either because the plaintiff’s attorney decided to file an amended complaint to avoid the threatened demurrer or the defendant’s attorney decided filing a demurrer was not cost-effective—were the weaker motions. But, so what? Even weak demurrers impose delay, expense, and clutter that is better avoided.

Moreover, because of the new “in person or by telephone” meet-and-confer requirement, the scope of the demurrer that is ultimately filed may be narrowed, saving the time needed to brief and argue the motion.

The new statute expects attorneys complying with the “in person or by telephone” requirement to have a substantive and thorough discussion. California Code of Civil Procedure Section 430.41, subdivision (a)(1), requires “the demurring party [to] identify all of the specific causes of action that it believes are subject to demurrer and identify with legal authority the basis of the deficiencies.” The statute also requires the “party who filed the complaint, cross-complaint, or answer [to] provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal deficiency.”

The attorney for the demurring party is required to file with any demurrer a declaration attesting to compliance with the new meet-and-confer requirement. My experience in ruling on demurrers is that increasingly some attorneys are dodging the “in person or by telephone” requirement. However, courts are developing strategies to encourage compliance with the new statutes. The Judicial Council has approved a check-the-box form to satisfy the statutory requirement. The declarant may check whether the meet-and-confer was by telephone or in person at least five days before a demurrer is filed. (Form Civ-140 is approved for optional use.)

My practice in drafting tentative rulings for demurrers is to note that the demurring party complied with the “in person or by telephone” meet-and-confer requirement. If the demurring party has not provided the declaration, that would justify taking the demurrer off calendar until such time as counsel do meet and confer in person or by telephone. The “in person or by telephone” requirement has reduced demurrer hearings in my courtroom and, by extension, all civil departments. Judicial enforcement of the new statutory requirement may be needed to retain its effectiveness. Lawyers benefit from the new statutes. Indeed, it may be anticipated that when knowledgeable advocates take time to discuss the merits together, they may not only save a trip to the courthouse but also establish a relationship that will bear fruit over the course of the litigation. ■

¹ CODE CIV. PROC. §430.41.

² CODE CIV. PROC. §435.5, 439.

Richard L. Fruin is a Los Angeles Superior Court judge.

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