General Municipal Litigation Update

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General Municipal Litigation Update 2024

I. *City of Grants Pass, Oregon v. Johnson* (2024) 144 S.Ct. 2202

Holding: Ordinances criminalizing sleeping or camping in public do not constitute cruel and unusual punishment, overturning *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584.

Facts/Background: In *Martin*, the Ninth Circuit held it violates the Eighth Amendment to criminalize public camping whenever the number of homeless individuals in a jurisdiction exceeds the number of "practically available" shelter beds. The Ninth Circuit reasoned that, unless adequate shelter is available, such ordinances criminalize the status of being homeless. A flood of challenges followed, and the new standard proved largely unworkable for cities trying to enforce camping ordinances.

The City of Grants Pass prohibited camping on public property or parking overnight in the city's parks, and imposed increasing sanctions including fines, stay-away orders, and a maximum penalty of 30 days' jail. Plaintiffs filed a class-action lawsuit, and the district court entered an injunction prohibiting Grants Pass from enforcing its camping ordinances against homeless individuals in the city. The court concluded that the unsheltered homeless population in Grants Pass was "involuntarily homeless" because the total homeless population outnumbered the number of available shelter beds. Many shelter beds were discounted from this calculation because they were run by religious charities with strict rules, such as requiring residents to abstain from smoking and to attend religious services.

A divided panel of the Ninth Circuit affirmed the injunction, and rehearing *en banc* was denied with significant dissent. The U.S. Supreme Court granted cert. Over two dozen cities supported the city's petition for certiorari, along with Cal Cities and its counterparts in other states.

Analysis: The United States Supreme Court reversed, holding that the Cruel and Unusual Punishment Clause of the Eighth Amendment did not prohibit statutes criminalizing camping in public.

The Court began by noting the complexities of the homelessness crisis in the western United States, and that most municipalities (including Grants Pass) employ a multipronged approach to addressing homelessness. It recognized homelessness has no single cause, and that diverse factors such as economic conditions, rising housing costs, natural disasters, substance abuse, and mental illness can all contribute. Individuals experiencing homelessness may camp in public for a multitude of reasons, ranging from necessity to access to drugs. The Court found local governments face significant obstacles from unregulated encampments, including increased crime, drug use, and lack of proper sanitation. These problems often persist or grow despite an increase in available shelter space. Given this backdrop, the Court noted that criminal statutes aimed at preventing camping are an important tool for local government.

The Court then summarized jurisprudence surrounding the cruel and unusual punishment clause of the Eighth Amendment, finding that it did not prohibit camping ordinances. The Court first explained that, historically, cruel and unusual punishment did not apply to what conduct gets criminalized, but how it was punished. Only punishments designed to add terror, pain, or disgrace to a conviction, or which had others fallen into disuse, generally counted as "cruel and unusual." Fines and a 30-day jail sentence did not meet these criteria.

The Court then distinguished *Robinson v. California* (1962) 370 U.S. 660, the case *Martin* relied on in concluding that camping ordinances violated the Eighth Amendment by criminalizing the status of being homeless. In *Robinson*, the Supreme Court struck down a California statute that made it unlawful to be addicted to narcotics, reasoning that even one day in jail would be cruel and unusual when punishing the "status" of being an addict. Although the majority in *Grants Pass* intimated *Robinson* was wrongly decided, it stopped short of overturing the decision. Instead, the Court emphasized that the holding in *Robinson* was narrow, expressly not extending it to volitional acts such as possessing and using narcotics. Similarly, the Court reasoned, Grants Pass did not criminalize the status of being homeless, only the act of sleeping in public.

Impact: Following the decision, cities may now impose criminal penalties for acts like public camping and public sleeping, even if there is insufficient shelter space within the jurisdiction for the unhoused population. As a result, public entities across California have started to again enforce their anti-camping ordinances and similar laws, including the State, which in July 2024 began removing encampments from state property. However, the potential for challenges remains on legal grounds such as the ADA, the state-created danger doctrine, and others.

II. *Sheetz v. County of El Dorado, California* (2024) 601 U.S. 267

Holding: Legislatively approved permit fees are subject to the *Nollan/Dolan* test for determining whether a fee imposed as a condition for a land-use permit constitutes an unconstitutional taking under the Fifth Amendment.

Facts/Background: The Takings Clause of the Fifth Amendment forbids the government from taking private property without just compensation. Courts recognize that the coercive power governments wield in the land-use context can lead to an unconstitutional exaction when governments demand concessions from developers unrelated to the burdens created by the project. Thus, a permit condition becomes an unconstitutional taking under *Nollan v. California Coastal Comm'n, 483* U.S. 825 and *Dolan v. City of Tigard*, 512 U.S. 374, when it lacks either an "essential nexus" to the government's land-use interest or "rough proportionality" to the development's impact. In California, this restriction was interpreted to apply only to "ad hoc" exactions applied as conditions to a particular development, but not to legislatively enacted fees.

To address traffic congestion along Highway 50, El Dorado County requires developers to pay a traffic-impact fee as a condition of receiving a building permit. The fee amount is determined by a legislatively set rate schedule, which accounts for the type of development and its location. The opinion notes, "[t]he amount is not based on 'the cost specifically attributable to the particular project on which the fee is imposed.'"

Sheetz owned a residentially zoned property and applied for a permit to build a prefabricated home. As a condition of receiving the permit, the County required Sheetz to pay a traffic-impact fee of $23,420, as dictated by the rate schedule. Sheetz paid under protest, then sought judicial relief for the allegedly unlawful exaction. California courts ruled against Sheetz, based on then-controlling California precedent.

Analysis: The United States Supreme Court reversed, holding that the Takings Clause applies to all permit conditions, whether passed legislatively or imposed on an ad hoc basis. The Court first emphasized that imposing permit conditions remains a legitimate use of the police power, and that requiring developers to compensate the public for the increased impacts of development is "a hallmark of responsible land-use policy."

However, government may not withhold or condition a permit for reasons unrelated to its land-use interests, as the landowner is likely to acquiesce to extortionate demands because of the value of the permit. Thus, the constitution imposes the requirements for an "essential nexus" and "rough proportionality." These criteria apply both to land dedications and monetary exactions.

The Court held that the California Court of Appeal erred in refusing to assess the County's traffic-impact fees for an essential nexus and rough proportionality. It noted that the text and history of the Takings Clause did not exclude takings by the legislative branches, and that historically most takings were accomplished by statute. The Court has consistently applied the Takings Clause to legislative acts in other contexts, such as statutes that result in the physical taking of property for public use or that deny an owner practically all economic value from their property.

Impact: Going forward, cities should take care to prepare a study, when imposing development impact fees or other legislative land use exactions, that specifically addresses the "essential nexus" and "rough proportionality" requirements. However, in many cases this will not place any additional burden on government, as similar requirements already exist under the Mitigation Fee Act.

III. *Legislature of the State of California v. Weber* (2024) 16 Cal.5th 237

Holding: Ballot measure that would subject all government revenues to voter approval was a constitutional revision and could not be accomplished by initiative.

Facts/Background: Article XVIII of the California Constitution reserves to the People the right to "amend" the Constitution by initiative; however, a "revision" to the Constitution requires popular approval after either a constitutional convention or a supermajority vote by the Legislature. A constitutional revision cannot be achieved by initiative. The difference between an amendment and a revision is one of degree. An initiative impermissibly seeks to revise the Constitution when it would substantially alter the state's basic governmental framework.

In 2022, the California Business Roundtable secured sufficient signatures to place the so-called "Taxpayer Protection and Government Accountability Act" ("TPA") on the November 2024 ballot. Section 3 of the TPA stated its purpose was to require voter approval of "any new or higher tax" and to require legislative, not administrative, action on "all fees or other charges." Among the changes it proposed were mandating that all revenue measures require action by the local legislative body (subject to referendum) and that all tax increases receive voter approval. The net effect was that all government levies, at every level and however justified, were subject to voter approval.

The California Legislature and Governor Gavin Newsom filed a petition with the California Supreme Court seeking a writ prohibiting the Secretary of State from placing the initiative on the November 2024 ballot. Petitioners argued the TPA was an invalid revision of the California Constitution via citizen initiative, and "would seriously impair essential government functions." The Supreme Court found that Petitioners had made a sufficient *prima facie* showing and set the petition for oral argument.

Analysis: The Court first determined that preelection review of the initiative was appropriate. Generally, substantive challenges to initiatives are reviewed after an election to avoid disrupting the electoral process. However, preelection review is proper where, as here, the challenge is based on a claim that the initiative may not be submitted to the voters because it amounts to a constitutional revision. The Court also noted that pre-election review was particularly appropriate because the TPA's rollback provision applied to any revenue measure adopted after January 1, 2022, already creating significant uncertainty and a chilling effect on government finances.

The Court then identified three major changes the TPA would make to California's form of government, which taken together amounted to a revision of the Constitution. First, it would require voter approval for all tax increases by state or local government entities. The Court noted that, "[f]rom the state's founding, the Legislature has had broad authority to levy taxes," and that the power to tax was a power reserved to the legislature, not granted to it. While initiatives over the last 50 years have limited "the Legislature's and local governments' tax authority," the TPA would have prevented the Legislature from levying any new tax without voter approval, significantly interfering with the Legislature's fiscal powers and stripping it of authority to promptly raise revenues when necessary.

Second, the TPA would have mandated any change in state law resulting in a taxpayer paying a new or higher charge be passed by legislative act. Not only would this be a huge burden on state and local government, it would subject all revenue measures to referendum, "including fees for trash collection and water service, sewer connections, permits and licenses, cemeteries, and parks and recreation." The Court agreed this would "significantly rework the current balance between legislative and executive functions at the state and local level" and create an ongoing threat of fiscal disruption.

Third, the initiative would have transferred all local fee-setting to local legislatures, forbidding administrative fee setting. Thus, for example, a local utility could not adjust rates

without the legislative body passing an ordinance, and fines for overdue library books and expired parking meters would become taxes subject to voter approval. Such far-reaching changes amounted to a qualitative revision of the Constitution.

Impact: For cities, the major impact of this case is to remove the uncertainty that had been hanging over local finances since the measure qualified for the ballot. Useful for local initiative challenges, the Court noted severance of the offending portions of the measure was not appropriate in a pre-election challenge. The voters who signed the initiative did so to put the entire measure before the electorate, and modifying the initiative before the election would frustrate that intent. Similar arguments can be made when local government challenges the constitutionality of local initiatives pre-election.

IV. *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785

Holding: In a challenge to a water agency's tiered-rate structure under the proportionality requirement of Prop. 218, the independent-judgment standard of review applied, and the agency's determination was not entitled to deference. Damages in the form of a refund for overcharged rates may be awarded in such a challenge.

Facts/Background: Proposition 218, section 6(b)(3), states that the amount of any fee or charge imposed as an incident of property ownership "shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b)(3).) This is known as Prop. 218's "proportionality requirement," in that it requires that any fees charged for a service to a particular property be proportional to the cost to provide the service to that property.

Based on this requirement, a resident brought a class-action lawsuit against the Otay Water District ("District"), challenging the District's imposition of "tiered" water rates on single-family residential customers. Under a tiered-rate structure, as the amount of water used by a customer increases, the customer enters a higher "tier," where a higher rate is charged for the same unit of water. Typically, such structures are adopted primarily to encourage water conservation.

The plaintiff alleged that the District's tiered-rate structure violated Prop. 218's proportionality requirement because the cost to the District for supplying each unit of water remained the same regardless of the volume used, making it unlawful to charge higher rates for higher usage. The plaintiff brought claims for injunctive and declaratory relief, restitution of the allegedly excessive water rates, and a writ of mandate under Code of Civil Procedure section 1085.

The case was tried on an administrative record consisting of the evidence before the District when it adopted the rates, the primary components of which were two rate studies performed by third-party consultants. In addition, the trial court took extra-record evidence in the form of expert testimony from both sides, which analyzed the rate studies.

Following a bifurcated trial, the trial court found in favor of the plaintiff class, holding that the District failed to meet its burden of demonstrating that its tiered-rate structure complied with Prop. 218's proportionality requirement. On the issue of damages, the trial court awarded approximately $18 million in overcharged fees. The District appealed.

Analysis: Under Prop. 218, in any legal action under its provisions contesting the validity of a fee or charge, "the burden shall be on the agency to demonstrate compliance." (Cal. Const., art. XIII D, § 6, subd. (b)(5).) Thus, the District had the burden of showing that its tiered-rate structure satisfied Prop. 218's proportionality requirement.

According to the Court, "[t]o carry its burden, an agency must generally provide evidence identifying the data used, analyzing the cost of service, and demonstrating the proportionality of the rate." (P. 797.) In an effort to meet this burden, the District relied upon the two rate studies used by it in adopting the rates, and on extra-record testimony from an expert witness interpreting the studies. The plaintiff also relied upon expert testimony.

Based on existing authority—primarily, the California Supreme Court case of *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, and the case of *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493—the Court of Appeal held that the District's decision to adopt the tiered rates was subject to the independent-judgment standard, *not* the substantial-evidence standard, and that the District was not entitled to any deference on its rate-making. According to the Court, the language of Prop. 218 was specifically intended to "curtail" such deference on this issue. Thus, the District could not satisfy its burden simply by pointing to supporting evidence in the record; on the contrary, that evidence had to demonstrate compliance with the proportionality requirement under the reviewing court's independent judgment.

However, despite the applicability of the independent-judgment standard to the review of the District's decision to adopt the rates, the Court applied the substantial-evidence standard in evaluating *trial court's* factual findings. This meant the Court of Appeal did not perform a *de novo* review of the entire case, but instead upheld the trial court's findings if there was any substantial evidence in the trial court record to support them. This was important to the result, as many of the trial court's factual findings concerned the interpretation of the District's rate studies, as explained by the parties' competing experts. Based on the substantial evidence standard, the Court of Appeal simply deferred to the trial court's determinations on those issues.

Against this backdrop, the Court of Appeal upheld the trial court's determination that the District did not meet its burden, primarily because (1) the District's rate studies, its expert, and comments by its board at the time of adoption of the rates, all acknowledged that the tiered rates were at least partially, if not primarily, adopted for *conservation purposes* rather than cost-recovery purposes, (2) the District's rate studies did not contain evidence showing that the per-unit cost of providing water increased as usage increased (and the District's expert even admitted to the contrary), and (3) the difference in pricing between the District's tiers was based on percentages stated in an industry manual rather than on specific data relating to usage by the District's customers.

In addition, the court found the District's arguments in favor of so-called "peaking factors" to be unconvincing, upholding the trial court's determination that the District failed to show a link between these factors and an increase in the costs of providing service to a particular parcel. The court was particularly troubled by the fact that peaking factors appeared to be based on a "peak" time of demand, during which the strain on the District's facilities was the highest, and yet the District's meters did not collect time-of-use data that would allow the District to attribute that peak usage to particular parcels.

On the issue of damages, the Court held that they were available in a challenge under Prop. 218, at least where, as here, the plaintiff sought a writ of mandate under Section 1085 for restitution of the overcharged fees. (It was unclear from the Court's discussion whether other procedural vehicles would also allow for a claim for damages to be made.) In reaching this conclusion, the Court also held that the Government Claims Act ("Act") applies to such damages claims, meaning a timely tort claim must be filed (as it was here) with the agency before suing. Notably, the ability to obtain refund damages for a violation of Prop. 218 was an issue of first impression.

Impact: *Coziahr* makes clear the difficulties that cities and other public agencies will have in justifying tiered-rate structures for property-related fees or charges. The key battleground in any such case will be a factual debate over the expert reports relied upon by the agency at the time of adoption of the rates. To be successful, those reports must clearly show the link between the rates and the costs of providing services to particular parcels. *Coziahr* also clarifies the legal standards that will be applicable in such a challenge, and shows the hurdles agencies will face in relying on peaking factors.

In addition, a key issue that will have to be addressed in future cases is the extent to which the law established by *Coziahr* has been changed by recently passed legislation, including (1) SB 1072, which requires that any surplus funds collected from water and wastewater customers be used to reduce future fees; and (2) AB 1827, which confirms that meter charges and peak usage associated with higher costs of water service are appropriate components of water fees.

V. *AIDS Healthcare Foundation v. Bonta* (2024) 101 Cal.App.5th 73

Holding: State law did not preclude State Legislature from passing law that authorized local legislative bodies to supersede local housing density caps, even if those caps were adopted by voter initiative.

Facts/Background: To help combat California's housing crisis, in 2021, the State Legislature adopted Senate Bill 10 ("SB 10"), codified at Government Code section 65913.5. SB 10 authorizes local legislative bodies, including those of charter cities, to zone urban-infill parcels for 10 units of residential density, regardless of any local restrictions on density, whether adopted by ordinance or initiative. To override local restrictions, SB 10 requires only a simple majority vote

of the local legislature to supersede a housing density cap enacted by local ordinance, but a supermajority two-thirds vote to supersede a cap adopted by local voter initiative.

The Petitioners brought a facial challenge against Senate Bill 10, claiming that it violated the California Constitution by allowing local legislative bodies to override the will of the voters as enacted by initiative. The trial court ruled in favor of the State, holding that SB was valid exercise of the State Legislature's power. The petitioners appealed.

Analysis: In holding SB 10 constitutional against the petitioners' facial challenge, the Court of Appeal made the following primary holdings:

First, even though issues of land use are typically considered matters of local concern, the power granted to local legislative bodies by SB 10 nevertheless applies equally to charter cities, because the housing crisis that the law seeks to address is a matter of statewide concern. In finding for the State on this issue, the Court did not merely accept the Legislature's declaration of a statewide concern, but made its own independent determination on that issue. Among other things, the Court stated that the housing crisis was best handled at the State level to avoid local NIMBY concerns.

Second, SB 10 preempts local laws that set residential density caps at less than 10 units per parcel because such laws purport to prohibit what the state law expressly authorizes. According to the Court, because local housing caps "tell the local legislative body, 'You cannot do X [where X is approving a project that exceeds the locally enacted housing density cap],' while Senate Bill 10 tells the local legislative body, 'You have the option of doing X [opting to exceed the cap] or doing Y [opting not to exceed the cap],'" such local laws are preempted.

Third, the State Legislature may preempt local laws adopted through the initiative power if there is a "clear showing" or a "definite indication" of legislative intent to do so. (Citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-776, and *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1079.) In SB 10, the Legislature expressly manifested such an intent by giving the power to local legislative bodies to override all local housing density caps, including those adopted by initiative.

Fourth, the State Legislature may exercise its preemptive power by essentially delegating to local legislative bodies the discretion to exercise that power on a parcel-by-parcel basis. The Court's reasoning for this conclusion was that (1) the California Supreme Court approved a similar limited granting of local control in the preemption context in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, involving development fees, and (2) granting local legislative bodies the discretion to supersede local housing density caps on a case-by-case basis is more protective of the local initiative power than a "wholesale invalidation of all local caps," and thus not "constitutionally offensive."

Impact: The key impact of this case is its determination that SB 10 is constitutional, and therefore can be relied upon by cities to override local housing density caps, even if those caps were enacted directly by the voters via initiative. In addition, the court recognizes (not surprisingly)

the fact that laws enacted to combat the state housing crises represent matters of statewide concern. More broadly, the court describes the preemptive power of the state over local legislation very broadly, even stating that local laws will be preempted if they prohibit what state law expressly permits, and permitting the state to "delegate" that preemptive power to local legislative bodies.

VI. *Cohen v. Superior Court of Los Angeles County* (2024) 102 Cal.App.5th 706

Holding: Government Code section 36900(a), which grants a right to redress violations of municipal ordinances via either criminal prosecution or civil action, only authorizes actions by public agencies, not private citizens, overruling *Riley v. Hilton Hotels Corp.* (2002) 100 Cal.App.4th 599, which was from the same District and Division of the Court of Appeal (Second District, Division Four).

Facts/Background: Government Code section 36900(a) provides that "[v]iolation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction," and that "[t]he violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action." Prior law from the Second District Court of Appeal, Division Fourt (Los Angeles County) had held that this statute allowed private parties to bring civil actions for violations of municipal ordinance. (See *Riley v. Hilton Hotels Corp.* (2002) 100 Cal.App.4th 599.)

Based on this law, the plaintiff property owners brought a civil action against their neighbors, alleging claims for nuisance and declaratory relief, and for violations of provisions of the Los Angeles Municipal Code relating to landscaping height. The neighbors demurred, and the trial court sustained the demurrer as to the nuisance and declaratory relief claims, but, based on the *Riley* case, permitted the case to proceed with respect to the claims for violations of the Los Angeles Municipal Code. In response, the neighbors filed a petition for writ of mandate in the Court of Appeal, which took the case for review.

Analysis: The Court of Appeal first addressed the mootness and jurisdictional questions raised by the plaintiffs, who claimed that (1) the case was moot because they wished to dismiss the case and no longer proceed, (2) the court lacked jurisdiction to consider the overruling of a demurrer at this stage, and (3) the court lacked jurisdiction to overrule existing appellate authority.

With respect to mootness, the Court held that it was irrelevant that the plaintiffs "wished" to dismiss their case since they had not yet done so, and regardless, given that the case raised a significant issue of law that was likely to recur, the Court chose to exercise its discretion to address the issue at this stage. With respect to the alleged lack of jurisdiction to address an overruled demurrer, the Court held that it has the authority to do so in response to a petition for writ of mandate, so long as the case presents a significant issue of law and the remedy of appeal would be inadequate. The Court found both conditions to be satisfied here.

With respect to the Court's alleged lack of "jurisdiction" to overrule existing appellate authority, the Court rejected as inapposite the authorities holding that one district or division of

the Court of Appeal my decline to follow a ruling from a different district or division. Irrespective of such authority, the Court held that the various divisions of the Court of Appeal "are empowered to reconsider—and in the appropriate case disapprove of or overrule—prior decisions of those courts." The Court did not specifically observe that the *Riley* decision is from the very same District and Division as the *Cohen* case, but that fact may have been pertinent to this conclusion.

On the issue of readdressing *Riley*, the Court held that, despite the importance of *stare decisis*, it was nevertheless appropriate to reexamine the case because (1) the court in *Riley* did not support its interpretation with any principles of statutory construction, and (2) it did not appear that the issue was heavily briefed in *Riley* or that court considered the legislative history. Moreover, the Court held that overturning *Riley* would not have a significant impact because it has "only been cited in 20 decisions," these decisions merely accepted *Riley*'s conclusion.

On the interpretation of Section 36900(a), the Court held that the language was ambiguous in referring to violations being redressable "by civil action," but held that the better interpretation was that it only gave such power to "city authorities" because of the mention of such authorities in the prior clause. On this issue, the Court also cited "principles of interpretation governing clauses written in the 'passive voice.'" According to the Court, "where the drafter of a sentence identifies the actor in the first clause, but uses the passive voice in the next clause, and therefore does not identify the actor to whom that clause applies, it is reasonable to infer that the undisclosed actor in the second clause is the same actor specified in the first." (P. 722, citing *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1525.) Furthermore, the Court held that this interpretation was supported by the legislative history, which had stated that Section 36900(a) was merely a reinstatement of prior law, which had only granted the power to sue over municipal violations to cities.

Finally, the Court held that its decision did not disturb existing authorities holding that a violation of a municipal ordinance could form an element of another cause of action (such as a nuisance claim), or that persons can sue for violations of a municipal ordinance that (1) was enacted for their benefit, and (2) causes a unique injury to them that is different from the kind of injuries suffered by the general public.

Impact: The primary impact of this case is that it overrules a 22-year-old precedent regarding the right of individuals to sue for violations of local ordinances. Under *Cohen*, the law is now clear that only cities have that right. On a broader note, the court relied on a seldom-used rule of statutory interpretation regarding a sentence that "identifies the actor in the first clause, but uses the passive voice in the next clause"—an interpretation tool that may be useful to litigators.

Hate Bombing and Poetry Recitations: Handling Disruptive Public Comment

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Hate-Bombing and Poetry Recitations: Handling Disruptive Public Comment

Amy Ackerman[1]

Introduction[2]

When the pandemic hit, city councils held their meetings remotely, using zoom and similar technologies. Even as councils returned to in-person meetings, many continued to allow residents to attend and make public comment remotely. Residents enjoy the convenience of remote attendance, and many councils saw greater attendance at their meetings. Unfortunately, in the past year, many councils in California and nationwide have had their meetings disrupted by groups of remote attendees spewing racist and antisemitic vitriol. These events have been referred to as "zoom-bombing," but more properly should be termed "hate-bombing." In response to these incidents, many councils, believing that the Brown Act and the First Amendment require councils to allow these speakers to speak, stopped remote attendance or stopped allowing remote public comment. This article argues against the necessity of abandoning remote attendance and comment, and that there remains a path consistent with First Amendment jurisprudence, to control hate-speech at Council meetings. That path is not entirely without legal risks but should be considered when balanced against the potential of losing a valuable means of encouraging public participation in governance.

I. The Legal Framework

A. The Brown Act

The Brown Act governs the conduct of meetings of legislative bodies of local agencies.[3] This article discusses the provisions of the Brown Act that address participation by members of the public at the meetings of legislative bodies and removal of disruptive persons from meetings.[4] In enacting the Brown Act, the Legislature declared that public commissions, boards, and councils exist to "aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly."[5]

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[1] Amy Ackerman is a partner and lead government attorney at Renne Public Law Group.

[2] This article draws on an article written by our late colleague, Randy Riddle, a leader in the field of municipal law. We were honored to work with him and miss him every day.

[3] Gov. Code § 54950 *et. seq*. "Legislative body" is defined in Government Code section 54952. City councils are legislative bodies. (Gov. Code § 54952(a).)

[4] For a more comprehensive guide to the Brown Act, see "Open & Public VI: A Guide to the Ralph M. Brown Act "(Revised 2024), published by the League of California Cities, available at: https://www.calcities.org/resource/open-public-v-a-guide-to-the-ralph-m.-brown-act

[5] Gov. Code § 54950.

1. Public Comment

Along with requiring most actions to be taken at public meetings, the Brown Act requires a council to take comments from members of the public before or during each item of business.[6] In addition, at regular meetings, a council must also allow the public to comment on anything within the subject matter jurisdiction of the council that is not on the agenda (often referred to as "general public comment").[7]

The Brown Act expressly provides that a "legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body."[8]

2. Restrictions on Public Comment

The Brown Act applies some restrictions to public comment.

a. Committee exception.

First, if an item has been considered at a public meeting of a committee composed exclusively of members of the legislative body, where "all interested members of the public" were permitted to comment on the item, the "parent" legislative body need not take public comment.[9] This exception does not apply if the item has been "substantially changed" since the Committee heard the item.[10] The legislative body makes the determination if the item has been substantially changed.[11]

b. Reasonable Regulations

Next, a legislative body may adopt "reasonable regulations" to ensure that members of the public have an opportunity to address the legislative body. Reasonable regulations include, but are not limited to, "regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker."[12] We discuss what regulations are reasonable, below.

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[6] Gov. Code § 54954.3(a).

[7] Gov. Code § 54954.3(a).

[8] Gov. Code § 54954.3(c).

[9] Gov. Code § 54954.3(a).

[10] *Id.*

[11] *Id.*

[12] Gov. Code § 54954.3(b)(1). The Act requires that if the legislative body limits time for public comment, it must provide at least twice the allotted time to a member of the public that uses a translator. This requirement does not apply if the agency uses simultaneous translation equipment. Govt. Code § 54954.3(b)(2),(3).

3. Removal of Disruptive Persons

The Brown Act contains two provisions addressing the removal of disruptive persons.

a. Disruptive Groups

A council may order the meeting room "cleared" if a meeting is "willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting[.]"[13]

The Council must require representatives of the press or other news media to remain in the meeting room, unless they participated in the disturbance.[14] The Council may establish a procedure for readmitting persons not responsible for the disturbance.[15]

b. Disruptive Individuals

In 2022, the Legislature enacted SB 1100, which added section 54957.95 to the Brown Act. Section 54957.95 allows for the removal of an individual for "disrupting the meeting."[16] "'Disrupting' means engaging in behavior during a meeting of a legislative body that actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting[.]"[17] Disruption includes "[e]ngaging in behavior that constitutes use of force or a true threat of force."[18] A "true threat of force" means "a threat that has sufficient indicia of intent and seriousness, that a reasonable observer would perceive it to be an actual threat to use force by the person making the threat."[19]

"Disrupting" also means "[a] failure to comply with reasonable and lawful regulations adopted by a legislative body[.]"[20] Before removing a person, unless the removal is due to their making a true threat of force, the presiding member or their designee, must "warn the individual that their behavior is disrupting the meeting and that their failure to cease their behavior may result in their removal."[21]

In the course of enacting section 54957.95, the Legislature declared its intent not to prohibit criticism of the policies, procedures, programs, or services of the agency, or of the acts or

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[13] Gov. Code § 54957.9.

[14] *Id.*

[15] *Id.*

[16] Gov. Code § 54957.95(a)(1).

[17] Gov. Code § 54957.95(b)(1).

[18] Gov. Code § 54957.95(b)(1)(B).

[19] Gov. Code § 54957.95(b)(2).

[20] Gov. Code § 54957.95(b)(1)(A).

[21] Gov. Code § 54957.95(a)(2).

omissions of the legislative body, as provided for in section 54954.3(c).[22] In addition, the Legislature declared its intent to "codify the authority and standards for governing public meetings in accordance *with Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (9th Cir. 2013), in which the court explained that an ordinance governing the decorum of a city council meeting is not facially overbroad if it only permits a presiding officer to eject an attendee for actually disturbing or impeding a meeting." We discuss the *Acosta* case below.

B. Other Statutory Provisions

1. Penal Code section 403.

Penal Code section 403 states: "[e]very person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character . . .is guilty of a misdemeanor."[23]

In *In re Kay*, the California Supreme Court overruled the conviction of four protestors at an Independence Day celebration, where an invited speaker, a congressman, who had declined to support a consumer boycott of non-union table grapes, spoke.[24] During the candidate's speech, a "comparatively small part of the total crowd . . . engaged in rhythmical clapping and some shouting for about five or ten minutes."[25] The demonstration did not affect the program.[26]

The Court observed that in analyzing Penal Code section 403, it must be guided by the First Amendment. It noted that, "[s]ince the Constitution indubitably affords some measure of protection to the free expression of all those present at a meeting – speakers, officials, and audience – section 403's prohibition of 'disturbances' potentially may collide with safeguarded First Amendment interests. Nonetheless, the state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion. Freedom of everyone to talk at once can destroy the right of anyone effectively to talk at all. Free expression can expire as tragically in the tumult of license as in the silence of censorship."[27]

The Court concluded that it was required to adopt an interpretation of Penal Code section 403 that eliminates doubts as to the provision's constitutionality and held it authorizes the imposition

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[22] 2022 Cal. Legis. Serv. Ch. 171 (S.B. 1100.)

[23] Penal Code section 403 excludes from its purview disruptions to meetings referred to in Penal Code section 302 (addressing disturbances of religious assemblies) and Elections Code section 18340 (public meetings of electors), which are addressed in distinct statutes.

[24] *In re Kay* (1970) 1 Cal. 3d 930, 934.

[25] *Id.* at p. 935.

[26] *Id.*

[27] *Id.* at p. 941.

of criminal sanctions only when "the defendant's activity itself—and Not [sic] the content of the activity's expression—substantially impairs the effective conduct of a meeting."[28]

Subsequently, in *McMahon v. Albany Unified School District*, the court of appeal upheld the arrest of the plaintiff who dumped gallons of garbage on the floor of a schoolroom during a school board meeting.[29] The presiding officer warned the plaintiff not to dump the trash in the room, which was also used as the school's cafeteria, assembly room, and for an after-school program.[30] The court concluded that the plaintiff's action disrupted the meeting because if he were allowed to "continue dumping his trash in the middle of the meeting, one of two outcomes would necessarily have transpired. Either the meeting would have been further delayed at some point while McMahon picked up the garbage or other speakers would have had to stand near the trash in order to address the board and audience members would have been forced to peer over a mound of garbage in order to watch a public body perform its duty."[31]

2. Government Code section 36813.

Government Code section 36813 states, that a council "may establish rules for the conduct of its proceedings. It may punish a member or other person for disorderly behavior at a meeting." Of course, when exercising this authority, a council must act within constitutional constraints.[32]

C. The First Amendment

The First Amendment is the primary law that dictates what limits may be placed on the public at council meetings.

In *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Commission*, the U.S. Supreme Court held that the First Amendment required that a teacher be permitted to speak at a public meeting of the school board, despite the board's contention that such action by the teacher would be unlawfully engaging in negotiations with a member of the bargaining unit other than the exclusive collective bargaining representative.[33] The Court stated that, "[w]hatever its duties

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[28] *Id.* at p. 942, capitalization in the original.

[29] *McMahon v. Albany Unified School District* (2002) 104 Cal. App. 4th[h] 1275, 1279.

[30] *Id*. at p. 1280-1281. In *CPR for Skid Row v. Khan* (9th Cir. 2015) 779 F.3d 1098, the Ninth Circuit held that Penal Code section 403 did not apply to the protests to walks through the Skid Row neighborhood sponsored by business improvement districts attended by public officials, law enforcement, and other members of the public. The court upheld the constitutionality of Penal Code section 403 from a facial challenge noting that the statute "does not prevent all protests or means of protest. It requires only that a protest not be so disruptive as to break up or substantially impair the meeting." (*Id.* at p. 1111.)

[31] *Id.* at p. 1289.

[32] See *Nevens v. City of Chino*, 233 Cal. App. 2d 775, 778 (1965) (in invalidating prohibition on tape recording legislative body meetings, court explained that rules adopted under section 36813 cannot be "too arbitrary and capricious, too restrictive and unreasonable.").

[33] *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Commission*, (1976) 429 U.S. 167.

as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."[34]

In a concurring opinion, Justice Stewart noted, "[a] public body that may make decisions in private has broad authority to structure the discussion of matters that it chooses to open to the public. Such a body surely is not prohibited from limiting discussion at public meetings to those subjects that it believes will be illuminated by the views of others and in trying to best serve its informational needs while rationing its time."[35]

Following the Supreme Court opinion, the Ninth Circuit has considered the application of the First Amendment to meetings of legislative bodies in the following major cases.

1. *White v. City of Norwalk*[36]

In *White v. City of Norwalk*, the plaintiffs challenged the constitutionality of the city's municipal code provision that prescribed rules for persons addressing the city council.[37] The ordinance prohibited public speakers from making "personal, impertinent, slanderous or profane remarks to any member of the Council, staff or general public" and permitted the presiding officer, or a majority of the council, to remove a person who made such remarks, "or who utters loud, threatening, personal or abusive language, or engages in any other disorderly conduct which disrupts, disturbs or otherwise impedes the orderly conduct of any Council meeting."[38] Significantly, the ordinance required that the presiding officer issue a warning to the speaker that they are "breaching the rules of decorum" and permitted the removal of the speaker only if the speaker "persists in disturbing the meeting."[39] The Court held that, under the challenged ordinance, "[s]peakers are subject to restriction only when their speech 'disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.' So limited, we cannot say that the ordinance on its face is substantially and fatally overbroad."[40]

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[34] *Id.* at p. 176.

[35] *Id*. at p. 427.

[36] *White v. City of Norwalk* (9th Cir. 1990) 900 F. 2d 1421.

[37] Plaintiffs had been removed from council meetings for violation of the rules. (*Id.* at p. 1423.)

[38] *Id.* at p. 1424.

[39] *Id.* at p. 1424.

[40] *Id.* at p. 1426. In *Reza v. Pierce* (9th Cir. 2015) 806 F. 3d 497, the Ninth Circuit Court of Appeals reversed the trial court's grant of summary judgment on a First Amendment claim against a state senator who had barred the plaintiff from entering the state capital building. The Court noted that the capital building was a limited public forum, like a city council meeting. (*Id.* at pp. 502-503.) The Court concluded that the senator's restrictions on the plaintiff "which attempted to preserve the ability of the Senate to hold uninterrupted legislative hearings, were viewpoint neutral," but there were material issues of disputed fact concerning whether the plaintiff actually disrupted the proceedings, and whether the

The Court recognized that: "City Council meetings like Norwalk's, where the public is afforded the opportunity to address the Council, are the focus of highly important individual and governmental interests. Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city. It is doubtless partly for this reason that such meetings, once opened, have been regarded as public forums, albeit limited ones."[41]

But the Court added that:

> On the other hand, a City Council meeting is still just that, a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact. In the first place, in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious.
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> Similarly, the nature of a Council meeting means that a speaker can become "disruptive" in ways that would not meet the test of actual breach of the peace, or of "fighting words" likely to provoke immediate combat. A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.[42]

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senator had legitimate concerns that, if the plaintiff were allowed into the building in the future, he would interrupt legislative debate. (*Id.* at p. 503.)

[41] *Id.* at p. 1425.

[42] *Id.* at pp. 1425-1426. Most other Federal Circuits have similarly held that Council meetings are limited public forums and have upheld similar limitations. (See *Tyler v. City of Kingston* (2nd Cir. 2023) 74 F. 4th 57, 63 [Upholding prohibition on signs at council meetings as reasonable restriction: "[I]n limited public fora such as city council meetings, government entities are permitted to restrict the form or manner of speech offered by members of the public, even if such speech addresses the topic or agenda of that forum."]; *Galena v. Leone* (3rd Cir. 2011) 638 F.3d 186, 199, citation omitted ["In a limited public forum, such as the Council meeting, "content-based restraints are permitted, so long as they are designed to confine the forum to the limited and legitimate purposes for which it was created. The government may not regulate speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."]; *Fairchild v. Liberty Independent School Dist*. (5th Cir. 2010) 597 F. 3d 747, 760 [School board meeting is a limited public forum and rule prohibiting criticism of named teachers or individual employees at public comment in favor of using the dispute resolution process a reasonable restriction because the Board has "a strong and speech-neutral interest in setting an agenda and paths to Board hearings to avoid irrelevant topics or extended contentious debate."]; *Ison v. Madison Local*

2. *Kindt v. Santa Monica Rent Control Bd.*[43]

Next, in *Kindt v. Santa Monica Rent Control Board*, a rental property owner alleged that the rent control board violated his First Amendment rights when ejecting him from public board meetings. The Court first addressed the nature of forum, stating that, "it seems to us that the highly structured nature of city council and city board meetings makes them fit more neatly into the nonpublic forum niche. But, as we intimated in *City of Norwalk,* the important thing is not whether we call the meetings highly regulated limited public fora or nonpublic fora. The fact remains that limitations on speech at those meetings must be reasonable and viewpoint neutral, but that is all they need to be."[44]

The Court concluded that, "[t]he Board regulations restricting public commentary to three minutes per item at the end of each meeting are the kind of reasonable time, place, and manner restrictions that preserve a board's legitimate interest in conducting efficient, orderly meetings."[45]

3. *Norse v. City of Santa Cruz*[46]

In *Norse v. City of Santa Cruz*, the Ninth Circuit reversed the District Court's dismissal of plaintiff's claim that the City Council violated his First Amendment rights when he was ejected from a Council meeting for giving the Council a "silent Nazi salute" and arrested.[47] The Court reversed the decision, because it found that the procedure the District Court used to summarily dispose of the plaintiff's claims was deficient and unfair to him.[48]

In discussing the First Amendment's application to council meetings, the Court first rejected the City's contention that only certain portions of its meetings are limited public forums and that no members of the public have any First Amendment rights at all once the public comment period has concluded. The Court stated, "[a]s we explained in *Norwalk* the entire city council meeting held in public is a limited public forum. But the fact that a city may impose reasonable time

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School District Bd. of Educ. (6th Cir. 2021) [Finding Board meetings limited public fora and upholding a requirement that members of the public preregister to make public comment, but finding Board's policy restricting abusive," "personally directed," and "antagonist" statements unreasonable restrictions.]; *McDonough v. Garcia* (11th Cir. 2024 --- F.4th ---- 2024 WL 4195557 [Council meetings are limited public forums where restrictions must not discriminate against speech based on viewpoint and be reasonable in light of the purpose served by the forum.].)

[43] *Kindt v. Santa Monica Rent Control Bd.* (9th Cir. 1995) 67 F.3d 266.

[44] *Id.* at pp. 270-271.

[45] *Id*. at p. 271; see, also, *Ribakoff v. City of Long Beach* (2018) 27 Cal. App. 5th 150, 170-176 [upholding three minute time limit on public speakers even where staff members and invited guests are permitted to speak for longer periods of time.].)

[46] *Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966.

[47] *Id.* at p. 969.

[48] *Id.* at p. 971.

limitations on speech does not mean it can transform the nature of the forum by doing so, much less extinguish all First Amendment rights."[49] Thus, the plaintiff's First Amendment rights were protected even after the public comment period was closed.

Next, the Court rejected the City's argument that it may define "disturbance" in any way it chooses and here, it defined "any violation of its decorum rules to be a 'disturbance.'"[50] The Court stated, "[a]ctual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption."[51]

Significantly, as noted in Judge Kozinski's concurring opinion, the evidence provided to the court -- the video of the meeting -- "clearly shows that Norse's sieg heil was momentary and casual, causing no disruption whatsoever. It would have remained entirely unnoticed, had a city councilman not interrupted the proceedings to take umbrage and insist that Norse be cast out of the meeting."[52] Judge Kozinski stated that the Councilmember wanted the plaintiff expelled because "the 'Nazi salute' is 'against the dignity of this body and the decorum of this body'" and not because of any disruption. But, unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech."[53]

4. *Acosta v. City of Costa Mesa*[54]

More recently, in *Acosta v. City of Costa Mesa*, the Ninth Circuit held that the City's ordinance that made it a misdemeanor for members of the public who speak at Council meetings to "engage in 'disorderly, insolent, or disruptive behavior'" was facially overbroad in violation of the First Amendment, because it did not limit proscribed activity to only actual disturbances.[55]

The Court noted that the text of the ordinance differed from that of the ordinance considered in *White v. City of Norwalk.* In *White*, the Court upheld the ordinance because while it prohibited making "personal impertinent, slanderous or profane remarks," the ordinance contained additional language limiting its potential application to speech that caused an actual disturbance. "The requirement of actual disruption meant the ordinance was valid."[56]

The Court also distinguished Costa Mesa's ordinance from Norwalk's because the qualifiers used in Costa Mesa's ordinance – "disorderly, *insolent*, or disruptive behavior" -- were broader than

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[49] *Id.* at pp. 975-976.
[50] *Id.* at p. 976.
[51] *Id.* at p. 976.
[52] *Id.* at p. 979 (Kozinski concurring opinion.)
[53] *Id.* at p. 979.
[54] *Acosta v. City of Costa Mesa* (9th Cir.) 718 F.3d 800.
[55] *Id*. at pp. 806-807.
[56] *Id.* at p. 813.

those in the Norwalk ordinance – "disrupts, disturbs, or otherwise impedes."[57] The Court found that "insolent" behavior (which was undefined in the ordinance) "could, and often likely would, fall well below the level of behavior that actually disturbs or impedes a City Council proceeding."[58]

The Court noted that the ordinance could have been written narrowly, citing to a Costa Mesa ordinance that makes it unlawful for any person in attendance to "[e]ngage in disorderly, disruptive, disturbing, delaying or boisterous conduct, such as, but not limited to, handclapping, stomping of feet, whistling, making noise, use of profane language or obscene gestures, yelling or similar demonstrations, which conduct substantially *interrupts, delays, or disturbs* the peace and good order of the proceedings of the council."[59]

5. *Project for Open Government v. County of San Diego.*

While no longer binding in federal court, we include a discussion of the following case, because its analysis is persuasive, particularly regarding disruptive hate speech.

In *Project for Open Government v. County of San Diego*, the plaintiffs alleged that the Board of Supervisors' meeting rules violated the First Amendment.[60] The Board's rules provided that if a person makes discriminatory or harassing remarks at a public meeting, "the Chairperson may interrupt and admonish the speaker by taking the following actions: (1) stating the County's policy prohibiting discrimination and harassment, (2) stating that comments in violation of County policy will not be condoned, and (3) inform the speaker that their language is unwanted, unwelcome and/or inappropriate, and that they interfere with the ability of those present to listen and understand."[61] The Rules defined "discriminatory or harassing remarks," and provided that during the admonishment, the speaker's time is held, the speaker is allowed to resume, and if the speakers' comments "continue to disturb, disrupt, or impede the orderly conduct of the meeting," the Chairperson may have the speaker removed from the meeting.[62]

The court first found that the Board's admonishment of the speaker's discriminatory and harassing remark constituted government speech, which was protected under the First

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[57] *Id.* at pp. 814-815.

[58] *Id.* at p. 815, emphasis in the original.

[59] *Id.* at p. 816, emphasis in the original.

[60] *Project for Open Government v. County of San Die*go (2022) 2022 WL 4181008, vacated and remanded to state court in *Project for Open Government v. County of San Die*go (9th Cir. 2024) 2024 WL 20068.

[61] *Id*. at p.*2. The Board of Supervisors' rules are available at: https://www.sandiegocounty.gov/content/sdc/bos/boardrules.html

[62] The rules defined "discriminatory or harassing remarks" as including "legally protected speech in a Board meeting that disparages an individual or group based on their perceived race, religion, sexual orientation, ethnicity, gender, disability, etc. or other hate speech but does not rise to the level of a criminal threat or inciting violence." *Id.*

Amendment.[63] The court then concluded that the rule did not violate the First Amendment, relying on *White v. City of Norwalk*, because the "Chairperson's ability to stop a speaker's discriminatory or harassing remarks is limited to instances where the comments actually 'interfere with the ability of those present to listen and understand' and 'continue to disturb, disrupt, or impede the orderly conduct of the meeting.'"[64]

The Plaintiffs appealed the decision to the Ninth Circuit Court of Appeals, which found that the plaintiff**s** failed to establish Article III standing, because the plaintiff**s** did not allege that they had suffered an actual injury traceable to the defendant that is likely to be redressed by a favorable judicial decision.[65] The Court vacated the district court's dismissal and directed the district court to remand the case to state court.[66]

While the case may not be relied upon in federal court, the opinion is persuasive and generally consistent with existing case law. It suggests that similar actions by agencies to counter hate speech would withstand First Amendment challenges.

D. Harassing Conduct

Because council meetings occur in a public workplace with public employees present, we briefly address discriminatory and harassing conduct.

California employers have a duty to take "all reasonable steps necessary to prevent discrimination and harassment from occurring."[67] Harassment in the form of a hostile work environment constitutes unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, California's Fair Employment and Housing Act, and 42 U.S. Code section 1983.[68] "Although commonly alleged in connection with sex and gender, a hostile work environment claim may also be based on other protected characteristics such as race."[69] "To prevail on a hostile work environment claim under Title VII, a plaintiff must show (1) that she was subjected to verbal or physical conduct because of a protected characteristic such as sex or race, (2) the

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[63] *Id.* at p.*2.

[64] *Id* at p. 4. (See also *Dyer v. Atlanta Independent School System* (11th Cir. 2021) 852 Fed. App'x. 397 [Upholding school board's multiple suspensions of plaintiff from speaking at, and later attending, school board meetings for use of "racially charged, derogatory epithets like the 'N-work" because that offensive speech was disruptive to the meeting.]; *Moms for Liberty v. Brevard Public Schools* (N.D. Iowa 2022) ["[P]rohibiting abusive and obscene comments is not based on content or viewpoint, but rather is critical to prevent disruption, preserve 'reasonable decorum,' and facilitate an orderly meeting—which the Eleventh Circuit has held on multiple occasions is permissible."].)

[65] *Project for Open Government v. County of San Diego* (9th Cir. 2024) 2024 WL 20068.

[66] *Id.*

[67] Gov. Code § 12940(k).

[68] *Lelaind v. City and County of San Francisco* (N.D. Cal. 2008) 576 F. Supp. 2d 1079, 1100.

[69] *Id.* at p. 1100.

conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment."[70]

An employer's duty to prevent employees from discrimination and harassment includes protecting employees from harassment from third parties. In the Ninth Circuit, "employers are liable for harassing conduct by non-employees 'where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.'"[71]

While determining whether persistent racist, sexist, or other public comment related to a protected characteristic meets the standard of hostile work environment is beyond the scope of this article, certainly the agency has a duty to protect employees from such harassment. The duty to protect agency employees is a factor to consider when managing public comment that constitutes harassment and underscores the potentially disruptive nature of such conduct.

II. Hate-Bombing Disrupts Council Meetings

Based on the reported responses to hate bombing at council and board members, the evidence demonstrates that hate bombing has been disruptive to meetings. For those of us who have experienced hate-bombing, we experienced that it disrupted the meeting. Public comment consisting solely of disparaging hate speech is irrelevant to city business, time-consuming, chills the First Amendment rights of other attendees, and delays a council's ability to accomplish its business in a reasonably efficient manner.

We want to clearly distinguish incidents of hate-bombing from a situation where due to a particular business item before a council, such as discussions of a diversity, equity, and inclusion policy, public comments regarding race, gender or other protected classes may be relevant to the item. Even when an agenda item may involve those topics, public comment may be made without using terms that disparage individuals based on membership in a protected class. Councils should take care when discussing those items not to prohibit speech based on viewpoint, such as comments criticizing those policies.

Hate-bombing disrupts council meetings because it is jarring and traumatic to those, including councilmembers, employees, and other members of the public, who must hear it, and distracts all attendees from the council business. After experiencing an incident at a San Jose City Council meeting, a Councilmember stated that, "I find the slurs that are being used by some of the public commenters to be very disruptive, and frankly, anxiety inducing for some of us."[72] At a City of

[70] *Little v. Windermere Relocation, Inc*. (9th Cir. 2002) 301 F. 3d 958, 966.
[71] *Id.* at p. 968.
[72] Silicon Valley meetings disrupted by virtual hate speech," San Jose Spotlight (October 12, 2023), available at: Silicon Valley meetings disrupted by virtual hate speech - San José Spotlight (sanjosespotlight.com)/.

La Mesa Council meeting, after callers made "antisemitic hate speech," "[s]ome people sitting in the audience gasped. [A Councilmember] stood up and walked out."[73] The Councilmember stated, "I got up in a huff and left the room, both in anger, but also because I wanted to make sure that people knew that at least I didn't think that the comments we were hearing were appropriate or welcome[.]"[74] At a Bend, Oregon meeting of its Human Rights & Equity Commission, the hateful bombing "left many in tears and derailed the meeting, as many needed to reflect on what had just occurred."[75]

When the Capitola, California, City Council called a recess after enduring hate speech at a meeting, a Councilmember stated, "[t]here wasn't much discussion during the break, just a lot of hugs, and asking ourselves, can we do this? Can we take this anymore [tonight?] . . . The audience was shook. The council had previous discussions about how to address this. But as much as we could prepare, there is nothing like it when it actually happens. And it was awful."[76] These reactions support the view that such conduct interferes with a council's ability to conduct its business.

Responding to hate bombing also lengthens Council meetings and, therefore, disrupts the ability of Council to carry out business efficiently. Many councils, like those in Capitola and Hermosa Beach, have called recesses in response to hate-bombing.[77] In addition, councilmembers, reasonably, feel the need to counter the hate speech. Councilmembers respond by informing the public that the harassment is not consistent with the city's anti-discrimination and anti-harassment policies and city values of inclusivity. In response to antisemitic and threatening speech at a Walnut Creek, California Council meeting, a Council member "apologized to the

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[73] "La Mesa, Cal. Suspends Virtual Comments After Zoom Bombs, San Diego Union Tribune (March 11, 2024), accessed on govtech.com at: La Mesa, Calif., Suspends Virtual Comments After Zoom Bombs (govtech.com)

[74] *Id.*

[75] "City of Bend reacts to racist 'Zoombombing' of Human Rights & Equity Commission meeting, seeks to avoid repeat," Harley Coldiron, KTVZ.com (March 28, 2024) at: https://ktvz.com/news/government-politics/2024/03/27/city-of-bend-reacts-to-racist-zoombombing-of-human-rights-equity-commission-meeting-seeks-to-avoid-repeat/

[76] "'Zoom bombing' tests the boundaries of free speech and access in local government meetings," Christopher Neely (Nov. 6, 2023) Lookout Santa Cruz at: 'Zoom bombing' tests the boundaries of free speech and access in local government meetings - Lookout Santa Cruz

[77] "'Zoom bombing' tests the boundaries of free speech and access in local government meetings," Christopher Neely (November 6, 2023) Lookout Santa Cruz at: 'Zoom bombing' tests the boundaries of free speech and access in local government meetings - Lookout Santa Cruz.

"Anonymous callers make racist, antisemitic comments at Hermosa Beach council meeting," Michael Hizon, Daily Breeze (July 26, 2024) at: https://www.dailybreeze.com/2023/10/02/anonymous-callers-make-racist-antisemitic-comments-at-hermosa-beach-council-meeting/.

community."[78] The Mayor of Palo Alto issued disclaimers after hateful speech from remote attendees.[79] To counter the hate speech during a meeting, a Sunnyvale City Councilmember "showed a slideshow of locations he visited in Vienna, Austria, including photos from Judenplatz, a town square central to the city's Jewish community, and the Jewish Museum."[80] Spending the time to respond to these disruptions impacts the ability of a council to efficiently carry out its business.

And some cities have had to end meetings early, preventing them from accomplishing their business entirely. The City Council of Laguna beach ended a meeting early after remote speakers "unleashed antisemitic, homophobic, transphobic and racist tirades" during the public comment period:[81] "We couldn't get any work done," [said the Mayor]. "It just wasn't productive."[82]

As discussed above, agencies also have a duty to protect their employees from discriminatory and harassing conduct. To protect them, the council must allow employees to leave the meeting during hate speech. Attempting to run a meeting without a clerk to take minutes, a city manager to answer questions from Councilmembers, and an attorney to respond to legal questions, undoubtedly disrupts the meeting and prevents a council from accomplishing its business in a reasonably efficient manner.

Hate speech also chills the speech of others. In the meeting in Matthews, North Carolina, members of the public left the meeting in response to the harassment.[83] Causing people to leave council meetings interferes with their rights to freedom of association, free speech, and the right to petition government. It surely chills the rights of members of protected classes from participating in meetings. Attendees who are subjected to such hate are, reasonably, intimidated and less likely to make their own public comments or to attend future meetings.

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[78] "Man spews antisemitism, does Nazi salute, at Walnut Creek City Council meeting," Miabelle Salzano, Kron 4 (February 20, 2024) at: https://www.kron4.com/news/bay-area/man-spews-antisemitism-does-nazi-salute-at-walnut-creek-city-council-meeting/ .

[79] "Faced with Hate Speech, Palo Alto to curb zoom for public comments," Gennady Sheyner. Palo Alto On line (May 14, 2024) at: https://www.paloaltoonline.com/news/2024/05/14/faced-with-hate-speech-palo-alto-to-curb-zoom-for-public-comments/

[80] "Silicon Valley meetings disrupted by virtual hate speech," San Jose Spotlight (October 12, 2023), available at: Silicon Valley meetings disrupted by virtual hate speech - San José Spotlight (sanjosespotlight.com)/.

[81] See "Laguna Beach shuts down council meeting after 'Zoombombing' incident," Los Angeles Times (February 14, 2024), available at: Laguna Beach council meeting halted by 'Zoombombing' incident - Los Angeles Times (latimes.com).

[82] *Id.*

[83] "Matthews town meeting becomes heated after 'disgusting' Zoom-bombing incident," Jason Puckett. WBTV.com (February 27, 2024) at: https://www.wbtv.com/2024/02/27/matthews-town-meeting-becomes-heated-after-disgusting-zoom-bombing-incident/

At the Matthews Town Commission meeting, a Jewish Commissioner left the meeting, explaining, "[t]he language that I heard last night ... I am fortunate that I lived my entire life without hearing it. . .It was transphobic, homophobic, antisemitic and it reached a point where I heard things that I cannot unhear. That is when I knew that I had to step out, not because I didn't believe they had a right to say it, but because I have to protect my mental health and my emotional well-being."[84]

At a San Bernardino City Council meeting, a member of the public was subjected to racist slurs by a remote caller. The speaker, who was African American, stated, "It took me aback; I was angry, I was scared. I didn't know if I was being verbally assaulted, and if this would be followed by a physical assault."[85]

Finally, there is overwhelming evidence that verbal conduct that disparages protected classes has chilled the First Amendment rights of other attendees. Many cities including Crescent City, Palo Alto, and San Francisco have ended remote participation in meetings entirely, or allow remote attendance but now prevent remote attendees from addressing comments to the Council.[86]

A 2024 Common Cause report, in which 119 cities responded to their survey (albeit before the rash of hate bombing), found that "[a] majority of city respondents believe remote public comment options made it easier for the public to participate, improved city council meetings and civic engagement, and that its benefits justify its costs."[87] Remote participation allows those who cannot easily leave home for meetings – including older adults, the disabled, those who lack transportation, and parents of young children – to participate in meetings. At a La Mesa City Council meeting at which ending remote public comment was discussed, participants spoke of the benefits of virtual participations "like providing access for caregivers of children and elders, people with disabilities and those unable to drive. One La Mesa resident spoke while in New

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[84] *Id.*

[85] "San Bernardino City Council meeting derailed by racist slurs from caller," Shelby Nelson. KTLA.com (October 20, 2023) at: San Bernardino City Council meeting derailed by racist slurs from caller (ktla.com).

[86] "Crescent City Discontinues Virtual Public Comment After Zoombombing Attack," Jessica Cejnar Andrews. Wild Rivers Outpost (March 19, 2024) at: https://wildrivers.lostcoastoutpost.com/2024/mar/19/crescent-city-discontinues-virtual-public-comment/

"Faced with Hate Speech, Palo Alto to curb zoom for public comments," Gennady Sheyner. Palo Alto Online (May 14, 2024) at: https://www.paloaltoonline.com/news/2024/05/14/faced-with-hate-speech-palo-alto-to-curb-zoom-for-public-comments/.

"Facing 'intolerable' bigotry, SF Supes end remote public comment," Adam Shanks. San Francisco Examiner (October 17, 2023) at https://www.sfexaminer.com/news/politics/sf-supervisors-end-comment-policy-after-bigoted-callers/article_61b2e522-6c69-11ee-8ed8-63fc5a33a00a.html."

[87] "Opening California's Democracy: A Survey on Remote Participation at Government Meetings," Common Cause (2024) at: https://www.commoncause.org/california/wp-content/uploads/sites/29/2024/01/CA-Remote-Accessv2.pdf.

Mexico, one person said his two children were sick, and another participated virtually because he was sick."[88]

Hate-bombing has limited the access of many remote attendees to participate in their government. That certainly chills their First Amendment Rights.

III. Managing Disruptive Conduct at Public Meetings

Based on the Ninth Circuit decisions, a public agency cannot limit public comment based on the viewpoint of the speaker. An agency may, however, remove a speaker – and therefore, limit the speaker from speaking – if the speaker's conduct disrupts the orderly process of the meeting. That disruption may include violating the council's rules, provided that the rules are reasonable. Before limiting the speech of a speaker, the presiding officer must warn the speaker they are violating the council's rules, and the violation is disrupting the meeting. If the speaker continues to disrupt the meeting, removal of the speaker, or terminating the speaker's ability to speak should survive First Amendment scrutiny.

The following strategies help councils to manage disruptive public conduct.

A. Adopt and Implement Effective Rules

One of the most important tools in handling disruptive conduct is the council's rules. Having specific rules that regulate council meetings and public comment can allow the council to manage disruptive conduct in a way that comports with the First Amendment. We recommend the following:

1. **Address Conduct Not Speech**
   Ensure that removal procedures address disruptive conduct, and not the content of the speech.

2. **Include the Agency's Harassment-free Workplace Policy**
   Ensure that the agency's anti-discrimination and harassment-free workplace policy is included, as a whole or by reference, in the council's rules. Include a statement that the meetings of the council (and other legislative bodies) are part of the city's workplace subject to those policies.

3. **Allow Public Criticism**
   Ensure that rules do not prohibit or expressly permit public criticism of the policies,

[88] "La Mesa, Calif., Suspends Virtual Comments After Zoom Bombs," Lauren J. Mapp. San Diego Union-Tribune (March 11, 2024) at: https://www.govtech.com/security/la-mesa-calif-suspends-virtual-comments-after-zoom-bombs

procedures, programs, or services of the agency, or of the acts or omissions of the council.

Notably, while the Brown Act prohibits a council from prohibiting criticism of policies, procedures, programs, services and acts or omissions of the council, it does not prohibit a council from limiting criticism of individuals. In *Baca v. Moreno Valley Unified School District,* the District Court granted a preliminary injunction preventing the enforcement of the school district's policy that prohibited oral or written presentations in open session that included "charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee."[89] The court found that the policy was a content-based prohibition what could not be justified on employees' right to privacy or liberty interests.[90] The court acknowledged the district had an interest in regulating its meetings, but found that "the policy here, which focuses on content and not only conduct, is not narrowly drawn so as to achieve District's purported compelling interest without impinging upon the public's First Amendment rights, which rights include the right to be passionate and even uninformed in the expression of one's views."[91]

Given the *Baca* case, meeting rules that prohibit criticism of employees likely violate the First Amendment. We think, however, a presiding officer can work to ensure that criticism focuses on the acts or omissions of employees, rather than ad hominem attacks (impugning a person's character rather than their acts or omissions), and does not disparage an employee's race, gender, religion or other membership in a protected class.. (See below.)

4. **Set Reasonable Time Limits**
   Include reasonable time limits on the total time allotted for public comment on each item of business and total time per speaker, subject to the presiding officer or majority of the council's ability to establish a time limit. Apply the time limits in an unbiased and uniform manner to avoid allegations of bias and favoritism.

5. **Establish Reasonable Conduct Standards for Attendees and Speakers**
   As discussed above, the Ninth Circuit has upheld objective conduct standards for attendees of city council meetings, provided that attendees are removed only when they

[89] *Baca v. Moreno Valley Unified School District* (C.D. Cal. 1996) 936 F. Supp. 719.
[90] *Id.* at pp. 730-731, 731-734. (But see *Davison v. Rose* (4th Cir. 2021) 19 F.4th 626, 635 [Upholding school board policy prohibiting comments "'that are harassing or amount to a personal attack against any identifiable individual' including board members "as necessary to further the forum's purpose of conducting good business."].)
[91] *Id.* at p. 734.

violate the conduct standards ***and*** actually disrupt the meeting. Objective standards (for both remote and in-person attendees) include prohibiting use of profanity, threatening language, whistling, stamping feet, clapping, yelling, speaking over or interrupting the recognized speaker, and speech that violates the city's anti-discrimination and harassment-free work environment. The Rules should also state that public comment is accepted only on matters within the subject matter of the council.

6. **Establish a Warning and Removal Process**
   The Rules should state that violating the council's rules is disruptive to the meeting and provide an explanation of why the violations are disruptive: Rule violations interfere with the council's ability to accomplish its functions in a reasonably efficient matter by causing a delay or distraction from Town business, interfere with other attendees' ability to listen and understand the business and proceedings of the city council, chill the participation by other attendees, and may violate the city's anti-discrimination and harassment-free work environment policy.

   The Rules should also provide a process for warning and removing participants (whether virtually or in person) for disruptions caused by continued violations of the Rules. Establishing a process, and following it consistently, shields a council from allegations of bias or unfair treatment based on viewpoint. The Rules should require the presiding officer to stop the timeclock, warn the speaker that they are in violation of the Rules and they are disrupting the meeting, explain that the speaker may continue speaking if the speaker refrains from violating the rules, restart the clock and allow the speaker to continue. If the speaker continues to disrupt the meeting after being warned, the presiding officer can stop the speaker and have the speaker physically removed or by muting the speaker if the speaker is attending remotely.

7. **Address Hate Speech.**
   Either as part of the warning and removal process described directly above or separately, the Rules should address verbal conduct denigrating individuals based on a protected category.

   As explained above, the Rules should inform attendees that the city has a discrimination and harassment-free workplace policy, the meetings of the council (and other city legislative bodies) are part of the city's workplace, and that verbal conduct denigrating individuals based on a protected category violates that policy.

   If a speaker violates the anti-harassment policy, the presiding officer should stop the timeclock and the speaker. The presiding officer should read relevant portions of the anti-harassment policy and state that speaker is in violation of both the council rules and

the city's anti-harassment meeting; the speech does not pertain to anything within the subject matter jurisdiction of the council; the city does not condone the speaker's comments; the speaker's harassing conduct is impeding the orderly conduct of the meeting by interfering with the Council's ability to accomplish its functions in a reasonably efficient matter by causing a distraction from Town business, chilling participation from other members of the public, interfering with the ability of those present to listen and understand the business and proceedings of the Town, and may constitute or contribute to employment or other forms of discrimination. The presiding officer should inform the speaker that if they refrain from their disruptive conduct, they may continue to speak, but if they cannot, they will be removed for disrupting the meeting. If the speaker continues to engage in harassing conduct, the presiding officer may remove them from the meeting.

B. Meeting Preparation

Preparing for meetings, particularly when there may be controversial items on the agenda, is essential for managing disruptive conduct. All officers and employees should be informed when there is a controversial matter on the agenda. The city attorney should educate the presiding officer, city manager, and if necessary, the police department or security representative, on the protocols for disruptions and the requirements of the First Amendment.

In addition, in our experience, the organized groups often sign on and off during the same meeting using different names. In some cities, the IT staff were able to limit remote speakers based on their web addresses, so that they were able only to speak once. Explore whether this is an option in your city.

C. Effective Presiding Officer

The presiding officer, likely the mayor, plays the most important role in managing a meeting.[92] City attorneys can work with the presiding officer to ensure that they are familiar with council rules, procedural rules, and their role in managing a meeting and procedures for removing disruptive members of the public.

1. Consider the Order of Items on the Agenda

Consider the order of items on the agenda. If there is a particularly controversial item on the agenda, consider whether to hear the item at the start of the meeting if most members of the public will be attending for that item. Alternatively, if there are items that must be heard on that date, schedule them first to ensure the necessary business is completed.

[92] The Institute of Local Government maintains resources for chairing a meeting on its website at: https://www.ca-ilg.org/chairing-meeting.

2. Inform the Public of the Rules

Where there are a lot of members of the public present (in person or on zoom) or there are contentious items on the agenda, it's often helpful for the meeting chair to provide an overview of meeting procedures and explain the rules regarding public comment at the start of the meeting so that the public is aware that the council has rules prohibiting disruptions and the consequences for disruptions. The presiding officer should also remind attendees that they will take public comment only on matters within the subject matter of the council.

3. Take In-person Public Comment First

We recommend that councils take in-person public comment before taking comments from remote attendees. Those in person are more likely to be residents of the community and council can hear substantive comments first. Making hate-bombers wait through more meeting time may make them decide not to speak.

4. Intervene

Next, the presiding officer should be prepared to intervene when a speaker's comments criticizing officers or employees veer into ad hominem attacks, criticism based on the officers or employee's status as a member of a protected class, or address matters outside of the council's subject matter jurisdiction. A presiding officer can interrupt the speaker, hold the speaker's time, tell the speaker that the Council welcomes criticisms of the acts or omissions of employees, but request that they refrain from ad hominem attacks or disparagement based on their race, religion, sexual orientation, or other protective class.

The presiding officer should also be prepared to deal with disruptive comment. The city attorney can provide a script for the presiding officer to follow in the event of disruptions.

5. Remain Calm

Finally, the presiding officer should remain calm and focused to help keep the meeting as calm as circumstances permit and enforce council rules in an unbiased manner.

D. Call a Recess

The presiding officer should call a recess if the meeting is threatening to become disorderly. The recess might allow tempers and the room temperature to cool a bit. Smaller jurisdictions who do not have a routine police presence at their meetings can call the police to ensure officers are present when the meeting resumes.

Conclusion

Effective rules, training on Brown Act and First Amendment requirements, and coordination between the presiding officer, city manager, clerk, city attorney, and the police department can all assist in preventing disruptive meetings. Where these fail, however, we believe that a Council has the right to cut off a speaker who engages in certain kinds of hate speech, using the procedures described above. While many will argue that eliminating all remote public comment is a lower risk option legally, that point should be balanced against what is lost by making participation in local democracy less accessible. Preserving accessible and non-discriminatory public discourse is worth it.

Land Use and CEQA Litigation Update

Thursday, Oct. 17, 2024

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CEQA Litigation Update

Cases Reported from April 1, 2024 through August 31, 2024

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I. Introduction

The appellate court California Environmental Quality Act ("CEQA") case load seems to have slowed in recent months,[1] and with the exception of the People's Park student housing case, none of the below cases present substantive changes to the law. However, the below cases address a range of important procedural and substantive CEQA issues.

II. Case Summaries

A. *Save the Capitol, Save the Trees v. Department of General Services* (2024) 101 Cal.App.5th 1237

Holding: Department of General Services failed to demonstrate that its Revised EIR – prepared as a result of the Court of Appeal's earlier writ of mandate – actually corrected the deficiencies identified by the Court and fulfilled the writ's requirements.

Practice Tips: If your city is in the unfortunate position of having to file a writ return, you must carefully consider the writ language and what the writ has directed the city to do in order to discharge it. Upon writ issuance, consider confirming and clarifying the terms with the court to avoid future confusion. And be mindful of the writ when overseeing the preparation of the revised CEQA document or approach to environmental review because a petitioner does not have to file a separate action to challenge your return.

Summary:
This case involves a State Department of General Services ("DGS") project to demolish an existing building (the "Annex") attached to the historic Capitol building and construct a new one, as well as construction of a new visitor center and parking garage. In *Save Our Capitol! v. Department of General Services* (2023) 87 Cal.App.5th 655, Petitioner challenged the adequacy of the project's EIR and the Court agreed, issuing a writ of mandate directing DGS to revise and recirculate deficient portions of the EIR including the project description, historic resources and aesthetics chapters, and alternatives analysis.

DGS filed a return on the writ stating that it had partially decertified the EIR, vacated project approvals as required by the writ, certified a Revised EIR, and reapproved the project without the visitor center. Save the Trees ("STC") challenged the writ return on the grounds that the Revised EIR did not adequately address the project description. DGS argued that the writ language required the trial court to determine that the Revised EIR actually remedied the deficiencies. The trial court ultimately discharged the writ, and STC appealed that discharge order.

The Court of Appeal reversed, stating that certification of the Revised EIR was "not enough" to discharge the writ since "there has not yet been an adjudication as to the adequacy" of the Revised EIR. Since there had been dispute over STC's ability to challenge the writ return itself rather than simply proceeding with a new writ action, the Court noted that when a writ directs an

[1]See CEQA Litigation Update (Cases Reported from August 1, 2023 through March 31, 2024), *accessible at* https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/land-use-and-ceqa-litigation-update-(1).pdf?sfvrsn=91894c1f_3

agency to take a specific action and the return states that the court's mandate has been carried out, a petitioner may challenge the writ return. The Court also stated that CEQA requires the trial court to retain jurisdiction *until the agency has complied with CEQA* under Pub. Res. Code Section 21168.9(b).

B. *Make UC a Good Neighbor v. Regents of University of California* (2024) 16 Cal.5th 43

Holding: The California Supreme Court upheld the UC Regents' Long Range Development Plan ("LRDP") EIR as having adequate noise and alternatives analysis after the Legislature adopted AB 1307 in direct response to the Court of Appeal's opposite conclusions.

Practice Tips: Lobbying works! CEQA is the law, but this case reminds us that the Legislature can change it. We may see more changes to CEQA like this as the Legislature continues to attempt to address the housing crisis. However, we note that it took a state agency (the UC Regents) to effectuate this particular change. Our cities – particularly smaller ones – may not be in as prime of a position as the UC Regents were to obtain the needed legislative relief.

Summary: The University of California campuses are required to adopt LRDPs to determine whether and what types of infrastructure is needed to support its student population. Berkeley's UC Regents ("Regents") adopted the 2021 LRDP which anticipated construction of approximately 11,700 housing units or "beds" that would accommodate around 14,000 new residents (students, faculty, and staff). The 2021 LRDP also estimated that approximately 8,000 more would be added to the UC population by 2036 which would not be provided with university housing. A petitioner group ("Petitioner") challenged the adoption and the Regents' EIR for the project which analyzed both the potential programmatic environmental impacts associated with implementing the overall plan and the potential site-specific environmental impacts for two housing developments, one of which would be located in People's Park in the City of Berkeley.

The First District Court of Appeal held that the EIR violated CEQA because it did not adequately analyze (1) noise impacts on surrounding neighborhoods ("social noise" impacts), or (2) sufficient alternative locations for the project. The Supreme Court granted the Regents' request for review on these adequacy issues and denied Petitioner's request for review of the Court of Appeal's determination that population increases due to university enrollment were not part of the 2021 LRDP project such that the EIR would have needed to analyze an alternative where enrollment was capped.

In response to the Court of Appeal's decision, the Legislature adopted AB 1307 after the Supreme Court granted review but before the case was heard. AB 1307 amended CEQA by adding statutory language stating: "For purposes of [CEQA], for residential projects, the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment." (Pub. Res. Code § 21085.) Further, AB 1307 specifically noted that "institutions of public higher education shall not be required, in an environmental impact report prepared for a residential or mixed-use housing project, to consider alternatives to the location…of the project" if the site was less than five acres surrounded by urban uses and had been evaluated in an EIR for the most recent LRDP. (Pub. Res. Code § 21085.2(b).)

The Supreme Court thus overturned the Court of Appeal's decision and held that AB 1307's new CEQA provisions applied to both the specific People's Park development project and the 2021 LRDP.

C. *Nassiri v. City of Lafayette* (2024) 103 Cal.App.5th 910, 323 Cal.Rptr.3d 168

Holding: The court held that a 12-unit residential project qualified for the CEQA infill exemption and that substantial evidence supported the City's findings that the project site had no value as habitat for endangered species and that the project would not result in significant air quality impacts.

Practice Tips: Always confirm that the administrative record contains substantive responses to retained experts. The court will defer to an agency's conclusions as long as they are based on substantial evidence, and an agency will always win a battle among experts (even an army of NIMBY experts).

Summary:
This case involved a neighbor challenge to the demolition of a vacant building and construction of a 12-unit condo complex (the "Project") in the City of Lafayette. The 03-acre Project site included a creek running along the south side. After an extensive public review process involving Planning Commission, Design Review, and City Council hearings, the City Council approved the Project and determined that the Project was exempt from CEQA under CEQA Guidelines section 15332 – the infill exemption.

During the Project hearings, a neighbor ("Nassiri") retained an expert who submitted comments throughout the hearing process to argue that the project was not exempt. The City nonetheless concluded that Nassiri had not provided substantial evidence to support the claim that the project was not exempt. While the trial court initially granted Nassiri's writ petition, after the publication of the *Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal.App.5th 951 decision (holding that a "project site" is limited to the project footprint in the infill exemption context), the trial court granted a motion for a new trial and denied the writ petition in its entirety. The Court of Appeal affirmed the trial court's decision.

The infill exemption requires that "[t]he project site has no value as habitat for endangered, rare or threatened species." (CEQA Guidelines § 15332(c).) The court held that the substantial evidence supported the City's finding that the project site was not known to have any value as habitat for rare species. Both the City's and Nassiri's experts had confirmed sightings of certain species (the oak titmouse and the Nuttali's woodpecker), but the court concluded that there was evidence demonstrating that these are not "rare" species for purposes of CEQA and that Nassiri had only demonstrated that these may be species "of special concern." Additionally, the court determined that substantial evidence supports the City's finding that the Project would not result in a significant effect to air quality because Nassiri's report did not accurately reflect the scope of construction of the Project and because the developer's report adequately responded to and refuted Nassiri's report.

D. *Westside Los Angeles Neighbors Network v. City of Los Angeles* (2024) 104 Cal.App.5th 223

Holding: A "decision-making body" is any person or group of people within a public agency permitted by law to commit an agency to a definite course of action for a project, and thus the City's Planning Commission properly certified the EIR for a multi-component project even though the Commission only had the authority to approve one of the components and the other component required further discretionary review by the City Council. Additionally, the City's finding that one of the project components was exempt from CEQA was supported by substantial evidence.

Practice Tips: In certain circumstances, a Planning Commission may be a "decision-making body" that can approve a project and certify an EIR. But please note that many cities have local rules and regulations that would preclude or otherwise thwart this scenario (e.g. requiring all EIRs to be approved by the City Council; making the Planning Commission a recommending body if a project component or entitlement requires City Council approval; elevating all project entitlements to the highest approval authority). And we think these are *good* local rules – a large part of this case could have been avoided had both of the approvals simply been made by the City Council with a recommendation from the Planning Commission rather than having the Commission take action on one component. Finally, this case is an example of a scenario where the City *prepared an EIR* which found significant impacts, but then also declared part of the project to be *exempt from CEQA*. While the court found in the City's favor here, this is an uncommon approach and we are still slightly perplexed at the court's findings (and, frankly, the approach itself).

Summary:
This case involved a complicated fact pattern but generally concerns the City of Los Angeles' certification of an EIR for the Westside Mobility Plan ("WMP") which includes short- and long-term plans to address congestion and mobility in the Westside area. The WMP has six components, three of which are at issue in the lawsuit – two specific plans (collectively, the "Fee Program Updates") and the Streetscape Plan.

The City released a Draft EIR in May of 2014 that analyzed the Fee Program Updates. The Draft EIR stated that its analysis was limited to the potential environmental impacts of the Fee Program Updates as the WMP's other components, including the Streetscape Plan, were not subject to CEQA review. The City published the Final EIR sixty days later. The Final EIR strangely concluded that the Fee Program Updates would have significant and unavoidable impacts to air quality, noise and vibration, and transportation, but that they were also statutorily exempt from CEQA under Pub. Res. Code section 21080(b)(8).

In March of 2018, the City certified the Final EIR, determined that the Fee Program Updates were both statutorily exempt from CEQA (under Pub. Res. Code section 21080(b)(8)) and categorically exempt from CEQA (under CEQA Guidelines sections 15301, 15304, and 15308). The City also adopted the Streetscape Plan, recommended the Fee Program Updates to be adopted by the City Council, and filed a NOD and NOE for the Project.

Petitioners challenged the EIR and the findings of the NOE. After some procedural back-and-forth involving amended petitions, the trial court ultimately denied the writ petition, determining that:

- the Planning Commission was a "decision-making body" with authority to certify the EIR;
- substantial evidence did not support the City's determination that the Fee Program Updates are statutorily exempt from CEQA;
- substantial evidence supported the City's determination that the Streetscape Plan is categorically exempt from CEQA;
- Petitioner did not demonstrate the Streetscape Plan falls within the unusual circumstances exception to the application of categorical exemptions; and
- the EIR was legally adequate.

The Court of Appeal upheld the trial court's decision denying the petition. The court first held that the Planning Commission had authority to certify the EIR because the CEQA Guidelines state that a "decision-making body" is any person or group of people within a public agency permitted by law to commit an agency to a definite course of action for a project. The fact that a project has multiple components that may be approved by different bodies does not change the analysis. Because this "project" involved unique overlap between the approvals (i.e. adoption of the Fee Program Updates component is required to *implement* the Streetscape Plan component), and because the Planning Commission had the authority to adopt the Streetscape Plan and commit to a "definite course of action," the court found that the Planning Commission was thus authorized to certify the EIR and "approve" (the court actually put the word "approve" in quotation marks here) the overall project despite the additional discretionary approval needed by the City Council to adopt the Fee Program Updates.

Finally, the court held that the Streetscape Plan was categorically exempt from CEQA under Guidelines section 15301 because it involved minor alterations to existing rights of way and does not expand the use of those rights of way.

E. Center for Biological Diversity v. County of San Benito (2024) 104 Cal.App.5th 22

Holding: Petitioners were not time-barred from filing a CEQA lawsuit within 30 days of the Notice of Determination filed after the final decision to approve the project following an appeal to a higher approval authority.

Practice Tips: Despite the holding in this case (which is neither surprising nor particularly noteworthy), we still recommend filing NODs (and NOEs!) early and often. Had Petitioners failed to file a timely or otherwise legally sufficient appeal, the Planning Commission's decision could have been final.

Summary:
This case involves a mixed-use, roadside development project in San Benito County that included a gas station, convenience store, restaurant, amusement buildings and exhibits, motel, banquet hall, outdoor pool and movie screen, and outdoor event center on 26 acres west of Highway 101. During the project's planning process, site surveys showed some tribal cultural

resources for the Mutsun people (the "Tribe"). Following the Planning Commission's certification of the EIR and approval of the project on October 12, 2022, the County filed a Notice of Determination ("NOD") on October 14, 2022.

The Center for Biological Diversity ("CBD") and the Tribe appealed the Planning Commission's decision to the County Board of Supervisors which subsequently denied the appeals, approved the project, and certified the EIR on November 8, 2022. On November 10, 2022, the County filed another NOD for Board of Supervisors actions. On December 9, 2022 both the CBD and the Tribe filed separate writ petitions, and the real parties in interest filed a demurrer, joined by the County, stating that the petitions were time-barred under Pub. Res. Code section 21167(c) because they were filed more than 30 days after the *first NOD* filed on October 14, 2022. The trial court sustained the demurrer without leave to amend.

The Court of Appeal reversed. The court stated that CEQA requires the local agency to file a NOD "within five working days *after the approval or determination becomes final*." (Pub. Res. Code § 21152(a).) However, the County Code expressly allows for a 10-day period within which the Planning Commission decision can be appealed to the Board of Supervisors (i.e. the Planning Commission decision is *not final* until expiration of the 10-day appeal period). Because CBD and the Tribe timely appealed the Planning Commission approval, the project was not actually approved until the Board of Supervisors acted on the appeal. Thus, the *second* NOD, filed on November 10, 2022, started the 30-day statute of limitations period and the CBD and Tribe petitions were timely filed.

F. Upland Community First v. City of Upland (2024) --- Cal.Rptr.3d ----2024 WL 4182599

Holding: Substantial evidence supported the City of Upland's finding that a 201,096-square-foot delivery service warehouse would not have significant greenhouse gas emission impacts.

Practice Tips: This is a relatively rare MND-related victory, so it is important to remember that thorough responses to MND comments and bolstering the MND record can help the document withstand scrutiny. However, this case was focused on the MND's thresholds of significance rather than actual impacts, so we still remain wary of using MNDs when a scoped EIR might be the more "bulletproof" CEQA document option.

Summary:
In April 2020, the City of Upland approved a 201,096 square-foot "warehouse/parcel delivery service building" to be located on 50.25 acres near a local airport (the "Project"). The City also approved a mitigated negative declaration ("MND") for the Project.

Petitioner claimed the project violated CEQA because a fair argument could be made that the project would have significant greenhouse gas ("GHG") emissions impacts as well as impacts related to traffic and air quality. Thus, Petitioner claimed the City should have prepared an EIR and specifically noted that the City used two quantitative thresholds of significance for measuring the Project's cumulative impacts on GHG emissions: (1) a threshold of 10,000 metric tons of carbon dioxide equivalent per year (MTCO2 e/yr.), and (2) a lower threshold of 3,000

MTCO2 e/yr. in a supplemental GHG analysis prepared in response to comments on the draft MND claiming that the 10,000 MTCO2 e/yr. threshold was too high and should only be used for large, industrial projects with primary stationary-source GHG emissions (e.g., power plants, factories). Petitioner argued that the lower threshold was appropriate for mixed-used commercial/industrial projects, with primary mobile-source GHG emissions (such as the Project). The trial court ordered the City to set aside its resolutions approving the MND and the Project, solely "for the purpose of addressing the sufficiency of evidence supporting the City's threshold of significance for GHG emissions under CEQA."

On appeal, the City and Real Party in Interest argued that substantial evidence supported the City's use of both the 10,000 MTCO2 e/yr. and 3,000 MTCO2 e/yr. quantitative thresholds of significance for GHG emissions. Alternatively, even if substantial evidence did not support the City's use of either quantitative threshold, substantial evidence supported the City's determination that the project's GHG impacts would be less than significant based on a qualitative, performance-based standard because the Project is consistent with the City's 2015 climate action plan. The Court of Appeal agreed and held that substantial evidence supported the City's finding that the Project would not have significant impacts on GHG emissions. Specifically, substantial evidence supported the City's use of the 3,000 threshold for measuring the significance of the Project's impacts on GHG emissions and demonstrated that the Project's GHG emissions would be below the 3,000 threshold. Finally, the court concluded that due to this evidence, it would not reach the question of the Project's compliance with the 10,000 threshold or consistency with the climate action plan (except it did state that the City had forfeited the latter argument as it was not raised at the trial court).

Development Agreements - All You Need To Know For Successful Development

Thursday, Oct. 17, 2024

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Government Code Development Agreements – All You Need to Know for Successful Development
CalCities Annual Conference
October 16-18 2024
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INTRODUCTION

Cities are more and more being asked to enter into development agreements with developers for development projects. Although development agreements may encourage and enable much needed development throughout the state, they also can lock cities into a particular development proposal far into the future with potential negative consequences on the locality. This paper explores the development agreement statute and discusses options for protecting cities in the negotiation of development agreements.

A development agreement is an agreement between a property owner and a city or county, whereby certain development rights are "frozen", providing assurances to the developer that it will be able to develop a project at a future date in accordance with the regulations in place at the time the project is approved. Unless otherwise specified in the development agreement, the land use regulations and policies in place at the time the agreement is entered into are the ones that will apply to the development of the property that is subject to the development agreement. (Gov't Code Section 65866(a).)

VESTED RIGHTS

Development agreements are a statutory response to California's common law vested rights doctrine designed to mitigate the impact on development of late vesting rights. California case law only vests development rights when a property owner has performed substantial work and incurred substantial liabilities. The late vesting of development rights was seen as a deterrent for developers to invest in large scale developments that could take several years to complete because of the risk that prior to completion, land use laws could be changed such that the development entitlements would be withdrawn. Development agreements introduced a level of certainty to the development process by freezing the land uses applicable to a project to those in effect at the time the development agreement becomes effective. Development agreements are a powerful tool to encourage development and have proved popular with both cities and developers.

In adopting the development agreement statutes in 1979, the Legislature found and declared that "lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning" and that "[a]ssurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of

approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development." (Gov't Code Section 65864(a)-(b).) The development agreement statutes are intended to provide that development certainty.

In order to understand the power of development agreements and why developers request cities to enter into one , it is important to understand the vested right doctrine.

a. The Avco Rule

A project's approvals may be vested under the common law vesting doctrine, also known as the "Avco Rule" regardless of whether the permits have expired or land use controls have changed. (*See Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785.) Under the Avco Rule, if a property owner has "performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government," then the property owner has a vested right to complete the project in accordance with the original approvals, notwithstanding other local laws or regulations to the contrary. (*Id.* at 791.)

i. Nature of the Permit

The Avco Rule simply states that "a permit issued by the government" is required for vesting, but it does not directly address what form of permit is required. (*Id.*) Although many cases require that a building permit must be obtained for the Avco Rule to apply, some California Courts of Appeal have suggested that "a vested right might arise before the issuance of a building permit if the preliminary permits approve a specific project and contain all final discretionary approvals required for completion of the project." (*Billings v. California Coastal Com.* (1980) 103 Cal.App.3d 729, 735; quoting *Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965, 975, fn. 5.) The California Supreme Court has not ruled definitively as to whether a building permit is required or if another form of final approval may satisfy the Avco Rule; it has resolved cases regarding vesting claims on other grounds without explicitly permitting or prohibiting approvals other than building permits to support a claim of vested rights. (See *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465; *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858.) To resolve a case regarding vested rights under California law brought in federal court, the Ninth Circuit assumed that "sufficiently detailed special use permits" would satisfy the Avco Rule. (*Lakeview Dev. Corp. v. South Lake Tahoe* (9th Cir. 1990) 915 F.2d 1290, 1298.)

ii. Substantial Work and Substantial Liabilities in Good Faith Reliance on the Approval

A property owner must have "performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government" before acquiring vested rights to develop. (*Avco Community Developers, Inc.*, 17 Cal.3d at 791.) Soft costs to obtain project approvals or to prepare for construction are insufficient to create vested rights; "hard costs" towards completing physical construction are necessary. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 552.) Even once construction has started and substantial liabilities have been incurred, vested rights do not attach to a project unless the

property owner acts in good faith to "expeditiously" proceed with the development. (*Lakeview Dev. Corp.*, 915 F.2d at 1298.) As a limiting factor to the Avco Rule, the California Supreme Court held that "[t]he rights which may "vest" through reliance on a government permit are no greater than those specifically granted by the permit itself." (*Santa Monica Pines, Ltd.*, 35 Cal.3d at 866.) This means that a property owner cannot claim a vested right for a particular project "when the project temporally exceeds the scope of that approved" and that project approvals are "necessarily conditioned on the developer's proceeding at a pace reasonably close to that contemplated at the time the project was approved." (*Id*.)

In *Lakeview*, the developer applied for and received a subdivision map and a special use permit for a two-phase residential development and a hotel. (See *id.* at 1291.) The approval contemplated a three- to six-month time frame between the completion of phase one and phase two. (*Id*.) The developer completed phase one on schedule, then proceeded with the hotel development, which took several years to complete because of changing market conditions and financing issues. (See *id.* at 1293.) The developer waited ten years from the completion of phase one – twelve years from receiving its original approval – to request building permits for phase two. (See *id.* at 1298.) The court reasoned that the city and the developer did not foresee that phase two would remain undeveloped for so long, and the long break between phases indicated that the expenditures the developer made to develop phase one and the hotel could not have been made in reliance on the ability to have a vested right to complete phase two. (*Id*.)

California's common law vested rights doctrine makes development in uncertain times more difficult and could deter developers from incurring the initial costs needed to bring a development to fruition. A development agreement in its most simple form is intended to address this issue by providing certainty but since the development agreement statutes were adopted and development agreement have become more ubiquitous, the scope of development agreements has also expanded, sometimes to the benefit to cities and sometimes to their detriment.

GOVERNMENT CODE PROVISIONS FOR DEVELOPMENT AGREEMENTS

The California Government Code lays out specific requirements that must be included in a development agreement. We will identify the requirements here and later in the paper will discuss some additional considerations when negotiating and drafting a development agreement.

a. Parties.

In many instances, a development agreement is initiated by a project applicant and some jurisdictions have a specific application form or process for a project applicant to request a development agreement. As part of the application review process, it will be important to understand who will be entering into the development agreement with the city. A person entering into a development agreement with a city or county must have a legal or equitable interest in the real property. (Gov't Code Section 65865(a).) The interest in the real property is important, as the development agreement will be recorded on title to the property and thus the entity entering into the agreement must have an interest in the real property that allows for such recording. Often cities are asked to negotiate the development agreement prior to the developer obtaining title to the property. The developer may either have an option to acquire the property or a

purchase and sale agreement with the property owner. Although an option or a purchase agreement can constitute an interest in the property sufficient for purposes of the development agreement statute it is advisable to obtain the property owner's consent before negotiating since the terms of the agreement can have an impact on the property.

b. Content.

The Government Code specifies certain requirements of what must be included in the development agreement. In particular, the agreement must specify the duration of the agreement, the permitted use of the property, the density or intensity of use, the maximum height and size of the proposed buildings, and provisions for reservation or dedication of land for public purposes. (Gov't Code Section 65865.2.) The development agreement additionally may, but is not required to include conditions, terms, restrictions, requirements for subsequent discretionary actions, and conditions relating to applicant financing of necessary public facilities or reimbursement over time. (*Ibid*.) While these are not considered requirements under the development agreement statutes, it is good practice to include this information. If the development agreement includes a subdivision that will include development of more than 500 dwelling units (or in the case of a public water system with fewer than 5,000 service connections an increase of 10 percent or more in the number of existing service connections) the development agreement must provide that any tentative map prepared for the subdivision will comply with Government Code Section 66473.7, which requires a condition of approval that sufficient water supply is available. (Gov't Code Section 65867.5.) Another topic that is a good practice to include is procedures for subsequent approvals and whether any land use regulations or policies will not vest through the development agreement. (Gov't Code Section 65866(a).)

c. Approval Procedures and Monitoring.

Development agreements are legislative acts and approved by ordinance. (Gov't Code Section 65867.5.) As such, they must follow general procedures for the adoption of a land use ordinance. A public hearing before the planning agency (the planning commission in most jurisdictions) and then the legislative body must be held. A notice of intention to consider the adoption of a development agreement must be given prior to the public hearings in accordance with Government Code Sections 65090 and 65091. (Gov't Code 65867.) This notice involves publication in a newspaper of general circulation or posting the notice in three public places at least ten days before the hearing date, mailing to specified property owners and agencies at least ten days before the hearing date, and any other public hearing procedures adopted by the local jurisdiction. As part of the approval process, the city must make findings that the provisions of the agreement are consistent with the general plan and any applicable specific plan. Additionally, if any amendment is made or if the agreement is cancelled in whole or in part, by mutual consent of the parties (or their successors), notice of intention to amend or cancel any portion of the agreement, must be made as provided in this paragraph and follow the same procedures for approval. (Gov't Code Section 65868.)

Once a development agreement has been approved, it must be recorded on title to the property within ten (10) days. (Gov't Code Section 65865.5.) This provides record notice of the development agreement, as the burdens of the agreement are binding on all successors in interest to the parties of the agreement.

After the development agreement is adopted and goes into effect, there must be periodic review, at least every 12 months, to demonstrate that the developer is in good faith compliance with the terms of the agreement. (Gov't Code Section 65865.1.). If the local agency finds on the basis of substantial evidence that the applicant is not in compliance with the terms or conditions of the agreement, the local agency may terminate or modify the agreement. (*Ibid.*) The procedures for the periodic review may be included in the development agreement or in the city's local ordinance on development agreements.

d. Other Considerations.

The Government Code lays out several additional items that may not be applicable in all development agreement contexts. A city must, upon the request of an applicant, establish procedures and requirements for the consideration of development agreements. These may be established by resolution or ordinance and the city may recover the direct costs associated with establishing such procedures and requirements. (Gov't Code Section 65865(c)-(d).) Many cities have already adopted such procedures and requirements.

A city may enter into a development agreement with a project applicant that proposes a project for a property that is in unincorporated territory if the property lies within the city's sphere of influence. The agreement, however, cannot become operative unless annexation proceedings to annex the property to the city are completed within the time period specified in the agreement. If such annexation does not occur in the specified time period, the development agreement is null and void. (Gov't Code Section 65865(b).)

As mentioned above, development agreements are approved by ordinance, which is a legislative act. This means that a development agreement is subject to referendum. (Gov't Code Section 65867.5.). Referendums are a process by which voters may weigh in on laws that have been passed by their elected representatives and suspends operation of the law until it has been approved by a majority of voters.

Lastly, the development agreement statutes apply to charter cities (Gov't Code Section 65867.5(d).) Caselaw has also confirmed this. (See *Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689.)

BENEFITS OF DEVELOPMENT AGREEMENTS FOR DEVELOPER

Development agreements offer benefits for both the developer and the city. For the developer, the most obvious benefit is the certainty of the rules that will govern the development. Development agreements provide developers of large scale multi-phased projects with certainty that investment in the early phase of the project will not be wasted due to a change in city laws, policies or politics.

a. Development Agreement Vested Right.

As noted above, Government Code Section 65866 freezes the rules, regulations and official policies governing permitted use of the land, density, design, improvement and construction standards to those in place at the time of execution of the development agreement. By freezing the rules governing development, the development agreement statute eliminates the uncertainty caused by the common law vested rights doctrine.

It should be noted that not all rules, regulations and official policies must be frozen by the development agreement. Government Code Section 65866 is clear that the policies and regulations governing land uses, density, design, improvements and construction standards are frozen unless otherwise provided by the development agreement. Thus, as part of negotiating the development agreement, the city and the developer can establish the parameters for which policies and procedures are frozen to benefit the developer.

b. Fees.

Many development agreements go beyond the list of rules and policies in Government Code Section 65866 and include within the regulations frozen, impact and permit fees or provisions that limit the increases in those fees. Freezing permit and impacts fees provides developers with the benefit of understanding the financial costs of completing the development before commencement and eliminates the surprise of new impacts fees. Given that impact fees often increase more rapidly than inflation and new impacts fees can be common, this limit on impact fees can provide a significant monetary benefit to developers, particularly if the development agreement term is lengthy.

c. Extended Term of Permits

Development agreements may extend the duration of permits, approvals and maps to the term of the development agreement, giving developers additional time before commencing development and eliminating costs associated with obtaining approval of extensions.

d. CEQA Certainty

Development agreement often include provisions that the CEQA review for the approval of the development agreement will serve as the CEQA review for all subsequent approvals related to the project unless CEQA requires further analysis. Technically, these provisions may not provide much benefit to a developer since whether additional CEQA review is necessary will be governed by CEQA. But the inclusion of such provisions does limit cities from requiring environmental analysis of subsequent approvals that may not be required under the CEQA statute but that the city or the members of the public believe is necessary.

e. Public Input and Participation

Depending upon the initial approvals granted at the time the development agreement is entered into, discretion for subsequent approvals may be limited, having the effect of limiting the impact of public input for those approvals. The need to participate in lengthy and time-consuming public hearings and meetings for each approval for a development project can delay project development as well as result in unforeseen costs. Development agreements, by freezing the land use policies in place at the time of execution of the agreement, limit policy makers options with regards to subsequent approvals, providing faster and less controversial processing of the subsequent approvals. Some development agreement may also set out the procedures for subsequent approvals, allowing for some approvals to be handled administratively, providing even greater benefits for the developer.

BENEFIT OF A DEVELOPMENT AGREEMENT TO THE CITY

Although the primary purpose of development agreements is to provide developers with certainty of the ability to proceed with a project once approved, there are benefits of a development agreement for cities as well. In addition to providing avenues for development of large-scale projects that provide benefits to the city, development agreements also give cities more regulatory flexibility, allowing for the negotiation of additional public improvements or community benefits.

a. Flexibility and Ability to Shape Projects

Development agreements give cities flexibility to shape development projects in a manner that may not be possible through a standard permit process. By negotiating the density, design and layout of a development, a city may shape the development to meet the city's planning goals in ways that application of a standard zoning ordinance may not allow or encourage.

b. Fees.

Fees imposed by development agreements are specifically exempt from the Mitigation Fee Act (Gov't Code Section 66000(b)). This exemption from the Mitigation Fee Act gives cities the latitude to negotiate additional fees that may not be directly related to the impacts of the development, including fees for community benefits such as recreational programs, job training programs, and other programs that provide benefit to the community as a whole but for which meeting the nexus requirements of the Mitigation Fee Act can be a challenge.

c. Public Improvements

Cities have used development agreements to require developers to pay for public improvements that might provide benefits not just for the development but for the greater community. Because the development agreement is a negotiated contract that a developer voluntarily enters into, the fear of a claim for a regulatory taking is diminished with the use of a development agreement. Examples often include park improvements that go beyond the standard level or size of park,

additional roadway improvements including additional landscaping and contributions of land or money for public facilities such as fire stations, police stations and community centers. In addition, through a development agreement, a city can require the completion of these public improvements faster than might occur as a condition of approval thus ensuring that facilities and services are available to the development when the first users arrive rather than the last, which is more common.

DRAFTING DEVELOPMENT AGREEMENTS

Care should be taken in drafting development agreements. Most development agreements have a term that continues beyond the term of the city council that approves the development project and some development agreements may have terms that exceed 15 or 20 years. Given that a development agreement locks in certain land uses and design standards it is important that the agreement reflect the city's goals for the development throughout the development process and if possible, preserve some flexibility for the city to adapt the development to changing circumstances.

a. Project Definition and Vesting.

The most powerful aspect of a development agreement is the ability to freeze land uses to those in place at the time the development agreement becomes effective. Most development agreements incorporate the language of Government Code Section 65866 into provisions granting the developer vested rights to develop the proposed project. However, without a clear project definition, exactly what rights are vested may become subject to dispute as the development agreement is implemented. Often the development agreement will vest the rights granted to the developer pursuant to specifically referenced entitlements, without defining what development is allowed under those entitlements. Review of the entitlements and conditions of approval is crucial in order to draft the development agreement to ensure that the city obtains the development it bargained for. Language in entitlements allowing construction of "up to" a maximum number of residential units or specifying the maximum square footage of open space but not a minimum may mean that the developer can decrease the number of residential units or the size of parks and open space and still be within the rights vested in the development agreement even though the city approved the project on the basis of a certain numbers of square feet of open space or a certain number of residential units. One way to address this is to provide a range, limiting both the minimum number of units or square footage and the maximum. This reduces the flexibility the developer may have to make changes to the development project without being required to amend the development agreement.

b. Applicable Laws/Application of new laws.

Because development agreements can freeze the land uses, density, design and construction standards to those in place as of the effective date of the development agreement it is important for the development agreement to specifically identify the applicable laws. Most development agreements list such things as the general plan, the city municipal code in effect at the effective date and all other city codes, resolutions and ordinances. Without further clarification, newly

adopted city resolutions and ordinances that are consistent with the development project that provide benefits to the city or promote citywide policies cannot be applied to the project.

A development agreement should include provisions for the application of new city laws that do not conflict with the development project. In order to make such a provision less likely to result in future disputes between the city and the developer, provisions on what it means to conflict with the development should be included. These provisions may address specific aspects of the project or be more general. Often these provisions will include some quantifiable standards for determining if a new city law conflicts with the development project – for example, if the application of the new city law would reduce the density of the development by an agreed upon percentage or increase the costs of the development by a specific amount or percentage.

Cities will also want to reserve the authority to apply new construction codes to development. As cities continue to adopt new construction codes designed, for example, to address the impacts of climate change and conserve resources, it is important that these provisions can be applied to development that may be approved prior to the advancement of technology or the widespread availability of techniques that are better for the environment.

Finally, it is important that the applicable laws that are frozen be preserved so that as the development agreement ages, staff can refer back to the applicable provisions. Some development agreements attach as an exhibit the full municipal code in effect at the time of approval, however this may be cumbersome for recording purposes. Other development agreements may require that a copy of the existing codes, regulations, and policies be compiled and retained on file.

c. Term.

One of the most heavily negotiated provisions of a development agreement is often the term. Developers will of course want the longest term, arguing that for developments that may be multi-phased they need the opportunity to weather economic cycles. The term of each development agreement is dependent upon the size and type of development covered by the agreement and the expected schedule for development. Developers are reluctant to propose a schedule for fear of being held to the schedule, but it is important for the city to have a proposed schedule to determine what a reasonable term is for the development agreement.

In considering the term of a development agreement, cities will want to look at the proposed schedule as well as how delays in the project will impact city benefits provided by the development.

d. Force Majeure

Closely related to the term is force majeure language. Most development agreements will include standard force majeure language that grants extensions of time for performance by the parties in the event of circumstances beyond the parties' control. Often developers will request additional force majeure protection for economic downturns. There are several disadvantages to

cities to allowing an economic force majeure provision. First, it is hard to quantify what constitutes an economic event that prevents development versus a slow down that may make development less economically advantageous to a developer but still feasible. Second, true economic downturns can delay a development project for an extended period of time resulting in a development agreement term extending well beyond the original expected period for performance. If considering an economic force majeure provision, it is advisable to consult with a knowledgeable real estate economist and to run some scenarios of the length of the delay using whatever quantifiable standard is agreed to so that the city has some idea of what the potential period of time for delay could be. And of course, some economic events are unforeseeable such as the 2008 great recission so trying to anticipate all events is impossible.

e. Fees/Taxes

Whether a development agreement freezes or limits impacts fees is usually a heated topic of negotiation. For cities, freezing fees at the level when the agreement is drafted can severely constrain municipal resources once the development is actually constructed. Some development agreements do not freeze fees but rather limit the amount by which fees can be increased each year. Other development agreements may freeze fees only for a limited amount of time to create an incentive for the developer to begin construction on the development project earlier in the development agreement term. In considering provisions related to limitations on fees it is important to make sure that the agreement is clear on which fees may be limited – just impact fees or impact fees and processing fees. Since permit processing fees are designed to cover city costs, cities should avoid placing any limitations on processing fees.

If existing impact fees are to be limited by the development agreement, the agreement should also address whether the development project is subject to any newly adopted impact fees. Often developers will want to limit cities abilities to assess new impact fees or limit the application of new impact fees only to those that are applicable citywide to all similar projects. Similar consideration needs to be made with respect to the application of new taxes and assessment imposed by the city.

f. Subsequent Actions

Development agreements often include language about how subsequent project approvals will be handled. Developers are looking for streamlined processes for subsequent approvals, including limitations on CEQA review, as discussed above. Cities should consider whether allowing administrative approval of some subsequent actions is beneficial to the city given that often, the city's discretion is limited. Along the same line, cities should consider whether any modification to the project and/or the development agreement are considered minor and can be approved at the staff level and which types of modifications would require approval by the planning commission or city council.

g. Survival

A city may desire certain provisions of the agreement survive termination. An example of this may be an indemnification provision or developer obligations that may be long term. Another example is if a service is to be provided as a community benefit, the city may desire this service be continued beyond the term of the development agreement. In some instances, it may make sense to enter into a separate agreement to address these obligations. Items that survive termination should be specifically identified in the development agreement as surviving termination. It may help future reviewers of the agreement if there is a section that identifies all the provisions that survive, in addition to specifying within each particular section.

h. Multi-Phase Projects

In multi-phase projects, a city and developer may want to address what happens to parcels after they have been developed and obligations with respect to that phase of development have been met, or remain ongoing. One such consideration is if a phase of the project is developed and that parcel or parcels are sold, does the development agreement remain on title and become an obligation of the successor in interest, or is that parcel released from the agreement. This may depend on the obligations laid out in the agreement and whether any are intended to continue beyond the completion of a phase of the project.

i. Community benefits

As noted above, development agreements provide an opportunity for cities to negotiate community benefits that the city may not otherwise be able to impose on the project as a condition of approval. The development agreement should be specific as to the community benefits to be provided including the timing for the community benefits to be implemented. The goal should be to ensure that the community benefits are provided as the development is constructed rather than at the end of the development.

CONCLUSION

As described throughout this paper, development agreements provide certainty to developers that they will be able to develop their project as anticipated. Many benefits are provided to the developer, but development agreements also provide an opportunity for cities to receive benefits, as well and the agreement can be mutually beneficial to both parties. Achieving those benefits requires careful drafting and recognition that a one size fits all approach may not be in the best interest of the city.

The Builder's Remedy: Fear and Trembling and Local Control

Thursday, Oct. 17, 2024

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THE BUILDER'S REMEDY: FEAR AND TREMBLING AND LOCAL CONTROL

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PART ONE: WHAT IS THE BUILDER'S REMEDY?

The "**Builder's Remedy**" is a provision in the Housing Accountability Act (Gov. Code § 65589.5, the "**HAA**") that may prevent a city from denying certain housing development projects if the city does not have a housing element in substantial compliance with state law.[1] Specifically, a city may not deny a housing development project that includes at least 20% affordable housing for lower income households (or 100% of units affordable to moderate-income households) on the basis that the project is not consistent with the zoning ordinance or General Plan land use designation, unless the city has adopted a revised housing element that substantially complies with Article 10.6 of Government Code Title 7, Division 1, Chapter 3 (the "**State Housing Element Laws**").[2]

1. Legislative tightening of the Builder's Remedy statute

The original Builder's Remedy provision (Gov. Code § 65589.5(d)) was enacted in 1990 (SB 2011). According to the legislative counsel's digest, SB 2011 was enacted to encourage the infilling of existing urban areas and reflected legislative concerns regarding the lack of affordable housing. The SB 2011 version of the Builder's Remedy was amended several times after 1990, reflecting continuing legislative concerns about the lack of affordable housing.

The current version (as of January 1, 2024) of Government Code section 65589.5(d) is summarized as follows:

> A local agency shall not disapprove a housing development project, for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the housing development project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:
>
> (1) The jurisdiction has adopted a housing element pursuant to this article that has been revised in accordance with Section 65588, is in substantial compliance with this article, and the jurisdiction has met or exceeded its share of the regional housing need allocation.

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[1] Gov. Code § 65589.5(d)(5). Unless otherwise specified, all citations are to the California Government Code.

[2] *Ibid*.

(2) The housing development project or emergency shelter as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(3) The denial of the housing development project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(4) The housing development project or emergency shelter is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project.

(5) The housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with Housing Element law.

The Builder's Remedy statute prohibits a local agency from disapproving a housing development project for very low, low-, or moderate-income households, or conditioning approval in a manner that renders the housing development project infeasible for development for the use of very low, low-, or moderate-income households unless it makes certain written findings, *based upon a preponderance of the evidence in the record*. Instead of the usual test for a local land use decision, which upholds the decision of the local agency so long as it is supported by substantial evidence on the record, the Builder's Remedy statute requires a higher level of review, which could result in an agency decision being overturned by a court after independent review of the agency decision.

Therefore, while it is still theoretically possible to condition or deny a housing development project, the local agency must give careful thought to laying an evidentiary foundation in the administrative record to support the agency's decision. For example, if the agency believes a housing development project could be approved at a lower density, it would be advisable to introduce expert testimony into the administrative record that the project at a lower density would still be feasible to support "housing for the very low, low-, or moderate income households" (currently defined as including a minimum of 20 percent of the total units sold or rented to lower income households or 100 percent of the units sold or rented to moderate income households).

Similarly, if a local agency were to conditionally approve a project at lower density on the grounds that it does not have adequate water or wastewater facilities to serve the project, it would be advisable to introduce engineer's testimony into the record to

support that decision. The agency would also need to anticipate evidence from the developer or third parties to the contrary.

Local agency decision makers need to understand that laying these evidentiary foundations will cost time and money, and still comes with significant legal risks. Courts may also likely take into consideration whether decisions are made due to community opposition rather than objective concerns that cannot be mitigated under reasonable circumstances. In this regard, the public statements of decision makers will matter.

Lastly, in evaluating the risks of conditionally approving or denying a housing development project, as discussed, above, local agencies should also weigh the legal consequences of failing to meet the evidentiary standard of review if the developer or third-party challenges the conditional approval or denial, particularly if a court finds the agency acted in bad faith. These risks include court-imposed penalties ($10,000 per unit), court order compelling compliance, posting a bond to pay for delay damages in the event of an agency appeal, and attorneys' fees.

PART TWO: A CASE STUDY OF THE BUILDER'S REMEDY IN SANTA MONICA

1. Builder's Remedy Projects Filed in Santa Monica

Between July 2 and October 13, 2022, the City of Santa Monica ("**City**") received sixteen (16) preliminary applications from developers for housing development projects that were inconsistent with the City's land use designations as defined by its General Plan Land Use and Circulation Element ("**LUCE**") or its zoning code (collectively, the "**Builder's Remedy Applications**").

Collectively, these projects proposed 4,609 units of housing, including 950 affordable units; 6 – 15 stories; on either single or double 7,500 square foot lots. In short, these projects represented significantly higher density than allowed under then existing codes, including State density bonus law.

The Builder's Remedy Applications were filed prior to the City's adoption of its 6th Cycle (2021-2029) Housing Element Update on October 11, 2022, which the California Department of Housing and Community Development ("**HCD**") certified on October 14, 2022.

The timeline for HCD's approval of the City's Housing Element was as follows:

DATE	EVENT
March 4, 2021	RHNA Allocation; 8895 units, 70% affordable
May 24, 2021	Draft of 6th Cycle Housing Element Published
June – July 2021	Council Hearings on draft
July 1, 2021	Transmittal of draft to HCD for review

August 30, 2021	HCD notice of deficiencies to draft
September 8, 20, 24, 2021	Three public hearings to walk Council and the community through the proposed deficiencies/corrections to the draft
October 12, 2021	Council adopts draft
February 8, 2022	HCD notice of deficiencies in adopted housing element
February – June 2022	Frequent consultation with HCD technical staff
July 8, 2022	Submittal of 2nd draft housing element draft to HCD
September 6, 2022	HCD issues conformance letter
October 11, 2022	Council adopts 2nd draft
October 14, 2022	HCD certifies 2nd adopted Housing Element

All but one of the Builders Remedy Applications were filed before the City's HCD approved housing element was adopted on October 11, 2022, but after HCD had issued a substantial compliance letter, signaling that HCD would certify the draft if adopted. The timing of the filing of the preliminary applications was thus a subject of contention because the City believed in good faith that it could make the required fundings to deny or condition these projects because the findings would be made at the time of the discretionary approval, when the City's housing element had been certified by HCD. Conversely, the developer asserted that the status of the City's housing element would be retroactive to the date that the preliminary applications were filed.

a. Public comments will influence whether HCD makes a finding of Substantial Compliance

A city's planning agency must make the draft revision of a housing element available for public comment for at least 30 days and, if any comments are received, take at least 10 business days after the 30-day public comment period to consider and incorporate public comments into the draft revision prior to submitting it to HCD. Gov. Code § 65585. In the preparation of its findings on a draft housing element, HCD may consult with any public agency, group, or person. *Id. Furthermore, HCD must receive and consider any written comments from any public agency, group, or person regarding the draft or adopted element or amendment under review*. *Id.*

The City followed these requirements and submitted all its comments to HCD as part of the submittal of its first and second draft housing elements. The same developers that filed the preliminary applications for Builder's Remedy projects also provided numerous comments directly to HCD to either oppose or condition HCD's approval of the City's draft housing elements, and these comments were either disclosed in HCD's letters to the City or via emails produced in the Public Records Act request. Local agencies should thus anticipate that developers and other third parties will correspond directly with HCD about the sufficiency of the draft housing elements. This correspondence

may influence HCD's determination of substantial compliance, however, the Housing Element Laws mandate that HCD take these comments into consideration.

b. Assume that HCD will take 90-days to review a draft Housing Element for Substantial Compliance

At least 90 days prior to adoption of a revised housing element (and after the 30-day comment period), a city's planning agency must submit the draft to HCD for a written determination as to whether the draft substantially complies with Housing Element Laws. Gov. Code § 65585(d).

If HCD finds that the draft element or draft amendment does not substantially comply with this article, the City's legislative body must take one of the following actions:

Option 1: Change the draft element or draft amendment to substantially comply with this article.

Option 2: Adopt the draft element or draft amendment without changes. The legislative body shall include in its resolution of adoption written findings that explain the reasons the legislative body believes that the draft element or draft amendment substantially complies with this article despite the findings of HCD. Gov. Code § 65585(f).

Like many other many other municipalities throughout the State, the adoption of the City's housing element was not straightforward. Despite the City's good faith efforts, HCD determined that its 1st adopted 6th cycle Housing Element was not in substantial compliance with Housing Element Laws after the City's submitted this draft to HCD.

After receiving HCD's comments, the City modified its draft to address HCD's comments and because the City believed that it had modified its draft to address HCD's comments, the City elected Option 1 and adopted the modified draft on October 12, 2021. Unfortunately, this adoption resulted in additional public comments (as described above) and HCD's second round of comments, wherein HCD determined that the City's adopted housing element was not substantially compliant.

Following HCD's second rejection, the City's planning staff engaged in several working consultations with HCD's technical staff over the next six months, and then resubmitted its 2nd draft housing element to HCD for its 90-day review on July 8, 2022. By then, the developers' representatives had been closely monitoring the City's progress. All sixteen preliminary applications were filed between July 2 and October 13, the day before HCD certified the City's adopted 2nd draft.

2. Legal Analysis – Fight or Settle?

Not surprisingly, the near simultaneous filing of preliminary applications for sixteen Builder's Remedy projects (4609 units) caused significant consternation within the City. The City Attorney's Office was thus tasked with evaluating the following issues:

1. Did the City have the legal ability to refuse to process the Builder's Remedy Applications?
2. If the City was obligated to process the Builder's Remedy Applications, what were the City's prospects of prevailing in litigation if the City were to deny or reduce the density of the Builder's Remedy Applications?

As to the first issue, the City Attorney's Office identified the risks of refusing to process Builder's Remedy applications, including that the failure of the City to process a pending application for a housing development project could also result in "deemed approvals" of these projects under SB 330, SB 8, and the Permit Streamlining Act ("PSA"), as further discussed, below.

As to the second issue, the City Attorney's Office identified the risks that while it would be possible to make the necessary findings to conditionally approve one or more of these projects, the City would have to spend significant resources on feasibility and technical consultants, and incur significant legal risks, if these conditions were challenged by the developers.

Assuming the resources were spent, and the risks accepted, the City's Planning staff focused on making the following findings:

- That the conditions would not cause the project to be infeasible for development of very-low, low-, or moderate-income households (Gov. Code § 65589.5(d), which would have to be supported by a feasibility analysis;
- That the project would cause specific adverse impacts because these projects were all infill development, and the City is built out with aging water and sewer infrastructure with either limited or full capacity (Gov. Code § 65589.5(d)(2)) in the localized areas in which the development was proposed, which would have to be supported by an engineering analysis; and
- That the City had obtained HCD's certification of its 6th Cycle Housing Element by the time these applications would be reviewed under the City's discretionary review process.

3. Builder's Remedy and SB 330 Application Processing Deadlines

To evaluate the City's risks, the City Attorney's Office examined the timelines for processing housing development projects, which are governed by the state law known as SB 330 or the "Housing Crisis Act of 2019" and the PSA. Among other things, SB 330 modified certain sections of the Housing Accountability Act (the "HAA") (Gov't Code sections 65589.5 – 65589.6) and the PSA (Gov't Code sections 65920 *et seq.*) to impose more objectivity in and expedited processing of permit applications for housing development projects through January 1, 2030.

SB 330[3]

SB 330 imposed significant new requirements on the City's ability to delay or prevent processing of applications for new housing development projects. Notably, SB 330 requires the following:

[3] SB 330 (effective from January 1, 2020 – January 1, 2025) (amended Section 65589.5 of; amended, repealed and added Sections 65940, 65943, and 65950 of; added and repealed Sections 65905.5, 65913.10, and 65941.1 of; and added and repealed Chapter 12 (commencing with section 66300) of Division 1 of Title 7 of, the California Government Code, relating to housing).

- Requires that an application must be "deemed complete" if a preliminary application is submitted in accordance with Government Code section 65941.1 or, if the applicant has not submitted a preliminary application, has submitted a formal application found to be complete in accordance with Government Code section 65943. (HAA: Cal. Gov't Code § 65589.5(h)(5))
- Requires that if the City considers a proposed housing development project to be inconsistent with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision, it shall provide the applicant with written documentation identifying the exact inconsistencies within 30 days that the application is determined to be complete if the project contains 150 or fewer housing units; or within 60 days if the housing project contains more than 150 housing units. If the City fails to provide this analysis, the housing project shall be deemed consistent with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision. (HAA: Cal. Gov't Code § 65589.5(j)(2))
- Requires that a housing project only be subject to the ordinances, policies, and standards adopted and in effect when a preliminary application is submitted, except as specified. (HAA: Cal. Gov't Code § 65589.5(o))
- Requires that an application for a housing development project be deemed to have submitted a preliminary application upon providing specified information and upon payment of the application fee. (PSA: Cal. Gov't Code § 65941.1 (a))
- Requires that the project applicant apply for the project that includes all information necessary for the City to review the application (the "formal application") under the PSA within 180 days of submitting the preliminary application. (PSA: Cal. Gov't Code § 65941.1 (d)(1))
- Requires the City to notify the applicant if the formal application is incomplete and provide the applicant with an exhaustive list of items that were not complete within 30 days after the City has received the application. (PSA: Cal. Gov't Code § 65943(a))
- Requires the City to notify the applicant whether the application is complete after receiving all required materials. (PSA: Cal. Gov't Code § 65943(a)) If the City fails to notify the applicant, the application is deemed complete. (PSA: Cal. Gov't Code § 65943(b))
- If the formal application is not complete, requires that the project applicant submit the information needed to complete the application within 90 days of receiving the incomplete letter. If the applicant does not submit this information within the 90-day period, then the preliminary application "shall expire and have no further force or effect." (PSA: Cal. Gov't Code § 65941.1 (d)(2)).

- Establishes certain processing timeframes accordance with the applicable periods (PSA: Cal. Gov't Code § 65950)
    - 90 days from certification of an EIR for a housing development project.
    - 60 days from certification of an EIR for a housing development project with at least 49% of the units reserved for very low- or lower-income households or a project financed by tax credits
    - 60 days from the date of adoption of a negative declaration or determination that project is exempt from CEQA

SB 8[4], which went into effect on January 1, 2022, clarified certain provisions of SB 330, including the following:

- SB 330 applies to housing development projects that involve no discretionary approvals, projects that involve both discretionary and nondiscretionary approvals, and projects that include a proposal to construct a single dwelling unit.
- The vesting period for ordinances, standards, and policies is extended from 2.5 to 3.5 years from receiving all approvals to obtain a building permit for affordable housing projects.

The Permit Streamlining Act (PSA)

Even before SB 330 was enacted, the PSA provided that the failure of an agency to act to approve or disapprove a development permit within the time limits prescribed by the PSA shall be "deemed approval" of the permit application for the development project. (PSA: Cal. Gov't Code § 65956) This provision of the PSA was not changed by SB 330.

Given the processing deadlines and potential for deemed approvals of the Builder's Remedy projects under SB 330, SB 8, and the PSA (as discussed, above), the City Attorney's Office concluded that it was necessary to review these applications for completeness and code conformance. Planning staff processed these applications as Development Review Permits, which is a discretionary process with Planning Commission as the decision-maker and City Council as the appeal body. At the time, it was anticipated that the Development Review Permit findings could be made to deny or conditionally approve some of these Builders Remedy applications, based upon the findings authorized under the Builders' Remedy statute, recognizing that these exceptions would likely be challenged by the developers.

4. The Settlement

Notwithstanding the City's decision to process the Builder's Remedy Applications, both the City and the developers understood the significant legal risks to both sides in proceeding with the City's discretionary review processes. For the City, the biggest risk was that the Builder's Remedy statute could be interpreted to require a substantially compliant housing element at the time the preliminary application was deemed

[4] SB 8 (effective January 1, 2022) (extended SB 330 to January 1, 2030; amended Sections 65589.5, 65905.5, 65913.10, 65940, 65941.1, 65943, 65950, 66300, and 66301 of the Government Code, and amended Section 2 of Chapter 654 of the Statutes of 2019, relating to housing).

complete rather than at the time the discretionary review occurred. For the developer, the biggest risk was dedicating time and resources to fight the City – likely a two-year process.

Not surprisingly, the City and developers decided on a pragmatic approach and entered into lengthy and complicated negotiations, resulting in a settlement agreement that tolled the applications for most of these projects.

As outlined in the Settlement Agreement, during the tolling period, the City had the option to adopt an ordinance (retaining Council's full discretion to do so) before a mutually agreed upon deadline, that would facilitate the developers' use of the City's existing ministerial process for approvals of housing developments rather than the discretionary process used to implement the Builder's Remedy statute. If adopted, the ordinance would also provide additional development incentives that would allow for an on-site density bonus for off-site development of the affordable units, expedited permit processing, and parking incentives. This settlement worked, in part, because the City's existing streamlined ministerial process, coupled with the off-site density bonus, and State density bonus flexibility provided enough development incentives for the developers without the Builder's Remedy.

5. What Happened Post-Settlement

The City Council adopted the settlement ordinance, described above. However, after the ordinance was adopted, the State Legislature enacted AB 1287, which provided additional density bonus, incentives and/or concessions under State density bonus law.

In short, AB 1287, coupled with the City's existing streamlined ministerial processes, afforded enough development incentives to obviate the developer's election to use the Builder's Remedy or utilize the ordinance that added for a local density bonus for off-site development of affordable housing.

6. Takeaways from Santa Monica's Experience

- Adopt your Housing Element on time with early and frequent check-ins with HCD's technical staff. Don't assume that you are on the same page with HCD unless you get a 90-day letter with a determination that your housing element draft is substantially compliant with Housing Element Laws. HCD has refused to approve housing elements unless it previously approved a draft.
- Assume that developers and pro-housing advocates are talking to HCD directly during HCD's 90-evaluation period. Make regular Public Records Act requests because HCD will not usually share the letters unless you ask.
- Educate the councilmembers and public on the Builder's Remedy so that they understand that discretion in disapproving or conditionally approving these projects is extremely limited.
- Resign yourself to the fact that the State Legislature can always change the law to facilitate and incentivize housing development without local control.

PART THREE: THE BUILDER'S REMEDY IN THE COURTS

There are reportedly many Builder's Remedy projects in the state. One developer-side firm reported at a recent conference that it was representing applicants for 10,000 Builder's Remedy units throughout the state. But to date, we are not aware of any Builder's Remedy project that has been approved.

There are also as of yet no Court of Appeal decisions regarding the Builder's Remedy, although at least four cases have been appealed. (One of these was recently dismissed.) There have been at least six significant trial court decisions. For the most part, the decisions have not been particularly supportive of cities' arguments in opposition to use of the Builder's Remedy, and, in some cases, the courts have seemed to go out of their way to reject cities' claims. A list of the relevant trial court cases is attached, as well as recent filings; trial court Housing Accountability Act cases are listed as well, which may be relevant in specific cases.

The trial court decisions to date generally involve Builder's Remedy projects where a city has refused to process the project as a Builder's Remedy application, for various reasons. Where cities are processing these applications, in most cases review under the California Environmental Quality Act (CEQA) (usually an Environmental Impact Report (EIR)) is underway.

The issues raised in these cases can be divided into those related to the preliminary application; those related to the adequacy of the housing element; and asserted conflicts with other provisions of state law. This section describes the trial courts' decisions regarding these issues. It also notes how the proposed legislation discussed below resolves those issues.

1. Issues Related to the Preliminary Application

A preliminary application is an abbreviated project application, requiring far less information than cities normally require for project approval. (See Gov't Code § 65941.1.) Nonetheless, it vests projects in the general plans, zoning, and other development standards in place when it was submitted. (Gov't Code 65589.5(o).)

But for the preliminary application to remain valid, the applicant must submit a formal project application within 180 days. The city must review the application for completeness within 30 days under Section 65943. If found incomplete, the applicant must submit the information needed to complete the application within 90 days of receiving the incomplete letter. If the applicant does not submit this information within the 90-day period, then the preliminary application "shall expire and have no further force or effect." (PSA: Cal. Gov't Code § 65941.1 (d)(2)).

Many of these early cases deal with the status of project applications found to be incomplete.

Effect of Not Submitting Complete Application within 90 Days. Although the text of the statute appears to clearly require that a **complete** application be submitted within 90 days after the applicant receives a letter saying that the application is incomplete, one trial court determined that the application does not expire so long as the applicant keeps

submitting new applications within the 90-day period, citing the ability to resubmit incomplete applications provided by Section 65943.[5]

Note that courts will also do a searching review of the incompleteness determination to determine if: a) everything in the letter was listed in the application form; b) whether any comments are unrelated to completeness (such as whether the project is consistent with local zoning); c) whether any new comments are in subsequent completeness letters (not permitted); and whether all time limits were met.[6]

Whether an Application for a General Plan Amendment or Rezoning Can Be Required. Cities have required applicants for Builder's Remedy Projects to apply for general plan and zoning amendments, either because they desire to avoid legal nonconformities, or because they have determined that the projects are not eligible for the builder's remedy, and so general plan and zoning amendments are needed.

HCD on March 28, 2024, sent a letter to the City of Compton stating that general plan and zoning amendments could be required to avoid legal nonconformities, and then on June 26, 2024, reversed itself in a letter to Beverly Hills.

Two trial courts have treated a requirement to apply for general plan and zoning amendments as the denial of the application, either because the city is refusing to process the application or because the city has stated that the Builder's Remedy does not apply. Then the courts have found a violation of the HAA because the city did not make the findings for denial of the application found in the HAA – even though the city thought it was making a determination on the completeness of the application.[7] Once a violation of the HAA is found, a city may not be able to appeal because some courts have required multimillion dollar bonds.

At least one court has also held that general plan and zoning amendments aren't required because they were not listed as a completeness requirement for design review, subdivision approval, etc., and consistency with local ordinances is not a completeness issue.[8]

AB 1893 states that no general plan or zoning amendment may be required for a Builder's Remedy project.

2. Issues Related to Housing Element Adequacy

The Builder's Remedy applies only if a housing element does not substantially conform with state law. Two issues have been litigated regarding the timing of the consistency determination, and, in addition, cities have attempted to defend the adequacy of their housing elements, despite HCD findings of inadequacy.

Whether the Preliminary Application Vests the Housing Element's Status. Cities have argued that, while the preliminary application vests the standards in effect when it was submitted, it does not vest the **status** of the housing element as in compliance with state law, or not; and the status of the housing element should be determined when a

[5] *Jha II.* Abbreviations for these cases are listed on the attached list of cases.
[6] *See generally* Gov't Code § 65943.
[7] *La Canada-Flintridge II; Jha II.*
[8] *Jha II*

decision is made on the project. If the housing element was inadequate when the Builder's Remedy application was filed but is adequate when a decision is made on the project, the Builder's Remedy should not apply.

To date, the trial courts that have considered this have all held or assumed that the housing element's status is determined when the preliminary application is submitted.[9]

AB 1893 states clearly that the housing element status is determined when the preliminary application is submitted.

Whether Housing Element Adequacy is Determined at Adoption, or When HCD Says It Conforms with State Laws. The statute allows a Builder's Remedy project to be denied if a city has **adopted** a housing element in accordance with state law. (Gov't Code § 65589.5(d)(5).) Nonetheless, HCD on March 16, 2023, issued a memo stating that a city is only in compliance when HCD issues its letter finding substantial compliance.

There are mixed decisions from the trial courts on this issue. One court agreed that a housing element later found in compliance by HCD to have been adequate when adopted.[10] In two cases, a court exercised its independent judgment to determine adequacy.[11] Since it found the housing element not to comply with state law, the date of compliance was not at issue. In two cases decided by the same judge, the court agreed with HCD's view: the housing element was not adequate until HCD issued its letter.[12]

Proposed AB 1886 adopts HCD's interpretation and provides that a housing element is adequate only on the date HCD or a court determines adequacy. It also contains language stating that this position is "declaratory of existing law."

Whether the Housing Element is Adequate. A separate lengthy paper would be needed to discuss the courts' standards for determining the adequacy of housing elements. The lead appellate cases are *Fonseca v. City of Gilroy*[13] and *Martinez v. City of Clovis.*[14]

Where cities involved in Builder's Remedy disputes have asserted that their housing elements are adequate, the trial courts have generally agreed with HCD. Where HCD found the element to be inadequate, the courts have agreed;[15] and where HCD has approved a housing element, the courts have also agreed.[16]

Note that if AB 1886 is enacted, there will be little value to a city in attempting to have a court overrule HCD's view of the housing element's adequacy. Because the city will not be considered to be in compliance until either HCD or the court decides it is in compliance, it will be exposed to the Builder's Remedy until the litigation is concluded. Although cities often perceive HCD's comments as unsupported by the statutes, there will be few avenues by which to challenge these comments.

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[9] *La Canada-Flintridge II; Redondo Beach II; Jha II.*
[10] *Redondo Beach I.*
[11] *La Canada-Flintridge II; Rancho Palos Verde.*
[12] *Redondo Beach II; Jha I.*
[13] 148 Cal.App.4th 1174 (2007).
[14] 90 Cal.App.5th 193 (2023).
[15] *La Canada-Flintridge I & II; Beverly Hills.*
[16] *Redondo Beach I.*

3. Issues Related to Conflicts with Other State Laws

Chris Elmendorf, a University of Davis law professor whose articles are credited with encouraging use of the Builder's Remedy, has pointed out that there is a conflict between the Builder's Remedy and other provisions of the HAA. In particular, Section 65589.5(f)(1) provides that:

> (f)(1) Except as provided in subdivision (o), **nothing in this section shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need pursuant to Section 65584**. However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development **at the density permitted on the site** and proposed by the development.

"Nothing in this section shall be construed" is strong language; if the builder's remedy provisions are construed to mean no standards apply, doesn't this language become meaningless surplusage? And the last sentence allows only the "density permitted on the site." Because waivers under density bonus law can be required for most development standards, it is unclear what effect this provision might have on density bonus waivers, but an argument can be made that, as now drafted, this provision limits density bonus waivers as well.

No case has directly considered this provision, although in dicta one court stated that it did not apply to builder's remedy projects, because if a city had an inadequate housing element, its standards were per se inconsistent with meeting the city's share of the regional housing need.[17]

AB 1893 modifies this section to state that: a) it does not apply to Builder's Remedy projects; and b) it does not limit a project's eligibility for waivers and concessions under density bonus law.

4. Other Issues Raised

Other miscellaneous issues have been raised in other Builder's Remedy cases.

Compliance with Coastal Act. A trial court held that even Builder's Remedy projects had to comply with a community's Coastal Development Plan.[18]

Need for Voter Approval of Required Rezoning. If a community's housing element is approved more than 120 days after the due date (one year after the due date in the SCAG region), then the community must adopt any rezoning required by the housing element within one year of the housing element due date, or its housing element will not be considered to be in compliance with state law. (Gov't Code § 65588(e)(4)(C).)

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[17] *Jha II.*

[18] *Redondo Beach II.*

A voter-adopted ordinance arguably required a vote of the electorate before the required zoning could be adopted. The city asserted that the requirement for a popular vote was preempted by state law, and the trial court agreed.[19]

5. Takeaways

Most arguments raised to date by cities in the trial courts have not been successful. And to the extent that they may have validity, the Legislature is encouraging use of the Builder's Remedy by eliminating these arguments.

It is interesting to ponder why the Legislature is not satisfied with the significant upzoning that has occurred as a result of this housing element cycle and seems determined to allow projects that exceed twice the density allowed by local zoning (which is allowed by density bonus law) – 23-story buildings proposed in single-family neighborhoods, for instance. The truth is that despite the hundreds of housing bills passed by the Legislature since 2017, fewer total units were built in 2023 than in 2017 – and over 20,000 of those units were accessory dwelling units. The rush to file Builder's Remedy projects has likely convinced the Legislature that if the development community is totally freed of the shackles of local regulation, perhaps the housing crisis will be "solved." And so perhaps we should all resign ourselves to seeing if this theory works.

PART FOUR: DEVELOPER'S PERSPECTIVE

The Builder's Remedy presents both large potential incentives and large potential risks for developers. The biggest incentive is essentially a blank slate to develop a project that would not otherwise be permitted under the City's General Plan and or zoning regulations. Subject to a few limitations, the developer has a free hand to design the project they want rather than a project the city would otherwise allow. Submitting a Builder's Remedy project application is also a guaranteed way to get the city's attention - for better or worse - and can be used to potentially create negotiating leverage. The risks still lie in a less than clear legal landscape and the often-strong negative response that these applications evoke from City decision makers, community members and staff. The aggressive nature of Builder's Remedy applications also often results in a city review process with exceptionally high scrutiny and induces the local agency to employ oppositional tactics, of a kind not as commonly seen in the review process for routine projects.

Not surprisingly, these projects generally attract developers who are willing to take a higher risk - and who can afford to wait through a potentially lengthy approval process - to reap the higher rewards of an approved Builder's Remedy project or a modified project resulting from a negotiated settlement. Sometimes these developers have reached an impasse with the city on other existing projects and a Builder's Remedy is seen as a tool to break through the stalemate. On the other hand, many developers elect not to pursue Builder's Remedy projects, preferring to avoid the associated risks

[19] *Redondo Beach I.*

and potential delays, and/or preferring to avoid the strong opposition - both from the city and the public - that is often evoked by these projects.

The willingness of developers to continue pursuing these projects will depend, in part, on future litigation outcomes, especially the eventual appellate decisions, and on future legislative changes, including the potential amendments to the Housing Accountability Act discussed below.

PART FIVE: PROPOSED LEGISLATION - AB 1893

Assembly Bill 1893 (AB 1893) has been adopted by the legislature, signed into law by the Governor and takes legal effect on January 1, 2025.

The existing language of AB 1893 allows developers with pending Builder's Remedy applications to "opt in" to its provisions, meaning that developers with pending applications may also choose *not* to opt in. AB 1893 provides that the applicant for projects that were deemed complete on or before January 1, 2025 "may choose to be subject to the provisions of this section that were in place on the date the preliminary application was submitted." For purposes of the previous sentence, "deemed complete" means that a preliminary application was submitted, not that the City actually deemed the full application complete. Consequently, developers with pending Builder's Remedy applications at the time the bill takes effect could choose to be subject to the provisions of the HAA as they exist <u>now</u>, rather than being subject to the changes made by AB 1893.

AB 1893 makes the following changes to the Housing Accountability Act:

1. <u>Prohibit cities from requiring a general plan amendment or zone change for Builder's Remedy applications</u>. AB 1893 provides that a Builder's Remedy project shall not be required to apply for, or receive approval of, a general plan amendment, specific plan amendment, rezoning, or other legislative approval.

2. <u>Clarify that filing a preliminary application vests the Builder's Remedy</u>. AB 1893 resolves the current legal ambiguity about whether filing a preliminary application vests the Builder's Remedy. Specifically, AB 1893 (in concert with AB 1886, a related bill) amends the HAA to state that, for purposes of the Builder's Remedy, a housing element is only considered to be in substantial compliance with state law if it was in substantial compliance with state law *on the date that the preliminary application was submitted* or, if a preliminary application was not submitted, then on the date that a complete application was submitted.

3. <u>Establish site location requirements for Builder's Remedy projects</u>. AB 1893 provides that Builder's Remedy projects may not abut a site where more than one-third of the square footage on the site has been used within the past three years by a heavy industrial use or a Title V industrial use, as those terms are defined in Section 65913.16.

4. Establish base density caps for Builder's Remedy projects. The base density caps are based on multiple factors. Density, as calculated before the application of a density bonus, would be capped at the greater of the following:

    (I) Fifty percent greater than the minimum density deemed appropriate to accommodate housing for that jurisdiction as specified in subparagraph (B) of paragraph (3) of subdivision (c) of Section 65583.2.
    (II) Three times the density allowed by the general plan, zoning ordinance, or state law, whichever is greater.
    (III) The density that is consistent with the density specified in the housing element.

    Furthermore, projects receive an additional 35 dwelling units per acre if any part of the site is located within 1/2 mile from a major transit stop, within a very low vehicle travel area, or within a high or highest resource census tract.

    AB 1893 provides that this density can be used as the base density for a density bonus. Consequently, the ultimate density of a Builder's Remedy project could be up to two times the base density allowed under AB 1893 if the developer seeks a 100% density bonus under Government Code Section 65915(v) and includes the required number of affordable units.

5. Establish a minimum density requirement. AB 1893 provides that the density of the project shall not be less the minimum density required on the site if the site (a) has a minimum density requirement and (b) is located within one-half mile of a commuter rail station or a heavy rail station. On all other sites with a minimum density requirement, the density of the project shall not be less than the local government's minimum density or one-half of the minimum density deemed appropriate to accommodate housing for that jurisdiction as specified in Government Code Section 65583.2(c)(3)(B), whichever is lower.

6. Clarify what development standards apply to a Builder's Remedy project. Under AB 1893, a city may require the project to comply with the objective development standards that apply in a general plan designation and zoning classification that allows the density and unit type[20] proposed by the applicant, or if no such zone exists, then the applicant may identify any objective, quantifiable, written development standards, conditions, and policies associated with a different general plan designation or zoning classification within that jurisdiction, that facilitate the project's density and unit type, and those shall apply. The project would also be allowed to request incentives and concessions, waivers of development standards, and reduced parking ratios under density bonus law.

[20] "Unit type" means the form of ownership and the kind of residential unit, including, but not limited to, single-family detached, single-family attached, for-sale, rental, multifamily, townhouse, condominium, apartment, manufactured homes and mobile homes, factory-built housing, and residential hotel.

7. Change the affordability requirements for a Builder's Remedy project. Current law requires a Builder's Remedy project to either restrict 20% of the total units for lower income households or 100% of the total units for moderate income households. Under AB 1893, a Builder's Remedy project would have the following options: (a) 100% of total units for lower income or moderate-income households; (b) 7% of total units for extremely low-income households; (c) 10% of total units for very low-income households; or (d) 13% of total units for lower income households. Under AB 1893, "total units" excludes any units added by a density bonus. Affordable units in the Builder's Remedy project must have a comparable bedroom and bathroom count as the market rate units.

   Additionally, a project must still provide sufficient units to meet any relevant requested density bonus. Furthermore, a city can also require the project to comply with a local inclusionary housing requirement so long as it does not require that more than 20% of units be affordable; however, the city can only require this if it makes a finding that requiring compliance with the inclusionary housing ordinance will not render the project infeasible.

8. Provide two additional incentives/concessions to Builder's Remedy projects. AB 1893 provides that a Builder's Remedy project that qualifies for a density bonus under state density bonus law shall receive two incentives or concessions in addition to those granted by state density bonus law. This means, for example, that if a Builder's Remedy project restricted 15% of its base units for very low-income households, then it would be entitled to 3 incentives/concessions under state density bonus law (Government Code Section 65915(d)(2)(C)), and an additional 2 incentives/concessions under the HAA, for a total of 5 incentives/concessions.

9. Provide an additional density bonus and other benefits for a Builder's Remedy project that includes units for extremely low-income households. AB 1893 provides that a Builder's Remedy project that dedicates at least 7% of its units to extremely low-income households shall be eligible for the same density bonus, incentives or concessions, and waivers or reductions of development standards as provided to a housing development project that dedicates three percentage points more units to very low-income households under state density bonus law. For example, if a project dedicated 7% of its units to extremely low-income households, then it would be entitled to the same benefits provided by state density bonus law to a project that dedicated 10% of its units to very low-income households.

10. Clarify that a Builder's Remedy project can be combined with SB 35. AB 1893 provides that a Builder's Remedy project shall be deemed to comply with the local agency's objective zoning standards, objective subdivision standards, and objective design review standards for purposes of SB 35 (Government Code Section 65913.4). This would entitle the project to streamlined processing and

an exemption from CEQA, provided the project is located in a jurisdiction that is subject to SB 35, and the project otherwise complies with SB 35.

11. Add to the list of city actions that constitute "disapproval" of the project. In addition to the current definition of "disapproval," AB 1893 provides that disapproval of a project would include the following: (a) failing to cease a course of conduct that effectively disapproves the project, subject to certain procedural requirements; (b) violating the 5-hearing rule under Government Code Section 65905.5; (c) violating provisions of the Permit Streamlining Act related to determining that the project application is complete; (d) requiring the project to obtain a general plan, specific plan, or zoning amendment, or imposing a requirement that applies to the project solely or partially on the basis that the project is a Builder's Remedy project; and (e) determining that a preliminary application has expired in violation of Government Code Section 65941.1.

In summary, from a developer's standpoint, AB 1893 attempts to strike a balance by reining in Builder's Remedy projects to an extent but also clarifying currently unsettled legal issues and pushing back against some of the tactics cities have used to delay and frustrate these projects. From a local government standpoint, the bill allows enormous densities in many single-family areas (70 to 80 units/acre base density, which can be doubled), places no limits on heights or density bonus waivers, and eliminates the one benefit to cities: the 20 percent lower income requirement. Combined with AB 1886, it also makes HCD all-powerful, in that if HCD decertifies a community's housing element, it subjects the local government to the builder's remedy. In the end, the bill will likely expand the universe of developers who are willing to pursue these projects since it brings the Builder's Remedy process more in line with familiar development tools, such as state density bonus law. It is unlikely, however, that this bill will resolve all issues and questions surrounding the Builder's Remedy.

SUMMARY OF RECENT TRIAL COURT DECISIONS REGARDING STATE HOUSING LAWS

Builder's Remedy and Housing Element Adequacy

Californians for Homeownership, Inc. v. City of La Canada-Flintridge (July 2023): Found that adequacy of site methodology was a matter for trial. City ordered to complete rezonings. Didn't reach decision regarding builder's remedy because no real project; CFH did not have standing. On appeal. *(La Canada I)*

Californians for Homeownership, Inc. v. City of Beverly Hills (September 2023): Found City's site inventory inadequate. Seems to require site by site review. (Appeal dismissed by City after HCD approved revised housing element.) *(Beverly Hills)*

New Commune DTLA LLC v. City of Redondo Beach (October 2023): Found voter approval not needed for zoning changes required by housing element because preempted by state law.

Found housing element site inventory adequate. Found housing element adequate when adopted, not when HCD found adequate. On appeal. *(Redondo Beach I)*

New Commune DTLA LLC v City of Redondo Beach (February 2024): Found developer entitled to builder's remedy because housing element not approved by HCD when preliminary application submitted. However, could not be approved because inconsistent with local coastal plan. Appeal dismissed. *(Redondo Beach II)*

California Housing Defense Fund v. City of La Canada-Flintridge (600 Foothill Owner LP as RPI) (March 2024): Court independently reviewed adequacy of housing element and determined it didn't comply, so City subject to builder's remedy. Ordered City to process project and complete CEQA. (Applicant reportedly is refusing to submit to deposit funds for EIR because views EIR as an obstacle to development.) On appeal. *(La Canada II)*

Jha v. City of Los Angeles (March 2024) (decision on demurrer): City is subject to builder's remedy until HCD approves housing element. *(Jha I)*

Californians for Homeownership v. City of La Habra (June 2024): Court agreed that changes made to housing element after adoption were "non-substantial changes" authorized by City Council. On appeal.

Jha v. City of Los Angeles (July 2024) (decision on writ): Evaluated City's review of builder's remedy project. Held preliminary applications remain valid so long as applicant keeps resubmitting within 90 days of every completeness letter. City could not keep demanding that applicant comply with zoning or other requirements or apply for zoning amendments for application to be complete. Found that decision on completeness was a disapproval because it required modifications to conform with zoning and general plan; decision was also a violation of HAA because City didn't make disapproval findings. *(Jha II)*

Conjunction Junction LLC v. City of Rancho Palos Verde (August 2024). City demurrer regarding builder's remedy project upheld with leave to amend because of numerous deficiencies: action not ripe; did not allege project was a housing development project; did not adequately allege deficient housing element. Court held that court, not HCD, determines element adequacy. *(Rancho Palos Verde)*

HAA Claims

NRF Project Owner LLC v. City of Oceanside (May 2021): held that referendum overturning approval of a 585-unit project violated the Housing Crisis Act's moratorium provisions (weird reasoning). Appeal later dismissed.

JM Squared Development v. City of Simi Valley (May 2021): Court held that an assisted living project where no units included kitchens was a "housing development project" under the HAA. Not appealed.

CaRLA v. City of Huntington Beach (October 2021): Court held City violated the HAA in denying project because standards not objective, there was substantial evidence that the project was consistent, and preponderance of the evidence did not support the "specific adverse impact" finding. [Interesting twist that project not "deemed consistent" even though City had missed deadline for finding inconsistencies. Other courts disagree with this conclusion.] Appeals dismissed by parties.

YIMBY v. City of Los Angeles (July 2022): Court held City did not respond to resubmittal within 30 days and also did not provide written response to appeal within 60 days, so application "deemed complete." City also refused to accept preliminary application, violating HAA. Also found that LA General Plan and zoning inconsistent, so no zoning amendment needed, and City violated HAA. (60-unit building in single-family zone.) Found bad faith and ordered City to approve project. Although the City's position on the zoning/GP consistency was upheld by the Court of Appeal in *Snowball West Investments v City of LA,* LA could not appeal because Court set very high bond (at least eight figures).

TNHC Canyon Oaks LLC v. City of Calabasas (November 2023): City's denial of project violated HAA because standards were not objective and many were not applicable, and preponderance of the evidence did not support "specific health & safety" finding (EIR disagreed with finding). City could not use failure to make CEQA override finding to deny project if it could not make "specific health & safety" finding. Also found City acted in bad faith and ordered city to approve project. No appeal filed.

SB 9 and Charter Cities

City of Redondo Beach v. Bonta (April 2024): SB 9 does not apply to charter cities. Narrow opinion. AG has appealed.

Cases Filed

Californians for Homeownership v. City of Beverly Hills: Beverly Hills found builder's remedy application incomplete because did not include applications for general plan and zoning, following direction in HCD's Compton letter. HCD changed its view before the hearing and said City could not require general plan and zoning applications.

Grand Santa Barbara LLC v. City of Santa Barbara: Applicant for builder's remedy project did not bother appealing City's extensive notice of incompleteness. Instead alleges that City cannot require any items unrelated to findings in Section 65589.5(d)(5).

Housing Advocacy Committee v. City of San Mateo: Challenges site inventory in HCD-approved housing element to require individual analysis of sites rather than use of generally applicable methodology.

Lazier v. City of Del Mar: Applicant for builder's remedy project alleges City has failed to process project and effective denial under the HAA. Project is in the coastal zone and does not comply with the City's CDP.

Legacy Point v. City of Industry: City found preliminary application did not contain all required information and project application was not completed within required time period, so project not eligible for builder's remedy. Challenged under HAA (PSA not mentioned).

Gandolfi Investments LLC v City of Gilroy: City asserted housing element was adequate when preliminary application was filed, and application incomplete because rezoning and general plan amendment required.

BEYOND THE OATH:

Recommendations for Improving Civility

Initial Report of the California Civility Task Force

A joint project of the California Lawyers Association and the California Judges Association

September 2021

Introduction

In 2014, the California Supreme Court—at the recommendation of the State Bar of California Board of Trustees—took a significant step aimed at improving civility among California lawyers. It adopted what is now Rule 9.7 of the California Rules of Court, adding new language to the attorney oath of admission. The new rule required anyone thereafter admitted to practice law in the Golden State to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The change resulted from an admirable effort by the American Board of Trial Advocates (ABOTA) and its allies to inspire greater focus on civility and professionalism by convincing states to add civility language to their oaths. Pat Kelly, then Chair of the State Bar Board of Trustees and now a member of this task force, drafted the language and shepherded the effort in California. The hope was and is that the oath's aspirational language would influence new lawyers to embrace civility.

The changed oath signaled a renewed commitment to civility by the legal profession. But while the commitment remains, incivility persists. Most lawyers entered the profession before 2014 and have never taken the oath. And many who have taken the oath seem to have forgotten their promise. In an era marked by coarseness and political division, the legal profession suffers from a scourge of incivility. Discourtesy, hostility, intemperance, and other unprofessional conduct prolong litigation, making it more expensive for the litigants and the court system. Moreover, incivility among lawyers extends beyond litigation, interfering with, if not derailing, transactions of every kind. It can create toxic workplaces. And unfortunately, young lawyers, women lawyers, lawyers of color, and lawyers from other marginalized groups are disproportionately on the receiving end.

The time has come for remedial action beyond the oath. This report sets forth four concrete, realistic, achievable, and powerful proposals to improve civility in California's legal profession. Through this initial report, the California Civility Task Force asks its sponsoring organizations, the California Lawyers Association (CLA) and the California Judges Association (CJA), to endorse

these proposals and join in asking the State Bar and Supreme Court to implement them.

1. Require one hour of MCLE devoted to civility training, included in the total number of MCLE hours currently required. Approved civility MCLE programs should highlight the link between bias and incivility and urge lawyers to eliminate bias-driven incivility.
2. Provide training to judges on the need to both curtail incivility and model civility, both inside and outside the courtroom, explaining the tools available to them to do so.
3. Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation; and
4. Require *all* lawyers, not just those who took the oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

The California Civility Task Force

The California Civility Task Force is a joint project of the CLA and CJA. It consists of approximately 40 leading lawyers and judges from across the state, all committed to fairness, justice, and the improvement of the legal profession. A list of members, with biographical information, is attached as Appendix 1.

The task force is sui generis, having arisen from grass-roots concern about incivility and having been embraced by the State Bar of California, CLA, and CJA.

In 2019, leaders of the Association of Business Trial Lawyers (ABTL) from across the state gathered for a weekend retreat. More than one hundred prominent judges and lawyers spent several hours addressing incivility and possible responses to it, in a wide-ranging discussion moderated by Court of Appeal Justice Brian Currey.

Not content merely to talk about incivility, the participants resolved to do something about it. First, the Los Angeles ABTL chapter published a summary of the discussion and a collection of articles growing out of it. A copy is attached as Appendix 2. Second, on behalf of this group, Justice Currey approached Alan Steinbrecher, then Chair of the Board of Trustees of the State Bar, to inquire about the possibility of implementing one of the group's proposed solutions: designating one hour of the existing MCLE requirement for civility training. Steinbrecher's response was to appoint Justice Currey as Chair of this task force, and request that Justice Currey assemble a talented and diverse group of judges and lawyers, examine the issues, and return with a series of proposals. He also designated Brandon Stallings, a member of the State Bar Board of Trustees, to serve as Vice Chair of the task force. At the suggestion of Steinbrecher's successor, Sean SeLegue, and with enthusiastic support from their respective leadership, responsibility for the task force later shifted from the State Bar to CLA and CJA. Both organizations added additional members to the task force, and Heather Rosing, who served as the first president of CLA, was named a Vice Chair of the task force.

The members of the task force wish to express their gratitude to the State Bar, CLA, and CJA for their support of the task force and demonstrated interest in improving civility in California.

The Need to Readdress Incivility

Thirty years ago, dealing with a case whose very existence it attributed to a "fit of pique between counsel," the First District Court of Appeal addressed this entreaty to California lawyers: "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the

slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641.

What's happened since? Despite repeated calls for course correction from every corner of the profession, incivility has only increased. Bullying, intimidation, and nastiness have too often replaced discussion, negotiation and skillful, hard-fought advocacy. We have reached the point where it has become increasingly necessary to remind some of our number that "Objectifying or demeaning a member of the profession, especially when based on gender, race, sexual preference, gender identity, or other such characteristics, is uncivil and unacceptable." (*Briganti v. Chow* (2019) 42 Cal.App.5th 504.)

"The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are." (*In re Mahoney (2021)* 65 Cal.App.5th 376.)

We are professionals. We are officers of the court. We are governed by Rules of Professional Conduct, or in the case of judges, Canons of Ethics. We are not just vendors or suppliers who come into the court to do business; we are justice's lifeblood. The judicial system is not a collection of buildings, it's a collection of people and principles. And we have been entrusted with its safekeeping. The problems and conflicts with which we deal—like those encountered by our fellow professionals in medicine and science and engineering—are too important to be obscured and marginalized by aggression and chicanery.

We know this. And the courts have been trying for decades to get us to address it. "'[T]he necessity for civility is relevant to lawyers because they are the living exemplars—and thus teachers—every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.'" (*Lasalle v. Vogel*, (2019) 36 Cal.App.5th 127, 141, quoting Chief Justice Warren E. Burger, The Necessity for Civility (Address to the

American Law Institute), 52 F.R.D. 211.) Now is the time for us to live up to our responsibility as exemplars.

Civility matters not simply because lawyers are examples to others on how to engage competing ideas and interests. It matters because our system of justice simply cannot function fairly and reliably with systemic incivility. In a 2020 Gallup Poll, a meager 21% of respondents rated lawyers as having very high/high honesty and ethical standards.[1] The perceived incivility between lawyers and between lawyers and judges, as often portrayed in the media, is a significant driver in the poor perception of lawyer honesty and professionalism. Why does this perception matter? Because a populace that does not perceive lawyers—who are the gateway to accessing justice—to be honest and ethical translates to a populace that does not trust its legal system. Lawyers are the last line of defense for the Rule of Law, the sine qua non of the freedoms we hold so dear. If we lose the trust of our colleagues and our fellow citizens, we put those freedoms at risk.

We also owe it to ourselves as human beings. Ours is an exceptionally stressful profession. At its best, it can take a toll on the individuals who practice it, and what we're seeing today is not the profession at its best. According to a recent study by the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation, nearly 21% of lawyers are problem drinkers and over 36% *admit to* struggling with alcoholism. Another 9% *admit to* prescription drug abuse. Another study shows 28% fighting depression. A working environment described by one court as "rife with cynicism, awash in incivility" (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293) will continue to exacerbate these numbers if we don't take steps to ameliorate them. We deserve better for ourselves and our loved ones.

We are professionals, and "[c]ivil behavior is a core element of attorney professionalism. As the guardians of the Rule of Law that defines the American social and political fabric, lawyers should embody civility in all

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1 (https://news.gallup.com/poll/328136/ethics-ratings-rise-medical-workers-teachers.aspx.)

they do. Not only do lawyers serve as representatives of their clients, they serve as officers of the legal system and public citizens having special responsibility for the quality of justice. To fulfill these overarching and overlapping roles, lawyers must make civility their professional standard and ideal." (J. Reardon, *Civility as the Core of Professionalism,* Business Law Today, September 2014 (ABA Business Law Section).)

Our system of justice requires lawyers to exercise honesty, integrity and accountability, without which, the system will fail. In a 2014 survey of Illinois lawyers (, 85% of respondents reported experiencing some instance of uncivil or unprofessional behavior within 6 months of the survey. Examples included playing hardball (such as not agreeing to reasonable requests for extensions); inflammatory writings; and—reported by over 16% of respondents—misrepresenting or stretching the facts or negotiating in bad faith.[2] All are counter to the dictates of our professional conduct rules.

Whether in litigation or a transactional context, our adversarial system requires zealous representation. But an adversarial system should not be confused with an acrimonious one. Zealous representation in an adversarial system still necessitates objective analysis, active listening to the other side's position to best address adversarial points and the need to focus on the ultimate goal of the system, which is the resolution of issues. As Jayne Reardon, Executive Director of the Illinois Supreme Court Commission on Professionalism, observed, "research conclusively bears out, (1) civil lawyers are more effective and achieve better outcomes . . . " and ". . . clients evaluate a lawyer who exhibits civility and professionalism as a more effective lawyer." *Civility as the Core of Professionalism, supra.*

In contrast, rampant incivility leads to an inability to analyze cases and legal positions because incivility clouds meaningful analysis. Incivility breeds a lack of self-responsibility. Incivility erodes adherence to an honor system. And most critically, incivility justifies unfounded vilification of others

2 (https://2hla47293e2hberdu2chdy71-wpengine.netdna-ssl.com/wp-content/uploads/2015/04/Study-of-Illinois-Lawyers-2014.pdf)

Understanding that it is such a critical component of effective advocacy, how can civility be promoted among lawyers? The attorney oath is a good start; but it's only a start. Civility takes effort and training. Promising to be civil without a continuous reminder of the promise allows the promise to fade. We are convinced that the initiatives we have laid out in this report will start us back onto the high road on which our practice should travel.

Restoring civility will not be easy, but it must be done. And soon. Every generation of uncivil lawyers teaches incivility to the next. We must act now, and act decisively. "If this be quixotic, so be it; Rocinante is saddled up and we are prepared to tilt at this windmill for as long as it takes." (*Kim v. Westmoore Partners*, *supra*, 201 Cal.App.4th 267, 293.)

Proposals of the California Civility Task Force

Proposal 1: Ask the State Bar Board of Trustees to mandate one hour of civility MCLE training (without increasing total MCLE hours). Some portion of the civility training should be devoted to making the profession more welcoming to underrepresented groups by addressing the link between incivility and bias.

Our first proposal is to ask the State Bar Board of Trustees to amend State Bar Rule 2.72 (which contains MCLE requirements) to require, as a part of the existing total MCLE hours required, one hour of civility training. For most lawyers, a total of twenty-five hours is required during each MCLE compliance period. Of the required hours, at least four must be devoted to legal ethics, at least one must deal with recognition and elimination of bias in the legal profession, and at least one must address substance abuse or other mental or physical issues that impair a lawyer's ability to provide competent legal service. Our proposal would *not* increase the total number of hours required. Instead, it would require that at least one of the existing required hours be devoted to civility.

The goal is to promote courtesy, integrity, and professionalism in the bar. We believe mandatory MCLE civility programs could and should educate

attorneys about the economic and human costs of incivility; provide lawyers with reasons and tools to change their own behavior if they are uncivil; teach lawyers how to help those who are uncivil change their behavior; help lawyers deal with stress and dissatisfaction caused by toxic uncivil behavior; and reduce bias-driven incivility.

Voluntary continuing legal education programs on civility already exist, of course. The problem is that attendees are self-selected: Those most committed to civility (including those who have been victimized by incivility) are the most likely to attend. Thus, these courses tend to "preach to the choir." Making civility education mandatory would bring those who need education the most into the tent. All attendees would be able to reflect on their own behavior, and become empowered to make necessary improvements.

Task force members have reviewed existing civility programs available online. Some programs are decidedly better than others. We envision that mandating civility education would spur the creation of excellent new programming on the topic by California MCLE providers. To aid in that effort, we have provided the following additional resources. Appendix 3 includes a list of California cases dealing with civility and a summary of key cases. Appendix 4 contains a table and memorandum identifying and describing some individuals who have expertise in workplace incivility generally (i.e., not limited to the legal profession). It also includes a list of some individuals who have written or spoken about incivility. The listings do not purport to be exhaustive, and the mere fact that a name is listed does not imply that the task force endorses that person's views. Appendix 5 describes referral and dispute resolution techniques that have been employed in other jurisdictions to resolve disputes among lawyers, and in private and public organizations to resolve disputes among employees. Although we are not currently recommending that California adopt such a program, the idea warrants further study.

The amended MCLE rule should specify that some portion of civility training must be devoted to addressing the link between incivility and bias. If our profession is serious about increasing diversity and embracing justice, it must

reduce incivility directed at attorneys who come from underrepresented groups. Doing so would be consistent with the State Bar's Strategic Plan, which includes (as part of Goal 4 of that plan) promotion of "policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves." Appendix 6 is a memorandum authored by task force members exploring bias-driven incivility in the legal profession. An important article by Justice Lee Edmond and Judge Samantha Jessner entitled "Gender Equality is Part of the Civility Issue" is included in Appendix 2. These resources could be used as starting points for programming on this topic.

The task force is grateful that the State Bar already requires at least two hours of MCLE dealing with the recognition and elimination of bias in the legal profession and society, including one hour focusing on implicit bias and the promotion of bias-reducing strategies. We believe that melding the topics of incivility and bias, as we have proposed, would be a powerful tool to accomplishing our collective goal of a more open and welcoming profession.

The task force considered whether the mandatory civility MCLE requirement should be limited to lawyers who practice in a litigation environment. Based on anecdotal reports, however, we have concluded that lawyers in non-litigation practices also encounter incivility, including bias-driven incivility. We therefore believe it would be appropriate to require civility MCLE training for all lawyers.

Proposal 2: Ask the Chief Justice, as head of the Judicial Council, and the Center for Judicial Education and Research Advisory Committee (CJER) to provide specific training to judges on promoting civility inside and outside courtrooms. CJA should commit to do the same.

The task force believes judges can and should play a critical role in improving courtesy, integrity, and professionalism among lawyers. Judges can and often do serve as civility role models. These judges set the stage for improved civility by making clear that civility and professionalism are expected norms both inside and outside the courtroom. The profession would benefit from new

training programs designed to arm judges with tools to have a greater impact on promoting civility among lawyers.

Judges receive training and continuing judicial education from multiple sources. For example, new judges attend New Judge Orientation and later attend Judicial College. All judges are required to complete specified hours of continuing judicial education. Some continuing judicial education is provided through the Center for Judicial Education and Research Advisory Committee (CJER). CJA is another significant provider of excellent judicial education programs. Judges also attend other judicial education programs and MCLE programs. And of course, judges frequently teach continuing education programs for other judges and lawyers.

The task force's second proposal is to have CLA and CJA ask the Chief Justice, as head of the Judicial Council, to ask CJER to develop and promote programs specifically designed to educate judges on the need both to model civility and to require civility and professionalism both in and out of the courtroom. We also ask CJA to commit to developing and promoting such programs. Task force members Judge Wendy Chang and Judge Stuart Rice are developing a new PowerPoint presentation on the topic. It can be adapted for use by other judges who are willing to present on the topic. The presentation is a work in progress and will be beta tested and refined. The current version is attached as Appendix 7. Also, Appendix 2 contains an article by Justice Currey and then Los Angeles County Superior Court Presiding Judge Kevin Brazile entitled "Seven Things Judges Can Do to Promote Civility Outside the Courtroom," and an article by Justice Lee Edmon and Judge Samantha Jessner entitled "Gender Equality is Part of the Civility Issue." The two articles could be used as a starting point for additional judicial education programs on promoting civility, and can be used as handouts at any such program.

Proposal 3: Ask the State Bar Board of Trustees to recommend to the Supreme Court revisions to the Rules of Professional Conduct to clarify that repeated incivility constitutes professional misconduct and that civility is not inconsistent with zealous advocacy.

Other states have provisions in their rules of professional conduct making clear that incivility is not required for zealous client representation. Some states also have rules specifying that incivility constitutes professional misconduct.

Our proposal for similar rules in California is contained Appendix 8.

We suggest several modifications to clarify that civility is consistent with zealous advocacy.

California already has a rule specifying "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d). One of our proposals would add a comment that a lawyer may violate this rule "by repeated incivility while engaged in the practice of law or related professional activities." The language is intended to preclude disciplinary proceedings based on an isolated incident of incivility or conduct unrelated to the profession. Our proposal defines "incivility" for purposes of the rules as "discourteous, abusive, harassing, or other significantly unprofessional conduct."

We are aware that making incivility a breach of the rules of professional conduct may be controversial in some circles. Some lawyers may have First Amendment concerns. Others may be concerned that a single misstep could land them in hot water with the State Bar. Our proposal should allay both concerns. Our task force members are ardent defenders of the First Amendment and have no interest in deterring lawyers from advocating controversial legal positions.

Similarly, we are open to adding further definitional language so lawyers can have clarity about what conduct is and is not prohibited. In *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, the Ninth Circuit concluded that

California Business & Professions Code §6068(f)'s admonition that lawyers should abstain from "offensive personality" was void for vagueness, but appeared to find no such problem with the phrase "conduct unbecoming a member of the bar." We are confident that a rule can be drafted that gives attorneys sufficient notice of what conduct violates the rule.

Another issue is the rules' scope—should they apply only when lawyers are representing clients, when they are acting in any professional capacity (including participating in bar association activities), or at all times? The current oath requires lawyers to pledge to strive to conduct themselves "at all times" with dignity, courtesy and integrity. We propose language limiting the rule's application to when the lawyer is practicing law or engaged in professional activities. Some might prefer a rule limited to when a lawyer is representing a client. We acknowledge reasonable minds may differ on this issue.

In any event, we view our proposal as a starting point. We would fully expect the State Bar rulemaking bodies to take public input, consider alternative language, and craft a rule that best serves the public and the profession. We look forward to assisting in that process.

We share the view that a single misstep or isolated outbreaks of incivility should not result in State Bar discipline, which is why our proposal only applies to "repeated incivility." Indeed, we hope the mere existence of a disciplinary rule prohibiting incivility will spur civility.

Finally, we suggest that the State Bar develop a diversion program that would allow those charged for the first time with repeated incivility to avoid disciplinary proceedings by completing a civility mentorship program that could be modeled after judicial demeanor mentorships. The lawyer being mentored would pay for any costs. Ideally, judges would also be able to refer lawyers to this program, and allow layers to complete the program in lieu of paying sanctions for incivility.

Proposal 4: Ask the Supreme Court to amend Rule of Court 9.7 to require all attorneys, when annually renewing their licenses to practice law, to swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

As noted above, since 2014, the California Rules of Court have required every lawyer newly admitted to practice in California to take an oath that includes a civility pledge: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." (Cal. Rules of Court, rule 9.7, enacted in 2013 as rule 9.4.) But incivility continues to plague the profession. Part of the problem is that most lawyers were admitted to practice before 2014 and have never taken the civility pledge. As one part of a multi-pronged response to incivility, the Civility Task Force recommends amending Rule 9.7 (or adding a new rule) to require all attorneys to take the civility pledge annually. For example, the rule could be amended to read:

Rule 9.7. Attorney Oath and Civility Pledge

(a) Oath required when admitted to practice law

In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

(b) Annual civility pledge

Each active licensed attorney must take or reaffirm the civility pledge described in subsection (a) of this rule each year when paying annual bar dues. The State Bar must adopt appropriate procedures to ensure compliance with this requirement.

(c) Failure to take or reaffirm annual civility pledge

Failure to take or reaffirm the civility pledge as required by this rule may result in [administrative suspension/involuntary inactive enrollment].

The procedure could be as simple as checking a box when renewing online or by mail.

We are all in this profession together, and all lawyers should take the aspirational civility pledge.

Conclusion

The time has come for our profession to take additional steps to promote civility. We have made four significant proposals and ask that our sponsoring organizations, CLA and CJA, adopt resolutions embracing them.

Task force members are committed to sharing these proposals with the legal community and engendering support for them. We also commit to working with the Supreme Court, the Judicial Council, the Judicial Council Rules Committee, the State Bar Board of Trustees, and the State Bar Committee on Professional Responsibility and Conduct to fine tune these proposals or consider others.

Thank you for your support of the task force and for considering our views.

Justice Brian S. Currey, Chair
On behalf of the
California Civility Task Force

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Appendix 1: Members of the California Civility Task Force

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Justice Brian S. Currey, Chair

Justice Currey is honored to serve on the California Court of Appeal, Second Appellate District. He praises his talented, distinguished, and cordial colleagues, top-notch staff, and the generally excellent quality of lawyers who practice before his court. Together they enable the court to exercise its duty to do justice in the wide variety of cases before it.

On the civility front, he chairs the California Civility Task Force, a joint project of the California Lawyers Association (CLA) and California Judges Association (CJA), in cooperation with the State Bar of California. He authored a leading case linking (and condemning) incivility and bias, *Briganti v. Chow*, 42 Cal.App.5th 504 (2019), and co-authored a key article outlining ways judges can encourage civility in the legal profession. *See* B. Currey & K. Brazille, "Seven Things Judges Can Do to Promote Civility Outside the Courtroom," Summer 2019 ABTL-LA Report 11, 12-13.

Governor Jerry Brown appointed him to the Court of Appeal in 2018. The Commission on Judicial Appointments unanimously confirmed his appointment after the JNE Commission bestowed an "exceptionally well qualified" rating. Prior to his appointment, he served *pro tem* in Divisions 1 and 3 of the Second District Court of Appeal.

Before his elevation to the Court of Appeal, he served four years as a Judge of the Los Angeles County Superior Court. His assignments included presiding over a misdemeanor criminal courtroom, handling a wide variety of cases as the only civil judge at the Compton Courthouse, and serving in the Complex Civil Litigation Court.

In 2010, Los Angeles Mayor Antonio Villaraigosa appointed him as Counsel to the Mayor, and later also Deputy Mayor for Economic and Business Policy. In those roles, he served on the Mayor's small executive team, and oversaw the City departments responsible for the airport, port, convention center, planning, building and safety, and other key functions. His time at City Hall gave him an insider's understanding of how government works and a deeper understanding of public policy issues facing the Golden State.

Before that, he spent nearly 30 years litigating complex cases at O'Melveny and Myers LLP, one of the state's oldest, largest, and most highly regarded law firms. He performed various roles, including Vice-Chair of the firm's award-winning litigation department. While at O'Melveny, he served on a *pro bono* basis as counsel to the Christopher Commission after the Rodney King incident, was a member of the Los Angeles County Bar Association's task force on criminal justice reform, and secured a Supreme Court victory

allowing the U.S. Census to more accurately count traditionally undercounted groups. His firm was honored for a pro bono program he helped create whereby its lawyers gained trial experience by serving as deputy prosecutors for several smaller cities. He also received an award from an environmental organization for his pro bono work in Southern California.

Justice Currey serves on the CJA Executive Committee and represents appellate judges on CJA's Executive Board. Before going on the bench, he served for many years on the Board of Trustees of the Los Angeles County Bar Association (LACBA) and the Executive Committee of LACBA's Litigation Section. He was a lawyer representative to the Ninth Circuit Judicial Conference, Chair of the Magistrate Judge Selection Committee for the Central District of California, and chaired LACBA's federal courts committee. He has been a member of ABTL-LA's Board and Judicial Advisory Committee. He is or has been a member of several other important professional associations. He speaks and writes on legal issues, and has taught at the USC Gould School of Law.

Justice Currey attended the University of California, Davis, where he was recognized as the outstanding male graduate, and the University of Virginia Law School, where he served on the editorial board of the *Virginia Law Review*.

In his spare time, he likes running, hiking, kayaking, fly-fishing, and enjoying life with family and friends. *Rev. 8.21.*

Heather L. Rosing, Vice Chair
Shareholder and CEO, Klinedinst Attorneys
Immediate Past President, California Lawyers Association

Heather L. Rosing is a Shareholder with Klinedinst PC, with five offices across the West. Ms. Rosing chairs the firm's Professional Liability and Ethics Department and serves as the newly elected CEO and President. Ms. Rosing litigates and tries complex malpractice and fraud cases, advises in the areas of ethics and risk management, and serves as an expert witness. In her decades of defending lawyers and other professionals, Ms. Rosing has numerous notable victories in legal malpractice cases in state court, federal court, and arbitration. She also defends judicial officers before the Commission on Judicial Performance. Well known for her advocacy and contributions to the profession, Ms. Rosing was one of 18 lawyers honored as "Lawyer of the Decade" by the Daily Journal in January 2021.

A certified specialist in legal malpractice and a former member of the ABA Standing Committee on Lawyers' Professional Liability, Ms. Rosing also served as an appointed advisor to the Rules Revision Commission of the State Bar of California, which recommended wholesale revisions to the Rules of Professional Conduct (adopted in large part by the California Supreme Court in 2018), and an appointed member of the Mandatory Insurance Working Group of the State Bar. She frequently speaks on a pro bono basis on issues pertaining to malpractice, ethics, and risk management across California and the country. Ms. Rosing was also appointed to serve as the co-vice chair of the Civility Task Force, which is a joint effort among the California Lawyers Association (CLA), the State Bar, and the California Judges Association (CJA). Ms. Rosing is also a member of the CJA's Judicial Fairness Coalition, which focuses on education about the judicial branch and the importance of judicial independence.

In 2018 and 2019, Ms. Rosing served as the inaugural President of the CLA, the largest statewide voluntary Bar Association in the country. During her tenure, she launched the organization with a focus on its 16 Sections, the California Young Lawyers Association, governmental affairs, bar relations, and initiatives in the areas of diversity, access to justice, and civics education. Under her leadership, CLA took over the Annual Meeting, which has brought together judges, lawyers, and organizations from across the State for several days of meetings for over 80 years. Ms. Rosing now is the President of the philanthropic sister organization of CLA, the California Lawyers Foundation (CLF). CLF is focused on supporting organizations, causes, and projects related the core CLA initiatives.

Previously, she served for four years on the State Bar of California's Board of Trustees as Vice-President, Treasurer, and Chairperson of the Regulations, Admissions, and Discipline Oversight Committee. A strong advocate for judicial and legal diversity, Ms. Rosing served as President of ChangeLawyers (formerly the California Bar Foundation), which awards pipeline grants, scholarships, and fellowships across the State. Ms. Rosing has served in leadership roles of many other organizations, including as President of the San Diego County Bar Association in 2008, where she launched a Diversity Fellowship Program, spearheaded a civility initiative, and founded a pro bono program to assist active duty servicemembers.

The recipient of numerous accolades, Ms. Rosing was recognized by the *Daily Journal* as Top Lawyer of the Decade in 2021 as well as Top 100 Lawyers in California (2018-2021). Best Lawyers recognized Ms. Rosing as Lawyer of the Year for 2022 in Legal Malpractice Law Defense. She also has been

frequently honored by *San Diego Super Lawyers*, including Top 25 Women San Diego Super Lawyers, Top 50 San Diego Super Lawyers, and Number 1 Attorney in San Diego County. Ms. Rosing was named Woman of Influence in Law 2021 by the *San Diego Business Journal* which previously honored her as CFO of the Year (2011, 2014, 2016). She is the recipient of the San Diego Law Library Foundation's Excellence in Public Service Award (2019), Fastcase 50 (2019), Earl B. Gilliam Bar Foundation's Corporate Commitment to Diversity Award (2016), Lawyer of the Year by the San Diego Defense Lawyers (2015), and the Exemplary Service Award by San Diego Volunteer Lawyer Program (2014).

Brandon Stallings, Vice Chair

Brandon Stallings is a Deputy District Attorney V at the Kern County District Attorney's Office. He is a Supreme Court appointee to the State Bar Board of Trustees and has served on the board for the past six years. He currently sits as chair of the Regulation and Discipline Committee which oversees the discipline, judiciary, probation and rehabilitation offices of the Bar. He has served as chair of the Audit Committee, chair of the Programs Committee, liaison to the Committee on Professional Responsibility and Conduct Committee during the rewriting of the Rules of Professional Conduct, Appointment Liaison, Member of the Ad Hoc Commission on the Discipline System and is Liaison to the Probation Department Re-design and Collaborative Justice Working Group. Mr. Stallings is former chair of the Young Lawyers Section of the Kern County Bar, Court Advisory Committee, former member of the Board of Directors for the Kern County Bar Association and presents at undergrad and law schools on legal ethics, professional responsibility, ethical issues facing prosecutors, overview of the criminal justice system, prison gangs and basic legal principles. He chairs the Mothers Against Drunk Driving Auxiliary Committee for Kern County and sits of the New Wine Church Board and advises on a committee addressing drug addiction programs administered by the church.

Tad Allan

Tad Allan is Of Counsel in O'Melveny & Myer's Los Angeles office, having recently retired following 32 years as a partner in the firm's Business Trial and Litigation Practice. His practice focused on automobile and aviation industry litigation, and he also played a leading role in many of the firm's large, highly visible trials.

In the automotive industry, Tad has extensive expertise in automotive dealer litigation, including dealer terminations and dealer network issues, class actions and general commercial litigation. Tad prevailed in more than a dozen trials for his automobile manufacturer clients, which included American Honda Motor Company, General Motors, and Ford Motor Co.

Tad also represented major airlines and aviation manufacturers in air crash cases, commercial litigation and in regulatory issues, such as FAA safety investigations. Among the airline and aviation industry companies Tad has represented are Atlantic Aviation, China Eastern Airlines, United Airlines, U.S. Airways, Alaska Airlines, Flying Tigers Airlines, Lockheed (now Lockheed Martin), and Sikorsky.

Outside of the automotive and aviation industries, Tad has played instrumental roles in many high-stakes trials. For example, Tad was a member of the trial team that obtained a defense jury verdict in a $12 billion antitrust case brought by Rambus, Inc. against the firm's client Hynix Semiconductor, Inc., a result that was hailed by the *Daily Journal* as one of the Top Defense Verdicts of 2011.

Tad served on the California State Bar's Commission on Judicial Nominees Evaluation from 2011-13. He also served in many leadership positions within O'Melveny for associate development, including training, work assignment and mentoring.

Illustrative Professional Experience

Guimei v. General Electric Co., 172 Cal. App. 4th 689 (2009) (case arising out of air crash in China properly stayed in favor of proceedings in China, on forum non conveniens grounds)

Daugherty v. American Honda Motor Co., Ltd., 144 Cal. App. 4th 824 (2006) (auto manufacturer not liable for defects that do not manifest within the warranty period)

In re Claremont Acquisition Corp., 186 B.R. 977 (C.D. Cal. 1995), aff'd, 113 F.3d 1029 (9th Cir. 1997) (GM's decision to reject a prospective dealer upheld since based on objective, performance-related criteria)

Woods v. Saturn Distribution Corp., 78 F.3d 424 (9th Cir. 1996) (award of arbitration panel consisting of Saturn employees and dealers enforced notwithstanding charge of "evident bias")

Education

George Washington University, J.D., 1981 University of California at Berkeley, B.A., 1976

Hon. Katherine A. Bacal,
Judge Bacal is the supervising judge of the San Diego Superior Court's civil division, where she also handles an independent calendar. In the past, Judge Bacal presided over family and criminal matters, including handling felony arraignments for two years in the Chula Vista courthouse.

Before being appointed to the bench by Governor Arnold Schwarzenegger in January 2008, Judge Bacal was a partner/principle at Baker & McKenzie LLP. She started her legal career at Gibson, Dunn & Crutcher LLC. Judge Bacal received her law degree from the University of Texas at Austin and her undergraduate degree from the University of Redlands, Johnston Center, where she graduated Phi Beta Kappa with a liberal arts degree.

Judge Bacal was the judicial liaison to the San Diego County Bar Association's Legal Ethics Committee for several years. She is also a member of the judicial advisory board of ABTL, San Diego and the current co-chair of its civility committee. Judge Bacal is also the chair of the San Diego Superior Court's local rules committee. Serving in all of these roles, Judge Bacal was on the subcommittee that proposed revised civility guidelines adopted by the SDCBA and included in the San Diego Superior Court's local rules. Judge Bacal is a member of the California Judges Association and has presented updates to its membership. She is also a long-time member of the Advisory Board of Lawyers Club of San Diego. Before being appointed to the bench, Judge Bacal was Lawyers Club's president and received Lawyers Club's Belva Lockwood Award in 2015. Judge Bacal is also a member of the Louis M. Welsh Chapter of the American Inns of Court (which focuses on professionalism, ethics and civility) and is a two-time former small-group leader.

Sarah J. Banola
Ms. Banola is the Founding Partner of BRB Law LLP. She

concentrates her practice in the areas of professional responsibility, regulatory law, and employment law. Her professional responsibility practice includes representing lawyers and law firms in matters related to legal ethics, legal negligence, attorney-client fee disputes, professional discipline, State Bar admission, and conflicts of interest. She is a member of the California Bar's Committee on Professional Responsibility and Conduct (COPRAC) and was appointed to serve as the Vice Chair of COPRAC for the

2021-2022 Committee year. Ms. Banola is a past chair and current member of the Bar Association of San Francisco's (BASF) Legal Ethics Committee, a Board member of the Conference of California Public Utility Counsel (CCPUC), and a member of Women in Public Utilities (WIPU) and California Lawyers Association's Civility Task Force. Ms. Banola is a frequent lecturer and author on the law governing lawyers. She serves as a contributing editor to the professional responsibility chapter of the California Practice Guide on Employment Litigation and the legal malpractice chapter of the California Practice Guide on Claims and Defenses, published by the Rutter Group. She has also moderated a panel on lawyer impairment for COPRAC's 24th Annual Statewide Ethics Symposium and presented on civility guidelines before BASF.

Kendra L. Basner

Kendra Basner is a partner at O'Rielly & Roche LLP. She is an experienced litigator and certified specialist in legal malpractice law. Ms. Basner devotes her practice to counseling and advising lawyers, law firms, in-house corporate counsel, legal service providers and related businesses concerning legal ethics, risk management, and law practice planning and compliance with the unique perspective gained through advocating on behalf of lawyers in civil cases and State Bar discipline matters. Ms. Basner also serves as a consultant and expert on legal malpractice matters and related litigation.

After beginning her legal career as a prosecutor, Ms. Basner was a partner at an Am Law 200 firm where she spent over a decade defending lawyers and other professionals in civil cases and disciplinary actions in addition to advising on legal ethics and risk management matters. She is certified as a specialist in legal malpractice law by the State Bar of California Board of Legal Specialization. Knowing and appreciating the true obstacles and risks that lawyers, law firms and legal services face allows Ms. Basner to target issues and streamline the solutions to minimize the risk of liability.

Ms. Basner is a thought leader in legal ethics and law firm risk management both in California and nationally. She frequently speaks at local, national and international events on topics related to legal ethics, legal services, legal malpractice and law firm compliance; and she regularly contributes to legal industry publications and resources. In November 2020, Ms. Basner published anarticle,"12 Steps to a Healthier Law Practice in 2020: Step 11– Actions Speak Louder Than Words" which addresses the state of civility in

California. A complete list of Ms. Basner's recent publications and presentations can be found at: https://oriellyroche.com/attorney/kendra-l-basner/

Ms. Basner holds membership and leadership roles in some of the legal industry's most important professional groups addressing the pressing issues that face law firms and legal services today, including serving as an Editorial Board member of the ABA/BNA Lawyer's Manual on Professional Conduct; a Board member and Future of Lawyering Committee member for the Association of Professional Responsibility Lawyers (APRL); a Fellow of the American Bar Foundation; a selected member of the California Lawyers Association's (CLA) Civility Task Force; a past member of the State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC); and a member of the Attorney Discipline Defense Counsel (ADDC).She is also a current member and the Immediate Past Chair of the Bar Association of San Francisco's (BASF) Legal Ethics Committee, for which she was honored with BASF's 2019 Award of Merit. Ms. Basner also previously served on the Ethics Committee for USA Lacrosse.

Justice William W. Bedsworth

Justice William W. Bedsworth is the longest serving justice in the history of the 4th District Court of Appeal, Division 3. His 24 years on the court have included many noteworthy opinions including *People v. Garcia* (2000) 77 Cal.App.4th 1269, the first gay rights precedent in California, which prompted the California legislature to change its law governing jury selection to bar peremptory challenges on the basis of sexual preference. He has also authored several civility precedents, most notably *Kim v. Westmoore Partners* (2012) 201 Cal.App.4th 267 and *Lasalle v. Vogel* (2019) 36 CalApp.5th 127, and is a frequent speaker on national and statewide civility panels. In 2017, the California Chapter of the American Board of Trial Advocates honored him by creating the William W. Bedsworth Judicial Civility Award.

A graduate of Loyola Marymount University and Berkeley Law, Justice Bedsworth serves on the Board of Visitors of UCI Law School. He served on the Board of Directors of the National Conference of Christians and Jews and was a principal in Fair Share 502 (a charity whose 10 members raised almost a million dollars for homeless children).

He was the Hispanic Bar Association's Judge of the Year in 1997, the Celtic Bar's Judge of the Year in 2012, and received the LGBT Lavender Bar Association's first Leadership Award in 2011. In 2015, he was given the

David G. Sills Award, the Orange County Bar Association's Lifetime Achievement Award for appellate law. He was the 2018 recipient of the Franklin G. West Award, the highest honor bestowed by the Orange County Bar Association.

In addition to law review articles, he has published in the lay press, most recently in Sierra and Coast magazines. His monthly humor column "A Criminal Waste of Space" is nationally syndicated, and self-described as the most aptly named feature of the dozen legal publications in which it appears. He has won several awards for it, including six from the California Newspaper Publishers Association. In 2019 he won the California Newspaper Publishers Association contest to identify the best newspaper column in California.

In 2010, he was chosen for one of George Mason University's coveted Green Bag awards – the two other winners in his category were Nina Totenberg of NPR and Jeffrey Toobin of *The New Yorker*. In 2019, his opinion in *Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, was chosen by Green Bag as the recipient of one of five awards nationwide for "exemplary legal writing."

In 2003, *The Times of London* gave him its Judicial Wisdom of the Year award for recognizing that "There is no non-culpable explanation for monkeys in your underpants." His third collection of legal humor, *Lawyers, Gubs and Monkeys*, was published by Van de Plas Publishing in 2017.
Justice Bedsworth lives with his wife Kelly and their surfeit of cats in Laguna Beach, California. He worked as a National Hockey League goal judge for 15 years (he proudly wears a 2007 Stanley Cup ring) and was the subject of a story in *ESPN The Magazine* entitled "Justice of the Crease."

Michelle L Burton

Michelle Burton is an owner and the Managing Partner of Burton Kelley LLP, a women owned, civil litigation firm specializing in complex insurance coverage, bad faith defense, insurance defense, professional liability, regulatory compliance, and construction defect. Ms. Burton has obtained numerous jury trial defense verdicts for her clients against multi-million dollar claims throughout California. In addition to her trial practice, Ms. Burton is a Certified Appellate Specialist and has authored and argued numerous writs and appeals addressing insurance-related matters. She has mediated, negotiated and resolved thousands of property claims throughout California and Washington.

Ms. Burton frequently provides webinars on claims handling, coverage issues and litigation strategies. Ms. Burton has been a speaker at the DRI on emerging coverage issues for the Cannabis industry. The Combined Claims Conference on Property Appraisals and the ABTL on jury selection and use of technology in the court room. Ms. Burton has served as the President of the San Diego Chapter of the Association of Business Trial Lawyers (2018) where she started a Civility Committee to restore civility in the practice of law. The Civility Committee was expanded to all ABTL Chapters and became a statewide mission with collaboration between the bench and the bar. Ms. Burton is one of the ABTL representatives on the State-Wide Civility Task Force. She has been recognized as a Lawyer of Distinction in Civil Litigation (2015-2020), Super Lawyer (2018-2021), AVVO Top-Rated Lawyer (2018-2021) and in *Lawyer Monthly's* Women in Law Awards (2018). She is also a Fellow of the American Bar Foundation, for her commitment to the legal profession and her community. Ms. Burton was also President of Run Women Run for 10 years, a political action committee devoted to the mentorship and advancement of women in politics.

Ms. Burton obtained her B.S. degree from San Diego State University and her law degree from California Western School of Law. Ms. Burton is licensed in California and Washington.

Judge Wendy Chang

Judge Wendy Chang is a Judge of the Los Angeles Superior Court, assigned to an unlimited civil Independent Calendar courtroom. She was appointed by Governor Brown.

Prior to her appointment, Judge Chang was a leading national voice in the law governing lawyers, focusing her practice on the representation and counseling of lawyers and law firms, and having been a frequent national and local speaker and author on the subject. She was a certified specialist in legal malpractice law by the State Bar of California. She currently serves as a member of the State Bar of California State Bar's working group on Closing the Justice Gap and the 2021 California Lawyers Association Civility Task Force. Judge Chang previously served as a member of the State Bar of California's Task Force on Access Through Innovation of Legal Services,1 as an advisor to the State Bar of California's Commission for the Revision of the Rules of Professional Conduct (II) and also as Chair the State Bar of California's Standing Committee on Professional Responsibility and Conduct. She also served on the American Bar Association's Standing Committee on

Ethics and Professional Responsibility and on Los Angeles County Bar Association's (LACBA) Professional Responsibility and Ethics Committee. Judge Chang is a co-chair of the National Asian Pacific American Bar Association's Judiciary & Executive Nominations and Appointments Committee, and has served in that capacity since 2007. Ms. Chang served on LACBA's State Appellate Judicial Evaluation Committee for 6 years, and is former chair of the Appointive Office committee for the Women Lawyers Association of Los Angeles. She is a former member of the Board of the National Association of Women Lawyers, and a former president of the Southern California Chinese Lawyers Association. Judge Chang was also a contributing editor to Ronald E. Mallen "Legal Malpractice" treatises (2018 edition), published by Thomson Reuters.

Judge Chang received her juris doctor from Loyola Law School, Los Angeles, and her bachelor's degree from the University of California Los Angeles.

David Carr

David C. Carr, an attorney in private practice in San Diego, California, specializes in ethics advice to lawyers, California State Bar discipline defense, and attorney licensing.

Mr. Carr is a 1986 graduate of Loyola Law School in Los Angeles. Following several years of practice in commercial law and business litigation, Mr. Carr joined the State Bar of California as a staff attorney in 1989. He served as counsel to the State Bar's audit and review panel from 1989 to 1992. Mr. Carr served on the National Organization of Bar Counsel's advisory committee to the American Bar Association's McKay Commission on discipline enforcement in 1991.

He moved from oversight of the discipline system in 1992 to prosecuting cases as a deputy trial counsel in the discipline prosecutor's office of the State Bar. After five years trying discipline, admissions and reinstatement cases before the State Bar Court Hearing Department, Mr. Carr began to specialize in appellate advocacy before the State Bar Court's Review Department, resulting in 10 published decisions between 1997 and 2000.

During the shutdown of the State Bar in 1998 after former Gov. Pete Wilson's veto of the State Bar dues bill, Mr. Carr worked as an unpaid volunteer in the discipline system. He argued as amicus counsel to the California Supreme Court that a special master be appointed to oversee discipline

system spending, an idea adopted by the Supreme Court in its decision reviving the discipline system (In re Attorney Discipline System (1998) 19 Cal.4th 582.)

After the Supreme Court ordered a special dues assessment, Mr. Carr became an assistant chief trial counsel and manager of the general trials unit in Los Angeles in 1999. He also worked on discipline policy issues as the chief trial counsel's liaison with the State Bar's Committee on Professional Responsibility and Conduct (COPRAC) and the State Bar Court Executive Committee.

Mr. Carr returned to private practice in 2001 and his hometown of San Diego in 2002. He is a member of the San Diego County Bar Association, where he is active on the Legal Ethics Committee. Mr. Carr is a member of the Association of Professional Responsibility Lawyers (APRL), the ABA Center for Professional Responsibility, and the Association of Discipline Defense Counsel (ADDC), where he served as president from 2008 through 2011. He is also a member of COPRAC for the 2018-2021 term. As an adjunct faculty member, Mr. Carr has taught responsibility at the Thomas Jefferson School of Law in San Diego.

Mr. Carr grew up in the South Bay suburbs of San Diego and attended high school in the small desert community of Borrego Springs. After high school, he attended UCLA, where he graduated with a degree in history in 1978.

Judge Linda H. Colfax

Judge Linda H. Colfax, a San Francisco Superior Court Judge since 2011, currently sits in the criminal division of the court, supervises the preliminary hearing courts, and presides over serious preliminary hearings. Judge Colfax has also served as a juvenile court judge and family court judge, has presided over both civil and criminal trials, and served on her court's appellate panel for three years. and Executive Committee for 4 years.

Currently, Judge Colfax is a Vice President of the California Judges Association (CJA), a co-chair of the LGBT Judicial Officers of California (LGBT-JOC), a co-chair of CJA's Task Force on the Elimination of Bias and Inequality, and an active board member of the International Association of LGBTQ Judges.

Judge Colfax believes local service and involvement is equally important. She serves on the San Francisco Superior Court's Executive Committee, co-teaches the Bench Demeanor Training for temporary judges, serves as San

Francisco Superior Court's co-coordinator for the Judicial Council's Judges in the Classroom program, and has volunteered to mentor those seeking appointment to the bench both through her local court and the LGBT-JOC.

Prior to her election to the San Francisco bench, Judge Colfax worked as a San Francisco deputy public defender. Judge Colfax earned her A.B. from Harvard and her J.D. from the University of Michigan. While attending Michigan, Judge Colfax was one of the founding members of the Michigan Journal of Race and Law and served as an Articles Editor.

Outside of the legal world, Judge Colfax most enjoys spending time with her wife and 2 young adult children and friends, traveling, biking, walking her dogs, rock climbing or gardening.

Judge David J. Cowan

Judge David J. Cowan is Supervising Judge of the Civil Division of the Los Angeles County Superior Court. In that capacity, he is responsible for assignment of trials around the County, among other duties pertaining to managing Civil, including the PI Hub, I/C, UD and Small Claims courts, as well as the Complex Program. Judge Cowan is also active in this role in working with numerous local bar associations on issues of importance to the Bench and Bar and in ensuring the Court is responsive to lawyers' needs and concerns. In particular, he has instituted Bench Bar Working Groups on addressing the effects of the pandemic on Civil jury trials, as well as related to management of employment cases.

Previously, Judge Cowan was an Assistant Supervising Judge of Civil and sat in an I/C courtroom at the Mosk Courthouse.

Judge Cowan was formerly Supervising Judge of the Probate and Mental Health Depts. While in Probate, after initially handling a calendar of decedent estates, trusts, conservatorship and guardianship cases, he went on to focus on long cause or complex trials and settlement conferences.

Judge Cowan is a member of the Probate and Mental Health Advisory Committee to the Judicial Council of California, as well as Vice-Chair of the Probate Law Committee of the Calif. Judges Ass'n. He is also a member of numerous LASC committees, including Chair of the Special Civil Jury Trials Committee, as well as on the Court's COVID-19 Working Group.

Judge Cowan was appointed a Judge by Governor Jerry Brown in 2014. Previously, Judge Cowan served as a Court Commissioner. For much of that

time, Judge Cowan handled a Family Law calendar at the Santa Monica Courthouse.

Prior to going on the bench, Judge Cowan practiced business and real estate litigation for seventeen years. He started at Rogers & Wells, now known as Clifford Chance. Later, he had his own office.

Judge Cowan is a graduate of Univ. of Calif., Hastings College of the Law and Columbia University.

Judge Cowan has also taught as an Adjunct Professor at Loyola Law School on various subjects for more than ten years. He is a frequent speaker to different Bar groups on a variety of legal issues.

Jeremy M. Evans

Jeremy M. Evans is the Chief Entrepreneur Officer (CEO), Founder & Managing Attorney at California Sports Lawyer®, representing entertainment, media, and sports clientele in contractual, intellectual property, and dealmaking matters. Evans is an award-winning attorney and industry leader based in Los Angeles.

His clients range from *Fortune 500* companies to entrepreneurs, athletes, entertainers, models, directors, television showrunners and film producers, studios, writers, individuals and businesses in contractual, intellectual property, formation, production, distribution, negotiation, and dealmaking matters. Evans is a graduate of the University of California, Los Angeles (UCLA) with a Bachelor of Arts in Political Science with an Emphasis in American Politics (BA '05), Thomas Jefferson School of Law with a Juris Doctor (JD '11), Pepperdine University Rick J. Caruso School of Law with a Master of Laws in Entertainment, Media, and Sports Law (LLM '18), and Pepperdine University George L. Graziadio School of Business and Management with a Master of Business Administration in Entertainment, Media, and Sports Management (MBA '20).

Evans is a faculty member at California State University, Long Beach, (CSULB) and American Public University | American Military University, where he teaches Collegiate Sports Administration, Sports and Recreation Facility Management, Sports Communication, Sports Marketing, Promotion, and Public Relations, Sports Law, Sales and Promotions in Sport, and professional development courses in the two graduate sport management programs. He writes a weekly column for Sports Radio America and produces and hosts a weekly podcast “Bleav in Sports Law”, ranked the number one

sports law podcast in the world, with the Bleav Podcast Network. He currently serves as President-Elect of the California Lawyers Association (CLA), Secretary of the California Lawyers Foundation, and co-captain of outreach in Southern California with the Sports Lawyers Association.

Within the California Lawyers Association, he serves on the Joint Task Force on Civility in the Legal Profession with the California Judges Association and State Bar of California, co-chairs the Member Engagement Committee, is Ex-Officio to the Governance Committee, Chair of Sponsorships for the CLA Annual Meeting and Solo & Small Firm Summit, and Ex-Officio to The State Bar of California Liaison. With the non-profit arm of the CLA, the California Lawyers Foundation, he serves as Secretary and on the Fundraising and Governance & Nominations Committees, while leading the Signature Event Series programing.

Evans is also U.S. Production Counsel with MediaMonks | S4 Capital, one of the largest advertising agencies in the world.

Prior to opening California Sports Lawyer®, Evans worked as a Graduate Law Clerk at the Superior Court of California, advising judicial officers in civil and criminal law and motion matters. Prior to law school, he worked as the associate director for corporate finance at Quinn Emanuel Uquhart & Sullivan LLP. He has also worked as a legislative aide and field representative in the California State Legislature and continues to work on local and national campaigns.

Todd G. Friedland

Mr. Friedland is a founding partner of the business litigation firm Stephens Friedland LLP where his practice focuses on commercial litigation and strategic counseling including matters related to corporate governance and fiduciary duty, complex contract and manufacturing disputes, trade secrets, unlawful business practices, business torts, and real estate issues. Prior to forming Stephens Friedland LLP, Mr. Friedland practiced with the multi-national law firm of Pillsbury Winthrop Shaw Pittman. Mr. Friedland was also a Judicial Law Clerk to the Honorable Paul Boland and the Honorable Alexander H. Williams of the Los Angeles Superior Court, and a Judicial Extern for the Honorable Alicemarie H. Stotler, U.S. District Court, Central District of California.

Mr. Friedland has served the legal community in a variety of positions including: President of the Orange County Bar Association (2016); President

of the OCBA Charitable Fund (2017); President of the Association of Business Trial Lawyers - Orange County (2020); President of the Constitutional Rights Foundation Orange County (2010); and President of Project Youth OCBF (2021). Mr. Friedland has served and continues to serve on numerous committees including the OCBA Editorial Advisory Committee, Mentoring Committee, and Leadership Committee.

Mr. Friedland is the recipient of numerous recognitions that include being AV rated by Martindale-Hubbell, named a Southern California Super Lawyer (2011-2021), listed in Best Lawyers in America (2015-2021) and U.S. News & World Report Best Law Firm (Litigation) (2016-2021), awarded Top 50 Attorneys in Orange County (2018-2021).

As President of the Orange County Bar Association, Mr. Friedland created the Civility Task Force which drafted the OCBA Civility Guidelines. Today, those guidelines constitute the preamble to the Orange County Superior Court's Local Rules. Mr. Friedland currently co-chairs the Civility Task Force and is a frequent lecturer on civility issues. His presentations entitled "Don't Let Covid Infect Your Civility and Professionalism" and "Civility: Always the Right Path" have reached hundreds of legal professionals, students and court externs. Justice Sandra Day O'Connor stated: "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Mr. Friedland wholeheartedly agrees.

Ryan Harrison

Ryan Harrison, Sr. is an associate in the Sacramento, California, office of Jackson Lewis P.C. His practice focuses on defending employers in single plaintiff litigation matters in state and federal court, and at arbitration. He also has experience litigating labor disputes before the Public Employment Relations Board and litigating employee disciplinary matters and grievances in labor arbitration. He is also an experienced investigator, having conducted hundreds of neutral investigations for public and private sector employers regarding issues of unlawful discrimination, retaliation, conflicts of interest, embezzlement, and government corruption. Ryan has also provided advice and counsel for local government entities on ethics issues falling under the purview of the Fair Political Practices Commission.

Prior to his legal career, Ryan served as a dignitary protection law enforcement officer in the California State Senate, later returning to the institution as a policy consultant, and then becoming the principal internal

investigator for the Senate Rules Committee during the height of the #MeToo movement.

During law school, Ryan externed for the Chief Justice of the Supreme Court of California and competed on the number one nationally ranked UC Hastings Moot Court competition team. Ryan also co-founded a student legislative lobbying corps that helped secure a substantial apportionment to the law school enabling the construction two new campus buildings and the renovation of a third.

Ryan is committed to serving his community. In addition to his service on multiple state and local boards, he has served as a planning commissioner and as a Board of Appeals Commissioner for the City of West Sacramento.

Jeanne Fugate

Jeanne Fugate has a wide-ranging practice, focusing primarily on employment litigation and complex civil litigation. Jeanne is a first chair trial lawyer. She obtained a multi-million dollar verdict in a trade secret misappropriation case after a three-week jury trial, which was affirmed in full on appeal. She has led internal investigations for corporate clients related to numerous issues, including #metoo sexual discrimination and hostile work environment claims, and has in many cases successfully resolved those claims before litigation was filed. Jeanne was named as a Top 100 Woman Lawyer in California by The Daily Journal in 2018 and 2019. Jeanne was also recognized by the Los Angeles Business Journal on its "Thriving in Their 40s" list (2020) and as a Most Influential Women Lawyer (2017).

Jeanne is actively involved in bar and civic organizations in Los Angeles and across the state. In addition to her work on the Civility Task Force, Jeanne was involved in discussions aimed toward increasing civility in the legal profession while serving on the Board of the Association of Business Trial Lawyers (ABTL). Jeanne also chaired several ABTL-LA committees, including the Dinners Committee and the Annual Seminar organization committee.

Jeanne is President of the Board of California Change Lawyers (fka California Bar Foundation), which has a mission to increase diversity, inclusion, and access to justice throughout the California legal system. For the past seven years, Jeanne has served on the Board of Civil Service Commissioners for the City of Los Angeles, which oversees the appeals of the 60,000 City employees as to hiring and disciplinary issues and served terms

as the President (2018-2020) and Vice President (2016-2017). She is deeply involved with the Los Angeles chapter of the Federal Bar Association, co-chairing the Government Relations committee.

Jeanne, the daughter of two public school teachers, enjoys giving CLEs on a number of topics, including trial presentation, deposition taking and preparation, and providing mentoring and advice for more junior attorneys on a number of topics.

Jeanne clerked on the Ninth Circuit and the Southern District of New York.

Skyler Gray

Skyler Gray is an associate attorney at Goodwin Procter LLP in their emerging technologies practice. Skyler formerly served as Deputy Legal Counsel to Los Angeles Mayor Eric Garcetti. She graduated summa cum laude from UC Irvine School of Law and summa cum laude from UCLA with a B.A. in Communication Studies, College Honors. She clerked for the Hon. Joseph R. Goodwin of the U.S. District Court for the Southern District of West Virginia.

Marisa Hernández-Stern

Marisa Hernández-Stern is a Supervising Deputy Attorney General in the California Department of Justice Worker Rights & Fair Labor Section. Marisa graduated from Brown University and UCLA School of Law. After working at the U.S. Department of Justice Civil Rights Division, Voting Section, Marisa clerked for the late Hon. Judge Harry Pregerson, Ninth Circuit Court of Appeals. She previously worked at two private public interest law firms, Traber & Voorhees and Hadsell Stormer Renick & Dai, and Neighborhood Legal Services of Los Angeles County.

Marisa served as the 2020 President of the Mexican American Bar Association of Los Angeles County (MABA) and is the longtime chair, and current co-chair, of the MABA Judicial Externship & Scholarship Program. She is a board member of Federal Bar Association-Los Angeles and Los Angeles County Bar Association Litigation Section Executive Committee, and recently completed her term as Trustee on the Brown University Alumni Association Board of Governors. Marisa has been recognized by the Hispanic National Bar Association as a 2021 "Top Lawyer Under 40" and Super Lawyers Rising Star. She is a past recipient of the UCLA Academic Senate

Diversity, Equity, and Inclusion Award, which recognizes contributions to further a diverse, impartial, and inclusive academic environment at UCLA.

Tamila C. Jensen, Esq.

Ms. Jensen is a graduate of the University of California at Berkeley and earned her law degree from the University of California at Davis School of Law. She recently earned an LLM in Transnational Commercial Practice, Lazerski University, Poland. Ms. Jensen has an active practice in Los Angeles where she represents private professional fiduciaries and lay people in the Probate Courts. The focus of her practice is elder law and real property. She is past president of the Los Angeles County Bar Association. Ms. Jensen has taught widely including at Indiana University School of Business, and seminars at the School of Law, Debrechen, Hungary, and at the European School of Law and Economics, Pristina, Kosovo. Ms. Jensen participates in several volunteer activities including the Foreign Direct Investment (FDI) international moot court arbitration competition. Ms. Jensen is on the board of directors of Neighborhood Legal Services Los Angeles. She is a certified mediator and participates as a settlement officer in volunteer mediation and arbitration programs through LACBA. She has authored many articles including the recent "Scalia's Lasting Legacy: Debating the Constitution - The Living Constitution," *Valley Lawyer*, May 2016.

Patrick M. Kelly

Patrick M. Kelly is one of the pre-eminent mediators, trial lawyers, litigators, law firm leaders and professional association leaders in the country. He has vast experience in numerous substantive areas that he will bring to bear in efficiently, effectively and economically resolving matters as a mediator, arbitrator or referee. During his lengthy career, Mr. Kelly has tried, litigated, arbitrated, mediated and/or settled thousands of cases involving the following areas of law: Insurance Coverage and Bad Faith, Employment, Personal Injury, Product Liability, Professional Liability, Class Actions and Complex Litigation, Commercial Litigation, Premises Liability and Sports Litigation

<u>INSURANCE EXPERTISE</u>

From 1980 to 2019, Mr. Kelly served as Partner and Senior Counsel at Wilson Elser Moskowitz Edelman & Dicker LLP, an international litigation firm founded in insurance defense. His practice focused on advising and

representing insurance carriers in coverage matters and defending individuals and companies in high-stakes professional liability and commercial cases. He also handled numerous insurance bad faith, insurance coverage, product liability, premises liability, employment litigation, ski resort liability and railroad liability matters. He has particular experience with class actions involving directors and officers (D&O) liability, product liability, employment and consumer fraud claims.

From 1980 through 2013, Mr. Kelly served as the firm's Los Angeles Region Managing Partner, Western Region Managing Partner and Director of Litigation, and Member of the firm's Executive Committee. He also served as General Counsel to Snow Summit Ski Corporation, an owner of several ski resorts in California.

Mr. Kelly is a frequent author, columnist and lecturer in numerous subjects including trial tactics, insurance coverage and bad faith, personal injury, and professional liability. He is an original co-author of Insurance Litigation, The Rutter Group California Practice Guide, a frequently cited insurance treatise in California, and continues to edit the Directors and Officers chapter of the publication.

HONORS & AWARDS

Shattuck-Price Outstanding Lawyer Award, Los Angeles County Bar Association, Southern California Lawyer of the Year (Arbitration), The Best Lawyers in America, Griffin Bell Volunteer Achievement Award, Dispute Resolution Services, Top 100 Lawyers in California, Daily Journal, MetNews Person of the Year, Metropolitan News Enterprise, Bench Bar Coalition Advocacy Award, Bench-Bar Coalition, Diversity Award, State Bar Council on Access and Fairness, Lifetime Achievement Award, Association of Ski Defense Attorneys, Repeatedly recognized by Marquis Who's Who in American Law, as a Super Lawyer, as a Best Lawyer, and as one of the the Irish Legal 100EDUCATION & TRAINING

Mediating the Litigated Case (40 hours), Straus Institute for Dispute Resolution
40-Hour Mediation Training Program, Los Angeles County Bar Association
J.D., Loyola Law School, Los Angeles, California
B.A., Pomona College, Claremont, California
LEADERSHIP POSITIONS

Mr. Kelly's reputation as a problem solver and community leader have been recognized by his peers on both sides of the litigation spectrum. He has been elected to numerous professional organizations and leadership positions,

including:, President of the State Bar of California, President of the Los Angeles County Bar Association, Associate of the American Board of Trial Advocates (ABOTA), Fellow of the International Academy of Trial Lawyers, President of the Professional Liability Underwriting Society (PLUS), President of Dispute Resolution Services, President of the Coalition for Justice, Federation of Defense and Corporate Counsel

He also served multiple terms as a Los Angeles Delegate to the American Bar Association House of Delegates and the Steering Committee of the Open Courts Coalition.

SERVICE TO THE JUDICIARY

Mr. Kelly was elected or appointed to several positions working with the California Judiciary, including:

Member of the California Judicial Council, the board chaired by the Chief Justice that oversees the California Judicial Branch, including all California courts

Special Advisor to the Executive Committee and Commissioner for the Commission on the Future of the California Courts, which developed the recommendations guiding development of the courts

President of the the Coalition for Justice, which supports the independence of the judiciary

One of 11 members and Chair of the Rules Committee for the Commission on Judicial Performance, which administers judicial discipline in California state courts

In Federal Court, Mr. Kelly served two terms as a Lawyer Representative to the 9th Circuit and the Federal Magistrate Selection Committee.

SERVICE TO THE COMMUNITY

In pursuing his service to the community, Mr. Kelly was a member of the Boards of Directors of numerous community service organizations, including the Legal Aid Foundation of Los Angeles, the Constitutional Rights Foundation, and Loyola Law School of Los Angeles. He was also appointed by the then-mayor as a Commissioner of the Los Angeles Homeless Services Authority.

ARTICLES

California State Bar, California Lawyers Association, Los Angeles County Bar Association, International Academy of Trial Lawyers, American Board of Trial Advocates, Association of Business Trial Lawyers.

Beverly Hills Bar Association
Association of Ski Defense Attorneys
Claims and Litigation Management Alliance
Irish American Bar Association
Cowboy Lawyers
American Bar Association
Professional Liability Underwriting Society
Chancery Club of Los Angeles

Mr. Kelly's background and accomplishments have been the subject of numerous profiles in legal publications. He is also a frequent author and columnist.

Jessica Kronstadt

Jessica Kronstadt is a Deputy District Attorney for the Los Angeles County District Attorney's office. Ms. Kronstadt is currently assigned to the Sex Crimes Division, where she prosecutes child sexual abuse matters. In July 2021, Ms. Kronstadt was recognized by the Daily Journal as one of its "Top 40 Under 40" lawyers. Ms. Kronstadt received a Distinguished Young Alumna Award from Washington University in St. Louis School of Law in April 2019. She currently serves as President of the Women Lawyers Association of Los Angeles (WLALA). She was recognized as WLALA's "Changemaker of the Month" in April 2018. She has been acknowledged by Los Angeles Magazine as a "Rising Star" in public interest. Ms. Kronstadt received her B.A. from Yale University, where she was a member of the Varsity Women's Volleyball Team. Ms. Kronstadt received her J.D. from Washington University in St. Louis School of Law. After graduating from law school, Ms. Kronstadt worked as a litigation associate at Latham & Watkins and as a staff attorney at Bet Tzedek Legal Services. She has served on the WLALA Board of Governors since 2012. Ms. Kronstadt also serves on the Los Angeles County Bar Association's President's Task Force on Racial and Social Justice. She has also served on the Executive Committee of the Criminal Justice Section for LACBA, and as a board member of the California Young Lawyers Association. Ms. Kronstadt is a past Co-Chair of the Young Lawyers

Division of the Los Angeles Chapter of the Association of Business Trial Lawyers. She has run in and successfully completed five marathons.

Arnold Lee

Arnold Lee is an Assistant City Attorney for the City of Pasadena. He received his J.D. from Southwestern Law School and his B.A. in history and political science from UCLA. He currently serves as the President of the Asian Pacific American Bar Association of Los Angeles County and is a member of the Diversity Advisory Committee for the UCLA Alumni Association. He is also the immediate past-president of the Asian Pacific Alumni of UCLA and is a former board member of OCA - Greater Los Angeles, a civil rights organization dedicated to advancing the social, political, and economic well-being of Asian Americans and Pacific Islanders (AAPIs). Prior to practicing law, Arnold served as staff, intern, and volunteer on many statewide, legislative, and local candidate and issue campaigns. Additionally, he has served in leadership positions in statewide and local political organizations and advocated for voter education and voter outreach by providing training and resources to activists.

Commissioner Cynthia Loo

The Honorable Cynthia Loo received her Juris Doctorate from the University of Southern California. She has been a Superior Court Commissioner for the Kern Superior Court since 2016. In 2014 she served as a Commissioner for the Mariposa Superior Court and from 2000-2013 she served as a subordinate judicial officer with the Los Angeles Superior Court.

Much of her career as well as time off the bench, has been devoted to public service, efforts focused on inclusion and diversity in the legal profession, and access to justice.

While in law school, she interned at AYUDA, a non-profit agency assisting low-income individuals in domestic violence, immigration, juvenile, family law and unlawful detainer cases. She was a legal intern for the late U.S. District Court Judge Edward Rafeedie, as well as a law clerk at the Equal Employment Opportunity Commission.

Cynthia worked from 1991-1999 at the Children's Law Center of Los Angeles representing abused children. Prior to her judicial duties, she volunteered with the Legal Aid Foundation's Unlawful Detainer Equal Access Project as

well as the Los Angeles Superior Court / Los Angeles County Bar Association's Domestic Violence Project, where she returned to volunteer the Summer of 2013.

Cynthia was an adjunct law professor at the Peoples College of Law (PCL) from 2005 to 2013 where she taught criminal procedure, juvenile law, family law and evidence. PCL is a non-profit law school that trains lawyers devoted to social justice and was opened in part to give those historically denied access to legal training an opportunity to go to law school. Tuition is affordable because the professors donate their salaries back to the law school.

In 2005 Cynthia received the "Outstanding Judicial Officer of the Year" award from the Los Angeles County Juvenile Court's Bar Association. She received a "Community Leadership Award" by the Asian Pacific American Dispute Resolution Center and was awarded a "Teachers Making a Difference Award" in 2011. She received the 2014 "Public Service Award" from the Asian Pacific American Bar Association of Los Angeles County and in June 2017 the "President's Award" from the Asian Pacific American Women Lawyer's Alliance.

Cynthia is most proud of her efforts regarding inclusion and elimination of bias. She was the 2013-2014 Chair of the State Bar's Council on Access and Fairness, which during her tenure among other accomplishments implemented a state-wide pipeline into the legal profession program in collaboration with several well-respected community colleges, universities and law schools; as well as several state-wide diversity on the bench programs in collaboration with Governor Brown's office.

She is a past co-chair of the Multicultural Bar Alliance of Southern California and a past President of the Asian Pacific American Women Lawyers Alliance.

In 2016, she was a founding member for the Multicultural Bar Alliance of Kern County, a co-chair in 2020 and continues to serve a judicial advisor. On behalf of the MCBA she has organized and moderated several programs aimed at "bringing the law alive" - introducing students and new lawyers to the contemporary practice of law, the satisfaction of a legal career, and the role and responsibility we all have as leaders in the community of setting a good example of mutual respect and fairness, as well as the importance of "giving back."

Amy R. Lucas

Amy Lucas is a partner at O'Melveny and Myers, LLP. She is an accomplished litigator and trial lawyer who has guided clients to victories in

high-profile, high-stakes matters. Her adept skills—during and after trial, in discovery, and before litigation—have yielded success on complex cases at all levels. She regularly counsels clients on contract and intellectual property disputes, mass tort and product liability cases, business torts, and class actions.

Amy has represented a diverse range of clients, including some of the most influential companies in the world. Her dedication and diligence have produced headline-making results for clients—and in some cases, kept clients out of the headlines. Her knowledge runs deep across industries, including the pharmaceutical, finance, technology, entertainment, automotive, and new media sectors.

In addition to her regular practice, Amy devotes significant time to pro bono matters, and has represented clients in criminal trials, civil litigation, and administrative hearings, including in federal and state courts of appeals and the US Supreme Court.

Mike Madokoro

Mike Madokoro is the Managing Partner of the Los Angeles office of Bowman and Brooke LLP, a national law firm of trial lawyers representing domestic and international corporations in complex litigation. With more than 31 years of experience, Mike is a highly sought-after trial attorney who defends the world's largest automotive and product manufacturers in high-exposure product liability litigation. Mike's clients have taken advantage of his trial and litigation skills, relying on him to manage national discovery programs.

Mike has developed a wide range of product liability litigation experience and has also defended against allegations of premises liability, toxic tort liability, employment wrongful termination, qui tam claims, and other business litigation matters across the country. A graduate of UCLA and the University of the Pacific, McGeorge School of Law, Mike was the President of the Japanese American Bar Association in 2019, is active on the Board of JABA's Educational Foundation, and is a member of the California Lawyer's Association's Statewide Civility Task Force, the National Asian Pacific American Bar Association, California Minority Counsel Program, Multicultural Bar Alliance, Defense Research Institute, and Japan America Society. Mike currently serves as the Secretary for the Executive Committee of the Los Angeles County Bar Association's Litigation Section, where he has also co-chaired the Court Alerts, Breakfast at the Bar, Brown Bag Lunch, and Programs Committees. Mike has moderated two programs on Civility in the

Courtroom and in the Practice of Law for the LACBA Litigation Section featuring judges from the United States District Court for the Central District of California, the Los Angeles County Superior Court, and the California Court of Appeals. He is a Co-Chair of the LACBA Affinity and Affiliate Bar Group's Homelessness Service Initiative. Previously, Mike has also served on LACBA's Outstanding Juist Award Committee.

In addition to having been honored as a Southern California Super Lawyer for seven years (2007-2013), he was named one of the Most Influential Minority Attorneys by the Los Angeles Business Journal (2018), has been named to the Lawyers of Color Power List twice (2014 and 2020), and named as a Client Service All-Star by BTI Consulting Group (2017). Due in part to Mike's commitment to diversity and inclusion, Bowman and Brooke was awarded the CMCP's Drucilla Stender Ramey Majority-Owned Law Firm Diversity Award (2015). In 2018, Mike was the first runner-up in the Leukemia & Lymphoma Society's Man of the Year, Los Angeles Chapter, fundraising campaign.

Michael Mallow

Michael Mallow is the managing partner of Shook, Hardy & Bacon's Los Angeles office and is a co-chair of the firm's national Class Action & Appellate Practice Group. Michael is a trial lawyer and for more than twenty years, has focused his practice primarily on defending consumer class and regulatory actions throughout California and nationally. Michael also represents clients in general commercial litigation and counsels clients on minimizing litigation risk.

Michael is proud of the strong relationships he has created and maintained with opposing counsel in his cases. He is an outspoken advocate for civility and served as the founding chair of the Los Angeles Association of Business Trial Lawyers' Civility Committee. In this role, he helped create the Los Angeles ABTL's Civility Report that was published in the Summer of 2020, and which was dedicated to articles about civility, many of which were authored by members of the Civility Task Force.

Michael's efforts to better the bar and legal profession include serving as a member and former co-chair of the Los Angeles County Bar Association, Litigation Section, Complex Court Committee; an officer and member of the Board of Governors of the Los Angeles ABTL; a member of the Los Angeles County Bar Association, Litigation Section Executive Committee; and the founding co-chair of the Cambridge Class Action Defense Forum.

Michael is the recipient of numerous accolades, including recognition by Chambers USA in the categories of California Litigation: General Commercial, and Product Liability: Consumer Class Action; and The Legal 500 United States in Dispute Resolution – Product Liability, mass torts and class actions: automotive/transport and consumer products. Law360 named him one of the "Transportation MVPs of the Year" in 2018, and a "Privacy & Consumer Protection MVP" in 2012. BTI Consulting Group recognized him as a "BTI Client Service All-Star" in 2012. Southern California Super Lawyers has honored him for Class Action/Mass Torts, Business Litigation and Civil Litigation Defense from 2005-2022. In 2005, Michael was included in the "Top 20 Under 40" listing of the Daily Journal Extra. Michael also received the President's Volunteer Service Award from the President's Council on Service and Civic Participation.

When not practicing law, Michael is an avid marathoner, triathlete and four-time Ironman, completing Ironman Maryland (2018), Ironman Vineman (Sonoma County, California, 2016), Ironman Cozumel (2015) and Ironman Boulder (2014).

Alan M. Mansfield

Mr. Mansfield is of Counsel at Whtley Kallas LLP. He has practiced primarily in the area of national health care, privacy, and consumer class action and public interest litigation since 1989. His clients have included such public interest organizations as the California Medical Association, the Independent Physical Therapists of California, the Utility Consumers Action Network and Privacy Rights Clearinghouse.

Mr. Mansfield was one of the lead counsel in *Garrett v. City of Escondido*,465 F.Supp. 2d 1043 (S.D. Cal. 2006), in the U.S. District Court for the Southern District of California, which successfully challenged the legality of the City of Escondido's immigration landlord-tenant enforcement ordinance. Based on that and other work in the community performed by both him and the previous firm for which he was the managing partner (Rosner & Mansfield LLP), he and his firm was awarded the 2007 Public Service by a Law Firm Award by the San Diego County Bar Association. He currently volunteers as a *pro tem* commissioner for the San Diego County Superior Court handling small claims and traffic matters.

Mr. Mansfield is the Past President of the Association of Business Trial Lawyers, San Diego Chapter. Over the last several years when he was an

officer, ABTL helped lead the state-wide discussion of concrete actions to take on a state-wide basis to address issues of civility. Such discussions in part lead to the adoption effective January 1, 2020 of the Preface to the Local Rules of the San Diego County Superior Court referencing and expecting all attorneys to follow the San Diego County Bar Association's Attorney Civility and Practice Guidelines. (He also is a Master member of the Enright Inn of Court, and has been a team leader for numerous committees responsible for making presentations to members of Inn, including several addressing issues of civility and implicit bias. Previously Mr. Mansfield was a Lawyer Representative to the Ninth Circuit Judicial Conference, Southern District of California (6/2008 to 6/2010), where he helped create and make presentations to the Southern District of California Judicial Conference, including on issues of diversity in the legal profession.

Mr. Mansfield received his B.S. degree, *cum laude*, in Business Administration - Finance from California Polytechnic State University, San Luis Obispo in 1983 and his *Juris Doctorate* degree from the University of Denver School of Law in 1986. He is admitted to the Bar of the State of California, to the United States District Courts for all Districts of California, to the United States District Court for the Districts of Colorado, Michigan and New Jersey, to the Second, Third, Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeal, and to the Supreme Court of the United States of America.

Robin Meadow

Robin Meadow is a partner at Greines, Martin, Stein & Richland LLP, a Los Angeles-based appellate boutique. He joined the firm in 1994 after 23 years as a trial and appellate lawyer at a large commercial firm. His practice continues the substantive focus he developed in his earlier years—business disputes, real estate, partnerships, and probate and entertainment law. But, like most appellate lawyers, he is a generalist, and at GMSR he has handled multiple significant appeals involving healthcare, family law, personal injury, and bankruptcy.

Recognition of Mr. Meadow's appellate practice includes: California Lawyer of the Year, California Lawyer Magazine (the "CLAY" award), for his work on Estate of Duke (2015) 61 Cal.4th 871; the Los Angeles County Bar Association's Pamela E. Dunn Appellate Justice Award (2014); Best Lawyers' Los Angeles Appellate Practice "Lawyer of the Year" (2013, 2018); named in Best Lawyers for Appellate Law, Bet-the-Company Litigation, and Trusts

and Estates; and named in Chambers and Partners USA as a Band 1 Appellate Litigator in California.

Mr. Meadow has long believed in the importance of civility, and over the course of his 50-year career he has learned first-hand that participation in the organized bar is one of best ways to practice and promote civility. He has been a member of the California Academy of Appellate Lawyers since 1988, serving as president in 2005-2006, and has been a Fellow of the American Academy of Appellate Lawyers since 2000. He is also a member of Chancery Club of Los Angeles and the Association of Business Trial Lawyers. His leadership roles in law-related settings include multiple terms as a trustee of the Los Angeles County Bar Association; chairing or co-chairing multiple LACBA committees, including Appellate Courts, Arbitration Executive Committee, Judicial Evaluation and Juvenile Justice; serving as LACBA's representative to the committee that oversaw the design of the Edmund D. Edelman Children's Court; and ultimately serving as LACBA president in 2003-2004. He has served on the boards of the ACLU Foundation of Southern California and Public Counsel, and was president of Public Counsel in 1994 1995. He assisted in creating the Second District Court of Appeal's Pro Bono Project and Self-Help Clinic.

In his capacity as co-editor of the ABTL Report of the Los Angeles chapter of the ABTL, Mr. Meadow played a major role in creating the Report's Summer 2019 issue on civility, and he authored the article reporting on the civility roundtable at the 2019 Joint Board Retreat. He has also served on the ABTL-LA's Civility Committee.

Jonathan A. Patchen

Jonathan A. Patchen, a partner in the Litigation Department, is a leading technology and commercial trial lawyer focusing on complex civil litigation, trials and arbitrations. He has first-chaired bench and jury trials in federal and state court, arbitrated disputes, and briefed and argued cases on appeal.

Mr. Patchen has substantial experience handling disputes involving trade secrets and other intellectual property, breach of contract, breach of fiduciary duty, partnership and corporate governance, professional liability, and other complex business issues. He counsels leading companies across the consumer brands, bioscience, technology and financial services industries on a range of

technology disputes, with a particular focus on trade secrets, employee mobility, contract and fiduciary duty claims.

Mr. Patchen received a J.D. (magna cum laude) from Harvard Law School in 2003, where he served as Managing Editor of the *Harvard International Law Journal*. He received a B.S. in Economics and a B.A. in Political Science from the University of Wyoming in 2000, where he was a member of Phi Beta Kappa. Following graduation from law school, Mr. Patchen was a judicial clerk for the Hon. Ronald Gould of the Ninth Circuit U.S. Court of Appeals.

Mr. Patchen currently serves as Northern District of California Lawyer Representative and a member of the Advisory Board of the Ninth Judicial Circuit Historical Society. He is a member of the Board of Governors for the Association of Business Trial Lawyers (ABTL), Northern California Chapter and is advisor to, and former voting member of, the Executive Committee of the Litigation Section of the California Lawyers Association. He is also a member of the Executive Board of the Harvard Law School Association, Northern California Chapter.

Mr. Patchen has also served as a member and chair of the Bar Association of San Francisco's Judiciary Committee, as a member and chair of the Executive Committee for the Litigation Section, and as Symposium Chair for the 2015 Complex Courts Symposium. Mr. Patchen has organized or participated in numerous other professional panels, including organizing a panel regarding "Civility in the Law" through the ABTL.

Bradley S. Pauley

Brad Pauley is a partner at Horvitz & Levy LLP in Burbank, where his practice focuses exclusively on civil appeals and writs. He currently serves as President of the Los Angeles County Bar Association (LACBA). Founded in 1878, LACBA is one of the nation's largest voluntary metropolitan bar associations. Through its Professional Responsibility and Ethics Committee, LACBA regularly issues ethics opinions that are of value to judges and lawyers throughout the State. Brad has served as a LACBA Officer or member of its Board of Trustees since 2016. He also served as Chair of LACBA's Appellate Courts Section from 2015 through 2017.

Brad has long been active in the American Bar Association. Until recently, he represented LACBA in the ABA House of Delegates. He also served as Chair of the ABA's Council of Appellate Lawyers from 2014 to 2015 and, in that

capacity, he served on the Boards of both the ABA's Appellate Judges Conference and the Appellate Judges Education Institute (AJEI).

Brad began his legal career at Paul, Hastings, Janofsky & Walker LLP in Los Angeles, where he was a member of the firm's professional responsibility committee. He received his B.A., summa cum laude, from the University of California, Los Angeles, and received his law degree from UCLA School of Law. While at UCLA Law, he studied professional responsibility and ethics under the late California Supreme Court Justice Cruz Reynoso. Brad is admitted to practice before the state courts of California as well as the U.S. Court of Appeals for the Ninth Circuit and the United States Supreme Court.

Bryan R. Reid

Bryan Reid is a partner in the San Bernardino office of Lewis Brisbois Bisgaard & Smith and a member of the firm's Long-Term Care & Elder Law Practice. Mr. Reid's civil trial practice focuses on the defense of healthcare and long term care providers in professional negligence, elder abuse and related claims. He also has significant experience litigating cases in the field of sports and recreation liability having represented some of the most well-known names in professional sports.

Bryan is a Fellow of both the American College of Trial Lawyers and the International Society of Barristers. He is also an active member of the American Board of Trial Advocates, currently serving as a co-chair of the organization's national committee on Professionalism, Ethics and Civility. He has also served as president of CAL-ABOTA (representing the seven California chapters) and the San Bernardino/Riverside chapter of ABOTA.

A graduate of Southwestern University School of Law's SCALE program in 1991, Bryan has been awarded the Jennifer Brooks Lawyer of the Year Award by the Western San Bernardino County Bar Association (2019-2020) and Arthur W. Kelly, Jr. Civility Award by the San Bernardino and Riverside County Chapter of ABOTA (2016). Bryan has also been identified as one of the top 100 Civil Defense Litigators for Southern California by America's Top 100 and he enjoys an AV Rating by Martindale-Hubbell.

Bryan is admitted to practice before:

The State Bar of California
United States District Court for the Central District of California
United States Courts of Appeals for the Ninth Circuit
United States Supreme Court

Judge James R. ("Reg") Reilly

Judge James R. Reilly was appointed to the Alameda County Superior Court by Governor Brown in February 2018. He is currently assigned to a Civil Direct Calendar Department in Oakland. Since his appointment, he has also had assignments in Criminal Court in Oakland and the General Civil Department (restraining orders, unlawful detainer, and small claims) in Hayward. Before his appointment, Judge Reilly practiced civil litigation for 30+ years in San Francisco, with a focus on commercial litigation and product liability litigation. He has been a member of the American Bar Association, the San Francisco Bar Association and, currently, the Alameda County Bar Association. Additionally, he has served as an arbitrator for the Counties of Alameda and Contra Costa, as a mediator for the County of Contra Costa, and as a judge pro tem for the County of San Francisco. Before his legal career, Judge Reilly was an officer in the United States Navy for seven years, serving in the Third and Seventh Fleets. He earned his A.B. from the University of California at Berkeley and his J.D. from the University of San Francisco.

Judge Stuart M. Rice

Stuart M. Rice is a Judge of the Superior Court assigned to a civil independent calendar court in the Stanley Mosk Courthouse. He was appointed by former governor Arnold Schwarzenegger on July 27, 2005 after having served as a court commissioner from March 1, 2003 until his appointment. While a commissioner, he served as president of the California Court Commissioners Association. Judge Rice is a recent past- president of the California Judges Association while also serving a one-year term as a member of the Judicial Council.

He currently serves on the Judicial Council's Civil and Small Claims Committee and is a board member for the California Judges Foundation. Through the foundation, Judge Rice has established the Adam Z. Rice Memorial Scholarship Award, a needs-based scholarship for aspiring law students. He also serves as a member of the statewide task force on Civility in the Legal Profession.

Judge Rice is chair of the LASC Temporary Judge Committee, Legislative and Government Relations Committee and serves as a member of the Court's Executive Committee and Civil Jury Trial Committee. He was president of

the Benjamin Aranda III chapter of the American Inns of Court (an organization devoted to enhancing civility in the legal profession) in 2013-2014.

In 2012, Judge Rice was presented with the Judge William E. MacFaden Award as Judge of the Year by the South Bay Bar Association. He was honored in June 2021 with the Justice Sandy Lucas Judge of the Year Award by the Long Beach Bar Association. He received the Outstanding Mentoring Award from CA State University Dominguez Hills for leading the court observer program for undergraduates interested in a career in the law.

Judge Rice is a frequent speaker and educator and has been on the faculty of the Witkin Judicial College from 2005 to the present. He has taught numerous classes to judicial officers, attorneys, and court staff on a variety of subjects specializing in bench conduct and demeanor, high conflict personalities, and bias.

Prior to joining the bench, Judge Rice was an associate at Gottlieb, Gottlieb and Stein from 1978-1983 and then a senior partner at Rice and Rothenberg. He was the President of the Long Beach Bar Association in 2000 and the Long Beach Barristers in 1983. He also served as a member of the State Bar Board of Governors, the JNE Commission and the Legal Services Trust Fund Commission. He received a bachelor's degree magna cum laude from Tufts University and a J.D. from Northeastern University School of Law.

Michael Schonbuch

Michael Schonbuch attended The State University of New York at Albany on a Full New York State Regents Scholarship. He graduated from the Boston University School of Law in 1990 and promptly relocated by himself to Los Angeles in order to lift weights at Gold's Gym Venice and to become a trial lawyer.

Michael was admitted as an Associate to The American Board of Trial Advocates (ABOTA) in the year 2000 and currently holds the rank of Advocate. He was the President of The Association of Southern California Defense Counsel in 2015 and The President of California Defense Counsel in 2018. Michael became the President of The Los Angeles Chapter of ABOTA in 2020 and held that position through June of 2021. He is the Course Director of The Jack Daniels ABOTA Trial School at Loyola Law School and a frequent presenter at multiple ABOTA Masters in Trial Programs. Michael frequently teaches trial skills and civility at events hosted by ASCDC,

CAALA, ABOTA as well as various law schools including Loyola and Pepperdine. He is also a Fellow in The American College of Trial Lawyers.

Douglas N. Silverstein

Douglas N. Silverstein has devoted more than a quarter century career to litigating labor and employment cases. He is a founding partner of Kesluk, Silverstein, Jacob & Morrison, P.C., and leads the firm's trial, labor and employment, and class action efforts. Doug has been recognized by fellow attorneys, the national news media, and the general public as an employment law expert, and regularly writes and lectures on labor issues.

For over a decade, Doug exclusively represented companies at the national labor and employment law firms of Morgan, Lewis & Bockius; Ballard, Rosenberg, Golper & Savitt; and Littler Mendelson. He has represented numerous Fortune 1000, 500, 100 and 50 corporations. In addition to his employment law experience, Doug has substantial traditional labor experience before the National Labor Relations Board. He served as Southern California lead counsel in the 2003 grocery strike. Doug has also litigated ERISA cases with significant amounts at stake.

For the past 17 years, Doug has focused his practice on protecting the rights of employees in a wide variety of areas, including discrimination, harassment, retaliation, wrongful termination, whistleblowers, trade secrets, non-competes, and wage and hour class actions. In addition to his litigation practice, Doug negotiates employment and severance agreements on behalf of executives.

He has handled and argued cases in the California Supreme Court, California Courts of Appeal, Second, Ninth and D.C. Circuits, and has numerous published opinions establishing law on issues of first impression. More importantly, he takes cases to trial. In the last ten years, Doug has taken 19 cases to trial, winning 18 of them. In his last six trials where punitive damages were at issue, he obtained punitive damages in all six. Doug has been appointed lead class counsel in more than 100 wage and hour class, collective and representative actions.

Prior to joining a law firm, Doug was a Judicial Extern Clerk to former Chief Judge Alex Kozinskiof the Ninth Circuit, and a Judicial Extern Clerk to Judge Irving Shimer of the Los Angeles County Superior Court.

Doug is the Immediate Past Chair of the Los Angeles County Bar Association (LACBA) Litigation Section Executive Committee, where he meets regularly with federal and state court judges, and bar leaders to advance the cause of justice. He also serves on the Los Angeles Superior Court Bench Bar Committee. Doug will serve as the President of the Consumer Attorneys Association of Los Angeles (CAALA) in 2022, and is a past Chair of CAALA's Las Vegas Convention, the largest plaintiff's trial convention in the country. Doug currently serves on the California Civility Task Force, and seeks to foster civility throughout the practice of law. Admitted to practice before all state and federal courts in California, Doug is a member of the American, California, and Los Angeles County Bars Labor and Employment Law Sections, the National and California Employment Lawyers Associations, the American Association for Justice, and the Consumer Attorneys Organizations of California and Los Angeles.

For seven years straight, Doug has been honored as one of the top labor and employment attorneys in California by *The Daily Journal*. In the past ten years, Doug has had more than 50 speaking and writing engagements. He has been consistently designated a Super Lawyer, and was even asked to evaluate other labor and employment attorneys under consideration for being named a Super Lawyer.

Doug earned his J.D., *magna cum laude*, at Whittier Law School, where he was the Senior Articles Editor of the *Whittier Law Review*, won numerous awards in moot court and for academics, and received several merit scholarships. He earned his M.B.A. at Nova University, where he was awarded special recognition for outstanding academic achievement, and was a Henry King Stanford Scholar at the University of Miami, Florida, where he earned his B.A.

Through his class action practice, Doug has secured contributions in the hundreds of thousands of dollars to legal aid foundations in California that provide access to justice for those unable to afford it. Doug has been a Board Member and General Counsel of the non-profit Tripod, the leading education and support organization for deaf children and their families. He is also an Honorary Board Member of the Los Angeles Trial Lawyers for Charity (LATLC). Doug is conversant in Spanish. Doug coached his children on numerous sports teams, winning several league championships and the state championship in soccer, before his kids realized they could go further without him as their coach and became hockey players. Prior to becoming an attorney, Doug worked as a sommelier.

Chuck Thompson

Charles Thompson serves as the Co-Chair of the firm's Labor & Employment Wage & Hour Class and Collective Action Litigation group. He focuses his practice on employment litigation and counseling representing clients through all phases of Class Actions and Single Plaintiff cases. Charles has wide-ranging experience litigating employment-related issues for public and private companies, having handled over 1,000 employment matters for clients ranging from Fortune 500 companies to Silicon Valley startups. He has tried employment, commercial, and professional liability cases to verdict and directed verdict, has litigated and appealed cases from California State Courts to the United States Supreme Court, and is a Fellow of the prestigious College of Labor and Employment Lawyers.Charles represents employers in wage and hour cases, as well as EEOC class actions, in state and federal courts across the United States and has broad experience appearing before the California Department of Fair Employment and Housing, the Division of Labor Standards Enforcement, the Employment Development Department, and the United States Equal Employment Opportunity Commission and the Department of Labor.

In addition to his trial and counseling work, Charles serves as a private and judicial mediator and arbitrator, and has acted as a pro-tem judge upon request of the court. He has broad experience in binding arbitrations and trial. He has taught trial advocacy, diversity, employment and substance abuse to clients and industry organizations.

Throughout his career, Charles has been a champion for diversity and has served on the Executive Committee of the board of Directors for the Justice & Diversity Center of The Bar Association of San Francisco. He actively supports and promotes diversity efforts and collaborates with clients on diversity issues.

Emilio Varanini

Emilio Varanini is Supervising Deputy Attorney General, Healthcare Rights and Access Section, Public Rights Division, at the California Attorney General's Office.

He has the honor of serving as President of the California Lawyers Association, following in the footsteps of the organization's first President, Heather Rosing. As President, his aim is to help CLA achieve its mission by expanding its presence and deepening its commitment on diversity, equity, and inclusion issues, both within CLA and with external stakeholders. He also seeks to help CLA deepen its presence on access to justice and civic empowerment issues to enable it to meet its commitment to the rule of law. And he focuses on helping CLA continue its commitment to providing value to the profession and to its members, through helping the Sections continue and expand their offerings, through supporting its arm for young and emerging attorneys, the California Young Lawyers Association, and through the initiation of the Future of the Profession Task Force. He also has continued to build and strengthen CLA's ties with the Legislature, the State Bar, the Judicial Council, and the judiciary - including the California Judges Association. Previously, he served as CLA's Vice President.

He also served as a Delegate to the ABA House of Delegates, leading CLA's first-ever delegation to the Mid-Year Meeting in February of 2019..

Hon. Brian C. Walsh (Ret.)

Judge Walsh served on the Santa Clara County Superior Court for 20 years prior to his retirement on November 30, 2020. Currently, he is a mediator and arbitrator with JAMS, working out of its Silicon Valley office in San Jose.

Judge Walsh is a member of the California Lawyers Association Civility Task Force. Also, he is a member of the California Judges Association, the Santa Clara County Bar Association, and the Board of Governors of ABTL's Northern California Chapter and co-editor of its ABTL Report.

As President of the Santa Clara County Bar Association in 1992, Judge Walsh was the architect of that bar's Code of Professionalism, which was used as a model for the California Attorney Guidelines of Civility and Professionalism adopted by the State Bar in 2007.

While a lawyer, Judge Walsh was the President of the California Association of Local Bars and the Chair and Founder of the California Bench-Bar Coalition. He was named his county's Professional Lawyer of the Year in 1999, given its Byrl Salsman Special Award for Contributions to the Community and the Profession in 2002, and honored with the State Bar's Professional Responsibility Award in 2016.

Judge Walsh was Presiding Judge of his Court in 2013 and 2014 and Chair of the State Trial Court Presiding Judges Advisory Committee. Judge Walsh was twice a member of the Judicial Council of California and was a member of the California State-Federal Judicial Council for 16 years. He was a member of the Supreme Court Judicial Ethics Advisory Committee from 2002-2013 and of the State Bar Attorney Civility Task Force from 2006 to 2008.

During his last 4 years on the bench, Judge Walsh presided in the Court's Complex Civil Litigation Department. His previous judicial assignments included Civil Trials, Family Law, and Felony Trials. By appointment of the Chief Justice, he served on the Court of Appeal, Sixth Appellate District for a total of two years

His honors include: ABOTA San Francisco Bay Area Chapter's Trial Judge of the Year in 2019, Santa Clara County Bar Association Outstanding Jurist in 2014, Trial Lawyers' Judge of the Year in 2012, and the 2011 Santa Clara County Bar Association Diversity Committee Unsung Hero.

Judge Walsh received his J.D. from UC Berkeley School of Law, and his B.A. from the University of Notre Dame. He was admitted to the California State Bar in 1972 and was also admitted to the bars of the U. S. District Court (N. D. Cal), the U. S. Court of Appeals for the Ninth Circuit, and the United States Supreme Court

Daniel L. Warshaw

Daniel L. Warshaw is a civil litigator and trial lawyer who focuses on complex litigation, class actions, and consumer protection. Mr. Warshaw has held leadership roles in numerous state, federal and multidistrict class actions, and obtained significant recoveries for class members in many cases. These cases have included, among other things, antitrust violations, high-technology products, automotive parts, entertainment royalties, intellectual property and false and misleading advertising. Mr. Warshaw has also represented employees in a variety of class actions, including wage and hour, misclassification and other Labor Code violations.

Mr. Warshaw played an integral role in several of the firm's groundbreaking cases. In the In re TFT-LCD (Flat Panel) Antitrust Litigation, he assisted in leading this multidistrict to trial and securing $473 million in recoveries to the direct purchaser plaintiff class. After the firm was appointed as interim co-lead counsel in In re Credit Default

Swaps Antitrust Litigation, Mr. Warshaw along with his partners and co-counsel successfully secured a $1.86 billion settlement on behalf of the class.

Mr. Warshaw's cases have received significant attention in the press, and Mr. Warshaw has been profiled by the Daily Journal for his work in the digital download music cases. In 2019 and 2020, Mr. Warshaw was named as one of the Daily Journal's Top Plaintiff Lawyers. And in 2020 he was also named one of the Daily Journal's Top Antitrust Lawyers. Additionally, Mr. Warshaw has been selected by his peers as a Super Lawyer (representing the top 5% of practicing lawyers in Southern California) every year since 2005.

Mr. Warshaw has assisted in the preparation of two Rutter Group practice guides: Federal Civil Trials & Evidence and Civil Claims and Defenses. Mr. Warshaw is the founder and Chair of the Class Action Roundtable. The purpose of the Roundtable is to facilitate a high-level exchange of ideas and in-depth dialogue on class action litigation and encouraging civility from within the plaintiff bar.

Neil J. Wertlieb

Neil J. Wertlieb is an experienced transactional lawyer, educator and ethicist, who provides expert witness services in disputes involving business transactions and corporate governance, and in cases involving attorney malpractice and attorney ethics.

Mr. Wertlieb is the current Co-Chair and a Founding Member of the Ethics Committee of the California Lawyers Association, and a member of the Civility Task Force of the California Lawyers Association. He is a former Chair of the Ethics Committees of both the California State Bar and the Los Angeles County Bar Association, and a former Chair of the Business Law Section and both its Corporations Committee and Business Litigation Committee.

Mr. Wertlieb is a Special Deputy Trial Counsel, appointed by the California State Bar to investigate and prosecute attorney misconduct when the State Bar's Office of Chief Trial Counsel may be conflicted.

Mr. Wertlieb has practiced transactional law for over three decades, most recently as a Partner at Milbank LLP, where his practice focused primarily on acquisitions, securities offerings and restructurings. He also served as the

Chair of the firm's Ethics Group responsible for Milbank's California practices.

He is currently an Adjunct Professor at UCLA School of Law, where for the past two decades he's been teaching transaction skills. He is also a visiting adjunct lecturer at UC Berkeley School of Law, Santa Clara School of Law and USC Gould School of Law, and a Senior Advisor, Milbank@Harvard, at Harvard Law School Executive Education.

He is the General Editor of *Ballantine & Sterling: California Corporation Laws*, a 7-volume treatise on the laws governing corporations and other business entities in California, and an Editor of both *Litigating and Judging Business Entity Governance Disputes in California* and *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel*.

Mr. Wertlieb received his law degree in 1984 from the UC Berkeley School of Law, and his undergraduate degree in Management Science from the School of Business Administration also at the University of California at Berkeley. He also served as a Judicial Extern for Justice Stanley Mosk on the California Supreme Court. He is admitted to practice in California, New York and the District of Columbia.

Christopher P. Wesierski

Christopher Wesierski has been vetted and approved for 6 trial organizations all of which are difficult to get into and require nomination and thorough vetting: American Board of Trial Advocates; American College of Trial Lawyers; International Society of Barristers; Litigation Counsel of America; International Academy of Trial Lawyers; and Federation of Defense and Corporate Counsel. He was selected as CAL-ABOTA Trial Lawyer of The Year in 2019. Chris Wesierski has spoken on multiple occasions about civility to many groups including the Association of Southern California Defense Counsel (ASCDC). He has also received the Angelo Palmieri award for maintaining the legal profession's highest tradition of professionalism and civility by the Robert Banyard Inn of Court. The Orange County Council, Boy Scouts of America, recognized Christopher Wesierski as its 2018 Man of Character. The Character Award honors excellence in personal character as displayed through positive ethics, high integrity, and community impact. He was the 2020 President of CAL-ABOTA.

Judge Monica F. Wiley

The Honorable Monica F. Wiley was appointed to the San Francisco Superior Court Bench on September 1, 2009 by Governor Arnold Schwarzenegger. Judge Wiley is the second African American female judge appointed to the San Francisco bench. During her tenure with the San Francisco Superior Court, Judge Wiley has presided in the civil, criminal, family, delinquency and dependency departments in both trial and calendar courtrooms. Judge Wiley is currently the Supervising Judge of the Unified Family Court and serves as a member of the Court's Executive Committee, the Alternative Dispute Resolution Committee, the Personnel Committee, the Public Outreach Committee, the Technology Committee, and the Events/Collegiality Committee. Judge Wiley is a member on the 2019-2021 Judicial College Steering Committee, a member of the faculty for the California Center for Judicial Education (CJER) for New Judges Orientation (NJO), and a faculty member for the B.E. Witkin Judicial College. She serves on the CJER Juvenile Curriculum Committee and is an Adjunct Professor at U.C. Hastings College of the Law where she teaches an advanced Trial Advocacy course.

Prior to her appointment, Judge Wiley was a senior associate at the law firm of Carlson, Calladine & Peterson LLP in San Francisco handling catastrophic personal injury and wrongful death cases for individual and corporate defendants. Before joining the private sector, Judge Wiley worked as a Deputy City Attorney in the San Francisco City Attorney's Office for over ten years litigating complex personal injury matters and civil rights actions. She served as lead trial counsel in 27 jury trials both in state and federal court.

Judge Wiley earned her J.D., cum laude, from Howard University School of Law. She received her bachelor's degree in Political Economies of Industrial Societies from the University of California at Berkeley and is a four-year letter winner as a member of the women's intercollegiate basketball team. Go Bears!

As a practicing attorney, Judge Wiley was admitted to the United States District Court, Northern District of California, and the Ninth Circuit Court of Appeals. Judge Wiley currently serves as a task force member on statewide committees focused on civility and the elimination of bias in the legal profession and on the advisory committee of Centro Legal De La Raza's Youth Law Academy. Judge Wiley is a life member of the California Association of Black Lawyers (CABL), the Association of African American

California Judicial Officers (AAACJO) and is the past Chair of the Judicial Council of CABL.

Judge David Wolf

David Wolf is currently the Supervising Judge for North Kern and helped open and is assigned to Kern County's Prison Court. Judge Wolf has been working with the Public Defender's Office, the DA's Office, CDCR and others to make certain that state prison inmates have access to justice. Prison Court coordinates with all of these justice partners to allow inmates to appear in court via video appearance and meet with their lawyers by video. The bulk of requests to use the system come from the inmates themselves. Inmates have requested to use the video appearance system for numerous reasons including for health, programing (not missing college classes etc.) and safety reasons. The program, according to statistics provided by CDCR, is saving tax payers over a million dollars annually, all while providing greater access and service.

In addition to volunteering on the Civility Task Force, Judge Wolf is also the co-chair for the Kern County Elimination of Bias committee, works with the Prison Crimes Council, and volunteers with the Academic Decathlon, Mock Trial and We the People, and with prelaw and law school programs. He is the chair of the Bench and Bar committee, and a member of the Technology/Facilities and Felony/Criminal committees. Currently, he is working to develop a state-wide judicial Prison Crimes committee to help address improving state-wide access to justice and to provide a resource to judges for this unique area of the law.

Appendix 2: ABTL Report, Los Angeles Chapter, Summer 2019

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

SUMMER 2019

‘“[T]he necessity for civility is relevant to lawyers because they are the living exemplars—and thus teachers—every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.’”

— Lasalle v. Vogel (2019) 36 Cal.App.5th 127, 141,
quoting Chief Justice Warren E. Burger, The Necessity for Civility
(Address to the American Law Institute), 52 F.R.D. 211.

PRESIDENT'S MESSAGE

Sabrina H. Strong

Civility among lawyers is a topic I have wrestled with both inside and outside the courtroom. In this age of coarseness and division, the standards that we aspire to—that we're held to—have never been more important. As incoming president of the ABTL's Los Angeles Chapter a year ago, I recognized an opportunity and a responsibility to put these concerns into action. My goal: Find new, meaningful ways to promote civility.

I know that this cause is hardly new. I've lost count of how many lawyer organizations and courts have adopted civility guidelines—unfortunately to little effect, as best I can tell. But giving up is not an option.

So, as part of assembling the 2018-2019 officer and committee team, I created a new Civility Committee. I invited Michael Mallow to serve as chair and Celeste Brecht to serve as vice-chair, and they eagerly accepted. When they in turn invited board members to participate, about a third of our board volunteered—a sign, I think, of just how many of us take this issue to heart. By the end of the committee's first meeting, they already had a long list of projects to pursue.

You are reading one of those projects: a special, extra-long issue of the Los Angeles Chapter's ABTL Report devoted entirely to civility. The diverse, distinguished authors here explore the sources of incivility, address the problems it causes, ask whether it works (spoiler: it doesn't), place it in the context of lawyer well-being and mindfulness, provide judicial perspectives, and suggest ways to counter it with civility.

We have no illusions that this issue, or any of our other projects, will suddenly tame our profession's worst excesses. We know that some lawyers are fundamentally unwilling to display—or may be incapable of displaying—the kind of professionalism we take for granted in ABTL members. But we firmly believe that there are many other lawyers, particularly younger lawyers, who may yet be willing to examine whether they want to live their professional lives mired in toxicity. As you read this issue, we hope you will think of ways that you can help us reach them.

No matter how quixotic this quest may be, we must stand up and be counted among those who wish to preserve an ethical code that makes us proud to be lawyers.

Please read, think, and speak about this. The future of our profession depends on it.

***Sabrina H. Strong** is a partner at O'Melveny & Myers LLP and the 2018-2019 President of the Los Angeles Chapter of the ABTL.*

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CIVILITY REPORT INTRODUCTION

Michael L. Mallow

We have all encountered incivility. And if we reflect honestly, most of us can think of a time when we were uncivil. What can we do about incivility? The answer is: a lot. But like many good things in life, civility begins at home.

Some years ago, I had a very important case for a very important client, and my behavior was less than a model of civility. I was outraged that opposing counsel—call him Paul—berated two of my associates during a discovery conference. The next day, there was a conference call between our two teams, including both sides' associates. Going into the call, I had a full head of steam. I was going to be the protector and champion of my associates. I quickly lashed out at Paul for how he treated my team the day before. From that less-than-auspicious start, tempers escalated, and civility quickly diminished to a point where the crosstalk was so severe that neither Paul nor I could hear what the other said.

But although Paul and I weren't listening to each other, our associates were surely listening. For reasons I can't now explain, at some point during the call it hit me that I was acting horribly and that I was being anything but the role model I wanted to be. I asked Paul if he was willing to put the conference call on hold and speak directly with me on a private line, just the two of us, with no associate audience. During that private call, I shared my epiphany: Paul and I were being jerks, and we owed our associates far better than that. He agreed. We decided to get back on the conference call, apologize to each other's associates for our behavior, and have a "do-over" of the call—this time as professionals rather than as bickering children.

The litigation against Paul and his team lasted for another five years. During that time, there were many hard-fought issues, dozens of depositions, and numerous contentious hearings, including class certification and summary judgment. But Paul and I never had a negative word to say to or about each other for the remainder of the litigation, and we would often have lunch or dinner together when we were on the road for depositions. It was a tough case, and Paul and I were tough adversaries for our clients' positions, but we kept the litigation in perspective—and we ended up becoming friends. It was one of the highlights of my career, not for the result, but for how Paul and I were able to conduct the litigation after that horrible conference call.

Civility is not about being soft, or giving in, or selling your client short. To the contrary, approaching the practice with civility is always in a client's, and in our own, best interest. Being civil is being able to listen, with intent and thoughtfulness; making an effort to understand the other side's point of view; and using what one learns to the client's best advantage. Being civil promotes efficiency and reduces cost because it obviates needless and wasteful arguments and disagreements. Being civil enhances the enjoyment of the profession for all because it reduces unnecessary adversity and enhances well-being. It allows us to focus on the issues that are the most important and material to our clients and the litigation.

Civility is much more than merely exchanging pleasantries. Nothing makes that clearer than this issue of the ABTL Report. The articles in this issue touch on the complexity and importance of civility. From what civility is, to what causes incivility, to ways of promoting civility and combating incivility, as Chair of the ABTL's Civility Committee, I hope that this issue of the ABTL Report can serve as a resource for enhancing professionalism in our profession.

Deep thanks go to the authors who dedicated substantial time and effort to the kaleidoscope of articles that makes up this special issue of the ABTL Report. And a very appreciative tip of the hat to our ABTL Report Editors—Robin Meadow, John Querio, and Jessica Stebbins Bina—whose vision, perseverance, and guidance made this issue a reality.

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A CIVILITY ROUNDTABLE
THE 2019 ABTL BOARD RETREAT

Robin Meadow

At this year's Joint Board Retreat, hosted by the Los Angeles Chapter, nearly 100 lawyers and judges devoted Saturday morning to discussing the problem of incivility—what it is, why it exists, and what to do about it. Justice Brian Currey guided the free-flowing conversation. This article summarizes some of the key points that emerged.

What Is Incivility?

The image that probably comes to mind when someone complains about incivility is overt abuse—name-calling, physical threats, ad hominem attacks in briefing, and the like. But the meeting participants focused more on the wide variety of contexts in which incivility arises.

For example, incivility can surface when a lawyer conveys disrespect of another lawyer's area of practice—maybe a lawyer whose practice focuses on big-ticket commercial class actions acts condescendingly toward someone who handles collection cases. Another breeding ground for incivility is age difference—experienced lawyers sometimes abuse newer lawyers who are struggling with their first depositions or trials.

It wasn't until late in the meeting that one participant said, "Any conversation about civility must talk about gender and people of color." This kind of incivility often goes unnoticed by those who are not subjected to it, but it's widespread. One participant described how, during a break from a panel she was on, a long line of women waited to ask her and her co-panelists how to respond to gender/color bias. Surprising to at least some at the meeting was that not even bench officers are immune. (See Edmon & Jessner, *Gender Equality is Part of the Civility Issue,* in this issue.)

The causes of incivility are not always obvious. Discovery disputes and rapid-fire email exchanges were consistently recognized as common settings for incivility, but they are more symptoms (or perhaps facilitators) than causes. One participant suggested that, while business clients don't necessarily want lawyers to be uncivil, high billing rates create high client expectations, which in turn may ratchet up the lawyers' perceived need to be "tough." Another noted that it's a fact of law firm life that junior lawyers are rewarded not for civility, but for the number of hours they bill—and incivility generally means more hours billed. And sometimes the nature of a particular case itself may create tension that leads to incivility: One or both sides may feel insecure about a difficult issue, and that insecurity may trigger combativeness.

The way the discovery statutes work may also be an inducement to incivility: One can burden an opponent with a long, drawn-out discovery dispute and then, at the last minute, give in and avoid sanctions.

There was less consensus when the discussion turned to the strategy of villainizing an opposing party, as distinguished from that party's counsel. Some felt that this kind of conduct pushed the bounds of civility; others felt that, at least depending on the nature of the arguments made, it could be legitimate advocacy.

Why Be Civil?

In an era of coarsened discourse and hyper-partisanship, the advantages of civility may not be readily apparent. And, some may ask, if incivility furthers a client's cause, is it a virtue rather than a vice?

Not surprisingly, no one at the meeting agreed with that sentiment. The consensus was that any short-term advantage from incivility will ultimately be offset by long-term loss, either in the case itself or in damage to the uncivil lawyer's reputation. But most of the discussion focused on civility's advantages. (See Kuhl, *Winning Through Cooperation*, in this issue.)

Several participants talked about how civility furthered their own business development. Why? Because business development thrives on personal relationships, and civility fosters good personal relationships.

• One participant described a case in which he and his counterpart on the opposing legal team—both the most junior lawyers—were the only ones who could have a civil conversation. They developed a sufficiently good relationship that some years later, after one had taken an in-house position,

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A Civility Roundtable...continued from Page 5

he hired the other to represent his company.

• An in-house lawyer described consulting different firms about a new case. Several firms talked about how tough they would be with the lawyer on the other side. She hired the firm that described its experience working effectively with that lawyer.

• Another in-house lawyer said, "When I hear fighting and villainizing, I hear dollars." Incivility costs money, and business clients generally don't like that.

Another casualty of incivility—and a beneficiary of professional behavior—is one's reputation. There were repeated comments about how your reputation follows you—how judges have long memories and talk to each other. Among other client benefits, the lawyer with the reputation for civility and reasonableness will get the benefit of the doubt.

And anyone interested in going on the bench needs to cultivate his or her reputation for civility. As one participant put it, those with judicial aspirations should behave every day as if their opposing counsel is going to fill out an evaluation form—because that's exactly what will happen.

Finally, participants appeared to agree that a civil environment promotes lawyers' well-being and general job satisfaction. (See Buchanan, *Breaking the Cycle of Incivility Through Well-Being*, and Bacigalupo, *Mindfulness*, both in this issue.)

Being Civil

There is no lack of guidance about how to be civil. The Los Angeles Chapter has long had civility guidelines, which, along with numerous other guidelines, can be found on the ABTL website: http://www.abtl.org/la_guidelines.htm. But these are more in the nature of guiding principles than practical advice. The meeting participants focused on the latter.

In one participant's words, "Litigation should go back to being a contact sport." There appeared to be universal agreement that the best way to promote civility is through personal contact and communication. For example:

• Start the case with a phone call to introduce yourself.

• When doing out-of-town depositions or hearings, invite opposing counsel to dinner—not to discuss the case or settlement, but just to spend time together.

• Pick up the phone: Conversations, rather than emails, make it harder to be uncivil.

• One judge has a strategy of ordering disputing lawyers to go share a cup of coffee without saying anything about the case.

• Invite opposing counsel to an ABTL event.

(See Segal, *A Civility Checklist*, in this issue.)

Civility in letters and emails should be easier because they aren't—or at least shouldn't be—spontaneous: Just pause (or wait a few hours) to read what you've written before hitting "send." Civility in court filings should be easier still. One suggestion was to write memoranda in a way that encourages the judge to copy your language into the resulting order—a technique that will quickly weed out invective and ad hominem attacks.

Going deeper, participants talked about the importance of modeling civil behavior for others, most importantly junior colleagues: In one participant's words, "Don't just perform civility, practice it." It's not enough just to be civil to opposing counsel in front of a judge or other observers, but not elsewhere. You don't promote civility when you finish a civil telephone conversation and then, after hanging up, say to others in the room, "What a jerk." Language always matters, regardless of where or when you use it. In short, good mentoring breeds civility. (See Lanstra, *Teaching Civility,* in this issue.)

On the teaching front, Michael Mallow, chair of the Los Angeles chapter's Civility Committee, noted that one of the committee's projects—in which it hopes to enlist state-wide ABTL support—is to make civility a required MCLE subject. After all, the California Attorney Oath now requires lawyers to affirm that "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."

Others noted that being civil requires more than just being neutral. You can foster civility by affirmatively showing respect for the other side. And you might thank opposing counsel when you're able to resolve an issue cooperatively.

One's mental attitude matters, too. Generalizations and stereotypes—not just gender-based or racial, but professional attributes like plaintiff/defense, big/small firm, liberal/conservative—are counterproductive. Every opposing

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counsel—and every judge—is an individual human being. There will be more civility when you think of them that way.

The Judicial Perspective

The judicial officers at the meeting offered a wide range of experiences with incivility—not surprisingly, with discovery as the primary theme.

The most frequent comments focused on the benefit of early, hands-on involvement by judges, principally in face-to-face informal conferences with follow-up. Last year saw the enactment of Code of Civil Procedure section 2016.080, which authorizes courts to hold "informal discovery conferences" to resolve issues the parties are unable to resolve by themselves. But some judges had already discovered this technique and were using it with great success. One judge essentially stopped hearing discovery motions, and instead brought the lawyers into chambers to discuss their disputes. As he put it, "Emails don't count, letters don't count. At the end of the day, everyone is going to get what they need for trial."

Both judges and lawyers at the meeting stressed the highly positive impact of direct judicial participation in disputes. One judge who sometimes agrees to be available during depositions reported that, in many cases, the lawyers never call—they resolve the dispute rather than getting the judge involved. Likewise, when someone requests an informal conference, often the dispute magically disappears and the conference is never held.

But informality doesn't always work, and several judges spoke about the need to impose civility in some cases. This can range from simply ordering lawyers to be civil, to requiring lawyers to affirm the California Attorney Oath's commitment to "dignity, courtesy, and integrity," to more coercive measures (ordering the lawyers into the jury room to talk), to—of course—sanctions.

There was some discussion about whether judges should have the kind of flexibility with sanctions that Family Code section 271 provides: "[T]he court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." But judges who spoke on this topic generally felt that the discovery statutes provide sufficient flexibility, that sanctions should be a last resort, and that generally they're not needed when the judge gets personally involved.

But rules do help. One federal judge noted that the amendment to rule 37 of the Federal Rules of Civil Procedure to cover spoliation issues very significantly reduced motion practice in that area.

Other judges spoke of positive reinforcement techniques, particularly complimenting lawyers for good behavior—on the record, so that clients can see it.

There was also a recognition that there are some controversies that all the goodwill in the world can't resolve—the parties need the judge to make a decision so they can move on. And, as one participant put it, sometimes the lawyers need a judge to "save us from our worst impulses." (See Currey & Brazile, *What Judges Can Do*, in this issue.)

Meeting participants recognized the reality that they were preaching to the choir—organizations like the ABTL tend to attract lawyers and judges for whom civility is a priority and the norm. But the hope is that by spending time together probing what civility really means and how we can improve our efforts to achieve it, the participants left the meeting with a better appreciation of the value of being civil and of inspiring civility in others.

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BREAKING THE CYCLE OF INCIVILITY THROUGH WELL-BEING

Whatever the causes, the first step toward a real remedy to the incivility pandemic is recognition of the deeply destructive impact of uncivil conduct on individual lawyers who engage in it, on those subjected to it, on the bar as a whole, and ultimately on the American system of justice. It begins with recognition that civility is, and must be, the cornerstone of legal practice.

Bree Buchanan

As the old saying goes, "What goes around, comes around." Uncivil, unprofessional, and downright hostile behavior invariably induces distress and diminished well-being of those subjected to it. Those who are low on the well-being scale can find that their distress becomes the driver of uncivil, or at least unprofessional, behavior. Throughout my years as director of a lawyers assistance program, I witnessed how substance abuse, depressive episodes, severe anxiety, misplaced aggression, and inability to sleep are routine responses by lawyers who are victimized by the bad behavior of others. (Given that you are reading this article, I expect that you could add to that list.) The distress of callers seeking our services triggered painful recollections of my earlier years as a litigator, when my own level of well-being—so often weighed down by extreme stress, alcohol abuse, and depression—impacted my level of professionalism with other lawyers.

Now, thirty years into my career and a decade into recovery from alcoholism, I find myself a leader in our country's nascent lawyer well-being movement. Launched by the National Task Force on Lawyer Well-Being in 2016, this initiative defines well-being as a condition of health that exists on a continuum, from the absence of impairments, such as substance use and mental health disorders, to robust thriving across six dimensions that include occupational, intellectual, spiritual, emotional, social, and physical. With the benefit of hindsight gained from hard-earned personal experience and a systemic view of the profession, I see that incivility and well-being (or the lack of it) are intrinsically linked.

My first decade as a lawyer coincided with the 1980's, a time when Gordon Gekko's adage, "greed is good," represented the general "win at all costs" ethos of the era. I began my career as a family law attorney at legal aid, defending victims of domestic violence with a righteous vengeance. While I was on the receiving end of intimidation tactics by opposing counsel and parties, including verbal bullying, I was committed to dishing right back whatever was dished out to me. I also incorporated this behavior into my view of what, who, and how a lawyer should "be."

Emblematic of this attitude was my century-old photograph, small yet prominently placed over the entrance to our conference room, of an abattoir in which two butchers in their bloody gear smiled ghoulishly up at the camera. At the time, I was greatly amused by this stunt and never gave a thought to what it communicated about my professionalism. Instead, I felt that I was playing along with the ethos of family law litigation's strategic incivility in which late Friday filings with three-day notices were routine, along with mind-numbing loads of discovery intended to abusively weigh down and kill the spirit of opposing parties and their lawyers. Achieving my client's objectives should have sufficed, but "grinding my opponent down to a fine dust" was my internal modus operandi. Predictably, what I gave, I got in return. I missed more than one Christmas during my son's early years because of expedited deadlines or last-minute hearings scheduled the following day.

What of the toll that this behavior took on me? As someone subjected to incivility, and even outright bullying, I took home with me the distress, exasperation, anger, and fear

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that resulted from these experiences. I used our profession's most time-honored means of handling stress overload—alcohol. At first, it was two glasses of wine most nights. But consistent heavy usage, combined with a strong genetic propensity, ultimately led to an alcohol use disorder, mixed with multiple bouts of serious depression.

Having been in recovery for over nine years, I can now look back and see that I also used drinking to handle the internal distress I felt from being in "warrior mode." It allowed me to continue acting in a manner that conflicted with my inherent nature and internal values. Additionally, my drinking resulted in a diminished capacity to practice law to the best of my ability. Suffering from a hangover or dealing with the deflated energy that is a hallmark symptom of depression, I was left with a shortened fuse and lessened ability to function.

A pivotal point in my road to recovery was my experience with my state's lawyers assistance program. (This free and confidential service can be found through this directory: https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/.) In recovery, I've learned how to better care for myself. In working towards this goal, I have also become better (but not perfect) at taking care of, and treating well, those around me. While incivility still plagues the profession, a new mindset that highly values the physical and emotional well-being of its members is on the cusp of gaining widespread support. As part of that movement, the promotion of civility and professionalism is being put forth as a valid means of improving well-being among lawyers. I believe that the promotion of well-being can also be an effective way to intervene in the cycle of incivility. Treating one another better will result in each of us—not to mention the profession as a whole—being better .

The National Task Force on Lawyer Well-Being was formed in response to back-to-back studies that demonstrated the dismal state of well-being in lawyers and law students. Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,* 10 J. Addiction Med. 46 (2016); Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns,* 66 J. Legal Educ. 116 (2016). In 2017, it published a comprehensive report that laid out 44 recommendations for bringing about systemic change in how the profession as a whole addressed the well-being of its members. Bree Buchanan, et al., *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017), available at www.lawyerwellbeing.net. In recognition of the integral relationship between civility and well-being, the authors put forth in Recommendation 6 the imperative that members of the legal profession "foster collegiality and respectful engagement throughout the profession." *Id*. at 15. In support, the Task Force wrote that interactions among members "can either foment a toxic culture that contributes to poor health or can foster a respectful culture that supports well-being." *Id*. Their words echoed what I found in my own years as a litigator and, later, as a lawyers assistance program director: "Chronic incivility is corrosive. It depletes energy and motivation, increases burnout, and inflicts emotional and physiological damage." *Id*. Overall, it reduces our sense of well-being and, as I found, sets the stage in too many cases for the onset of impairments that ultimately lead to the degradation of our profession.

Chronic stress and distress are natural responses to living in the crucible of high stakes, "take no prisoners" litigation and legal practice, where sarcasm, rudeness, hostility, belittlement, and even downright bullying are characteristic. These strategies are intentionally used to wear down the opposing side, and they often have the result of doing just that. Living with the resulting uncomfortable feelings can be too painful; reaching for some means to self-medicate is all too common.

The 2016 nationwide study of 13,000 lawyers mentioned above found that between 21 and 36 percent qualify as "problem drinkers." Organ, *supra,* at 129. In the survey of law students, researchers revealed that one-quarter fell into the category of being at risk for alcoholism. As a lawyers assistance program director, I found that alcohol was the "drug of choice" for 90 percent of the individuals experiencing a substance abuse problem who called our program. In 2019, alcohol consumption is still the most widely accepted way

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to reduce stress, celebrate success, mourn losses, and often, simply end (or get through) each day. Over time, the anger, egotism, and selfishness experienced during inebriation begin to take over the alcoholic's personality through all hours of the day. Brain changes begin to occur that promote impulsive and uncivil behavior. The alcoholic's elaborate and impenetrable defense system renders impossible any insight into their actions—and any willingness to change absent the most egregious ramifications.

Lawyers are Type A, driven to succeed, and up against equally intense opposition. Attempting to achieve perfection in the midst of this dog-eat-dog world is also a perfect set-up for depression and anxiety. The lawyer study mentioned above found that more than one in four lawyers were struggling with some degree of depression. A frequent, but less recognized, manifestation of a depressed mood disorder—especially with men—is aggression, irritability, and anger. Hypersensitivity to others' actions can lead to lashing out and over-the-top reactions to what superficially appear to be minor slights. Depression in this guise may avoid detection until the person's condition worsens. Throughout this time, toxic incivility may become routine.

Many in the legal profession are concerned about what has been referred to as an "incivility pandemic." Breaking this cycle of incivility requires, as Jayne Reardon rightly states, "a recognition that civility is . . . the cornerstone of legal practice." Jayne Reardon, *Civility as the Core of Professionalism*, American Bar Association, Business Law Today, September 19, 2018, available at: https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/. Recognition alone, however, is simply the beginning. Throughout the country, hortatory civility codes have been adopted, and these are an excellent step in that they serve to call our attention to the situation. I do believe, however, that we as a profession must look more deeply at what lies at the root.

In addition to adopting standards that promote professionalism, we must pay attention to the well-being of individual lawyers—a rising concern of firms, courts, bar associations, regulators, and law schools. While I don't propose that maintaining consistent professionalism is a curative for alcoholism or depression, I do believe that a more civil work world can create an environment in which these disorders are less prevalent, and all lawyers can experience a heightened sense of well-being.

In our cover letter to the National Task Force's Report, my co-chair, James Coyle, and I wrote:

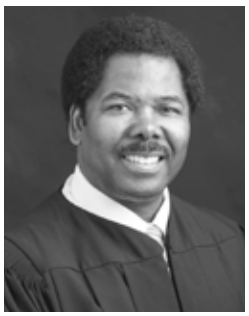
> We are at a crossroads. To maintain public confidence in the profession, . . . and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

Well-being is intrinsically connected to collegiality, civility and professionalism. When one is diminished or improved, so follows the other. The current systemic efforts to enhance the well-being of lawyers will, I believe, have a positive impact on improving the civility of the profession. In turn —what goes around, comes around—that improved civility will foster enhanced well-being.

Bree Buchanan, *JD, MSF, is a Senior Advisor for Krill Strategies, LLC. She also serves as a founding co-chair of the National Task Force on Lawyer Well-Being and chair of the ABA Commission on Lawyers Assistance Programs.*

SEVEN THINGS JUDGES CAN DO TO PROMOTE CIVILITY OUTSIDE THE COURTROOM

Justice Brian S. Currey



Presiding Judge Kevin C. Brazile

What can judges do to promote increased civility and professionalism among civil litigation lawyers outside the courtroom? We don't claim to have all the answers, and would welcome suggestions from colleagues, both on and off the bench. As a way of getting that discussion started, we offer seven things judges can do—and in many instances, are already doing—to promote civility:

1. Care about civility outside the courtroom and commit to doing something about it.

We define civility as treating others with dignity, respect, and courtesy—treating others as you would like them to treat you. This includes conduct such as punctuality, preparedness, accommodating opposing counsel's reasonable requests, and communicating politely, both orally and in writing. In short—acting professionally.

As former U.S. Supreme Court Justice Sandra Day O'Connor said, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers." Thus, increased civility offers benefits for all of us. Legal careers are too long for lawyers to spend them sniping with opposing counsel. Incivility drags lawyers down, increases their stress levels, and keeps them from doing their best work. It also gums up the wheels of justice, causing delays and unnecessary work for lawyers and judges. This in turn costs clients time and money. Uncivil conduct also interferes with settlement, increasing both client costs and judicial workloads. The animosity built up between counsel in interchanges outside the courtroom often spills over into the courtroom, needlessly consuming time and tax dollars. As one author has observed, despite indications from social science that people are more easily persuaded by those they like, "oftentimes counsel enter settlement negotiations with a genuine hostility towards opposing counsel. Because disputants generally dislike each other due to their conflict, it is essential that opposing counsel maintain a respectful and cooperative relationship that creates this 'liking' social obligation. Counsel should work together to grant discovery extensions and accommodations, when feasible, and to avoid toxic communications. By doing so, counsel can create a 'liking' dynamic that will increase the chances of getting what they ask for during litigation and settlement negotiations." (S. Feldman Hausner, *Psychology and Persuasion in Settlement* (2019) 32 Cal. Litigation 31, 34.)

Incivility also is bad for judges. It interferes with our shared goal of fair, timely, and efficient resolution of cases. It slows cases down and increases judicial workloads by fomenting needless discovery disputes and other unnecessary motions. It erodes the judicial process and the public's perception of it. And let's face it: Dealing with lawyer incivility can be unpleasant. We believe that justice is a serious business that demands professionalism and mutual respect. We don't relish supervising or disciplining lawyers who act like truculent children.

Incivility is equally bad for juries. Lawyers who fail to accord respect to one another almost always fail to honor and respect the citizens drafted to serve on juries. They keep them waiting. They bore them with overly-long, uninspired, or ill-prepared trials. They don't respect jurors' time or appreciate their service. Consequently, many people would rather have a root canal than serve on a jury. That's a shame, because most who serve on juries in cases tried by competent, professional, and respectful lawyers and judges enjoy the experience, and look forward to returning.

Finally, incivility erodes public support for the legal system and as Justice Arthur Gilbert noted, "debases the legal profession." (*Crawford v. JPMorgan Chase Bank, N.A.* (2015) 242 Cal.App.4th 1265, 1266.) At a time when we must fight to preserve court budgets, we need our constituents to value and respect the legal process.

So, as judges we have good reason to commit to reducing or eliminating incivility in the profession.

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2. Understand the problem.

As we communicate with lawyers, we hear increasing complaints about incivility. Perhaps more lawyers behave badly now, or perhaps lawyers complain more about it. Either way, incivility is a problem that needs to be acknowledged, studied, and remedied.

We encourage more rigorous study of incivility in the legal profession. Most of what we have seen and heard is anecdotal. But we are trained to resolve issues based on evidence, and here we admittedly have seen little professional literature on the nature, scope, and methods of remediating the problem. Incivility in the workplace generally may be better understood than incivility in the legal profession. Psychologists and human resources professionals who study workplace incivility have useful information to share. Bar groups could recruit some of those experts to develop research-based programs to reduce incivility among lawyers.

Based on what we've heard from lawyers and our own experiences, we know uncivil lawyers come in many unappetizing flavors. We've borrowed or adapted some of the following non-exclusive categories from another author (Futeral, *How to Deal with a Difficult Lawyer*, available at https://www.charlestonlaw.net/dealing-difficult-opposing-attorney) and have added some of our own:

- **Bullies.** These lawyers are rude to opposing counsel, witnesses, and opposing parties. They make threats and demands. Bullies may hurl insults or make snide comments. They may threaten opponents with unwarranted sanctions and include sanctions requests in most of their many motions. In court and in motion papers, these lawyers will accuse opposing counsel and parties of every imaginable misdeed. At their most extreme, they will display extreme anger management issues, invade others' personal space, and ask to "take it outside."
- **Obstructionists.** These lawyers make everything difficult. Phone calls and emails go unanswered. Depositions go unscheduled. Routine interrogatories and document demands are met with objections and without any substantive responses. Document production slows to a crawl. Meeting and conferring is unproductive. At depositions, they make long speaking objections. Time drags on and costs escalate.
- **Paper Tigers.** These lawyers generate frequent letters and emails, all of them unproductive. Their opponents' interrogatories receive lengthy responses containing no new information. Despite reams of correspondence, little gets resolved between the lawyers. Left unchecked by the judge, these lawyers will file repetitive discovery motions, and every other imaginable motion, all of which baselessly accuse the other side of misdeeds it did not commit.
- **Other "Bad Apples."** This catchall category includes pathological liars, racists, misogynists, and others who simply cannot get along with others. We cannot ignore reports that new lawyers, women lawyers, LGBTQ lawyers, and lawyers of color are victimized by incivility at least in part because of their youth or inexperience, gender, race, gender identity, and/or sexual orientation. As guardians of justice, this is something we cannot abide.
- **The Misguided.** These lawyers received little training, or were trained by members of the previous four groups. Perhaps they watched too many "lawyer" TV shows glorifying slickness over substance, or implying that the ends justify the means. Perhaps they are emulating the proliferation of incivility in the political sphere. Bad as they are, we view these lawyers with some optimism. These folks are our targets. They are the ones we will proselytize with the gospel of civility. Perhaps they can be saved.

Although the last category may be our targets, we cannot ignore the others. We should not give up hope that they are ultimately teachable—but if they aren't, we must be diligent in our efforts to keep them from contaminating the profession for others and interfering with the administration of justice.

3. Model, inspire, and set expectations for good behavior.

Common experience and social science research confirm that, left unchecked, incivility begets more misconduct in an unfortunate downward spiral of unpleasantness. (See, e.g., Andersson & Pearson *Tit for Tat? The Spiraling Effect*

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of Incivility in the Workplace (1999) 24 Acad. Mgmt Rev. 452, available at https://journals.aom.org/doi/full/10.5465/amr.1999.2202131.) Judges have unique abilities to help stem the tide by modeling good behavior, inspiring collegiality and professionalism, and demanding good behavior by lawyers working on cases on the judges' dockets.

Judges model good behavior by treating lawyers, jurors, witnesses, litigants, court staff, and others with respect. We are obligated to do so by the California Code of Judicial Ethics because appropriate judicial demeanor "is essential to the appearance and reality of fairness and impartiality in judicial proceedings." (Rothman, Cal. Jud. Conduct Handbook (3d ed. 2007) § 2.46, p. 93.) "Maintaining decorum and dignity, and being courteous and patient, sets the gold standard in the courtroom for everyone . . . and provides all with a greater level of satisfaction with the outcome and, obviously, improves the public's confidence in the judicial institution." (*Ibid*.)

Modeling good behavior is a start, but isn't enough. Judges can and do inspire and overtly demand professionalism and civility outside the courtroom. For example, judges may express their expectations in the "Courtroom Information" posted for each civil department on the Los Angeles Superior Court's website. This document also may be made available to lawyers at counsel tables. Here's an excerpt from the guidelines Justice Currey used in his courtroom when he was a superior court judge:

> The Court's goal of fair, timely, and efficient resolution of cases can only be achieved with the assistance and cooperation of counsel and self-represented parties. Knowledgeable, well-prepared lawyers who cooperate with each other and the Court streamline the litigation process, thereby conserving client and judicial resources. Therefore, the Court expects and requires the highest degree of professionalism from counsel appearing in this department, including knowledge of, and strict compliance with, the Code of Civil Procedure, the California Rules of Court, the Los Angeles County Court Rules, and the California Attorney Guidelines of Civility and Professionalism. The Court intends to treat everyone with respect and courtesy, and expects all those involved . . . to do the same. Uncivil or unprofessional behavior will not be tolerated.

The judge may repeat these exhortations at initial status conferences and hearings, using a shorthand version: "I intend to treat lawyers who appear before me with respect. In return, I expect lawyers to treat the Court and each other with respect and professionalism."

4. Facilitate civility.

Incivility can be reduced through positive interactions among lawyers. It is harder (but admittedly not impossible) for lawyers to be nasty to someone they know. Judges can encourage lawyers to meet productively early in the case and perhaps reduce potential future conflict. For example, at an initial status conference, the judge might suggest that counsel immediately go for coffee to discuss the case further—or even to discuss anything but the case. The judge could emphasize his or her expectation that counsel work cooperatively, treat each other courteously and respectfully, and collaborate to schedule and complete discovery.

Most lawyers behave well in court. Generally, incivility happens out of the judge's view. Usually, it has something to do with discovery, because that is the context in which lawyers most frequently interact outside the courtroom. A judge can communicate—early and often—high expectations for good attorney conduct in discovery and intolerance of incivility. Among other things, a judge may communicate distaste for unnecessary discovery disputes. California has a detailed Code of Civil Procedure and various practice guides that take virtually all the mystery out of what is required in the discovery process. A judge may express an expectation that attorneys will research and understand their discovery obligations, and work cooperatively to complete discovery with minimal court intervention. At the same time, the judge may make clear to the parties that he or she is available to help with difficult issues requiring judicial assistance (such as thorny privilege issues), or with finding ways to exchange information while reducing burden and expense. And the judge may also want to emphasize an intention to rein in incivility and any shirking of discovery obligations.

More and more judges require parties to have both meaningful lawyer-to-lawyer discussions (not a cursory exchange of emails) and an informal discovery conference with the court before a discovery motion may be filed. In effect, these

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judges opt to conduct an informal discovery conference "on [their] own motion" in every case. (Code Civ. Proc., § 2016.080.) How best to conduct these sessions is beyond the scope of this article, but we have several suggestions with respect to civility.

First, the informal discovery conference provides an opportunity for the judge to gauge how the parties interact. Do they work together professionally and productively? Have they held productive meet and confer sessions that narrow the issues? If not, the informal discovery conference is a good opportunity for the judge to restate ground rules and reinforce expectations about professionalism and common courtesy. The judge should call out and express disapproval of any incivility, whether revealed in "meet and confer" correspondence or personal interactions. If you see something, say something. Say "Stop it."

Second, the judge can model a pragmatic approach to discovery aimed at eliminating gamesmanship. Discovery is not a game of "Gotcha." It is intended to facilitate an exchange of relevant information and to avoid surprise at trial. At the informal discovery conference, the judge can underscore the goal of working together to reduce discovery costs and burdens—while stressing that everyone will get what they need for trial.

Finally, the parties should leave the conference with instructions from the judge to conduct further in-person meetings to narrow or eliminate disputes, requiring them to meet and accomplish something. The "something" might be a detailed schedule for all remaining depositions, or a document production schedule, or anything else that is useful and requires cooperative interaction. By emphasizing the need to meet rather than exchange email, the judge gets the participants to work together.

5. Be a good coach— help lawyers be civil to one another.

We often are asked by exasperated lawyers how to deal with an uncivil opponent. Obviously, judges cannot give ex parte tips to one side or another, but they can share suggestions with counsel at initial status conferences and similar occasions. Because these suggestions come from the judge, lawyers need not worry that their professional courtesy will be mistaken as a sign of weakness. Here are some thoughts a judge could share with lawyers:

a. Be proactive. At the start of a new case, reach out to opposing counsel. Introduce yourself. Perhaps offer to go to the other lawyer's office to meet, or meet for coffee or lunch. Make clear you are not arranging a meeting to seek settlement, serve papers, or make demands. The meeting may be short. It may even be awkward. But it will show your respect and help set a courteous tone.

b. Rudeness is contagious and spreads. Don't bite. Don't catch the disease.

c. Stay calm and be mindful. Equanimity is defined as mental calmness, composure, and evenness of temper, especially in a difficult situation. Display equanimity.

d. If you encounter incivility, say something. Label it. Be direct. "John, you are being rude. Can we discuss this in a professional manner?"

e. Use humor.

f. Fight rudeness with kindness. While rude behavior may be a misguided way to assert control, it also might be a response to stress, pressure, frustration, or some other form of unhappiness. (See *Five Ways to Deal with Rudeness in the Workplace*, available at https://www.mindtools.com/pages/article/five-ways-deal-with-rudeness.htm.) Be sympathetic and solution-driven.

g. Be a good role model. Demonstrate civility. Lead by example.

h. Defend colleagues. If you witness incivility directed at another lawyer, politely ask the offending lawyer to rephrase or otherwise act in a more courteous manner. Remember, "the most effective tools for erasing incivility in the profession may be the judges and lawyers willing to tamp down uncivil behavior the moment it emerges." (Filisko, *You're Out of Order! Dealing with the Costs of Incivility in the Legal Profession* (2013) ABA Journal, available at http://www.abajournal.com/magazine/article/youre_out_of_order_dealing_with_the_costs_of_incivility_in_the_legal.) Step in. Know the rules. (See, e.g., Super. Crt. L.A. County Local Rules, Chap.. 3, App. 3.A *Guidelines for Civility in Litigation*,

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available at https://www.lacourt.org/courtrules/CurrentRulesAppendixPDF/Chap3Appendix3A.PDF.) "Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility." (*Id*., § (l)(2).)

i. Enlist help from colleagues. Have a plan. If need be, bring serious episodes to the court's attention.

j. Join and support bar organizations that promote civility.

6. Be a problem solver.

Judges can and should tailor their approach to individual cases. For example, if a party brings to the judge's attention that one or more lawyers disrupts depositions by making uncivil remarks or lengthy, intemperate speaking objections, the judge could devise a plan for dealing with that particular issue.

The judge might offer to be available by telephone so that deposition exchanges can be read back by the reporter, or other issues can be resolved in real time. Judges committed to reducing incivility will give these calls priority, even briefly recessing a trial to take the call. (Most judges have found that merely being available to take a call usually causes lawyers to act more reasonably and work through their problems rather than call the judge.) Or the judge might order the next several depositions to be taken in her jury room, and make herself available to monitor the situation. Or require an additional camera in the deposition room that captures lawyer misconduct if the complaint is unprofessional conduct like making faces or placing feet on the table.

If the problem is that "nasty" correspondence has replaced meaningful dialogue, the judge might order the parties to conduct the next meet and confer session in person in her jury room, and offer to sit in for some period.

Some of these options may seem unappealing or unduly time-consuming, but dealing with incivility is worth the effort in the long run.

7. Apply sanctions as a last resort.

"Sanctions are a judge's last resort. At bottom, they are an admission of failure. When judges resort to sanctions, it means we have failed to adequately communicate to counsel what we believe the law requires, failed to impress counsel with the seriousness of our requirements, and failed even to intimidate counsel with the fact we hold the high ground: the literal high ground of the bench and the figurative high ground of the state's authority. We do not like to admit failure so we sanction reluctantly." (*Interstate Specialty Mktg., Inc. v. ICRA Sapphire, Inc*. (2013) 217 Cal.App.4th 708, 710.) And imposing sanctions against a lawyer seems a poor first response to incivility, because sanctions are unlikely to build bridges between warring counsel.

And yet, sanctions serve their purpose when other methods fail. They "can level the playing field. If we do not take action against parties and attorneys who do not follow the rules, we handicap those who do. If we ignore transgressions, we encourage transgressors." (*Ibid*.) And sanctions provide a way for clients to recover some of the added costs incivility can cause.

♦

No doubt, our seven suggestions are just a few of the things judges might do to promote civility, and hopefully our colleagues will chime in with others. In addition, many judges already lend their voices in support of efforts to promote courtesy and professionalism. For example, they participate in bar association civility training sessions, write articles like this one, and discuss the topic at bench/bar events. Nevertheless, the scourge of incivility persists. Whatever we may be doing as a profession, it seems we need to do more.

Hon. Brian S. Currey *is an Associate Justice of the California Court of Appeal, Second Appellate District, Division Four.*
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INCIVILITY AS A PROBLEM OF LAW FIRM RISK MANAGEMENT

T. John Fitzgibbons

There was a plaintiff's lawyer who was so famous among the defense bar that his last name became a verb. Let's call him Mr. Niceguy. His strategy was to accommodate his opponent's every wish throughout discovery. Whatever extension was requested would be granted; whatever the opponent wanted in discovery would be given. Time and time again, adversaries found themselves lulled into complacency and unprepared for trial. When the time for trial arrived, the friendly lawyer would use that situation to his client's advantage, either to extract a favorable settlement or to win a jury verdict. All with a smile on his face, and a twinkle in his eye. Other defense lawyers familiar with this lawyer would nod knowingly and say, "You got Niceguyed."

Contrast that strategy with the behavior of the bullies and obstructionists who are the reason for this edition of the ABTL Report. When faced with one of them, most among us redouble our efforts. We are going to beat this person, even if it kills us. It boggles the mind that such people would want to motivate their opponents to turn over every rock and investigate every argument. But that is what happens—they act badly, and we suffer increased stress and sleepless nights, consumed in an effort to beat the uncivil lawyer.

This human dynamic explains why incivility presents a risk management issue. Incivility makes bad case outcomes more likely. And that reality often leads to a later malicious prosecution claim, an order imposing sanctions or referring for discipline, or a legal malpractice claim or fee dispute.

Malicious prosecution. Incivility towards an adversary makes it more likely that after the matter is over, that adversary will pursue a malicious prosecution case against the uncivil lawyer.

To prove malicious prosecution, a plaintiff must show that (1) the defendant (lawyer or client) initiated or continued to prosecute an action against the plaintiff that resulted in a termination favorable to the plaintiff; (2) the defendant lacked probable cause to prosecute the action; and (3) the defendant prosecuted the action with malice. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.)

A lawyer's incivility is relevant to the third element: "Malice 'may range anywhere from open hostility to indifference.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 (*Soukup*).) Though it generally requires a showing that an action is brought for an improper purpose (such as to harass or to force a settlement of meritless claims), evidence of antagonistic threats and "bad blood" between lawyers also can show malice.

Evidence of a lawyer's hostile, unsupported threats can satisfy a malicious prosecution plaintiffs' burden of showing probability of success to defeat an anti-SLAPP motion. In one case, the evidence included physical threats for refusing to accept a settlement offer, as well as evidence that the lawyer told the plaintiff that his client had named her in the lawsuit "to prevent her from making trouble for him in the future." That incivility, coupled with a refusal to dismiss the plaintiff once the evidence was indisputable that there was no plausible claim against her, led the court to conclude that the plaintiff could show malice. (*Soukup, supra*, 39 Cal.4th at pp. 295-296.)

In another case, the court held that a lawyer's admission that there was "bad blood" between himself and his adversary supported the court's decision that the plaintiff could show malice. The lawyer's client testified at length about how much she hated the adversary. The court observed that the lawyer did not dissociate himself from his client's comments; to the contrary, without performing any research on the applicable law, the lawyer accused his adversary of ethical violations. That sufficed to show that when the lawyer pursued the meritless case, he acted with malice. (*Lanz v. Goldstone* (2015) 243 Cal. App.4th 441, 467-468.)

Sanctions. The most common risk of incivility is the imposition of sanctions. Case law is replete with examples of sanctions for incivility. Some of the more egregious examples have made it into the legal press or the blogosphere.

In one case, a lawyer was sanctioned for her conduct at a deposition, which included throwing iced coffee towards her opposing counsel. Though the lawyer claimed that she

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accidentally spilled the coffee, the district court found that unpersuasive in light of evidence from the deponent (her own client): "[T]he deponent confirmed that [the lawyer] threw her coffee in opposing counsel's direction, and that he saw coffee on opposing counsel's bag, computer, and person." (*Loop AI Labs Inc. v. Gatti* (N.D.Cal. Mar. 9, 2017, No. 15-cv-00798-HSG) 2017 WL 934599, at p. *17 (*Loop AI Labs*).) The court reporter also provided an affidavit that corroborated the deponent's account. (*Ibid.*)

The court then noted that rather than apologize—as most people would had the spill been accidental—the lawyer "sought to justify her behavior and called the resulting sanctions motion 'outrageous' and 'baseless.'" (*Loop AI Labs, supra,* 2017 WL 934599 at p. *17.) The court's opinion of this conduct was crystal clear: "No excuse (not even [the lawyer]'s belief that [opposing counsel] 'insulted her' by telling her to 'be quiet') can justify [the lawyer]'s on-the-record use of profanity and the ensuing outburst that resulted in her hurling her coffee in opposing counsel's direction." (*Ibid.*)

The coffee incident and other conduct led the court to conclude that a terminating sanction was appropriate and necessary, a decision affirmed by the Ninth Circuit. (*Loop AI Labs Inc. v. Gatti* (9th Cir. 2018) 742 Fed.Appx. 286.) In addition to revoking the attorney's pro hac vice admission in that case, the court said that it "will not grant such admission in any future cases before the undersigned." (*Loop AI Labs, supra*, 2017 WL 934599 at p. *18.) The lawyer's misconduct destroyed her client's case—putting her at risk for a malpractice claim—and ruined her reputation.

Referral for discipline. Incivility isn't just reserved for interactions with opposing counsel; it sometimes appears in court filings and can subject the uncivil lawyer to a referral to the State Bar. In a recent appellate case, a lawyer was reported to the State Bar for potential discipline for describing the trial court's ruling as "succubustic." The court pulled the definition of "succubus" from Webster's Dictionary: "'a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus; demon, fiend; strumpet, whore.'" (*Martinez v. O'Hara* (2019) 32 Cal.App.5th 853, 857 (*Martinez*).)

The appellate court concluded that this description of the female trial judge's ruling "constitutes a demonstration, 'by words or conduct, [of] bias, prejudice, or harassment based upon . . . gender.'" (*Martinez, supra,* 32 Cal.App.5th at p. 858.) The court's ire over the lawyer's choice of words was apparent: "We cannot understand why plaintiff's counsel thought it wise, much less persuasive, to include the words 'disgraceful,' 'pseudohermaphroditic misconduct,' or 'reverse peristalsis' in the notice of appeal." (*Ibid.*)

In referring the lawyer to the State Bar, the court invoked Business and Professions Code section 6068, subdivision (b), which requires lawyers to "maintain the respect due to the courts of justice and judicial officers." The court also noted that the conduct could violate new Rule of Professional Conduct 8.4.1, which prohibits lawyers "from unlawfully harassing or unlawfully discriminating against persons on the basis of protected characteristics including gender." (*Martinez, supra,* 32 Cal.App.5th at p. 858, fn. 9.)

In other jurisdictions, ABA Model Rule 3.2 has been invoked to discipline lawyers for incivility on the basis that the conduct needlessly increased the cost of litigation or wasted judicial resources. (See, e.g., *Attorney Grievance Com'n of Maryland v. Mixter* (Md. 2015) 109 A.3d 1, 60; *Obert v. Republic Western Ins. Co.* (D.R.I. 2003) 264 F.Supp.2d 106, 110-112.)

California has adopted a modified Rule 3.2, which prohibits a lawyer from "us[ing] means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." (Rules Prof. Conduct, rule 3.2.)

Other jurisdictions also have invoked ABA Model Rule 8.4(d) to discipline uncivil behavior; that rule provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." (See, e.g., *In re Abbott* (Del. 2007) 925 A.2d 482, 484-485; *The Florida Bar v. Norkin* (Fla. 2013) 132 So.3d 77, 87; *Disciplinary Counsel v. Cox* (Ohio 2007) 862 N.E.2d 514, 517.)

California has adopted Rule 8.4(d) verbatim. (Rules Prof. Conduct, rule 8.4(d).)

Legal malpractice and fee disputes. Perhaps not surprisingly, there are fewer examples in the case law for what appears anecdotally to be true: Uncivil lawyers face more claims

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for legal malpractice than civil lawyers. Certainly, a lawyer whose client's case is dismissed on a terminating sanction based on the lawyer's conduct would likely face a legal malpractice claim. But in addition to that situation, there are at least four reasons that uncivil conduct increases malpractice risk.

First, incivility contributes to legal malpractice claims because the most common response among competitive lawyers when faced with incivility is to increase their efforts to beat the uncivil lawyer. Those extra efforts add up—the opposing lawyer's performance improves. That improvement makes an adverse result in the matter the uncivil lawyer is handling more likely.

Employing the opposite strategy, "Mr. Niceguy" was much more successful—he lulled his opponents into a false sense of security and advanced his client's interests. Lawyering is hard: Why motivate adversaries to do more than they are already doing?

Second, overheated lawyers often suffer from poor judgment. Those who fight over every issue, big or small, lose the perspective needed to distinguish between issues that matter and those that don't. That can lead to time spent on trivial issues to the neglect of the critical ones. That, in turn, can increase the risk of losing the case and having the client second-guess the failure to focus on what mattered.

Third, incivility between counsel makes a later legal malpractice case more difficult to defend. In any legal malpractice case, the opposing counsel in the underlying case can be a key witness. It is hardly surprising that those defending a claim would prefer to have those key witnesses be friendly—or, at the very least, neutral—towards the lawyer being sued.

This is especially relevant in cases in which a former client has settler's remorse and sues the lawyer who handled the settlement. In those cases, a central issue is whether the client's adversary in the underlying case would have offered a better settlement—and that evidence often comes from opposing counsel.

Finally, an uncivil lawyer may struggle with client relationships because there is a tendency among lawyers who are not civil to mistreat everyone around them. For many lawyers, this isn't a switch that they can turn on for adversaries and turn off for clients and colleagues. It is ingrained in them to treat others disrespectfully.

Again and again, we see legal malpractice claims in which the lawyer has been rude to the client, the client becomes dissatisfied with the lawyer, and the client then pursues a claim against the lawyer. This can happen through a standalone legal malpractice case or as a cross-claim in an action to collect unpaid fees. And it can happen in a matter in which the lawyer did not make obvious mistakes, such as when the client has settler's remorse or second-guesses the lawyer's judgment calls.

Even when these cases lack merit, they are embarrassing, disruptive, and expensive to defend. The lawyer's emails with colleagues criticizing the difficult client—emails the lawyer thought the client would never see—become discoverable. They then show up as evidence that the lawyer was doing a poor job for the client.

But even when lawyers reserve their bad conduct only for their adversaries, scorched-earth tactics can backfire because clients later balk at the cost. That can lead to a malpractice case that is a fee dispute in disguise: The client's true complaint is that he or she paid a lot but received little of value in return.

For Mr. Niceguy, civility was a strong weapon in his arsenal—and if he finished last, that wasn't the reason. He would undoubtedly agree that incivility creates significant risks:

- Incivility increases the likelihood that a lawyer will face a malicious prosecution claim or sanctions.
- Incivility may violate the rules of professional conduct. Though lawyers are expected to zealously represent their clients, the rules forbid bullying and abusive conduct because that conduct delays or prolongs the proceedings and results in needless expense.
- Incivility increases the likelihood that a lawyer will face a legal malpractice or fee dispute claim, and it makes those claims harder to defend.

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TEACHING CIVILITY

Allen Lanstra

As the type of attorney who is reading a volume of the ABTL Report on civility, you are probably not experiencing an awakening about whether you practice civility. But our responsibility doesn't end with ourselves. Teaching others is essential. So here are some suggestions for fostering a culture of civility around you—from senior attorney, to junior associate or law clerk, to summer associate and law student. If enough of us appreciate the impact that good mentoring can have on the civility of those we mentor, it may help reverse the erosion of civility.

• Civility is not a performance. The discussion about civility in our profession often examines the issue in the vacuum of conduct between litigation parties, where we frequently witness the most outrageous acts. But civility transcends mere politeness and courtesy in bilateral relations. If you speak poorly of opposing counsel when you hang up the phone, you are treating civility like an acting performance and suggesting to your colleagues that being civil is fake. Notwithstanding the frustration, stress, and competitiveness of our profession, try implementing civility as part of the entire practice.

• Do not assign the worst motives. You are not a bad person for thinking that opposing counsel may be doing something improper—you're an attorney responding to the environment you were raised in. But pause and apply your analytical skills and think objectively. If we condition younger attorneys to presume that most opposing counsel are proceeding improperly and with malice aforethought, we lead them to believe that we operate in a system where courtesy and professionalism are exceptions, not the rule.

• Do not ask younger attorneys to do uncivil acts just so you don't have to. Don't force younger attorneys to do something that you would rather not do yourself—particularly without arming them with authority to resolve the issue any way they see fit. If you have a good reason to do the unusual, such as refusing a scheduling request or deadline extension because it hurts your client's interests, then picking up the phone and discussing that with opposing counsel yourself shouldn't be that hard. Don't send a messenger just to deliver an uncomfortable message, because doing so tends to breed incivility.

• Teach that civility is not weakness. Because it's not. You can still stand up for your clients. You can still make the arguments that are necessary. You can still be an advocate and use your persuasive skills. You can even still become upset about the way opposing counsel is acting. But civility and effectiveness are not mutually exclusive.

• Be accommodating. If a request really prejudices your client, ok. But I'm pretty certain that nearly every judge will tell us that she couldn't tell the difference between a brief written in 40 days versus 30 days. Good attorneys will do what they need to do in 30 days, regardless whether you jam them. All you've done is jam them (which is not civil). Treating scheduling as a game is petty.

• Set your own tone. As competitive, type-A, proud overachievers, lawyers probably find this the hardest task to execute. When opposing counsel lacks civility, your choices are to jump in the mud or maintain the high ground. Follow your better instincts.

• Opposing counsel is not your annoying sibling. Don't start stuff. Re-read and re-read your communications to opposing counsel before you send them to eliminate those shots across the bow, the passive-aggressive verbiage, and most of all, the unnecessary threats to seek sanctions.

• Encourage new attorneys to get to know people. It's undeniable that we treat our friends differently than strangers, and we aren't so anxious to assign malfeasance to someone whom we know and understand. The organized Bar—and the ABTL in particular—provide great opportunities for young/new lawyers to get to know people. It's hard to be uncivil to someone with whom you just completed a collaborative project that benefited the profession.

• Encourage new attorneys to pick up the phone. It's not as good as meeting in-person, but the phone works—if only because we want to get off the phone. It's a tremendous tool to cut through confusion or break down the presumption that the other side has the worst motives. Talk

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it out. Email's convenience and speed aren't well suited for resolving difficult issues, and email is more likely to foster misunderstanding than resolve it.

• Force them to write a letter. When a young attorney is amped up and wants to act back, challenge him or her to put it in a letter. The formality of letters carries with it a certain expectation of civility that often pauses our emotions and stops us in our tracks.

• Make them wait. Teach them to avoid reacting. Act after thinking. That usually means not responding immediately to that upsetting email. And make them re-read the email and re-read it again before sending it.

• Disclose your own stories, mistakes, and development. We all make mistakes. Some we pay for, and some we just regret. If you learned anything, share it. The best trial lawyers say they learn from what they did wrong, not from what they did correctly.

• Include younger attorneys. Even if the client won't pay for it, have younger lawyers shadow you as often as you can, whether it's a deposition or hearing, or just a phone call. Just as nothing teaches lawyering skills better than watching an accomplished lawyer in action, so too can you model civility.

• Treat everyone with respect. This is where it all starts. Make sure your young attorneys respect everyone they interact with—not just opposing counsel, but everyone within your firm, from the messenger up to the most senior partner.

• The listener has the power, not the speaker. As much as most of us ended up here because we like to talk or were told that we could dominate a debate, most of us prosper as attorneys because of our listening skills and patience. And you can't be uncivil when you're really listening (listening with eye-rolls doesn't count). Teach your younger lawyers this indispensable skill.

• Don't take yourself too seriously. Show your younger lawyers a healthy sense of self-deprecation, which will help them—as it helps you—shrug off perceived slights or rudeness from others.

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GENDER EQUALITY IS PART OF THE CIVILITY ISSUE

Justice Lee Smalley Edmon

Judge Samantha P. Jessner

At a recent ABTL joint board retreat, there was a session dedicated to a discussion of civility in the legal profession. Toward the end of a several-hour discussion, it was posited that any discussion of civility in the legal profession must include a discussion about the very different treatment that women receive compared to their male colleagues. While gender discrimination is obviously a serious issue in society as a whole, the legal profession should lead in the effort to eliminate gender bias. Rather than viewing gender discrimination as an entirely separate issue, we treat it here as a subcategory of incivility in the legal profession. With that in mind, we explore the persistence of unequal treatment of women in the law and make suggestions for promoting civility and respect in the profession.

Gendered Incivility in the Legal Profession

Despite the record numbers of women graduating from law school and entering the legal profession in recent decades, as well as the increase in women judges and women in leadership positions—not to mention the "Me Too" movement—women in the legal profession continue to encounter unfair treatment. In a 2018 survey of more than 7,000 women in the profession, half reported that they had been bullied in connection with their employment, and a third reported that they had been sexually harassed in the workplace. In addition, unequal treatment does not cease once a woman joins the judiciary. For example, a 2017 study conducted at the Pritzker School of Law at Northwestern University concluded that female United States Supreme Court justices are interrupted three times as often as their male counterparts.

Incivility can take many forms. The most common category consists of disrespectful behaviors, ranging from mild discourtesy to extreme hostility. Examples include condescension, interruption, profanity, and derogatory comments of a gendered nature, such as comments about an attorney's pregnancy or appearance.

Common complaints by women lawyers include being interrupted inappropriately or "talked over" while speaking, jokes and comments that are sexist, and comments that trivialize gender discrimination.

Other common examples reported by women lawyers include being professionally discredited. The misbehavior includes implicit or explicit challenges to their competence, being addressed unprofessionally (such as with terms of "endearment"), being critiqued on their physical appearance or attire, and being mistaken for nonlawyers (such as court reporters or support staff). A judge reported, "People tell me all the time I don't look like a judge even when I'm in my robe at official events." An attorney recalled an incident in which, when she stated her appearance on behalf of a shopping mall owner, the judge remarked that she was dressed as though she had just come from a shopping trip to the mall.

Less frequent—but still reported with regularity—are the most obvious forms of gender-based incivility, such as sexually suggestive comments or sexual touching.

The conclusion is inescapable that sexism is alive and prevalent in the legal profession, and that sexism finds its expression in incivility. The underlying reasons for sexism are varied, but among the obvious culprits with respect to the practice of law are that women remain underrepresented, particularly in leadership roles; there are fewer women than men on the bench; and there are enduring stereotypes with respect to the proper role of women in society.

The Costs of Incivility

The ramifications of incivility must not be trivialized as just part of the fabric of everyday life. Research shows that incivility makes people less motivated and harms their performance. One study showed that medical teams

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exposed to rudeness performed worse not only in all their diagnostics, but in all the procedures they did. This was mainly because the teams exposed to rudeness didn't share information as readily as others, and they stopped seeking help from their teammates. There is no reason to believe this dynamic is limited to the medical field.

Incivility causes individuals to feel less satisfied with their work, to cut back on their efforts at work, and to experience greater job stress. Incivility siphons energy away from workplace tasks, and sometimes it causes employees to leave their jobs.

When incivility shows up in the courtroom, in the presence of jurors and others who pass through the court system, it diminishes respect for and confidence in the legal system. To quote Justice Sandra Day O'Connor, "When people perceive gender bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law."

Promoting Civility in the Profession

While the demographics of the bench and bar have evolved over recent decades, sexism has proved difficult to dislodge. After all, the Rules of Professional Conduct proscribe sex discrimination, but it persists anyway. Working toward gender parity will help eliminate disparate treatment of women in the law, and will lead to enhanced civility in the profession.

On a more personal level, there are things each of us can do, through our own actions and in setting expectations with those around us. We can begin by simply being mindful. When someone makes an inappropriate casual remark or joke, we can simply refuse to engage. But we should not just be silent. While there is no need to turn every situation into a cause célèbre—it's probably counterproductive to do that—if you have a personal rapport with the individual who behaved unprofessionally, a private moment together can be a powerful way to advocate your values of civility.

If you are subjected to abusive behavior, or are a witness to it, come forward. The primary deterrent of reporting is fear—fear of damaging one's professional image, fear of harming a client's case, or fear of antagonizing a judge. It takes courage to blow the whistle, particularly when the wrongdoer wields power. Thankfully, however, we have seen a sea change in recent years, and women are now less reluctant to come forward. The courts and law firm leadership should strive to provide attorneys with safe and effective mechanisms to report mistreatment.

While we need to address uncivil behavior, it is also essential to recognize and take note of the civil behavior that we want to promote. If a colleague handled a difficult situation with grace and restraint, commend them on how well they handled it, and point it out to others. In doing so, you will help promote a culture of civility.

The Benefits of Civility

Apart from basic decency, there are other benefits to civility. Lawyers who behave with civility report higher personal and professional rewards, and conversely, lawyer job dissatisfaction is often correlated with unprofessional behavior by opposing counsel. Also, in the Internet era, a lawyer's reputation for civility is more vital than ever—a single uncivil outburst may haunt an attorney for years.

Lest you worry, nice guys do not finish last. In a biotechnology firm, a study showed that those who were seen as civil were twice as likely to be viewed as leaders, and they performed significantly better. Individuals who were viewed as civil were also seen as being important, powerful, and competent. If you're civil, you'll also be more effective.

Each of us can be more mindful and can act, when the opportunity arises, to promote civility. In doing so, we can help eliminate general incivility—as well as gender-related incivility—in the legal profession. At the same time, we also enhance our own well-being and sense of satisfaction with our chosen field.

Hon. Lee Smalley Edmon *is the Presiding Justice of the California Court of Appeal, Second Appellate District, Division 3.*
Hon. Samantha P. Jessner *is the Supervising Judge of the Civil Division of the Los Angeles Superior Court.*

WINNING THROUGH COOPERATION

Judge Carolyn B. Kuhl

"Winning through intimidation" became a catchphrase in the 1970s after a book by that title caught on and eventually became a New York Times bestseller. It was written by a formerly disgruntled real estate agent who eventually became successful enough to buy a Lear Jet. It includes such insights as, it isn't what a person says or does that matters but what his "posture" is when he says or does it. Not exactly the kind of attitude a judge appreciates in a lawyer.

Not everything about the digital age has been an improvement, but computer simulation has given us some evidence-based approaches to problems that previously had been left to self-proclaimed motivational experts. We now know that in many realms of human endeavor, cooperation yields better success for both parties even when they operate in an adversary setting. That is, adversaries each may be able to achieve a better result through cooperation than either could obtain by trying to win at the expense of the other. This conclusion is demonstrated in the work of Professor Robert Axelrod, Professor of Political Science and Public Policy at the University of Michigan, and a recipient of the National Medal of Science.

In his book, *The Evolution of Cooperation*, Professor Axelrod sets up a game based on the "Prisoner's Dilemma," a classic game theory exercise. In Axelrod's variation of the game, a player obtains: (1) the biggest payoff for winning at the expense of the other player, meaning that one player takes an aggressive position and wins when the other adopts a cooperative strategy; (2) an intermediate payoff when both sides choose to cooperate; and (3) the lowest payoff when both players attempt to win at the expense of the other player, meaning that both are made worse off by mutual combat. Axelrod announced an online tournament in which participants were challenged to develop a strategy to obtain the highest score when the game was played over and over indefinitely. Participants in the tournament included computer scientists, mathematicians, economists, psychologists, sociologists and political scientists.

The winning strategy was surprisingly simple. The best strategy was to cooperate with the other player and thereafter to attempt to win at the other's expense only when the other player had refused cooperation in the previous move. Professor Axelrod discerned four properties that tended to make a game strategy successful: (1) avoiding unnecessary conflict by cooperating as long as the other player does; (2) responding in kind to an uncalled-for provocative act by the other; (3) "forgiveness" (returning to cooperation) after responding to a provocation; and (4) clarity of behavior so that the other player can adapt to your pattern of action. "Nice" strategies—those that started with cooperation and responded to conflict without perpetual punishment—achieved higher scores.

Axelrod's findings do not suggest that we abandon the adversary system of litigation. Nothing is more conducive to finding the truth than cross-examination. Nothing is more helpful to a correct determination of a legal issue than briefing by opposing, well-informed advocates.

However, the choices available to litigation adversaries in their use of pretrial procedures fit the circumstances described by Axelrod in his game. Litigation adversaries are likely to have an indefinite number of interactions in the course of litigation. The rules of civil procedure should be directed toward allowing presentation of legal and factual issues to the decisionmaker (judge or jury) in a fair manner. But we all know that those rules also can be used as a tool for one party to attempt to obtain an advantage at the expense of the other r*egardless of the underlying merits*.

In the "game" of pretrial litigation, a provocative act might be use of the rules by one side to attempt to achieve an advantage without reference to the merits or the substance of the case. Think of propounding overbroad discovery for

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the sole purpose of burdening the other side. The proponent of the discovery might attempt to achieve a "high score" by increasing the other side's litigation costs. But if the other side responds in kind, both sides lose; that is, both sides get the low score in the "game." If the overbroad discovery yields only objections, both sides' litigation costs are increased with no countervailing benefit to either. Each side could do better by cooperating (i.e., propounding and responding to discovery in accordance with a fair understanding of the rules.)

To take another example, counsel for a party might refuse an extension of time to respond to discovery in an attempt to force the other side to lose all of its objections. The counsel who refuses the extension hopes for an advantage that is not warranted by the merits of the case—a "high score." However, the other side may convince the judge to forgive the late objections. In that case, both sides have incurred expense to no good end—a "low score" for both (and the counsel that refused the extension likely will incur an additional penalty by annoying the judge). If the refusal to grant an extension leads to a "tit-for-tat" response, neither side gains an advantage.

In litigation, procedure should be the servant of substance. That is, the goal of the rules of civil procedure is not for one side or the other to "win." Rather, procedural rules are intended to create an even playing field so that each side can obtain the facts underlying the dispute and present those facts and applicable law effectively to a decisionmaker. The purpose of civil litigation is fair dispute resolution. Judges focus on deciding cases based on the substantive merits of each side's position. Not surprisingly, judges are impatient with gamesmanship and lawyers' short-sighted procedural gimmicks.

Winning at the "game" of litigation should be about both sides presenting their best case on the merits. As Axelrod advises:

> Asking how well you are doing compared to how well the other player is doing is not a good standard unless your goal is to destroy the other player. In most situations, such a goal is impossible to achieve, or likely to lead to such costly conflict as to be very dangerous to pursue.

Axelrod's analysis demonstrates that starting with cooperation and returning to mutual cooperation as soon as possible helps both sides. He also concludes that when adversaries believe they are likely to see each other again, and when they have the ability to inform themselves about the prior actions of an opponent, cooperation is more likely to emerge. These conclusions are consistent with the observation that, in litigation specialties (for example, construction defect) or other close-knit practice groups, lawyers tend to find ways to cooperate on procedural aspects of a case. Axelrod's conclusions also suggest why organized bar associations are useful to their members. Opportunities to interact and develop personal relationships in ways that build trust reduce incentives to provocative behavior and increase expectations that cooperation will be reciprocated.

Axelrod's work demonstrates that, while it might "feel good" to win a procedural point now and then at your adversary's expense, in the long run the probabilities are against you and you are likely to end up a loser. The evidence shows that "winning through intimidation" is oxymoronic.

Hon. Carolyn B. Kuhl *is a Judge of the Los Angeles County Superior Court and sits in its Complex Civil Litigation Program.*

STRENGTHENING RESILIENCE THROUGH MINDFULNESS

Judge Paul A. Bacigalupo

How often do you feel mentally drained before you've even started your day? Perhaps it's because you've made dozens of mental decisions, thinking about something in the past and anticipating a future event, meeting, or deadline. While this is part of being human, this article will address how you can use the core strength of what we call resilience to lift the cognitive and emotional load of life. You can also use tools, such as mindfulness, to practice becoming more resilient in your professional and personal life.

Resilience is the ability to "bounce back" from difficult experiences and deal with life's challenges, even when those events are overwhelming or devastating. "If you are carrying an excessive load, you can either decrease the load or increase the capacity to lift the load," says Amit Sood, M.D., author of the Mayo Clinic *Handbook for Happiness*.

Some people are born with characteristics of resilience or a more positive outlook. But the rise of resilience research demonstrates that it isn't necessarily a trait that people either have or don't have. Resilience involves behaviors, thoughts and actions that can be learned and developed. Research also demonstrates that people's resilience is enhanced by training and makes a measurable difference in the experience of stress, anxiety, chronic fatigue and mindful attention.

The practice of resilience changes the structure of our brains, a process called neuroplasticity. Dan Siegel, M.D., in his groundbreaking book *Mindsight, The New Science of Personal Transformation,* explains that neuroplasticity involves the capacity for new neural connections and growing new neurons in response to experience. It can occur throughout our lifespan.

Having been on the bench since 2000 as a judge of the State Bar Court, the Supervising Judge of the Southern California Alternative Discipline Program, and for the last 17 years as a judge of the Los Angeles Superior Court, I've seen my fair share of attorneys who are burned out. Not all lawyers are prepared for the high conflict surrounding client relationships, the belligerency of opposing counsel, the wrangle of the courtroom and personal crises. When lawyers bring the baggage of unmanaged stress—professional and personal—into the courtroom and their work environment, it can lead to avoidable adverse consequences.

Chronic incivility—rudeness, disrespect, belittling others, speaking in a condescending tone—is unhealthy. No judge or member of the courtroom staff looks forward to dealing with lawyers in this condition. At the same time, there are plenty of judges who already feel overburdened by heavy dockets, weighty decisions, repeated exposure to disturbing evidence and traumatized parties and victims, anxiety over time limits, social isolation, false and misleading public attacks and the threat of recall and election challenge. We are all vulnerable and susceptible to stress and burnout. Given the destructive nature of incivility, we all need to be able to recognize these problems in ourselves so as to keep them from interfering in our relationships with others and improve our well-being.

Do you wonder if you need to increase your resilience? Dr. Sood suggests asking yourself a simple question. "Over the last month, how stressed have I felt on a scale of 1—being not at all—to 10?" He says, "If you are above a 5, you can be helped by resilience."

Many resources are available to improve resilience, including the Mayo Clinic resilience training program. On-line courses can also be found at Berkeley's Greater Good Science Center in partnership with Rick Hanson, Ph.D., at *The Resilience Summit*. Some of the fundamentals of resilience training are: **Social**—having good nurturing relationships to help you better withstand life's challenges; **Spiritual**—live a life full of meaning; **Physical**—getting regular exercise, sleep and a healthy diet; **Emotional**—boosting your ability to sustain positive emotions and recover quickly from negative ones; **Mental**—heightening focus and improving mindset through mindfulness, meditation and yoga.

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What exactly is mindfulness and meditation? These terms are often used interchangeably, but they're not the same. "Mindfulness is awareness that arises through paying attention, on purpose, in the present moment, non-judgmentally," says Jon Kabat-Zinn, Ph.D., Professor of Medicine Emeritus at the University of Massachusetts Medical School, founder of the Mindfulness-Based Stress Reduction (MBSR) Clinic (in 1979), and best-selling author of *Full Catastrophe Living: Using the Wisdom of Your Body and Mind to Face Stress, Pain and Illness* and *Wherever You Go, There You Are: Mindfulness Meditation in Everyday Life*.

Mindfulness involves focusing on the breath to cultivate attention on the body and mind as it is moment to moment. You allow your thoughts to come and go and not get attached to them. Mindfulness is about retraining your brain (neuroplasticity). When you are being actively mindful, you are noticing and paying attention to your thoughts, feelings and behaviors and how you react to them. This is a practice and requires both consistency and time.

Many say they can't sit still with their thoughts and feelings for more than a few minutes because their mind won't stop wandering. Some research suggests that mind-wandering comprises as much as 50% of waking life. We can all relate to mind-wandering and having off-task thoughts during an on-going task or activity, something that impacts our sensory input and increases errors in the task at hand. Paying attention and noticing and being in the moment reduces mind-wandering and helps you achieve equanimity, especially while under stress. The beauty of mindfulness is that you can practice it anytime, anywhere, and with anyone. Just a few minutes of mindfulness every day can clear away distracting thoughts, storylines and emotional baggage.

Mindfulness and meditation embody many similarities and can overlap. Meditation can be an important part of a mindfulness practice. It typically refers to a formal, seated practice that focuses on opening your heart, expanding awareness, increasing calmness and concentrating inward.

Mindfulness is associated with calm, and that's all the more reason why the U.S. Army has initiated mindfulness training for its soldiers to intensify mental focus, improve discernment of key information under chaotic circumstances, and increase memory function. Likewise, Fortune 500 companies such as Apple, Google, Nike, Procter & Gamble and Aetna incorporate meditation practice into their work environments, believing that meditation helps employee mental health and well-being, reduces stress, and improves listening and emotional intelligence.

Kabat-Zinn says, "The best way to capture moments is to pay attention. This is how we cultivate mindfulness. Mindfulness means being awake. It means knowing what you are doing." Making mindfulness part of your daily routine isn't a lot of work and can be integrated into many repetitive activities. Exercise like walking, hiking, and yoga are excellent times to cultivate mindfulness. Cooking, art, and music are opportune moments. Even gardening, housework, and doing chores are activities when, instead of letting your mind go somewhere else, you can use the time to focus on the task at hand.

Mindfulness is broadly accepted as a mainstream strategy with positive scientific results to improve resilience and well-being. It helps you maintain a realistic sense of control and choices, especially how to react in a given situation. It helps you maintain a positive outlook and perspective and accept change. It can literally impact your mind and body, your professional and interpersonal relationships, your career and daily life.

And all the benefits are free.

Hon. Paul A. Bacigalupo *is a judge of the Los Angeles Superior Court and President of the California Judges Association.*

A CIVILITY CHECKLIST

Judge Suzanne H. Segal

Checklists are often easier to follow than general advice. Why not a checklist for civility? This list is organized loosely according to the Federal Rules of Civil Procedure and the Central District of California Local Rules. While these suggestions follow the federal rules, the underlying concepts apply equally to practice in state court.

1. Initiate the rule 26 meeting with a diplomatic e-mail.

The Rule 26(f) meeting is a unique opportunity to set a positive and respectful tone for the entire life of the case. Start with a diplomatic email—or better still, call—using language that conveys a sincere interest in working cooperatively with your opponent. Of course, you may also include references to your client's view of the case, to allow the other side to understand your client's perspective. Just use diplomatic language—language really matters when trying to work cooperatively with an opponent.

Rule 26(f) requires that parties confer "as soon as practicable" or at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). It is easy to take the Rule 26(f) meeting for granted, perhaps as an annoying obligation, but it is truly an opportunity. You can use it to establish an expectation of civility for the entire case, particularly in the way you approach the "easy gives," i.e., the time, place and manner of the meeting. When and where the meeting takes place will not change the outcome of the case, but if you offer to meet in person at your opponent's office, on their schedule, at their convenience, you will begin the relationship with your opponent in a positive way. Offering to meet on your opponent's schedule communicates that you respect them. Rule 26 does not dictate who initiates the meeting. You will enhance the likelihood of a good relationship with the other side by starting off with a professional and diplomatic call or email at the earliest possible moment with an invitation to meet.

2. Educate your client on the benefits of civility.

Clients may complain that if you are too accommodating from the outset, you will be seen as not truly "fighting" on their behalf. The possibility of this concern suggests a need for a different type of early meeting—an early meeting with the client. From the beginning of the case, your client should have a clear understanding of how you intend to interact with your opponent. Emphasize to the client that you expect to advocate fiercely on their behalf, but that it is important for you to remain civil and professional at all times. You may need to explain that it is always in the client's best interest that correspondence or emails (which often become exhibits in discovery disputes) are phrased in a respectful manner, even when disagreements with the other side arise.

Approaching the Rule 26 meeting with diplomacy in mind does not mean sacrificing advocacy. The best lawyers make their Rule 26 initial disclosures as complete as possible, prior to the early meeting, and use the Rule 26 meeting to demonstrate their level of preparation and command of the case. The message from your first email and the early meeting disclosures should be that, although you are very interested in a cooperative relationship with opposing counsel, you are more than prepared for the adversarial battle that may lie ahead.

3. Discovery for the purpose of discovery.

It is easy to approach discovery practice as a less meaningful aspect of a case, or as a necessary evil to be dealt with by using form interrogatories or form requests for production. However, when you draft your discovery requests carefully, with focus and purpose, you can advance your case without antagonizing your opponents. This kind of discovery is proportional to the case, limited to the essential information necessary to resolve the issues in dispute, and served in a manner that is consistent with civility. In addition to developing useful information earlier than if you invite opposition, appropriate discovery can open the door to productive settlement discussions—by serving targeted but not abusive discovery, you force your opponent to reflect on aspects of the case that might prompt settlement. However,

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if discovery is used exclusively as a weapon, to inflict pain on an opponent by the burden imposed or served in a manner that would antagonize any reasonable party, it is likely to impede any effort to get along with opposing counsel and may interfere with efforts to settle. It will also be transparent to the court that you are using discovery for improper purposes. Use discovery for the purpose of discovery, and your opponent and the court will recognize your efforts as legitimate investigation and pretrial preparation.

4. Avoid the "drive-by" meet and confer.

Like the Rule 26(f) conference, approach the Rule 37 meet and confer as an opportunity to create more goodwill. Avoid the "drive-by" meet and confer, even if your opponent seems to prefer that approach. As with the Rule 26 meeting, pick up the phone or send a diplomatic email to initiate the meet and confer, and be cooperative regarding the date and location of the meeting. You will earn goodwill from your opposing counsel by reducing the stress in their life—show up in person and on time, and go to your opponent's office when it is convenient for them. Although Local Rule 37 requires opposing counsel to attend the meet and confer at the moving counsel's office, the rule also provides that the parties may agree to meet "someplace else." Provide whatever responses you can to demonstrate that you intend to fairly and honestly litigate the case. At the very least, you will narrow the discovery issues in dispute, reducing the cost of the litigation for your client and allowing the court to focus on the most difficult disputes. At best, you might settle the case.

5. Take advantages of informal discovery conferences with the court.

In 2015, Rule 16 was amended to include the following language: "The scheduling order may: . . . (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court." The Advisory Committee notes discussing the amendment observed: "Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion . . . ." These "informal discovery conferences" are now required by almost every Magistrate Judge in the Central District prior to the filing of a discovery motion, and are also used by many state court judges. Take advantage of the opportunity to have a judge participate in your discovery meet and confer, helping you and your opponent find reasonable solutions to your discovery disagreements. Start the conference by saying something positive about your opponent in front of the judge. This will set an optimistic tone for the conference and may increase the likelihood that your opponent will work cooperatively with you. By using the informal discovery conference, you may resolve discovery disputes in a less combative environment and avoid potential friction with your opponent.

6. Always rise above.

Lawyers often suggest that they were "dragged" into a conflict by their opposing counsel's combative or abusive behavior. While opposing counsel's conduct should not be condoned, it is best to "rise above" it and not sink down to the level that someone else may want you to sink to. If your opposing counsel is antagonizing you, remember that the more respectful and polite you are in the face of such behavior, the better you and your client will look before the court.

7. Focus on meaningful motion practice.

Are Rule 12 motions to dismiss (demurrers in state court) simply delay tactics? Or do they actually move the case forward? The answer is probably yes and yes. Sometimes early motion practice is for the purpose of delay, but on other occasions, a Rule 12 motion is necessary to resolve a fundamental legal question. To increase the likelihood of civility (and to improve your relationship with the court), avoid the "delay tactic" motions, even if your client wants you to file them.

Local Rule 7 requires that parties hold a meet and confer prior to filing any motion. Some lawyers may be skeptical of this requirement. Why would an opponent change a significant position in the case, simply because of a meeting? It is true that the Local Rule 7 meeting may be most effective for motions involving non-dispositive relief, i.e., motions that

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do not resolve ultimate issues in a case. However, even if you are meeting to discuss an issue that you do not believe your opponent will compromise on, the meeting can be yet another opportunity to develop a productive relationship with your opponent. View the Local Rule 7 meeting as another diplomatic mission: Even if you do not resolve the motion, you may lay the foundation for settlement.

8. Set yourself up to settle well.

I once had a supervisor who frequently reminded me that, in his view, I had only two goals as a litigator—to win or settle well. As a judge who has conducted hundreds of settlement conferences, I can comfortably say that personal animosity between clients or lawyers is one of the most common impediments to "settling well." Strong feelings of anger or resentment, which sometimes increase over the life of a case, greatly interfere with the logical decision-making necessary for effective negotiations. If civility has not been your priority from the outset, or if civility was lost along the way, it is difficult to recover a cooperative working relationship with your opponent when you attempt to settle a case.

9. Improve your trial preparation experience with cooperation.

Possibly the most painful phase of a case, if lawyers are not getting along, is the trial preparation phase. No other phase requires more cooperation between the lawyers than preparation of the pretrial documents. Local Rule 16 requires joint exhibit lists, joint jury instructions, joint witness lists, and a joint pretrial conference order, among other things. The requirement that documents, exhibits, orders, jury instructions, and other items be prepared jointly means that your life will be far simpler if you have already established a cooperative relationship with opposing counsel. At the end of the trial, remember to either win with humility or lose with grace. Whatever the outcome, you want the judge, the jurors, your opponent and your client to view you as someone who knows how to handle the situation with professionalism and dignity.

10. Forgive yourself, forgive others.

Following this checklist does not mean that you will never have bad days. You will make mistakes. You will make decisions you regret. You might lose your temper or say something you wish you could take back. Or you might take a position in a case that antagonizes someone, even if your position is completely justified.

When you make a mistake, fix it; apologize if appropriate; learn from it; forgive yourself; and move on. If you took a position that aggravated your opponent, look for an opportunity to repair that relationship.

Forgiveness is powerful. Try to recall a moment where someone forgave you for a mistake or showed you that they were willing to forget a past conflict. Remember how positive that experience was and apply it to your professional life. Putting aside past conflict, moving on, and seeking to develop new friendships are the building blocks for civility to spread. Start your case with diplomacy, maintain civility and professionalism throughout and forgive mistakes and it's possible that, win or lose, you may end the case with a new professional colleague or at least a respectful opponent.

Hon. Suzanne H. Segal *is a United States Magistrate Judge in the Central District of California.*

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Appendix 3: Key California Civility Cases

- *Lossing v. Superior Court* (1989) 207 Cal.App.3d 635.
- *Green v. GTE California, Inc.* (1994) 29 Cal.App.4th 407
- *People v. Chong* (1999) 76 Cal.App.4th 232.
- *Green v. GTE California, Inc.* (1994) 29 Cal.App.4th 407.
- *Pham v. Nguyen* (1997) 54 Cal.App.4th 11.
- *D.M. v. M.P.* (Nov. 30, 2001, G023935) [nonpub.opn.].
- *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158.
- *In re S.C.* (2006) 138 Cal.App.4th 396.
- *Ahanchian v. Xenon Pictures, Inc.* (9th Cir. 2010) 624 F.3d 1253.
- *Marriage of Davenport* (2011) 194 Cal.App.4th 1507.
- *Kim v. Westmoore Partners, Inc.,* (2011) 201 Cal.App.4th 267.
- *Wong v. Genser* (Nov. 30, 2012, A133837) [nonpub. opn.].
- *People v. Whitus* (2012) 209 Cal.App.4th Supp. 1
- *Interstate Specialty Marketing Inc. v. ICRA Sapphire Inc*. (2013) 217 Cal.App.4th 708.
- *In re Marriage of Lewis,* (Nov. 3, 2015, B255900) [nonpub. opn.].
- *Martinez v. Dep't of Transportation* (2015) 238 Cal.App.4th 559.
- *Sullivan v. Lotfimoghaddas* (June 18, 2018, B279175) [nonpub. opn.].
- *Fridman v. Beach Crest Villas Homeowners Ass'n,* No. (Mar. 19, 2018, G052868) [nonpub.opn.].
- *Flack v. Nutribullet, L.L.C.* (C.D. Cal. 2019) 333 F.R.D. 508.
- *Lasalle v. Vogel* (2019) 36 Cal.App.5th 127.
- *La Jolla Spa MD, Inc. v. Avidas Pharms., LLC* (S.D. Cal. Aug. 30, 2019, No. 17-CV-1124-MMA(WVG)) 2019 WL 4141237.
- *Briganti v. Chow* (2019) 42 Cal.App.5th 504.

- *Martinez v. O'Hara* (2019) 32 Cal.App.5th 853.
- *Block v. Bramzon,* (Jan. 22, 2021, B292129/ B297198) [nonpub. opn.].
- *In re Mahoney* (2021) 65 Cal.App.5th 376.
- *Karton v. Ari Design & Construction* (2021) 61 Cal.App.5th 734.
- *Mayorga v. Mountview Properties Ltd. P'ship* (Apr. 9, 2021, B298284) [nonpub. opn.].
- *Karton v. Ari Design & Constr., Inc.,* (2021) 61 Cal.App.5th 734.
- *In re Mahoney* (2021) 65 Cal.App.5th 376.

MEMORANDUM

To: Justice Brian Currey, California Civility Task Force
From: Amy Lucas, Larson Ishii
Date: September 10, 2021
Re: Civility Caselaw Research

In preparation for the Task Force's civility report recommending the adoption of a California state bar MCLE civility requirement, this memorandum serves as a summary catalog of California cases addressing civility (and the lack thereof). For this memo's purposes, analysis of the orders and opinions below focuses primarily on the issues of civility involved and not necessarily the relevant legal holdings. Cases are divided into three broad categories of incivility and subcategories within each: Part I outlines incivility directed at opposing counsel, Part II involves incivility related to different biases, and Part III details incivility aimed at the judiciary.

I. Incivility Directed at Opposing Counsel

A. Rude Behavior

1. *La Jolla Spa MD, Inc. v. Avidas Pharms., LLC*, No. 17-CV-1124-MMA(WVG), 2019 WL 4141237 (S.D. Cal. Aug. 30, 2019)

The district court granted sanctions against defendant's counsel in the amount of $28,502.03 for atrocious acts of incivility and unprofessional conduct primarily relating to a deposition. At the deposition, defendant's counsel "continuously interrupted, lodged frivolous objections, improperly instructed [her client] to not answer questions, and extensively argued with [opposing counsel]." *Id.* at 3. The court examined numerous examples of defendant's counsel's inappropriate comments on the record including:

- "You know what? While there's no question, I'm going to ask you to speed this up and say: Are there any products on that list that they did not manufacture? Can we do it quicker? . . . Yeah, I know you think it's important to waste our time, but we're trying to get out of here and with concern – out of courtesy for everyone's time." *Id.* at 10.
- "Objection; there's been no foundation laid for the fact it's an email. Do you want to do that first? . . . No, that's not the way to do it. Come on, Counsel." *Id.* at 11.
- The court described the following exchange as a "troubling tirade" in which "the cold, typed words of the transcript truly do not do justice to the tone and tenor of [defendant's counsel's] sustained harassment of [plaintiff's counsel]":
    - [Defendant's counsel]: No, the Court didn't say anything about timing. The witness – the witness is doing the best she can. And we moved this precisely for your convenience. Don't start doing that game. You've wasted plenty of time.
    - [Plaintiff's counsel]: Do you need to take a break?
    - [Defendant's counsel]: No, don't talk to my witness, ever. Don't you ever talk to my witness. Do you understand how threatening that is?
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: And how unprofessional that is?
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: Because you're a male exercising male privilege and talking to my witness in a situation where she's already nervous. And you're talking to her directly? That's, first of all, a violation of the ethical rules, as you know.
    - [Plaintiff's counsel]: Why are you standing up?
    - [Defendant's counsel]: We're going to take a break. Come on, Margie, let's take a break.
    - [Plaintiff's counsel]: You're leaning over the table.

    - [Defendant's counsel]: Yes, because of your threatening nature . . . Because you threatened my witness just now. Don't you ever talk to her directly. *Id*. at 18.
- "[Defendant's counsel] disparaged [plaintiff's counsel] and his case throughout the deposition, calling the case 'garbage' or maligning him personally and the nature of his questioning (see, e.g., 'Again, you're belaboring the witness, you have so many 'belief' questions.'); ('If you keep asking questions that are objectionable, we're really not getting anywhere. So let's go, come on Counsel. Ask questions that are good ones.'); ('Ask a real question with a noun, a topic and date.')). *Id*. at 21. (internal citations omitted).

Altogether, the court found defendant's counsel had "violated the basic standards of professionalism expected of all attorneys . . . was not courteous or civil; acted in a manner detrimental to the proper functioning of the judicial system; disparaged opposing counsel; and engaged in excessive argument, abusive comments, and delay tactics at [client's] deposition. The sheer volume of [defendant's counsel's] antics belie any notion of mistake or negligent conduct on her part but rather disturbingly reveal a systematic effort to obstruct [opposing counsel] for no good or justifiable reason or purpose. [Defendant's counsel] undeniably acted in bad faith." *Id.* at 23.

After lamenting the current state of the legal profession in which attorneys engage in scorched-earth tactics to make litigation as painful as possible, the court found itself obligated to act. Remarking that unchecked incivility "erodes the fabric of the legal profession," this case was such an extreme example of misconduct that required sanctions. *Id.* at 3. The court concluded: "Never before in this Court's nearly ten-year tenure have the sanctions the Court imposes today been more fitting and more deserved by an attorney. [Defendant's counsel's] atrocious conduct at the [client] deposition in particular fell far below the standard of professional conduct becoming an attorney practicing before this—or any other—Court. There may be a fine line between zealous advocacy and unprofessional conduct, but [defendant's counsel] trampled that line long before barreling past it." *Id.* at 25.

2. *In re Marriage of Davenport*, 194 Cal. App. 4th 1507 (2011)

The appellate court affirmed the trial court's order awarding sanctions and attorneys' fees under Section 271 of the Family Code in part due to incivility by petitioner's counsel. The court observed that the record was replete with inappropriate correspondence by counsel "that contained

abusive, rude, hostile, and/or disrespectful language." *Id.* at 1534. The court went on to highlight a few particular instances of incivility including:

- In a letter regarding nonappearance for a deposition: "Once again, you offer the same tired, old, and shopworn excuse. Your continued blustering about mutually agreeable dates, efficiency and promptness, and convenience is pathetic when your client's actions negate any semblance of cooperation. Talk is cheap. Actions speak louder than words. Your credibility is at stake here." *Id.*
- In a separate letter: "Enough already with the delays . . . . We don't accept your implication that you didn't already have [the Request to Inspect] . . . Perhaps you didn't look hard enough, because we filed a Motion to Compel . . . in which I attached RTI Set one to my Declaration. Or you weren't counting that copy. . . . Your last paragraph rings hollow." *Id.* at 1534-35.
- In another letter: "We've noticed that, in the past, you have had some trouble keeping things straight. We also noticed that you tend to stretch things somewhat too far in the name of appearances. . . . It's no surprise, then, that your letter of 8/7/08 appears to be an attempt to create a false and misleading exhibit for use at a later law and motion hearing so that your client can sit in court with a halo over his head, and so you can say 'look how many times Ken offered to settle!' That wouldn't surprise us at all, given your practice of attaching a large pile of exhibits to your declarations without any testimony from you concerning their truth." *Id.* at 1535.

The court noted counsel's comments violated California Attorney Guidelines of Civility and Professionalism that reminds attorneys of their obligations to act professionally with opposing counsel and instructs attorneys to avoid hostile, demeaning, or humiliating words. The court concluded that effective advocacy does not require incivility and reminded all counsel: "Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive." *Id.* at 1537.

3. *DeRose v. Heurlin*, 100 Cal. App. 4th 158 (2002)

The appellate court imposed sanctions in the amount of $6,000 against appellant's counsel for filing and prosecuting a frivolous appeal to delay an adverse judgment and cover up his dishonesty and mishandling of client trust funds. While the sanctions were for bringing and maintaining a frivolous

appeal, in chronicling counsel's misconduct, the court recounted numerous instances of rude and offensive behavior made by appellant to opposing counsel. Appellant's counsel had not responded to opposing counsel's repeated attempts to obtain documents, prompting opposing counsel to suggest his lack of cooperation constituted unprofessional conduct. Counsel told opposing counsel to "educate himself" on attorney liens, he would "see [him] in court," and "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." *Id.* at 162.

In response to statutory offers to compromise, appellant's counsel had replied "Let me ask: from what planet did you just arrive. It is my full intent to take judgment against Mr. DeRose on July 11, 2000 when my motion for summary judgment is heard, move for sanctions against you and your firm and do all in my power to see that you, and your firm, suffer to [the] full extent possible through a subsequent claim for malicious prosecution and, very likely, a malpractice action by your ex-client Mr. DeRose when he is presented with a fee demand for thousands of dollars. . . . [Y]ou can take [the American Board of Trial Advocates] Code of Professionalism and shove it—where this case is concerned. When all is said and done, you, Mr. Day and Mr. DeRose will be so very, very sorry this course was pursued." *Id.* at 165. Counsel's incivility continued as he later described opposing counsel as "a frightened Brier [sic] Rabbit who is now stuck to a tar baby of a case in which his client is on the hook for significant damages, attorney's fees, costs, etc.," and a "scared man looking for any way to avoid significant personal liability." *Id.* at 166. The court was clear in remarking that appellant's counsel's "conduct ha[d] been disgraceful" and published their opinion as a reminder and lesson to the bench, bar, and public. *Id.* at 161.

4. *Mayorga v. Mountview Properties Ltd. P'ship*, No. B298284, 2021 WL 1326695 (Cal. Ct. App. Apr. 9, 2021)

In a footnote affirming the trial court's decision to set aside a default judgment for respondent's reasonable mistake, the appellate court noted incivility in respondent's counsel's briefing. In a dispute over an apartment, appellant as tenant had filed an action against respondent landlord alleging uninhabitable conditions, while respondent had initiated eviction proceedings. Given the eviction proceeding was dismissed, respondent did not file a response to the uninhabitable conditions complaint, alleging his attorneys led him to believe it had been dismissed as well. The court noted that respondent's counsel's reference to appellant's "sloth and stealth" and having "extreme lack of hygiene" was "unnecessary to the resolution of the issues on appeal, and violate[d] the 'civility oath' as well as [California's]

civility guidelines." *Id.* at n. 4. However, the court did not "take further action in light of counsel's apology at oral argument." *Id.*

5. *In re Marriage of Lewis*, No. B255900, 2015 WL 6692239 (Cal. Ct. App. Nov. 3, 2015), *as modified on denial of reh'g* (Dec. 1, 2015)

In affirming the lower court's settling of a marital estate, the appellate court noted to both parties "attacks on the character of opposing counsel are not well-received in this court, and pejorative adjectives, including those directed towards the parties and the trial court, do not persuade." *Id.* at 2. While appellant's counsel disputed the trial court's findings of certain assets as community property, charging appellant for inappropriate transfers of money, and awarding more than $25,000 per month in support, the court held appellant's counsel had failed to meet his burden by not adequately pleading his argument or citing to the record.

In a footnote, the court highlighted the inappropriate attacks on opposing counsel in both parties' briefing. Respondent's brief improperly used the word "mantra" in claiming why appellant did not pay respondent and asserted "[appellant] does not believe that the rules apply to him and that he is one of those people who takes his anger and greed beyond the bounds of reason." *Id.* at n. 3 (internal quotations omitted). Appellant's brief accused opposing counsel of "'[t]aking the low road,' of characterizing [respondent's counsel's] argument as a 'a vain effort to make up for the deficiencies in her proof,' of describing an expert's testimony as 'gibberish.'" *Id.* Appellant's briefing also improperly criticized the trial court as having "commit[ed] a 'whopping' miscarriage of justice, of paying 'lip service' to a legally recognized distinction, and of having 'plucked [numbers] out of thin air' . . . 'The trial court has no discretion to use overblown financial figures to determine spousal support. As with all computer programming, garbage in, garbage out.'" *Id.*

6. *In re S.C.*, 138 Cal. App. 4th 396 (2006)

In affirming the orders of the juvenile court declaring a 15-year old minor with Down syndrome dependent and finding it detrimental to return to her mother's custody after being sexually abused by her stepfather, the appellate court referred the opinion to the California State Bar due to the gross misconduct contained in appellant's briefing. The court noted that appellant's 202-page opening brief was "a textbook example of what an

appellate brief should not be." *Id.* at 400. The court further described appellant's brief as "failing to provide meaningful legal analysis and record citations for complaints raised," (*Id.* at 408) and "an unprofessional and, in many respects, virulent brief." (*Id.* at 401.)

The court commented that appellant's brief "attack[ed] the character and motives of a social worker in this case" by gross exaggeration of the facts. *Id.* at 413. Appellant's counsel mischaracterized a physical examination as providing zero support of penetration when the examination was in fact inconclusive as it never occurred. Second, appellant's counsel mischaracterized the interviews by social workers with the minor as showing she "cannot distinguish between truth and fantasy," when the interviews actually showed "a developmentally disabled girl who clearly understood the difference between being truthful and telling a lie." *Id.* Appellant's counsel also misrepresented: (i) orders by the juvenile court regarding visitation, which were clearly refuted by the record; (ii) holdings of appellate decisions cited, which were clearly refuted by the court's review; and (iii) quoted expert authorities, which upon examination were not expert statements, but a recasting of her cross-examination questions.

The court took great issue with "the uncivil, unprofessional, and offensive advocacy employed by appellant's counsel" in attacking the mental ability of the minor, as "[t]he attack [was] stunning in terms of its verbosity, needless repetition, use of offensive descriptions of the developmentally disabled minor, and misrepresentations of the record." *Id.* at 420. Appellant's counsel "*attribute[d] to the judge* a statement that the minor, 'with an IQ of 44' and 'test results . . . in the moderately retarded range in all areas, is more akin to broccoli, than to a single celled amoeba,'" when in fact those were appellant's counsel's words. *Id.* at 421. Appellant's counsel also mischaracterized the expert witness in saying, "Dr. Miller think[s] [the minor is] pretty much a tree trunk at a 44 IQ." *Id.* Appellant's counsel belittled the minor's testimony about being sexually molested by accusing the minor of having "several more versions of her story, worthy of the Goosebumps series for children, with which to titillate her audience." *Id.* Appellant's counsel additionally described the minor's testimony as "jibber jabber," "meaningless mumble," "mumbles, in a world of her own," and "little more than word salad." *Id.*

The court also admonished appellant's counsel for disparaging the trial judge by making unsupported assertions the judge acted out of bias. Appellant's counsel claimed the trial judge pressed the minor into saying words the judge wanted and mischaracterized the judge's words to claim he admitted he was biased. In examining the record, the court noted the judge had asked questions to understand the minor's testimony and "no reasonable

attorney could interpret the judge's questions of the minor as a biased effort to help DHHS prove its case." *Id*. at 423. Next, the court remarked appellant's counsel had taken one statement by the trial judge out of context: "So that whole process is one in which I was very active, and I wasn't just an impartial person sitting on the sidelines evaluating the child." *Id.* In the proper context it was not an admission of bias, but "an observation that because of the minor's developmental disability, the judge was unable to just sit back to hear and observe her testimony; instead, he was required to get involved in the questioning in order to ensure that he understood the minor's answers." *Id.* at 424.

7. *D.M. v. M.P.*, No. G023935, 2001 WL 1527713 (Cal. Ct. App. Nov. 30, 2001)

The appellate court reversed the trial court's sanctions against (i) the mother's counsel in the amount of $368,000 and $16,200, and (ii) the ex-husband's counsel in the amount of $297,000 holding the lower court had abused its discretion. The underlying case involved a paternity suit for increased child support brought by the mother against the father, whom she had a child with while married to her husband (whom she later divorced, i.e., ex-husband). The father had previously recognized the child as his own, paying monthly child support, as it there was little doubt he was the father given the ex-husband had previously had a vasectomy. However, when confronted with a paternity suit, the father resisted a DNA-test and the mother's suit and requests for attorneys fees claiming she must first overcome the statutory presumption the ex-husband was the father given their marriage. After a drawn out litigation, the father was eventually found to be the rightful father, but the trial judge awarded sanctions against counsel for the mother and ex-husband for over-litigating the case, bad-faith tactics, and general incivility.

The appellate court held the trial court erred in finding the mother's counsel over-litigated the case by "acting frivolously in trying to obtain pendente lite support and fees." *Id.* at 6. Instead, the court noted "[t]he main reason that this paternity case took such a ridiculously long time to try was the father's insistence on litigating the issues of the nature of the ex-husband's relationship with the child and the reason for the mother's delay in bringing suit." *Id.* Under the basic facts of the case, there was "enough there for a 'preliminary determination' of paternity," meaning the mother's counsel's requests for fees was not frivolous. *Id.*

The appellate court also held that trial court abused its discretion in awarding sanctions for perceived bad faith tactics delaying the litigation and general incivility. The lower court had stated "this case has not been a pleasant one for the court," warned "many of the behaviors that [the court] observed could conceivably be career threatening," and laid a trap "to confirm that counsel had continued to engage in bickering, accusation and miscommunication between the parties and their counsel" after being instructed otherwise. *Id.* at 3-4. The trial court found inappropriate behavior among all parties' counsel: (i) mother's counsel had filed frivolous motions to obtain fees and lied about delaying the filing because of fear; (ii) ex-husband's counsel had frivolously attacked the integrity of opposing counsel while also giving false testimony about an abortion; and (iii) father's counsel had insinuated opposing counsel were "padding the bills" or "milk[ing] the case." *Id.* at 4. The appellate court disagreed held that the mother's counsel's attempts to gain fees and support were not frivolous given the facts of the case, the sanctions for false statements contravened traditional due process, and that the ex-husband's counsel's attacks on the integrity of opposing counsel were not frivolous given the record.

While the court noted the "growing incivility among attorneys has commanded considerable attention," the court remarked this appeal "presents a textbook case of incivility among attorneys, but unfortunately also presents a textbook case in how not to go about correcting it." *Id.* at 8. In reversing the sanctions, the court remarked: "No doubt the trial judge's motive here was a worthy one. Civility in the profession ought to be promoted by a strong hand from the bench. But sanction orders (particularly large ones) must surely be a disfavored means of doing so. Given the intense competitive pressures facing lawyers today, the opportunity *to have your opponent pay part of your client's bill* has become too much of a temptation: Judges have the duty to curb counsel's temptation in that regard." *Id.* Further, the court noted the danger in waiting to oppose sanctions at the end of case, as well as the unsuitability of laying a trap, because it risks "all kinds of conduct, ranging from lack of professional courtesy to something really bad will be[ing] jumbled together," so that "the relationship between the bad conduct and the amount of sanctions will be attenuated." *Id.*

8. *Sullivan v. Lotfimoghaddas*, No. B279175, 2018 WL 3017190 (Cal. Ct. App. June 18, 2018)

The appellate court affirmed the judgment of the trial court and denied appellant's motion for a new trial based in part on inappropriate arguments made by respondent's counsel to the jury. Appellant's counsel had requested

a new trial after the jury found respondent was not negligent concerning a car crash between the parties. The court denied appellant's counsel's motion because any misconduct was not prejudicial and appellant's counsel had not properly objected at trial. In affirming the lower court, the court did note two instances of unprofessional and uncivil conduct by respondent's counsel when addressing the jury during closing arguments.

Respondent's counsel had improperly appealed to the jury's self-interest by arguing the community's time and resources were being wasted for two trials "all based upon lies." *Id.* at 7. Respondent's counsel continued stating "if as a community we allow that type of misuse of scarce resources and good people's time, that maybe Shakespeare was right: First thing, let's kill all the lawyers." *Id.* The court noted respondent's counsel's argument was an improper and troubling argument to be made, especially because it was unsupported by any evidence.

Further, the court admonished respondent's counsel's "questionable advocacy" in commenting on the fact appellant's son was present during appellant's cross examination. *Id.* at 8. Respondent's counsel had said, "the plaintiff chose to allow his son to sit in this courtroom while he was cross-examined and shown to have lied at a public forum by his own testimony. He allowed his son to observe him in an attempt to misuse and manipulate this process for financial gain. That's wrong. That's really wrong. And killing all the lawyers won't fix that." *Id.* The court noted in making a "jury argument that attacks a litigant's personal integrity, impugns his parenting decisions, and gratuitously suggests the exercise of his constitutional right to petition the courts is worse than murdering attorneys, falls below the level of acceptable advocacy and civility that courts and bar associations are striving to restore in our profession." *Id.* Citing the ABTL civility guidelines, the court issued a reminder that "[e]ven when advocating zealously, counsel must recognize there are lines that are not to be, and need not be, crossed." *Id.*

9. *Fridman v. Beach Crest Villas Homeowners Ass'n*, No. G052868, 2018 WL 1373398 (Cal. Ct. App. Mar. 19, 2018)

In a protracted litigation between a couple and their homeowner's association, the appellate court concluded by urging the parties to return to civility. The original dispute was regarding the alleged improper installation of air conditioners in which the Fridmans were successful in their arbitration and were awarded attorneys' fees. As the homeowners association had no assets, to be awarded the money a writ of mandate was needed to compel a special assessment to pay the fees. While the Fridmans received this, they also lost a subsequent suit against the homeowners association president,

declared bankruptcy, and assigned the right to the fees to their attorneys. During bankruptcy, the Fridmans attempted to enforce their writ of mandate, but were denied as they no longer had a beneficial interest.

As the court concluded its denial of Fridmans' motion, they "strongly urge[d] all sides to quickly and civilly resolve the litigation between them before even more attorney fees are expended." *Id.* at 8. The court noted that various other courts had chronicled the rampant incivility among the parties: "The amount of energy which the parties have devoted to this litigation, and the extraordinary degree of venom they have poured on each other, make it clear that this case is more of a personal vendetta than a rational attempt by the parties to protect their legitimate interests. To say that either of these parties is acting in 'good faith' stretches the common meaning of that phrase to the breaking point." *Id.* (internal citation omitted). The trial court commented, "Finally, this Court notes the lack of professional civility and courtesy displayed by counsel in this action. The Motion, Opposition, and Reply are replete with harsh accusations, personal attacks, and unsupported tirades. Such attacks have no place in litigation." *Id.*

10. *Block v. Bramzon*, 2021 WL 223154 (Cal. Ct. App. Jan. 22, 2021)

This unpublished decision is included here due to the conduct and statements at issue in the decision.

Dennis P. Block dba Dennis P. Block & Associates ("Block") is a leading landlords attorney, and his firm handles unlawful detainer matters through employee attorneys, including co-Plaintiffs Gold, Rahsepar, and office manager Riesen. (Collectively Block and co-plaintiffs are referred to as "Plaintiffs"). *Id.* at *1. BASTA is a tenant rights law firm, founded by Bramzon, and defends unlawful detainer actions through employee attorneys. *Id.*

Block sued BASTA, Bramzon and another BASTA attorney Schulte, alleging that Defendants created, administered, and maintained a website, "dennisblock.com", and a twitter handle "@dennispblock" with the name "not Dennis Block", and the author named "Very Stable Genius Not Dennis P. Block," all without Block's permission. *Id.* at *1-2. Both the website and twitter account were alleged to post defamatory and derogatory comments, as well as post Block's personal cell phone number, home address, and photos of Plaintiffs and family members. *Id.* Defendants were also alleged to spam Block's law firm with, at times, thousands or more solicitations per day. *Id.* at *2.

Defendants filed anti-SLAPP motions to the complaint, contending that the twitter statements were statements made in connection with an issue of public interest, arguing that Block had made himself a public issue and the twitter account was merely a parody of Block's actual twitter feed. *Id.* at *3. The Court of Appeal disagreed. While eviction is an issue of public interest, Defendants' tweets were too tangentially related to constitute protected speech. *Id.* at *5. As to the allegedly libelous statements, Block's "trustworthiness" is also too tangentially related. *Id.* "A majority of the statements consist of vulgar and/or adolescent personal insults, misogynistic, racist, and xenophobic comments, and other slurs having nothing to do with any reasoned discussion of trustworthiness, competence, or any other 'public issue or an issue of public interest.'" *Id.* (*See, e.g.* "Dennis Block & Associates is helping to #MAGA by evicting one latino at a time!"; "My associate Nasti Hasti really needs to start wearing longer skirts to court. Or underwear. Or [omitted]"; "A client called to complain that our Manisha Bajaj was 'dressing like a prostitute'. I told him until wait until he sees 'Nasti Hasti' Rahsepar!"). [Further example tweets at quoted at page 5 and in the footnotes.]

The Court also found the tweets not to contribute to a public debate. *Id.* at *6. Recognizing the parties as frequent opposing counsel, the purpose of the tweets were to slam an adversary. *Id.* Finally, non-communicative acts, like the website's redirection of visitors from "dennisblock.com" to another firm website, or spamming Block's firm, are not protected acts. *Id.* The Court concluded with a comment on civility, and required the parties to brief the issue of whether or not the comments were a string of incivility (which Defendants conceded) but also, questioned whether they constituted an ethical violation. *Id.* at *7. The matter was remanded to the trial court to make this determination, and to determine sanctions, if appropriate. *Id.*

The author of this summary opines that the appellate court's question highlights the limitations of California's ethics rule as compared to the Model Rule on antidiscrimination. Some of the tweets openly sexually harassed and/or commented on an opposing counsel's gender and ethnicity in a sexually harassing way, and/or appeared directed towards inciting racial or national hostility. However, under California Rules of Professional Conduct Rule 8.4.1, discipline would not likely be prohibited, because although they are about opposing counsel, they are not made "in the representation of a client." By contrast, those same tweets would be a violation of Model Rule 8.4(g), which covers conduct "related to the practice of law," without requiring a nexus to a client matter. California expressly rejected the broader scope of the Model Rule. (*Compare Martinez v. O'Hara* (2019) 32 Cal. App. 5th 853, where counsel's reference to the female judicial officer's ruling as

"succubustic" and accusing the trial court of intentionally refusing to follow the law as conduct justifying referral to the State Bar.)

B. Unfounded Accusations or Representations

1. *Karton v. Ari Design & Constr., Inc.*, 61 Cal. App. 5th 734 (2021), *as modified on denial of reh'g* (Mar. 29, 2021), *review denied* (June 23, 2021)

The appeals court affirmed the trial court's decision to award only $90,000 in attorney fees to appellant of the $292,140 sought, in part due to the incivility of appellant's briefing. Appellant had successfully represented himself in an underlying action concerning the construction of his home by respondents, who were shown to have been unlicensed. After winning the award, appellant (with another counsel) asked for a large amount of attorney fees, but the trial court found the request excessive and awarded a lower amount.

The lower court noted that appellant's briefing for attorney fees "was replete with attacks on defense counsel such as that defense counsel filed 'knowingly false claims of witness tampering,' 'her comments were frivolous,' something was 'typical of the improper tactics employed by defendants and their counsel,'" and contained around 300 pages of extra documentation that went "so far beyond what was necessary on this matter." *Id.* at 741-42. The lower court attributed some of the over-litigation to appellant seeming "agitated about this case" as it was "your personal matter, and . . . you have strong feelings about this case and strong feelings about the course of this litigation and how it has proceeded." *Id.* at 742.

In affirming the lower court's fee amount, the court noted that attorney skill is a factor in deciding whether to adjust a fee amount, and "civility is an aspect of skill" where "excellent lawyers deserve higher fees, and excellent lawyers are civil." *Id.* at 747. The court highlighted the importance and desirability of civility for litigation for multiple reasons. First, civility "is an ethical component of professionalism." *Id.* Second, civility lowers the costs of dispute resolution by making it more efficient by "allowing disputants to focus on core disagreements and to minimize tangential distractions." *Id.* In contrast, incivility acts as "sand in the gears" and "can rankle relations and thereby increase the friction, extent, and cost of litigation . . . turn[ing] a minor conflict into a costly and protracted war" where "[a]ll sides lose, as does the justice system." *Id.*

The court further observed that when appellant's counsel was questioned about his incivility, appellant "respond[ed] to criticism of their personal attacks by attacking." *Id.* Counsel "continued to assert opposing

counsel was a liar," despite the record "not finding someone knowingly made false statements." *Id.* at 748. Next, counsel defended calling opposing counsel's comments frivolous despite not being able to cite any finding of fault from the letter in question. Finally, counsel claimed "denigrat[ing] the actions of opposing counsel as 'typical of the improper tactics employed by defendants and their counsel,'" was within the scope of approved advocacy. *Id.* Appellant's counsel continued attacks on appeal demonstrated that the lower court was "within its discretion to conclude the [appellant] conducted litigation that was less than civil" and reduce the requested attorney fees. *Id.* The court remarked that all counsel should be mindful that in fee-shifting cases, "low blows may return to hit them in the pocketbook." *Id.* at 747.

2. *Kim v. Westmoore Partners, Inc.*, 201 Cal. App. 4th 267 (2011)

The appellate court sanctioned respondent's counsel in the amount of $10,000 regarding inappropriate conduct on appeal. Under false pretenses, counsel received an extension to file their response brief and ultimately submitted a brief that was almost identical to another brief counsel had filed in another case. As part of the duplicate brief, counsel included identical accusations against opposing counsel of professional misconduct in "falsely arguing the case" and "that the appeal is frivolous, and a request for sanctions in the amount of $20,000." *Id.* at 291. Even more egregious, counsel had reduced such accusations to boilerplate by simply redacting the facts of the earlier brief.

While the court took issue with much of counsel's conduct, it was especially troubled by counsel's use of boilerplate accusations: "It is difficult for us to express how wrong that is. Sanctions are serious business. . . . A request for sanctions should be reserved for serious violations of the standard of practice, not used as a bullying tactic." *Id.* at 293. The court then recognized the unfortunate reality that the legal profession is "rife with cynicism, awash in incivility." *Id.* However, the court resolved: "It is time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." *Id.* The court was clear that sanctions should be reserved only for serious and significant instances of misconduct and incivility such as dishonesty and bullying.

C. Litigation Tactics Unbefitting the Profession

1. *Ahanchian v. Xenon Pictures, Inc.* 624 F.3d 1253 (9th Cir. 2010)

Ahanchian filed a complaint against Defendants for copyright infringement, breach of an implied contract, and unfair competition in violation of the Lanham Act. *Id.* at 1256. During the trial, Defendant sought an extension and Ahanchian exhibiting "professional courtesy expected of officers of the court" agreed. *Id.* But the district court rejected the extension. The district court set the trial date for November 18, 2008. *Id.* The discovery cutoff date was September 2, 2008, and the last day for hearing motions was on September 15, 2008. *Id.* August 25, 2008 was the last date to file any motion for summary judgment. *Id.*

On August 25, 2008, Defendants moved for summary judgment seeking dismissal of all Ahanchian's claims, and for terminating sanctions resulting from a discovery dispute, with roughly 1,000 pages of supporting exhibits and declarations. *Id.* Under the local rules governing briefing schedules, September 2, 2008—the day after Labor Day— was the deadline for Ahanchian to file his opposition, i.e., he had eight days, three over the Labor Day weekend, to draft his oppositions to the motions. *Id.* Ahanchian asked the Defense counsel to stipulate a week's extension, so they could review the voluminous documents and because the lead attorney on the case was out of town on a pre-planned engagement. *Id.* Defense counsel refused. *Id.* at 1257. The next day, Ahanchian filed a motion with the court to grant an extension and defense counsel opposed it. *Id.* The Court denied the extension. *Id.* at 1258.

On September 5, 2008, Ahanchian filed his opposition, three days late, with an ex parte application seeking permission to make the late filing. *Id.* at 1257. Defendant also opposed this motion. *Id.* On September 10, 2008, the district court granted Defendant's summary judgment while simultaneously denying Ahanchian's ex parte application. *Id.* Additionally, the district court also awarded the Defendants attorney fees. *Id.* at 1258. Ahanchian appealed. *Id.*

The Ninth Circuit Court of Appeals reversed and found the district court had abused its discretion. *Id.* at 1260. As it pertains to the initial request for an extension to file the opposition, the Court found Ahanchian's counsel had a good cause for requesting the extension and thus it should have been granted. *Id.* There was no proof that Ahancian's counsel was acting in bad faith or that granting the extension would have made it unfair to Defendants. *Id.* The trial court, had it had doubts about either "should have held an evidentiary hearing or sought more information, instead of summarily denying the request." *Id.* By its order, the trial court "doom[ed]"

Ahanchian's case "on the impermissible ground that he had violated a local rule." *Id.* Turning next to the request to allow the late filed opposition, the Court again found the district court had abused its discretion by applying an impermissible *per se* rule instead of the equitable balancing test required by circuit precedent. *Id.* at 1262.

The Court next turned to defense counsel, who contributed to the district court's errors, and who "disavowed any nod to professional courtesy, instead engaging in hardball tactics designed to avoid resolution of the merits of this case." *Id.* at 1263. Finding that counsel had taken knowing advantage of the time constraint created by local rules, the federal holiday, and lead counsel's out of state obligation, and further compounded the prejudice to Ahanchian by fiercely opposing Ahanchian's efforts to rectify the situation, the Court cited to the California Attorney Guidelines of Civility and Professionalism, §1:

> "The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice."

Id.

2. *Flack v. Nutribullet, L.L.C.*, 333 F.R.D. 508 (C.D. Cal. 2019)

In a footnote ruling on an *ex parte* motion, the court generally cited the ABTL "Civility" report as reminder of counsels' professional obligations to one another. In the course of scheduling medical examinations of the plaintiff, defendant's counsel sent an email on November 13, 2019, to plaintiff's counsel requesting parties to formally stipulate plaintiff would attend the examinations once physicians were secured. Plaintiff's counsel did not respond to the email, prompting defendant's counsel to file an *ex parte* motion. In the footnote, the court noted that while plaintiff's counsel may have been extremely busy and had a good explanation for not responding, "the better practice is to promptly respond to communications from opposing counsel, even if only to acknowledge receipt of a request, to demonstrate respect for one's opponent." *Id.* at n. 1.

3. *Lasalle v. Vogel*, 36 Cal. App. 5th 127 (2019)

In reversing a $1 million default judgment against appellant related to a legal malpractice claim, the appellate court grounded their justification on

basic standards of professionalism in Section 583.130 of the Code of Civil Procedure, which mandates cooperation among the parties. Appellant had been sued by respondent's counsel for legal malpractice and appellant did not respond to the complaint within 35 days, or after respondent's counsel's letter on the 36th day threatening to enter a default judgment if appellant did not respond by the close of the next day. Two weeks after respondent's counsel had requested an entry of default, appellant retained counsel and filed a motion to set aside default, explaining her failure to file an answer as a result of being a single mother practicing law while also taking care of her family, going through a divorce, and receiving notice her property and residence had gone into default. The lower court denied appellant's motion and entered a default judgment. Under its analysis of Section 583.130, the court accepted appellant's explanation for delay as adequate and rejected respondent's counsel's tactics of unreasonably short deadlines to reach default judgment as unethical and contrary to law and legislative policy. The court hoped in future situations, "opposing counsel [would] act with 'dignity, courtesy, and integrity.'" *Id.* at 141.

The court also used its opinion as a warning that the legal "profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130" and "urge[d] a return to the professionalism it represents." *Id.* at 130. Its analysis began by addressing the history of California courts battling incivility and unprofessionalism over the past 30 years by advising the bench and bar to practice with more civility. The court remarked: "Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success." *Id.* at 134. Citing the California state bar's attempts to fix the problem with a civility requirement, the court observed that "the problem is not so much a personal failure as a systemic one." *Id.* Finally, the court ended their opinion by citing remarks by former Chief Justice Warren Burger that "[L]awyers who know how to think but have not learned how to behave are a menace and a liability . . . to the administration of justice . . . [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best." *Id.* at 141.

4. *Pham v. Nguyen*, 54 Cal.App.4th 11 (1997)

Pham sued Nguyen for dental malpractice. *Id.* at 14. Four days before trial, both parties requested a continuance claiming they did not have time to

depose their expert witnesses. *Id.* The trial court denied their request. *Id.* On the day of trial, Nguyen requested a continuance, arguing that her expert witness would be unavailable. *Id.* The trial judge denied the continuance and at the conclusion of the trial, the judge found in favor of Pham. *Id.*

Ngyuen appealed contending it was an abuse of discretion to deny the continuance, particularly in light of Code of Civil Procedure §595.2, which states: "In all cases, the court shall postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed thirty (30) days, when all attorneys of record of parties who have appeared in the action agree in writing to such postponement." *Id.* The Court of Appeals affirmed the trial court's decision to deny the continuance finding the statute was "directory." *Id.* at 15. Even if both parties sought a continuance. *Id.* The Court emphasized that the courts should respect the legislative policy and grant continuances under CCP §595.2 when it is practical. *Id.* But when the accommodation is "impractical, the judicial control reposed in the court by the Constitution must prevail." *Id.*

However, the Court cautioned against being too strict on granting continuances, stating the Court aims to provide a more respectful environment for litigation. *Id.* at 17. "The law should also encourage professional courtesy between opposing counsel—which is precisely what the Legislature did in section 595.2. The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today. Bitterly fought continuance motions are not particularly productive for either the administration of justice generally or the interests of the litigants particularly. When opposing counsel needs a continuance, courts should look to section 595.2 as a statement of policy in favor of professional courtesy, not churlishness." *Id.*

Ultimately, the Court affirmed the decision to deny the continuance because Nguyen failed to provide any substantial explanation as to why the expert was unavailable. *Id.* at 18. Furthermore, there was no indication that Nguyen's witness was under subpoena. *Id.*

5. *Green v. GTE California, Inc.*, 29 Cal.App.4th 407 (1994)

Green sued defendant for wrongful termination. *Id.* at 408. On June 23, 1993 defense counsel was to conduct Plaintiff's deposition. *Id.* at 408-09. Plaintiff's attorney had a history with defense counsel and believed that defense counsel used "intimidation tactics" during depositions. *Id.* at 409.

Hoping to capture the "intimidation tactics" Plaintiff's counsel brought his own video camera. *Id.* Defense counsel objected and told Plaintiff's counsel he had not given proper notice to use the video camera under Code of Civil Procedure 2025. *Id.* Plaintiff's counsel agreed not to tape defense counsel, unless he perceived her to be using "intimidation tactics." *Id.* On the second day of the deposition, defense counsel refused to allow plaintiff's counsel to film at all. *Id.* Both counsels then engaged in what the court called a "verbal altercation, so lacking in civility, that we decline to repeat it here." *Id.* Following the altercation, the defense counsel refused to continue with the deposition. *Id.* Both parties then filed sanctions against one another. *Id.*

Plaintiff's counsel filed a motion to terminate the Plaintiff's deposition and obtain sanctions against defense counsel. *Id.* At the hearing on the motions, the plaintiff said his motion was designed to move discovery along. *Id.* The court responded by saying, "you were wrong in the first instance and you are wrong now and what's worse, you know you are wrong." *Id.* As a result of plaintiff's counsel's actions the trial court sanctioned him $950. *Id.* at 408. Plaintiff's attorney appealed the sanctions. *Id.*

The Court of Appeals agreed with the trial court. *Id.* The Court's exasperation is evident from its first sentence: "If this case is an example, the term 'civil procedure' is an oxymoron." *Id.*

The Court said Plaintiff's counsel's belief that his opposing counsel acted improperly in past cases cannot be a basis for relief. *Id.* at 410. "Plaintiff's counsel's attempted novel use of the video camera ran afoul of the notice requirements of Code of Civil Procedure section 2025, subdivision (l)(1). He did not give the 3–day notice required by the statute." *Id.* Furthermore, there was doubt on whether CCP §2025 applies to videotaping opposing counsel instead of the witness. *Id.* The court said the sanctions were warranted and that "cases like this one clutter our courts." *Id.* Moving forward, such an order was not appealable. *Id.* at 409-10. The Court concluded: "[b]oth the legal profession and the courts would be better served if litigation arose from legitimate disputes between the litigants instead of wasteful bickering between their attorneys." *Id.* at 410.

6. *Wong v. Genser*, No. A133837, 2012 WL 6028626 (Cal. Ct. App. Nov. 30, 2012)

In dismissing an appeal as untimely filed, the appellate court also imposed sanctions in the amount of $8,500 against appellant's counsel for

prosecuting a frivolous appeal and his dishonesty and lack of remorse to the court. On November 28, 2011, appellant's counsel appealed the denial of a motion to set aside a dissolution of marriage issued some six months earlier, on May 31, 2011. The appeal was not immediately dismissed for untimeliness because the court clerk had not maintained a copy of the fax serving notice of the May 31 order to appellant, and so the court was unaware of the order. After diligent investigation, respondent's counsel filed a motion to dismiss raising the issue of timeliness for appellant and the court.

Appellant's counsel was asked by the court clerk to produce a copy of the May 31 order if they had received it. A junior lawyer for appellant's counsel told the clerk he had found a copy, but it had privileged notes written on it, so he did not send a copy of it. Appellant's counsel then filed an opposition brief without addressing the question of timeliness raised by respondent's counsel. Despite refusing to produce the fax in a phone conversation with respondent's counsel, appellant's counsel filed a supplemental brief claiming respondent's counsel had "incorrectly and disingenuously" alleged the appeal was untimely. *Id*. at 3. Respondent's counsel again emailed appellant's counsel asking for a copy of the fax, this time threatening sanctions if it was withheld, and appellant's counsel refused. Upon a later request, appellant's counsel sent a copy of the fax to the court clerk. Respondent's counsel was notified and then filed it along with a request for sanctions. In his opposition, appellant's counsel again ignored the timeliness issue and refused to acknowledged he "did anything inappropriate relative to the issue of the document in question." *Id.* at 5.

The court held it was unquestionable that appellant's appeal was frivolous as it was untimely filed. Next, the court imposed sanctions on appellant's counsel because he either knew, or should have known, that the appeal was untimely, but still persisted. Further, appellant's counsel "impliedly represented to [the court] that no such notice had been given, although by then he was well aware that it had." *Id.* at 10. The court was left to infer that appellant's counsel "was attempting to prevent [the court] from learning of the existence of the notice." *Id.* at 11. The court noted it was "especially disturbing [appellant's counsel's] steadfast refusal to acknowledge his breach of his duty to provide us with a document bearing on our jurisdiction and to express any remorse for that breach." *Id.* at 8. The court concluded with a final word on civility and how everyone "would have been spared much effort if [appellant's counsel] had accorded [respondent's counsel] the simple courtesy of providing a copy of the fax notice when he requested it." *Id.* at 14. The court further condemned appellant's counsel's uncivil attacks on opposing counsel in calling his arguments "disingenuous"

and a "smokescreen." *Id.* The court hoped appellant's counsel's "lack of professionalism and respect" was not common, as "it demeans the profession as a whole and our system of justice." *Id.*

7. *Interstate Specialty Mktg., Inc. v. ICRA Sapphire, Inc.*, 217 Cal. App. 4th 708 (2013)

The appellate court reversed an order by the trial court for sanction's on appellant's counsel in the amount of $5,076.16 and noted simple acts of civility could have avoided the situation. In filing their complaint, appellant's counsel had attached an incorrect copy of the contract between the parties, a fact that was raised by respondent's counsel soon after but not corrected. Months later, after receiving admissions the contract was not the final version, respondent's counsel filed a motion for summary judgment. It was only at this time appellant's counsel sought to amend their complaint with the correct contract version. The trial court denied the motion for summary judgment, allowed the complaint to be amended, but then initiated sanctions against appellant's counsel for their mistake. The court reversed the trial court as appellant's counsel had filed their amendment within the safe-harbor allowed by the order to show cause for sanction and the sanctions were unsupported by law.

In reversing the trial court, the court specifically commented that "[a] little civility on [respondent's counsel's] part could have resolved the problems in this case early on, saved everyone a lot of time, money, and toner, and spared us the unpleasant role of judicial scold this case has forced upon us." *Id.* at 711. Respondent's counsel should have resisted "the temptation to exploit an adversary's gaffe so as to deny him a hearing on the merits," and "picked up the telephone or written a letter and simply explained that [appellant's counsel] had the wrong document, expressed a willingness to stipulate to an amendment, and only if Interstate had persisted in doing nothing, brought some sort of motion or other proceeding to correct the mistake. That would have been the civil and professionally correct thing to do." *Id.* at 715. Instead, defendant's counsel "evidence[d] a disturbing predisposition to pick up the sword before the plowshare," a practice that should be "turn[ed] away from." *Id.*

The court also pointed out that "[t]his case illustrates what happens when we turn to sanctions too quickly." *Id.* at 710. Sanctions can "serve a purpose other than punishment. If we cannot convince attorneys to conduct themselves honorably and ethically by appealing to their character, we can sometimes bring them into line by convincing them that obeying the rules is the route of least resistance—the less expensive alternative." *Id.* However,

"[s]anctions are a judge's last resort. At bottom, they are an admission of failure. When judges resort to sanctions, it means we have failed to adequately communicate to counsel what we believe the law requires, failed to impress counsel with the seriousness of our requirements, and failed even to intimidate counsel. . . . We don't like to admit failure so we sanction reluctantly." *Id.*

8. *Lossing v. Superior Ct.*, 207 Cal. App. 3d 635 (1989)

The court of appeals reversed the trial court and held that a malicious prosecution action brought against defendant's counsel should be dismissed. Defendant's counsel had been unable to obtain depositions of plaintiffs and unsuccessfully filed an order to show cause re contempt for plaintiffs refusal to comply. Plaintiff's counsel then filed an action for malicious prosecution and intentional inflection of emotion distress against defendant's counsel.

After holding the malicious prosecution action could not be maintained, the appellate court noted there were numerous other malicious prosecution actions pending in their court, and made concluding comments to remind all attorneys of their professional responsibilities with respect to civility:

> "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." *Id.* at 641.

II. **Incivility Relating to Bias**

A. *Briganti v. Chow*, 42 Cal. App. 5th 504 (2019), *reh'g denied* (Dec. 11, 2019)

The appellate court dedicated a specific section of its opinion to serve as a lesson on civility within the legal profession. In the appeal from the partial denial of an anti-SLAPP motion, counsel for appellant made highly inappropriate and sexist comments regarding the trial judge in their reply brief. Counsel's opening paragraph stated that the trial judge was "an attractive, hard-working, brilliant, young, politically well-connected judge on

a fast track for the California Supreme Court or Federal Bench," but "with due respect, every so often, an attractive, hard-working, brilliant, young, politically well-connected judge can err! Let's review the errors!" *Id.* at 510-11. When questioned at oral argument about the statements, counsel noted it was intended as a compliment.

The appellate court noted that counsel's brief "reflects gender bias and disrespect for the judicial system." *Id.* at 511. The court explained that calling a woman judge attractive is both irrelevant and sexist, whether intended as a compliment or not, and would not have occurred with a male judge. This type of gender discrimination is a part of the larger issue of incivility affecting the legal profession and demeans the seriousness of judicial proceedings. The court specifically cited their responsibility to "take steps to help reduce incivility . . . by calling gendered incivility out for what it is and insisting it not be repeated." *Id.* at 511-12. While the court reminded counsel that more serious incivility would demand a report to the state bar, the court's intention was "not to punish or embarrass, but to take advantage of a teachable moment." *Id.* at 510.

B. *Martinez v. O'Hara*, 32 Cal. App. 5th 853 (2019), *reh'g denied* (Mar. 22, 2019), *review denied* (June 12, 2019)

The appellate court noted plaintiff's attorney had committed misconduct in manifesting gender bias in reference to the trial judge and reported counsel to the state bar. In filing his notice of appeal, plaintiff's counsel referred to the female judge's ruling as a "disgraceful order," "succubustic," and "resulting [in] validation of the defendant's pseudohermaphroditic misconduct." *Id.* at 857. The court noted that "succubus" is defined in the dictionary as "1: a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus 2: demon, fiend 3: strumpet, whore." *Id.* The court stated that plaintiff's counsel referring to a female judicial officer in such a way "constitutes a demonstration 'by words or conduct, bias, prejudice, or harassment based upon ... gender' (Cal. Code Jud. Ethics, canon 3B(6)) and thus qualifies as reportable misconduct." *Id.* at 858. The court further noted that many of the other words and phrases in the notice have no place in a court filing. In addition to reporting counsel's conduct to the state bar, the court chose to publish only the portion of the opinion admonishing counsel "to make the point that gender bias by an attorney appearing before us will not be tolerated, period." *Id.* at 855.

C. *Martinez v. Dep't of Transportation*, 238 Cal. App. 4th 559 (2015)

The appellate court reversed the judgment of the trial court due to prejudicial attorney misconduct on the part of defendant's attorney and also referred the opinion to the California state bar. Plaintiff had been injured in a motorcycle accident and sued the California Department of Transportation (Caltrans) for use of a dangerous road barrier. In the course of a successful defense, defendant's attorney committed "egregious attorney misconduct." *Id.* at 561. Defendant's counsel made inappropriate statements alluding to the dire financial situation of Caltrans, repeatedly violated the trial court's in limine orders even after sustained objections, and "gratuitously besmirching the character of plaintiff." *Id.*

The lower court had barred any references to plaintiff's dismissal from a previous job and references to the ministerial motorcycle group "Set Free Soldiers," of which plaintiff was an ordained minister. During multiple cross-examinations, defendant's counsel repeatedly referenced plaintiff's job dismissal in violation of court order "to insinuate [plaintiff] was lazy and irresponsible . . . [and] was using the accident to scam the legal system for money." *Id.* at 567. Further, at trial, defendant's counsel attempted to show the jury the skull and WW2 helmet symbol of the "Set Free Soldiers" during a cross-examination, but the judge put it under consideration. In response, defendant's counsel asked, "At the time of the accident, the motorcycle that your husband was riding had a skull picture on it wearing a Nazi helmet; right?" *Id.* at 565. At closing arguments, plaintiff's counsel attempted to correct the Nazi reference, but that allowed defendant's counsel to double down and use "the word "Nazi" six times in rapid succession . . . not just referring to an article of clothing but to [plaintiff] himself." *Id.*

The court stated that "[t]he law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." *Id.* at 566. The court explained that rule "prohibit[s] irrelevant ad hominem attacks" and "a defense attorney commits misconduct in attempting to besmirch a plaintiff's character," even if the personal attack is "by insinuation." *Id.* The court found defendant's counsel particularly egregious as the Nazi reference was irrelevant and because "she admitted she wanted to besmirch [plaintiff's] character because some positive evidence had come in (his church work) which tended to put him in a good light and—though she did not say this explicitly—counteract the easily exploitable image of plaintiff as a stereotypical low-life biker." *Id.* at 568.

III. **Incivility Directed at the Judiciary**

A. *In re Mahoney*, 65 Cal. App. 5th 376 (2021)

Attorney Mahoney filed a petition on behalf of his client for rehearing, in which he impugned the integrity of both the trial court and the Court of Appeal, rather than focusing on the law. *Id.* at 377. The Court of Appeal issued an order to show cause why he should not be held in contempt for that filing, which included statements such as:

> "• 'Our society has been going down the tubes for a long time, but when you see it in so black and white as in the opinion in this case, it makes you wonder whether or not we have a fair and/or equitable legal system or whether the system is mirrored by [sic] ignored by the actions of people like Tom Girardi.' (Pet. at p. 6.)
> "• Insinuation that respondent Consolidated Contracting Services, Inc. (Consolidated) may have prevailed because it had contracts with a third party 'who ... wields a lot of legal and political clout in Orange County.' (Pet. at p. 6.)
>
> "• '... [B]ecause of a judicial slight [sic] of hand with no factual basis, this court has altered the landscape and created a windfall for Consolidated.' (Pet. at p. 8.)
>
> "• Suggestion that this court did not 'follow the law.' (Pet. at p. 11.)
>
> "• Assertion that the court 'ignores the facts' in its opinion. (Pet. at p. 8.)
>
> "• Conclusion that this court 'indiscriminately screw[ed]' Salsbury. (Pet. at p. 11.)"

Id. at 378-79.

Instead of expressing contrition, Mahoney "doubled down", asserting that he had merely "'mentioned the obvious things that go on in Orange County which has a lot to do with The Irvine Company, plain and simple." *Id.* at 379. The Court of Appeal viewed this statement as a further impugning of the integrity of the court. *Id.* The Court further noted that Mahoney also did not recant at the OSC hearing, even though they tried to nudge him towards a more temperate position. *Id.* at 380. "…[W]e are confronted with a member of the bar who, after 52 years of practice, believes this is legitimate argument." *Id.*

"We have elsewhere lamented the fact modern law practice 'rife with cynicism, awash in incivility.' [citation] This kind of over-the-top, anything-goes, devil-take-the-hindmost rhetoric has to stop." *Id.* Contrasting the proper way to advocate, the court denounced Mahoney's method. "'The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.' [citations]. 'However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.'" *Id.* (citing *In Re Ciraolo* (1969) 70 Cal.2d 389, 394-95).

After discussing the long history of civility in the courts, the Court concluded:

> "We publish this decision as a cautionary tale. The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are.
>
> We are professionals. Like the clergy, like doctors, like scientists, we are members of a profession, and we have to conduct ourselves accordingly. Most of the profession understands this. The vast majority of lawyers know that professional speech must always be temperate and respectful and can never undermine confidence in the institution. Cases like this should instruct the few who don't.
>
> Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a sine qua non."

Id. at 381.

The Court found Mahoney to be in direct contempt on two counts and fined him $2,000 total under Code of Civil Procedure §1209 and §1218, along with forwarding a copy of the judgment of contempt to the State Bar. *Id.* at 382.

B. *People v. Whitus*, 209 Cal. App. 4th Supp. 1 (2012)

In affirming the trial court's decision to sanction appellant $750 for failing multiple times to appear at trial readiness conferences, the appellate

court condemned appellant's oral advocacy on appeal as grossly inappropriate and referred the opinion to the California state bar to consider discipline. In the course of appellant's representation of defendant for a charge of driving under the influence, appellant did not appear at multiple trial readiness conferences despite the lower court specifically ordering his presence. The court affirmed the lower court's sanction given the unjustified absences, discretion to control the docket, and inadequate record supplied by appellant.

After deciding the merits, the court addressed appellant's oral advocacy on appeal that "[c]onsist[ed] of repeated tirades and impertinence . . . with a tone wholly condescending and accusatory . . . [that] is a serious and significant departure from acceptable appellate practice, or for that matter, practice in any court of law." *Id.* at 4. The court categorized appellant's oral argument "as a parade of insults and affronts," that "commenced with his demand that the deputy district attorney be removed from counsel table," "culminated with his rude insistence that the court 'state for the record that this is not a contempt proceeding,'" and "in between, the trial and appellate judges were repeatedly disparaged." *Id.* at 11-12. Among the inappropriate comments made by appellant to the judges, with a tone "best be described as confrontational, accusatory and disdainful," (*Id.* at 13) were:

- Describing the appellate division as "the fox [watching] the hen house." *Id.* at 12.
- "But it's common knowledge in the legal community, and you would be insulting me if you suggested otherwise, for us to believe that you judges don't talk like women in a sewing circle about us lawyers. You do. I know you do." *Id.*
- "I don't need to give you the universe of evidence in these proceedings. . . . You don't need a transcript." *Id.*
- "It must have been a while since you read the brief." *Id.*
- "I see a lot of judges that are really quick to bark at defense attorneys. We're always the fly in the ointment. I don't see judges willing to bark at prosecutors quite so readily. Maybe that's because if you upset them one too many times, they'll get one of their [minions to run against you and unseat you. As, I should add,] Michael Kennedy is now running for judge. I'm sure you've heard." *Id.*
- "OK. Well, hereinafter, I will honor your request. But before I proceed to honor your request, I'll tell you that in the 33 years that I've practiced law, I've appeared in front of many great men and women judges, including you three. And I've appeared in front of a few who are an embarrassment to our profession and [first and last name of the trial judge] is one of those people." *Id.*

- "When I came in and ultimately had a hearing, I had listened to the whole proceeding and I heard everything that [the trial court] had to say, and I addressed that in my arguments prior to his reaching his pre-printed ruling. And he said he didn't care. He was the epitome of the completely sealed and closed shut mind. You know . . . a human mind is a lot like a parachute. If it doesn't open, it will get you killed someday." *Id.* at 12-13.

The court chose to highlight appellant's inappropriate conduct because "[i]f left unaddressed, this sort of advocacy demeans the profession, lowers public respect, and conveys the impression that it is acceptable and effective." *Id.* at 4. The court observed: "The foundation of the rule of law is dependent upon lawyers treating judicial officers and each other with respect, dignity and courtesy. The need for civility and dignity is critically important, especially today, with the legal profession and the judicial branch of government under cynical attack from various quarters." *Id.* As officers of the court, professionalism and civility are "demanded of lawyers, at *all times* and at *all stages* of a case, no matter what the stakes involved." *Id.* at 13. The court concluded: "The civility requirements in no way reduce the practice of law to an antiseptic exercise. To the contrary, some of the most passionate and effective advocates for their clients also hold their adversaries, the Court, and its judicial officers in the highest regard. Passion can easily coexist with respect, dignity, and civility." *Id.* at 14.

C. *People v. Chong*, 76 Cal. App. 4th 232 (1999)

The appellate court rejected defendant's claim that the trial court committed prejudicial error by repeatedly admonishing his defense counsel in the presence of the jury. The court affirmed the trial court's decision to not continuously disrupt the trial by excusing jurors to reprimand defendant's counsel for "the many instances of unprofessional conduct in which [defendant's counsel] made disparaging comments to the court, violated court rulings, and repeatedly interrupted the court and witnesses." *Id.* at 235. In the published portion of the opinion, the court highlighted the "insolent and contemptuous conduct" (*Id.* at 243) of defendant's counsel including:

- After having objecting to a document being presented without having been received in evidence: "So in other words, you can put anything you want on the [overhead projector] and later you ask to admit it, is that the ruling?" *Id.* at 239.
- After having interrupted the court when ruling on an objection, the judge said "I don't appreciate the [facetious] remark on your part," and

defendant's counsel responded, "Well, I didn't appreciate the Court's comments on my questioning." *Id.* at 240.

- When responding to a directive not to insert gross prejudice: "Well, I think it's very difficult to — to — to work in an atmosphere where everything is considered not an issue by the Court. So I'm — I'm really trying to stick to the issues, if I could. Only I'm just trying — having trouble seeing what they are." *Id.* at 241.
- "Does the Court think that that's funny? . . . Does the Court think that's funny? I saw you laugh." *Id.* at 242.
- "You show respect for me as well. I've shown unbelievable respect for this Court in the fashion of [the] most unfair trial I've ever experienced in 22 years of practicing law. This place is unbelievable. I've never seen anything like it." *Id.* at 245.

The court noted that the "legal system, indeed the social compact of a civilized society, is predicated upon respect for, and adherence to, the rule of law," and "ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live." *Id.* at 243 (internal citation omitted). Thus, attorneys have "a paramount obligation to the due and orderly administration of justice," and "must not willfully disobey a court's order and must maintain a respectful attitude toward the court." *Id.* (internal citation omitted). The court upheld the trial court's actions as appropriate because: "By mocking the court's authority, an attorney in effect sends a message to the jurors that they, too, may disregard the court's directives and ignore its authority. This type of attorney misconduct must be dealt with in the jury's presence in order to dispel any misperception regarding the credence that jurors must give the court's instructions. Furthermore, when an attorney engages in repetitious misconduct, it is too disruptive to the proceedings to repeatedly excuse the jury to admonish counsel." *Id.* at 244. The court concluded "[i]n our collective 97 years in the legal profession, we have seldom seen such unprofessional, offensive and contemptuous conduct by an attorney in a court of law." *Id.* at 245.

Appendix 4: Selected Civility Resources

Name	Publications / Programs	Biography/ Links to Biography	Contact Information
Allison Buchanan	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics	https://www.hogefenton.com/our-people/alison-p-buchanan/	alison.buchanan@hogefenton.com 408-947-2415
Amee Mikacich	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-4a28-ab2a-c56a3eb4a5e0	https://www.hinshawlaw.com/professionals-Amee-Mikacich.html	AMikacich@hinshawlaw.com 415-743-3705
Ellen Pansky	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics	https://panskymarkle.com/ellen-pansky/	epansky@panskymarkle.com 213-626-7300;
Eric Galton	Summer 2021 Professional Skills Series | Pepperdine Caruso School of Law	https://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/	eric@lakesidemediation.com 512-477-9300
Erin Joyce	https://erinjoycelaw.com/2020/10/practice-tips-tales-of-civility-in-the-time-of-pandemic/	https://erinjoycelaw.com/2020/10/practice-tips-tales-of-civility-in-the-time-of-pandemic/	erin@erinjoycelaw.com 626-314-9050
Jean Cha	Civility Matters Panelist, CA American Board of Trial Advocates (CAL-ABOTA), December 2020	https://chalawethics.com/about/jean-cha-c-v/	jean@chalawethics.com 714-242-8588
Jill Fannin (Judge)	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://trellis.law/judge/jill.c.fannin https://cccba.org/for-attorneys/mcle-overview/mcle-self-study/	925-608-1121

Joanna Storey	http://content.sfbar.org/source/BASF_Pages/PDF/G181604materials.pdf "Civility and Communication in a Hybrid World," Bar Association of San Francisco, September 15, 2021 "What Not to Do – Ethics Lessons Learned from Fictional Attorneys," Bar Association of San Francisco (Virtual), May 11, 2021 "How to Ethically Mitigate Risk in Remote Meetings and Depositions," West LegalEdcenter Webinar, January 12, 2021 "Legal Ethics in a Remote World," Bar Association of San Francisco (Virtual), October 14, 2020 "Practical Tips for Solving Ethical Dilemmas in Mediation," Bar Association of San Francisco (Virtual), June 12, 2019 "How to Use Ethics as a Sword and Shield," Bar Association of San Francisco, January 24, 2018 "Who Knew the Courts Adopted Commonsense Professional Guidelines," San Francisco Attorney Magazine, November 27, 2017 "Ethics of Practicing Law in a Digital World," Bar Association of San Francisco, January 9, 2017	https://www.hinshawlaw.com/professionals-joanna-storey.html	jstorey@hinshawlaw.com 415-362-6000
Katie Lachter	https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/essential_qualities_instructors_workbook_final.pdf	https://www.proskauer.com/professionals/katie-lachter	klachter@proskauer.com 212-969-3618
Kendra Basner	"12 Steps to a Healthier Law Practice in 2020: Step 11 – Actions Speak Louder Than Words," California Attorney Ethics Counsel Blog, November, 2020 "12 Steps to a Healthier Law Practice in 2020: Step 2 – Treat Others The Way You Want to be Treated," California Attorney Ethics Counsel	https://oriellyroche.com/attorney/kendra-l-basner/	kendra@oreillyroche.com 415-952-3004

	Blog, February 18, 2020 "Actions Speak Louder Than Words: The Legal Ethics of Equality," The Recorder, February 5, 2016; "Can Zealous Advocacy Go Too Far," The Recorder, January 19, 2016. Presentations: "Charting an Ethical Course Through Perilous Waters," Pacific Admiralty Seminar, San Francisco, California, October 10, 2019; "Cutting Edge Conflicts: Recent Developments in Perilous Times," American Bar Association (ABA) National Legal Malpractice Conference, San Diego, California, September 13, 2019; "The Lessons of History: Are Civility and Professionalism Ethically Compelled?," West LegalEd Center live webcast, June 2008; "A Perspective: The Origins and Future of the Legal Profession," Sherwin Memel Memorial Presentation: Civility and Professionalism in Practice, California Society for Healthcare Attorneys, April 2008.		
Larry Cook	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.cmslaw.com/attorneys/larry-e-cook/	cook@cmslaw.com
Mark LeHocky	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	mark@markslehocky@.com 510-693-6443
Merri Baldwin	N/A	https://www.rjo.com/attorneys/merri-a-baldwin/	mbaldwin@rjo.com 415-956-2828
Niall McCarthy	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-	https://www.cpmlegal.com/professionals-niall-mccarthy-	nmccarthy@cpmlegal.com

	4a28-ab2a-c56a3eb4a5e0	whistleblower-attorney	650-697-6000
Nicole Mills	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	nicolemills@empower-mediation.com 925-351-3171
Philip M. Andersen	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.linkedin.com/in/philipandersen	Philip.Andersen.nx3z@statefarm.com
Rick Darwin (Judge)	https://portal.sfbar.org/SFBAR/Events/Event_Display.aspx?EventKey=G194111C&WebsiteKey=7ff45d51-7883-4a28-ab2a-c56a3eb4a5e0	https://trellis.law/judge/richard.c.darwin	415-551-0309
Robin Pearson	https://www.youtube.com/watch?v=wUWbCZj4WHk	https://www.ropers.com/our-team/robin-m-pearson	robin.pearson@ropers.com
Scott Garner	https://www.ocbar.org/All-News/News-View/ArticleId/1720/March-2016-Civility-Among-Lawyers-Nice-Guys-Don-t-Have-to-Finish-Last	https://www.umbergzipser.com/profiles/scott-b-garner/	sgarner@umbergzipser.com 949-672-0052
Steven K, Austin (Judge)	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	925-608-1133
Tracy L. Allen	Summer 2021 Professional Skills Series | Pepperdine Caruso School of Law	https://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/	tallen@mediate.com; tracy.allen@pepperdine.edu 248-882-4878;
Trisha Rich	Oh No! Attorney Incivility and its Repercussions, ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS / MAY 27, 2021	https://www.hklaw.com/en/professionals/r/rich-trisha-m	trisha.rich@hklaw.com 312-578-6514 212-513-3545
Wendy Chang (Judge)	"CIVILITY AND THE ELIMINATION OF UNPROFESSIONAL CONDUCT TOWARDS WOMEN" (April 2017);	https://trellis.law/judge/wendy.w.y.chang	661-483-5715

	https://www.yumpu.com/en/document/view/19037735/attorney-civility-powerpoint-ethics		
Wendy McGuire Coats (Judge)	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	https://www.cccba.org/flyer/2019-spectacular-materials/6.pdf	925-608-1117
American Board of Trial Advocates - Civility Matters Program (magazine)	http://www.cal-abota.org/pdf/ABOTA_CivilityMatters_Toolkit_1003111.pdf	American Board of Trial Advocates - Civility Matters Program (magazine)	CivilityMatters@abota.org (800) 779-5879
Amir Erez	https://www1.warrington.ufl.edu/departments/mgt/docs/cv_AmirErez.pdf	https://warrington.ufl.edu/directory/person/5084/	amir.erez@warrington.ufl.edu (352) 273-0339
Anna Maravelas	https://www.amazon.com/Creating-Drama-Free-Workplace-Insiders-Incivility/dp/B081S98SPZ/ref=cm_cr_arp_d_product_top?ie=UTF8	http://thera-rising.com/about/	anna@therarising.com
Annette B. Roter	https://www.amazon.com/Dark-Side-Workplace-Managing-Incivility/dp/113855930X	https://www.linkedin.com/in/annette-b-roter-phd-39989110	https://www.linkedin.com/in/annette-b-roter-phd-39989110?challengeId=AQGDpvVhOAafMAAAAXSyjJJasyaAZQjuAhHE9_Esy2JdwWG2fjqVGMT0ptdFX7cwUDLw-t3WXAtPANz6Den5iFKUWMd79ACi-g&submissionId=077ffc60-71e9-3616-

			d085-97b515519d24
Bob Sutton	https://www.amazon.com/Asshole-Rule-Civilized-Workplace-Surviving/dp/0446698202/ref=sr_1_1?dchild=1&keywords=No+Asshole+Rule&qid=1600709488&s=books&sr=1-1	https://www.bobsutton.net/	https://www.bobsutton.net/contact/
Catherine Mattice	https://www.amazon.com/Seeking-Civility-managers-workplace-bullying/dp/1530937728/ref=sr_1_2?crid=OVNS5QME965D&dchild=1&keywords=catherine+mattice&qid=1599933576&sprefix=catherine+mattice%2Caps%2C226&sr=8-2	https://civilitypartners.com/catherine-mattice-zundel/	Info@CivilityPartners.com; 619-268-5055
Christine Pearson	https://www.amazon.com/Cost-Bad-Behavior-Incivility-Damaging-ebook/dp/B002AU7MHM/ref=sr_1_1?dchild=1&keywords=pearson+porath&qid=1600999899&s=books&sr=1-1	https://thunderbird.asu.edu/christine-pearson	christinepearson@thunderbird.asu.edu
Christine Porath	https://www.amazon.com/Mastering-Civility-Manifesto-Christine-Porath/dp/1455568988	http://www.christineporath.com/	christine.porath@gmail.com
Craig Freshley	https://www.amazon.com/Wisdom-Group-Decisions-Craig-Freshley/dp/0978865723/ref=sr_1_1?dchild=1&keywords=The+Wisdom+of+Group+Decisions&qid=1600623762&s=books&sr=1-1	https://www.craigfreshley.com/about-craig/	craig@freshley.com; 207-729-5607
David A. Grenardo	https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1562&context=facarticles	https://law.stmarytx.edu/academics/faculty/david-grenardo/	dgrenardo@stmarytx.edu; 210-431-2127
Diana Damron	https://www.amazon.com/Civility-Unleashed-Survive-Thrive-Workplace/dp/1530312426/ref=sr_1_5?dchild=1&keywords=civility+workplace&qid=1599932597&s=books&sr=1-5	https://dianadamron.com/about/	diana@dianadamron.com; 406-890-8453
Dr. Linnda Durre	https://www.amazon.com/Surviving-Toxic-Workplace-Coworkers-Environments/dp/007166467X/ref=sr_1	http://www.survivingthetoxicworkplace.com/biogra	Linnda.Durre@gmail.com;

	_10?dchild=1&keywords=arsonist+in+the+office&qid=1600285176&s=books&sr=1-10	phy.html	406-890-8453
ELI Civil Treatment Series	https://www.eliinc.com/wp-content/uploads/6-ways-civility-rule-0317.pdf	https://www.eliinc.com/civil-treatment-series/about-civil-treatment/	info@eliinc.com; 800-497-7654
Ellen Burton	https://www.amazon.com/Civility-Project-reverence-wellness-productivity/dp/057843511X/ref=tmm_pap_swatch_0?_encoding=UTF8&qid=1599932091&sr=1-2	http://www.coachellenb.com/the-civility-project.html	coachellenb@gmail.com; 847-721-4694
James E. Lukaszewski	https://www.amazon.com/Decency-Code-Leaders-Building-Integrity/dp/1260455394/ref=sr_1_6?dchild=1&keywords=workplace+incivility&qid=1600378996&s=books&sr=1-6	https://premierespeakers.com/james_lukaszewski/bio	https://premierespeakers.com/james_lukaszewski/bio
Janine Hamner Holman	https://speakerhub.com/sites/default/files/Incivility-presentation-Vistage.pdf	https://jandjcg.com/our-team	Janine@Jandjcg.com; 323-493-6431
Jayne Reardon	https://www.2civility.org/wp-content/uploads/2013/12/surveyonprofessionalism_final.pdf	https://www.2civility.org/people/jayne-reardon/	jayne.reardon@2civility.org; 312-363-6208 or 312-848-0327
Jody J. Foster	https://www.amazon.com/Schmuck-My-Office-Effectively-Difficult/dp/125007567X/ref=sr_1_9?dchild=1&keywords=No+Asshole+Rule&qid=1600204433&s=books&sr=1-9	https://www.med.upenn.edu/professionalism/foster.shtml	ppmed@upenn.edu; 215-662-7677
Judith Bowman	https://www.amazon.com/Dont-Take-Last-Donut-Etiquette/dp/1601630875/ref=sr_1_1?crid=2HOZGIKZB0CO4&dchild=1&keywords=don%27t+take+the+last+donut&qid=1600792339&sprefix=don%27t+take+the+last+donut%2Caps%2C218&sr=8-1	http://www.nationalcivilityfoundation.org/speakers-bureau	judith@nationalcivilityfoundation.org

Lewena (Lew) Bayer	https://www.amazon.com/30-Solution-Increases-Engagement-Profitability/dp/1628652675/ref=sr_1_1?dchild=1&keywords=lewena+bayer&qid=1600624639&s=books&sr=1-1	https://lewbayer.com/	support@civilityexperts.com; 204-996-4792
Michael Lee Stallard	https://www.amazon.com/Connection-Culture-Competitive-Advantage-Understanding/dp/195049652X/ref=sr_1_1?dchild=1&qid=1600533244&refinements=p_27%3AKatharine+P.+Stallard&s=books&sr=1-1&text=Katharine+P.+Stallard	https://www.michaelleestallard.com/about-employee-engagement	mstallard@epluribuspartners.com; 203-550-0360
Michael P. Leiter	https://www.amazon.com/Analyzing-Theorizing-Incivility-SpringerBriefs-Psychology/dp/9400755708/ref=sr_1_4?dchild=1&keywords=workplace+incivility&qid=1600378996&s=books&sr=1-4	https://mpleiter.com/about/	https://mpleiter.com/contact/
Peggy Parks	https://www.theparksimagegroup.com/resources/books/	https://www.theparksimagegroup.com/about/	peggy@theparksimagegroup.com; 404-266-3858
Pete Havel	https://www.amazon.com/Arsonist-Office-Fireproofing-Coworkers-Employees/dp/1948484668/ref=sr_1_1?crid=3004QSPNYUBOF&dchild=1&keywords=the+arsonist+in+the+office&qid=1600183021&s=books&sprefix=the+arsonist+in+the+office%2Caps%2C207&sr=1-1	https://petehavel.com/about/	pete@petehavel.com; 855- NO-ARSON
Robert Danisch	https://www.amazon.com/Beyond-Civility-Obligations-Citizenship-Deliberation/dp/0271087307/ref=sr_1_1?dchild=1&keywords=beyond+civility&qid=1600017948&s=books&sr=1-1#customerReviews	https://uwaterloo.ca/communication-arts/people-profiles/robert-danisch	rdanisch@uwaterloo.ca; 519-888-4567 x 38603
Sharone Bar-David	https://www.amazon.com/Trust-Your-Canary-Workplace-Incivility/dp/0994726406/ref=cm_cr_arp_d_product_top?ie=UTF8	http://www.sharonebardavid.com/about/	info@sharonebardavid.com; 416-781-8132
SHRM,	https://blog.shrm.org/blog/we-need-	https://www.shr	contact via

Society of Human Resources Management	civility-now-more-than-ever	m.org/about-shrm/Pages/default.aspx	online form; 800-283-7476
Steven Michael Selzer	https://www.amazon.com/Civility-George-Washingtons-Rules-Today/dp/1524852449/ref=sr_1_1?dchild=1&keywords=steven+michael+selzer+civility&qid=1600015889&s=books&sr=1-1	https://www.stevenselzerbooks.com/biography	selzerlaw@gmail.com
The State Bar of California	http://www.calbar.ca.gov/portals/0/documents/publicComment/2007/Civility-Guide-Prop-Long-14.pdf	http://www.calbar.ca.gov/	https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1110&context=lawreview
Thomas G. Reio, Jr.	Research areas include workplace incivility	https://case.fiu.edu/about/directory/profiles/reio-thomas.html	reiot@fiu.edu; 305-348-2093
Trevor Foulk	Research areas include "deviant workplace behaviors"	https://www.rhsmith.umd.edu/directory/trevor-foulk	tfoulk@rhsmith.umd.edu; 301-405-8796
Weber Shandwick	https://www.webershandwick.com/wp-content/uploads/2019/06/CivilityInAmerica2019SolutionsforTomorrow.pdf	https://www.webershandwick.com/	Page 18 lists contacts, such as Kate Bullinger, President, United Minds, which is WS's "employee engagement and change management consultancy": kbullinger@webershandwick.com or kate.bullinger

			@unitedmindsglobal.com
Yasmin Anderson-Smith	https://www.amazon.com/gp/product/B005REU0KO/ref=dbs_a_def_rwt_hsch_vapi_tkin_p1_i0	http://kymsimage.com/about/	yasmin@kymsimage.com; 301-792-2276

*The Task Force wishes to thank Elizabeth Caulfield for her assistance.

MEMORANDUM

To: Justice Brian Currey, Civility Task Force
From: Larson Ishii
Date: September 10, 2021
Re: Civility Expert Research

Civility in the Workplace

American Board of Trial Advocates – Civility Matters Program

The Professionalism, Ethics, and Civility Committee of the American Board of Trial Advocates (ABOTA) created "Civility Matters," an educational program designed to promote integrity, honor and courtesy in the legal profession.[3] ABOTA created Civility Matters with the hope the educational programming would be shared at local ABOTA chapters across the country, used for other bar and professional programming, and presented in law schools nationwide.[4] The Civility Matters materials include two publications (*Why Civility and Why Now?* and *Presentation Materials*) along with accompanying DVDs, guidelines, and a toolkit.[5]

Why Civility and Why Now contains a series of articles by judges and practitioners emphasizing the importance of civility in the legal profession and how to promote it.[6] The publication also contains a series of example programs and rules of professional conduct from states and private committees.[7] The *Presentation Materials* and accompanying DVDs serve as a

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[3] *Civility Matters: Presentation Materials*, American Board of Trial Advocates, http://dev.innsofcourt.org/media/12357/civilitymattersmagazinesupplement.pdf.

[4] Civility Matters, American Board of Trial Advocates Foundation Website, https://www.abota.org/Foundation/Lawyer_Resources/Civility_Matters/Foundation/Professional_Education/Civility_Matters.aspx?hkey=7e9beb21-b2ca-41b3-a8e8-132ed045dd96.

[5] *Civility Matters Toolkit*, American Board of Trial Advocates, http://www.cal-abota.org/pdf/ABOTA_CivilityMatters_Toolkit_1003111.pdf.

[6] *Civility Matters: Why Civility and Why Now?*, American Board of Trial Advocates, http://dev.innsofcourt.org/media/12354/civilitymattersmagazine.pdf.

[7] *Id.*

kind of teaching manual for putting on the program, outlining three different example programs to be used, role play scenarios, presentation slides, written materials, and instructional audio and video resources.[8]

Yasmin Anderson-Smith, KYMS Image International

Yasmin Anderson-Smith is an image and branding consultant, trainer, and author focusing primarily on business image, civility, and personal branding.[9] Anderson-Smith is certified as an image professional by the Association of Image Consultants International (AICI) and a Personal Branding Strategist by William Arruda's Reach 360 program.[10] Anderson-Smith is a founding member and former chair of the AICI Civility Counts Project and US Affiliate of Canadian-based, Civility Experts Worldwide.[11] Anderson-Smith is a co-author of two books (*Executive Image Power* (2009) and *The Power of Civility* (2011)) and has had her work featured in other publications.[12] Her notable clientele include Bloomingdales' and Deloitte.

Anderson-Smith's work emphasizes that embracing and promoting civility creates strong personal and corporate image and branding. Civility is defined as a code of conduct emphasizing three principles—Respect, Restraint, and Responsibility—that guide behavior.[13] Brand image consists of three elements—Appearance, Behavior, and Communication—that influence how individuals and organizations are perceived.[14] Civility is the key to shaping a positive image from the inside out and is foundational for building a strong image and brand.[15] This harmonious relationship is shown through Anderson-Smith's "Image and Civility Model," which demonstrates how positive image/brand and smooth harmonious relationships are at the intersection between ethical and considerate conduct and Appearance, Behavior, and Communication.[16]

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[8] *Civility Matters: Presentation Materials*, *supra* note 1.
[9] KYMS Image International Website, http://kymsimage.com/about/.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Civility Counts, An Image Perspective* (white paper), The Civility Counts Project, Association of Image Consultants International, https://www.civilityexperts.com/wp-content/uploads/AICI_WhPaperFINAL.pdf.
[14] *Id.*
[15] *Id.*
[16] *Id.*

Going off of this model, Anderson-Smith argues image and brand consultants are well positioned to influence and promote civility in the workplace. These experts in etiquette, civility, protocol, image and brand management are well equipped to provide the training, education, and awareness for individuals and corporations to create a more positive impression and increase confidence, credibility and worth.[17]

Judith Bowman, National Civility Foundation

Judith Bowman is the founder and president of Protocol Consultants International, as well as the founder and Executive Director of the National Civility Foundation.[18] Bowman works as a consultant, author, and speaker in the field of professional presence and civility. Bowman has written two books on the subject (*Don't Take the Last Donut: New Rules of Business Etiquette* (2007) and *How to Stand Apart @ Work: Transforming Fine to Fabulous* (2014)) and authored many other publications, including a previous weekly etiquette column for the *Boston Herald*.[19]

Bowman's work focuses on teaching nuanced communication and civility practices within a professional setting. Bowman believes that very few people know how to effectively communicate today because they are no longer being taught it at home or in school.[20] Bowman's work seems to try and fill that gap in education by teaching the rules of professional etiquette and mannered conduct.[21] In business, there is nothing little about the little things and proper business etiquette is more than just manners, it forms the pillars of success.[22] Bowman preaches a system of the Four C's—Confidence, Control, Contribution, and Connection—that she pairs with meticulous advice for navigating small talk, networking, e-mails, presentations, dining, meetings, and a variety of other business settings.[23] Bowman asserts these types of practiced respectful behaviors resonate in powerful ways to make

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[17] *Id.*
[18] National Civility Foundation Speaker Bio, Judith Bowman, http://www.nationalcivilityfoundation.org/speakers-bureau.
[19] *Id.*
[20] Judith Bowman Speech, YouTube, https://www.youtube.com/watch?v=pwxuLSSAOGM.
[21] *Don't Take the Last Donut: New Rules of Business Etiquette*, (2nd ed. 2009).
[22] *Id.*
[23] *Id.*

others feel acknowledged and valued to advance critical interpersonal relationships and positively influence the bottom line.[24]

Ellen Burton, E.J. Burton & Associates

Ellen Burton is a personal and professional coach, business lecturer, and motivational speaker. Burton's work focuses on civility in the workplace, diversity, equity, and inclusion matters, inclusive leadership, and efficient business communications and strategy.[25] Burton is the author of the book, *The Civility Project: How to build a culture of reverence to improve wellness, productivity and profit* (2018).[26] Burton's notable clients include the University of Chicago, the City of New York, Northwestern University, and the University of Michigan.[27]

Burton builds on existing research and her own experiences talking to workers to catalog both the costs of incivility and push for different solutions.[28] Burton views civility as showing courtesy in behavior and speech that reflects respect toward the humanity of others.[29] To increase civility, work must be done on a personal as well as organizational level.[30] In the corporate world, Burton highlights wellness, productivity, and profit as the main issues for executive leadership to confront.[31] Workers facing incivility often are psychologically unwell, which leads to being less productive, which in turn leads to a loss of profits. Burton recommends organizations create clear standards and expectations for civil behavior to educate employees and not simply assume people know how to work together.[32] Next, Burton advises training all employees from executives down on civility and business etiquette, tying benefits and rewards to civil behavior, and creating an culture of reinforcement where individuals hold one another accountable.[33] Burton notes that promoting civility will decrease sick days, increase

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[24] Bowman Speaker Bio, *supra* note 16.
[25] Ellen Burton Website, http://www.coachellenb.com/about-us.html.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Workplace Civility with Ellen Burton, Career Tipper Podcast, https://www.youtube.com/watch?v=WehTO2CxlT4.
[31] *Id.*
[32] *Id.*
[33] *Id.*

employee engagement, improve productivity and translate into better customer service, a stronger brand, and increased revenue.[34]

Robert Danisch, University of Waterloo

Robert Danisch is a Professor of Communications Studies at the University of Waterloo.[35] Danisch's research interests concern rhetorical theory and public communication within democratic societies, including extensive work on the relationship between American pragmatism and rhetoric.[36] Danisch's written scholarship include numerous articles, and four books ranging from academic to practical (*Beyond Civility: The Competing Obligations of Citizenship* (2020), *What Effect Have I Had? 100 Communication Practices to be a Better Partner, Teammate, Writer, Speaker, and Leader* (2018), *Building a Social Democracy: The Promise of Rhetorical Pragmatism* (2015), and *Pragmatism, Democracy, and the Necessity of Rhetoric* (2007)).[37]

Much of Danisch's work explores analytical theory and frameworks behind communication and those effects on democratic institutions.[38] Danisch posits that civility is a form of communicative agency where power stems from a person's ability to use language to form relationships, an essential function of stable democratic societies.[39] While civility can form an important framework for communication, Danisch also argues that it's equally important to know when to put aside civility, or to champion uncivil protests and revolution, in order to provide an adequate check on institutions of power.[40] In balancing civil and uncivil forms of communication, civility still provides the best chance of creating durable democratic systems open to political change as it grounds itself in the importance of human relationships.[41]

On a practical level, Danisch tries to re-educate individuals about what it means to communicate. Danisch rejects the transmission model of communication in which effective communicators are those that are best able to take an idea from their mind and send it to another person with the least

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[34] The Civility Project Website, https://thecivilityproject.biz/the-project.
[35] Robert Danisch Faculty Page, https://uwaterloo.ca/communication-arts/people-profiles/robert-danisch.
[36] *Id.*
[37] *Id.*
[38] *Beyond Civility: The Competing Obligations of Citizenship*, (2020)
[39] *Id.*
[40] *Id.*
[41] *Id.*

distortion.[42] Instead of asking "did you get it?", Danisch implores people to ask "what effect did I have?"[43] Danisch emphasizes that focusing on context—that different situations call for different communication processes—and audience—trying to get another person to believe or act in a certain way—are crucial skills to practicing this type of effective communication.[44] Danisch gives 100 practices and tips to become better at achieving your desired effect, rather than just your message, and to become better at communication as a partner, teammate, writer, speaker, and leader.[45]

Sharone Bar-David, Bar-David Consulting

Sharone Bar-David is the president of Bar-David Consulting, a boutique firm that specializes in assisting organizations in creating civil work environments through training, civility tools, coaching, and consulting.[46] Along with workplace incivility, Bar-David specializes in dealing with abrasive leadership and has been accredited as a Boss Whisperer through the Boss Whisperer Institute.[47] Bar-David has worked with over 41,000 people in trainings, consulting, coaching, and speaking events, and has been authored numerous articles and one book (*Trust Your Canary: Every Leader's Guide to Taming Workplace Incivility* (2015)).[48]

Bar-David defines incivility as seemingly insignificant behaviors that are rude, disrespectful, discourteous, or insensitive, where the intent to harm is ambiguous or unclear.[49] Bar-David analogizes incivility in the workplace to a disease that can progress from being a persistent allergy to a chronic infection or acute disease if left unaddressed.[50] Further, incivility can costs companies by making workers less focused and productive, less trusting and collaborative, less healthy and engaged, and more likely to quit.[51] Bar-David

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[42] *What Effect Have I Had?: 100 Communication Practices to Help You be a Better Partner, Teammate, Writer, Speaker, and Leader*, (2018).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Bar-David Consulting Website, http://www.sharonebardavid.com/about/.
[47] *Id.*
[48] *Id.*
[49] *Trust Your Canary: Every Leader's Guide to Taming Workplace Incivility*, (2015).
[50] *Id.*
[51] *Id.*

recommends a multi-pronged approach for tackling workplace incivility: (i) mend broken windows and act quickly and decisively on small acts of rudeness to show commitment to civility; (ii) model civil behavior; (iii) encourage staff to shift from bystanders to upstanders; (iv) identify and address any underlying beliefs that promote incivility as normal; (v) train and build a shared language and competence; and (vi) implement meaningful consequences for incivility to keep others accountable.[52]

Bar-David consulting offers a number of resources, programs, and toolkits for companies including "Team Civility Booster" and "Respect on-the-Go." The Team Civility Booster covers five modules and provides video lessons demonstrating incivility and strategies for boosting civility, planning and implementation guides for facilitated discussions, and resources and guides for sustaining the change.[53] The Respect on-the-Go toolkit provides planning and coaching tools as well as hundreds of tips, phrases, and strategies on easy to access cards for HR, managers, and executives.[54]

Lewena Bayer, Civility Experts Inc.

Lewena Bayer is the CEO of Civility Experts Inc., an international civility training group with 501 affiliates in 48 countries.[55] Bayer is also the Chair of the International Civility Trainers' Consortium, President of The Center for Organizational Cultural Competence, and Founder of the In Good Company Etiquette Academy Franchise Group.[56] Bayer is one of only 26 Master Civility Trainers in the world and has received or been nominated for a number of awards and recognitions; Bayer describes herself as "the leading expert on civility at work."[57] In addition to being a seasoned speaker, Bayer is an 18-time author of numerous works about civility.[58]

Civility Experts defines civility as: a conscious awareness of the impact of one's thoughts, actions, words and intentions on others; combined with, a continuous acknowledgement of one's responsibility to ease the experience of

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[52] *Why Civility Should Matter to You*, Globe and Mail's Leadership Lab, (Jan. 26, 2016), https://www.sharonebardavid.com/wp-content/uploads/2011/12/Globe-and-Mail-Why-Civility-Should-Matter-to-You-Jan-2016.pdf.
[53] Bar-David Consulting website, *supra* note 44.
[54] *Id.*
[55] Lew Bayer Website, https://lewbayer.com/.
[56] *Id.*
[57] *Id.*
[58] *Id.*

others (*e.g.*, through restraint, kindness, non-judgment, respect, and courtesy); and, a consistent effort to adopt and exhibit civil behavior as a non-negotiable point of one's character.[59] Civility Experts provides a host of materials, trainings, consultations, and assessments to help businesses imagine and plan a civil workplace, identify and change organization structure and culture leading to uncivil behavior, and build competency in core areas—continuous learning, social intelligence, systems thinking, and cultural competence—leading to a better workplace.[60] Civility Experts also offers a number of certification courses for individuals to become coaches and civility trainers.[61]

Diana Damron

Diana Damron is a speaker, author, and coach who's work focuses on transforming toxic business environments to trusting civil workplaces.[62] Damron's background is primarily in news and media as a former radio and television anchor.[63] Damron is the author or two books on civility (*Civility Unleashed: Using Civility to Survive and Thrive in the Workplace* (2016) and *The Civility Workout: Your Personal Guide to Unleashing Civility in the Workplace* (2017)).[64]

Damron defines civility as the consistent implementation of respect.[65] Damron focuses on the word consistent as civility is a daily exercise that needs to be practiced even when doing so steps on other's toes.[66] To promote trust and civility, Damron utilizes the 3 C's: Civility, Communication, and Character.[67] Damron believes that our civility needs to undergird our communication with one another to form connections that promote respect and both protect and nurture others.[68] Further, Damron breaks down Civility into 5 action steps in which one: Chooses intentionally to be civil;

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[59] Civility Experts, Inc. Website, https://www.civilityexperts.com/.
[60] *Id.*
[61] *Id.*
[62] Diana Damron Website, https://dianadamron.com/about/.
[63] *Id.*
[64] *Id.*
[65] The Force of Civility, Ted Talk, https://www.youtube.com/watch?v=paAfcZMpFAc.
[66] *Id.*
[67] Diana Damron Website, *supra* note 60.
[68] The Force of Civility, *supra* note 63.

Identifies their own strengths and weaknesses; understands their Values; Invites change into their lives and others to join; and Let's go of negativity.[69]

Dr. Linnda Durre, Psychotherapist

Linnda Durre is a psychotherapist, consultant, author, speaker, and former columnist and TV/radio host.[70] Durre has written many different works including one book (*Surviving the Toxic Workplace: Protect Yourself Against Coworkers, Bosses, and Work Environments That Poison Your Day* (2010)).[71]

In her book, Durre discusses many of the prevalent types of toxic coworkers, bosses, and situations prevalent in workplaces today. While Durre describes common toxic scenarios, the book then recommends specific solutions that one may take to resolve the toxicity, as well as alternatives (*e.g.*, a lawsuit or going to HR) if direct action proves ineffective.[72] Durre advocates for the sandwich method to address incivility by (i) first giving a positive compliment, (ii) then using "and" (not "but") to give feedback regarding the problem you are facing, and finally (iii) again using "and" to present a positive solution to move forward.[73]

Stephen M. Paskoff, ELI – Civility Treatment Series

Stephen Paskoff is the founder, president, and CEO of ELI, a training company that helps organizations solve bad behavior in the workplace.[74] Paskoff is a former EEOC trial attorney, partner at a labor and employment law firm, and founder and co-chair of the ABA's compliance training and communication subcommittee.[75] Paskoff has numerous media appearances and has written two books on civility (*CIVILITY Rules! A New Business Approach to Boosting Results and Cutting Risks* (2016) and *Teaching Big Shots to Behave (and Other Human Resources Challenges)* (2004)).[76] ELI

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[69] Diana Damron website, *supra* note 60.
[70] Surviving the Toxic Workplace Website, http://www.survivingthetoxicworkplace.com/biography.html.
[71] *Id.*
[72] *Surviving the Toxic Workplace: Protect Yourself Against Coworkers, Bosses, and Work Environments That Poison Your Day*, (2010).
[73] Surviving a toxic workplace, News Interview, https://www.youtube.com/watch?v=c_BoRDIbFCw.
[74] ELI company website, https://www.eliinc.com/about-eli/meet-the-team/stephen-m-paskoff/.
[75] *Id.*
[76] *Id.*

provides an award-winning training program on civil treatment in the workplace for managers and employees. Notable ELI clients include Coca-Cola, Verizon, Mastercard, Cox, Capital One, and the Department of Justice.[77]

As a former attorney, Paskoff's work has a greater legal bent, attempting to reshape companies' perspectives on workplace behavior from one centered on legal compliance to one based on civility and respect.[78] Paskoff believes that this narrow, legal-focused approach pushes other concerns to the side, is harmful to business performance, makes it harder to build respectful cultures, and breeds cynicism and narrowness.[79] Paskoff gives six solutions for companies to consider when transforming their business: 1) legal compliance is mandatory for a business, but does not go far enough in eliminating workplace incivility; 2) civility may be a "soft skill" but it has "hard" results and costs for an organization depending on the continuum of uncivil behavior (*e.g,.* illegal to rude conduct) allowed to fester; 3) unite other behavioral and compliance trainings (*e.g.*, sexual harassment) under the umbrella of civility to avoid regulatory fatigue; 4) keep it simple to make it stick for employees; 5) welcome all concerns and feedback from employees to build trust and diagnose issues; 6) senior leaders should initiate and model the change to civility for the rest of the company.[80]

Amir Erez, University of Florida

Amir Erez is a Professor at the University of Florida's Warrington College of Business Management.[81] Erez's research focuses on how positive moods and positive personality, influence individuals thought processes, motivation, and work behaviors.[82] Erez also investigates how negative work behaviors such as rudeness and disrespect affect individuals performance and cognition.[83] Erez has a large number of journal articles and studies regarding the effects of civility and incivility.

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[77] *Id.*
[78] *6 ways to make Civility Rule!*, ELI, https://www.eliinc.com/wp-content/uploads/6-ways-civility-rule-0317.pdf.
[79] *Id.*
[80] *Id.*
[81] Amir Erez Faculty Page, https://warrington.ufl.edu/directory/person/5084/.
[82] *Id.*
[83] *Id.*

In his research, Erez has found that rude behavior and incivility can have a negative effect on the mental capacities of individuals.[84] Erez and a team found that incivility drains the working memories of individuals—the area of the cognitive system where planning, analyses, and management of goals occur—and adversely affects team performance.[85] Erez notes that people can't think correctly when confronted with rudeness, and that incivility can spread easily from person to person.[86] Erez has also studied the effects of civil behavior in the work place and found that it can have both positive and negative effects.[87] In two studies, team members that had civil team communication tended to perform better, but for surgery teams undergoing progressively complex tasks, civil team communication eventually flipped to a negative.[88] Thus, Erez has found that the type of effect civility will have often depends on the broader environmental demands of the team.[89]

Jody J. Foster, University of Pennsylvania

Jody Foster, MD, MBA, is a Clinical Associate Professor of Psychiatry in the Perelman School of Medicine at the University of Pennsylvania, chairs the Department of Psychiatry at Pennsylvania Hospital, and leads the Professionalism Program at Penn Medicine as the Executive Clinical Director.[90] Foster's clinical practice includes general psychiatry, with a special emphasis on treating acute inpatients, psychopharmacology, and also

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[84] Riskin, A., Bamberger, P., Erez, A. and Zeiger, A. (2020), *Discrete Incivility Events and Team Performance: A Cognitive Perspective on a Pervasive Human Resource (HR) Issue*, Buckley, M.R., Wheeler, A.R., Baur, J.E. and Halbesleben, J.R.B. (Ed.) Research in Personnel and Human Resources Management (Research in Personnel and Human Resources Management, Vol. 38), Emerald Publishing Limited, Bingley, pp. 223-258. https://doi.org/10.1108/S0742-730120200000038008

[85] *Id.*

[86] *The Sunshine Economy: Civility and Commerce*, WLRN, Oct. 27, 2020, https://www.wlrn.org/podcast/the-sunshine-economy/2020-10-27/the-sunshine-economy-civility-and-commerce.

[87] Liu, Y., Vashdi, D. R., Cross, T., Bamberger, P., & Erez, A. (2020), *Exploring the puzzle of civility: Whether and when team civil communication influences team members' role performance*, Human Relations, 73(2), 215-241. https://doi.org/10.1177/0018726719830164

[88] *Id.*

[89] *Id.*

[90] Jody Foster Faculty Page, https://www.med.upenn.edu/professionalism/foster.shtml.

provides consulting support and evaluation services to executives.[91] Foster has authored the book, *The Schmuck in My Office: How to Deal Effectively with Difficult People at Work* (2017).[92]

Foster approaches civility in the workplace from her psychiatric background. Foster finds that early and direct confrontation of uncivil behaviors is the best solution for stopping incivility in the workplace.[93] However, frequently people avoid unpleasant situations, including difficult people and disruptive workplace behavior.[94] Further, many employees don't understand why colleagues act uncivilly. Foster's book seeks to educate individuals to identify and understand numerous disruptive behaviors and archetypes within the workplace (*e.g.*, the narcissist, the robot, the controlling perfectionist, the chaos bringer).[95] Through greater clarity of the individual and their uncivil behavior, Foster argues one is then able to empathize with the individual and try and rectify the situation.[96]

Trevor Foulk, University of Maryland

Trevor Foulk is an Assistant Professor of Management & Organization at the Robert H. Smith School of Business at the University of Maryland.[97] Foulk's research interests center around deviant workplace behaviors, workplace power dynamics, social perception, and interpersonal influence behaviors.[98] Foulk has published numerous articles in both scholarly journals and popular news outlets.[99]

Foulk's research on the effects of incivility in the workplace has been diverse and covered multiple areas. Foulk defines rude work behavior as low-intensity deviant behavior with ambiguous intent to harm.[100] This incivility

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[91] *Id.*
[92] *Id.*
[93] *The Schmuck in My Office: How to Deal Effectively with Difficult People at Work*, (2017)
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Trevor Foulk Faculty Page, https://www.rhsmith.umd.edu/directory/trevor-foulk.
[98] *Id.*
[99] *Id.*
[100] *Why rudeness at work can be harmful and contagious*, Silicon Republic, Feb. 6, 2020, https://www.siliconrepublic.com/careers/rudeness-work-trevor-foulk.

can lead to adverse effects including decreased performance, decreased creativity, and increased turnover intentions.[101] Further rudeness in the workplace is contagious and can spread from person-to-person through (i) the process of social learning of uncivil workplace norms and (ii) through non-conscious agitation.[102] In non-conscious agitation, rudeness stimulates a part of the brain responsible for processing rudeness, making it more likely for a person to notice rude cues and interpret ambiguous interactions as rude.[103]

Foulk's research on rudeness has also extended to leaders in power, finding those who were reminded of their power were more likely to treat others inappropriately.[104] Further, those in power were also more likely to perceive interactions from others as uncivil.[105] This focus on rudeness took its toll on leaders outside of the office as the leaders reported greater negative feelings and reduced well-being later at home.[106]

Craig Freshley, Good Group Decisions

Craig Freshley is a professional meeting facilitator, speaker, trainer, consultant, and president of Good Group Decisions.[107] Freshley focuses his professional work on improving how corporate teams collaborate and get things done. Freshley won the 2019 American Civic Collaboration Award for creating and facilitating make shift coffee houses in an effort to bring civility and understandings to political life.[108] Freshley has written hundreds of tips and insights for improving group skills including one book (*The Wisdom of Group Decisions* (2010)).[109]

Freshley provides facilitation and trainings for companies looking to improve group collaboration while handling conflict, running meetings, and

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Feeling Powerful at Work Makes Us Feel Worse When We Get Home*, Harvard Business Review, June 13, 2017, https://hbr.org/2017/06/feeling-powerful-at-work-makes-us-feel-worse-when-we-get-home?elqTrackId=f1a4c64d43d04a3b9478ee828ab8a6aa&elq=a6aa296715844dfaad976d0b53d9efab&elqaid=14504&elqat=1&elqCampaignId=6105.
[105] *Id.*
[106] *Id.*
[107] Good Group Decisions Website, https://craigfreshley.com/about-craig/.
[108] *Id.*
[109] *Id.*

disagreeing.[110] Much of Freshley's published work is condensed into one-page pieces of advice on over one hundred different topics (*e.g.*, email, agenda setting access, crediting the group, private criticism, etc.).[111] These tips start with a principled understanding of the issue, and how it can go wrong, then offers practical tips to better communicate with others.[112]

David A. Grenardo, St. Mary's School of Law

David Grenardo is a Professor of Law at St. Mary's University School of Law teaching professional responsibility, contracts, sports law, business associations, and civil procedure.[113] Grenardo has presented on professionalism and ethics multiple times locally, statewide and nationally, including at the American Bar Association's Annual Meeting and the ABA's Annual National Conference on Professional Responsibility.[114] Grenardo has written multiple articles on the topic of civility in the legal profession.

Much of Grenardo's civility scholarship has revolved around fixing incivility in the legal profession by advocating for mandatory civility rules. In his work Grenardo examines the various definitions of civility before noting that civility includes treating opposing counsel, the parties, the courts, and everyone an attorney encounters, with respect, courtesy, and dignity.[115] For attorneys especially, civility is also linked to professionalism and ethics.[116] Grenardo highlights the high costs of incivility within the legal profession as increased costs for the client, potentially losing a case, greater stress for the attorneys, negative public perceptions of the legal profession, waste of public and judicial resources, and ostracization within the legal community.[117] In spite of these costs, most jurisdictions have only adopted voluntary civility

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[110] *Id.*
[111] *The Wisdom of Group Decisions*, (2010).
[112] *Id.*
[113] David Grenardo Faculty Page, https://law.stmarytx.edu/academics/faculty/david-grenardo/.
[114] *Id.*
[115] *Making Civility Mandatory*, Cardozo Pub. Law, Policy, & Ethics J., Vol. 11, 239 (2013), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1044&context=facarticles.
[116] *Id.*
[117] *The High Costs of Incivility*, 43 Student Law. 24 (2015), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1561&context=facarticles.

oaths and civility guidelines for attorneys.[118] Grenardo finds these voluntary acts fall short of stopping incivility as there are no repercussions for uncivil violations.[119]

In response, Grenardo argues for making civility mandatory. For Grenardo, if civility is considered mandatory, then any time an attorney fails to act with civility, they would be sanctioned or penalized; though sanctions and penalties need not only be monetary, but could also include treatment or rehabilitation to fix the root of the problem.[120] To help enforce civility, Grenardo offers ten model rules and comments for mandatory attorney civility.[121] Grenardo also takes on objections to the idea of mandatory civility. He rejects the idea that because incivility cases are subjective they are cannot be ruled on given the legal profession already regulates similarly opaque professional conduct.[122] Next, Grenardo asserts that zealous advocacy does not require incivility, finds that civility requirements do not chill free speech, and will lower the costs of enforcement in the long run.[123] Finally, Grenardo advocates that solving incivility will require greater education in law schools and requiring professionalism/civility courses for lawyers.[124]

Janine Hammer Holman, J&J Consulting Group

Janine Holman is the founding principal and CEO of J&J Consulting Group. Holman uses scientifically validated strategies and tools to build high performance teams, enhance organizational development, and develop organizations and leaders with whom everyone wants to work.[125] Holman spent 10 years studying brain science and developed curriculum to help great organizations create thriving workplaces with engaged, emotionally

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[118] *Making Civility Mandatory*, *supra* note 113.
[119] *Id.*
[120] *Id.*
[121] *Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct,* National Conference on Professional Responsibility (2013), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1002&context=faccle.
[122] *Id.*
[123] *Id.*
[124] *Making Civility Mandatory*, *supra* note 113.
[125] J&J Consulting Group Website, https://jandjcg.com/our-team.

intelligent, high-performing teams, led by dynamic, innovative and compassionate leaders.[126]

Holman defines incivility in the workplace broadly as rude and disrespectful behavior that violates organizational norms and has an ambiguous intent to harm.[127] Holman combats this incivility through a unique approach that utilizes "brain science," emotional intelligence, and partnerships.[128] Holman defines "brain science" as the study of how the human brain works, and emphasizes that the trainings and approaches she takes are scientifically-based in how the brain responds to incivility.[129] Further, Holman emphasizes partnership as an active choice among individuals when working together and the importance of managing and understanding the emotions of oneself and others.[130] For organizations, Holman identifies 10 ways to increase civility: 1) focus on organization culture, 2) enroll leaders on the importance of action, 3) create a policy of large and small changes, 4) manage yourself, 5) use emotional intelligence, 6) screen out incivility in hiring, 7) teach and train others on civility best practices, 8) learn how to deal with conflict, 9) be intolerant of bad behavior, and 10) reward good behavior.[131]

Pete Havel, The Cloture Group

Pete Havel is a keynote speaker, trainer, and consultant on workplace culture and organizational leadership.[132] Havel is the president of The Cloture Group which provides speaking, training, and consulting to help transform toxic workplaces.[133] Pete has written tips and advice for dealing with toxic workplaces as well as a book on the matter (*The Arsonist in the Office: Fireproofing Your Life Against Toxic Coworkers, Bosses, Employees, and Cultures* (2019)).[134]

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[126] *Id.*
[127] *The Incivility Epidemic*, Sept. 11, 2020, https://jandjcg.com/blogs-%26-articles/f/the-incivility-epidemic.
[128] J&J Consulting Group Website, *supra* note 123.
[129] *Id.*
[130] *Id.*
[131] The Brutal Costs of Incivility on the Bottom Line, https://speakerhub.com/sites/default/files/Incivility-presentation-Vistage.pdf.
[132] Pete Havel Website, https://petehavel.com/about/.
[133] *Id.*
[134] *Id.*

Havel defines a toxic workplace as one wherein drama, chaos, and dysfunction trump common sense, ethical standards, and reason.[135] While toxic employees may pervade every organization, Havel notes it is management that is responsible for workplace culture and dealing with toxic environments.[136] In working to detoxify workplaces, Havel trains leadership and mangers to have the mindset, the understanding, and the tools to identify the problem areas, re-establish the organization's core values, and then identify and implement solutions.[137]

Michael P. Leiter, Deakin University

Michael P. Leiter is Professor of Organizational Psychology at Deakin University, Melbourne, Australia.[138] He previously held the Canada Research Chair in Occupational Health at Acadia University.[139] Leiter's work focuses on job burnout, work engagement, and workplace civility, with recent initiatives surrounding improving the quality of work life through enhancing the level of civility and respect among colleagues.[140] Leiter is widely published and has authored a number of articles and books (including *Analyzing and Theorizing the Dynamics of the Workplace Incivility Crisis* (2013)).

Leiter approaches incivility at work from a psychological background, incorporating academic theory to build a model of how and why incivility exists. In analyzing civility at work, Leiter uses a risk management model to explain the negative effects of incivility.[141] Under this model, incivility creates greater risks by ostracizing colleagues from the group, whereas civility brings safety.[142] Leiter's model's application to workplace civility builds on five propositions: 1) people want to belong in social groups; 2) people notice their own status in social groups; 3) workplace climates are self-perpetuating; 4) improving civility benefits from feeling psychologically safe;

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[135] *The Arsonist in the Office: Fireproofing Your Life Against Toxic Coworkers, Bosses, Employees, and Cultures* (2019).
[136] *Id.*
[137] Pete Havel Wesite, *supra* note 130.
[138] Michael Leiter Website, https://mpleiter.com/about/.
[139] *Id.*
[140] *Id.*
[141] *Analyzing and Theorizing the Dynamics of the Workplace Incivility Crisis*, (2013).
[142] *Id.*

5) improving civility is a reflective process.[143] The reflective process to improve civility requires clear and shared values, active and meaningful reflection and conversations, action and practicing civility, and full integration into day-to-day work life.[144] Through these processes, Leiter finds that the level of civility and respect in a workplace can improve, and there is a close link of improved collegiality with greater engagement with work (leading to less burnout).[145] However, any improvement requires groups to make a serious commitment to change, to dedicate time to a changes process, and to focus their attention on bringing that change about.

James Lukaszewski

James Lukaszewski identifies as "America's Crisis Guru" and the go-to person for senior executives when there is trouble in the room or on the horizon.[146] Lukaszewski is retained by senior management to directly intervene and manage the resolution of corporate problems and bad news while also providing personal coaching and executive recovery advice for executives in trouble or facing career-defining problems and succession or departure issues.[147] Lukaszewski has authored hundreds of articles and 13 books (including *The Decency Code: The Leader's Path to Building Integrity and Trust* (2020) (co-authored with Steve Harrison)).[148]

Lukaszewski's book emphasizes the importance of little acts of decency as the way to promote civility within the workplace. Lukaszewski defines business decencies as a thoughtful, meaningful gesture offered that in ways small and large can enhance a corporate culture; decencies are how we humanely treat each other.[149] Institutionalized corporate decencies are self-propagating and create a barrier to misconduct by building an ethical, compliant, and productive culture through pathways of accountability, civility, compassion, empathy, honesty, humility, and principle.[150] Lukaszewski believes that

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[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Jim Lukaszewski Website, https://www.e911.com/.
[147] *Id.*
[148] *Id.*
[149] *The Decency Code: The Leader's Path to Building Integrity and Trust*, (2020).
[150] *Id.*

seeing and experiencing little decencies adds impact to principle and creates change that can be felt and observed by everyone.[151]

Anna Maravelas, Thera Rising International

Anna Maravelas is the founder and president of Thera Rising International.[152] Maravelas is a Psychologist Emeritus with additional training in system thinking and process mapping.[153] Her work focuses now on transforming negative cultures into climates of respect, fiscal responsibility and pride.[154] Maravelas is the author of *Creating a Drama-Free Workplace: The Insider's Guide to Managing Conflict, Incivility and Mistrust* (2020). Notable clients include Wells Fargo, Target, Honeywell, General Mills, 3M, Lockheed Martin, and Best Buy.[155]

Thera Rising provides both seminars and trainings, workplace consulting, and facilitator and trainer certifications.[156] When working with companies, Thera Rising employs a three-step team building process: 1) a seminar training on drama-free work; 2) applying new principles to behaviors within the team and creating a code of conduct; 3) working to resolve private conflicts between pairs.[157] Maravelas' seminars and trainings emphasize three broad areas to increase civility: 1) positive energy is necessary to protect health, create connection, and lower stress levels; 2) insights into the causes and cures of workplace hostility by building alliances, being hard on the problem (soft on the person), and identifying the root of conflicts and when people are most vulnerable; 3) specific strategies to transform confrontations to shared searches for solutions, use reciprocity favorable, avoid adversarial factions, change blame-based conversations, and open up dialogue with a 96% chance of a positive outcome.[158]

Catherine Mattice, Civility Partners

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[151] *Id.*
[152] Thera Rising International Website, http://thera-rising.com/about/.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Creating a Drama-Free Workplace: The Insider's Guide to Managing Conflict, Incivility & Mistrust*, (2020).

Catherine Mattice is the founder and CEO of Civility Partners and provides consultant, speaker, and trainer services on transforming workplace culture and preventing workplace bullying.[159] Mattice is active in the International Association for Workplace Bullying & Harassment (IAWBH) and one of the four founding members of the National Workplace Bullying Coalition, a nonprofit organization focused on ending workplace bullying.[160] Mattice has written multiple articles and three books on stopping workplace bullying (*BACK OFF! Your Kick-Ass Guide to Ending Bullying at Work* (2012), *Seeking Civility: How leaders, managers and HR can create a workplace free of bullying and abusive conduct* (2016), and *Stand Up, Speak Out Against Workplace Bullying: Your Guide to Survival and Victory Through 23 Real Life Testimonies* (2018)).[161]

Mattice's work focuses on incivility in the workplace through the lens of bullying. Mattice defines workplace bullying as unwanted and recurring negative and abusive acts aimed at one or more individual.[162] Bullying often involves perceived power imbalances and inability to engage in self-defense, resulting in psychological harm to the victim and monetary losses to the organization.[163] As most instances of bullying are not covered by law or most corporate policies, it is often a reflection of the organizational culture and how employees communicate and interact with one another.[164] Mattice offers seven steps to create a bully-free workplace: 1) strategically use internal communication to create a culture of support, fairness, and listening; 2) obtaining and maintaining organizational commitment at every level; 3) periodically auditing internal communication processes for inappropriate behavior; 4) implement an anti-bullying policy; 5) conduct repeated management and employee trainings; 6) take grievances seriously and investigate them immediately; and 7) use a 360-degree review process where every person reviews everyone they have worked with.[165] Eliminating

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[159] Civility Partners Website, https://civilitypartners.com/catherine-mattice-zundel/.
[160] *Id.*
[161] *Id.*
[162] *7 Steps to a Bully-Free Workplace: Deliver a culture of civility to your organization & sustain the positive change*, HR Times, Vol. 3 Issue 4, https://assets.nu.edu/assets/resources/degreeResources/7_Steps_HRTimes_Cover.pdf.
[163] *Id.*
[164] *Id.*
[165] *Id.*

bullying from the workplace motivates staff, increases the quality and quantity of work, reduces stress, and improves the health of employees and the organization.[166]

Peggy Parks, The Parks Image Group

Peggy Parks is a speaker, trainer, and consultant focusing on business etiquette and corporate civility.[167] Parks is certified as an image and etiquette trainer, a branding strategist, and reach assessment analyst.[168] Parks has written numerous articles and some book chapters on business etiquette and civility.[169] Notable clients include AT&T, eTrade, Intel, and UPS.[170]

Parks provides customized workplace civility trainings and workshops for companies to address individual needs. To aid in solving the complex aspects of uncivil behaviors, Parks has created a civility solution model.[171] The 4C's Model for Civil Communication emphasizes communication must be clear, correct, calm, and conscious.[172] Parks supplements training on this communication model with self-assessments relating to communication habits and lessons on why civility matters and how it can improve business through increased respect, retention, morale, and profits.[173]

Christine Pearson, Arizona State University

Christine Pearson is a Professor of Global Leadership at Arizona State University's Thunderbird School of Global.[174] Pearson is an expert on curtailing and containing dysfunctional behavior at work, from dramatic organizational crises, to the corrosive impact of problems stemming from low-intensity incivility and aggression.[175] Pearson also serves as a consultant and executive-development adviser, with notable clients including PepsiCo,

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[166] *Id.*
[167] The Parks Image Group Website, https://www.theparksimagegroup.com/about/.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] Christine Pearson Faculty Page, https://thunderbird.asu.edu/christine-pearson.
[175] *Id.*

Dow Chemical, NASA, Clorox, Transamerica, Cisco Systems, Kraft Foods, AT&T, Mobil, and Chevron.[176] Pearson has authored numerous articles and six books relating to crisis leadership and bad behavior at work (including *The Cost of Bad Behavior: How Incivility Is Damaging Your Business and What to Do About It* (2009) (co-authored with Christine Porath).[177]

Pearson defines civility in the context of the workplace as behavior that helps to preserve the norms for mutual respect at work; it comprises behaviors that are fundamental to positively connecting with another, building relationships and empathizing.[178] In contrast, incivility in the workplace entails the violation of those norms such that cooperation and motivation are broadly hindered.[179] Further, Pearson diagnoses the various ways incivility can creep into an organization. Incivility may be confined into non-escalating exchange between two individuals.[180] However, incivility may also escalate and with each action promoting a more uncivil response creating a spiral.[181] Additionally, incivility can cascade outside of just the participants through direct and indirect displacement (when incivility with one person is taken out on another), word-of-mouth, and direct observation.[182] Much of Pearson's studies have been analyzing and accounting for the costs this incivility can have in the workplace (see Christine Porath below).

To combat incivility, Pearson recommends a series of corrective and protective actions. First, Pearson notes a company must set clear and expectations regarding their standards for interpersonal communication and not simply rely on the assumption everyone knows what civility means; once set, leaders must exemplify such values.[183] Next, companies can reduce incivility by screening for it during hiring, and then by training employees on civil behavior throughout their tenure.[184] Finally, companies should both

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[176] *Id.*
[177] *Id.*
[178] *Assessing and Attacking Workplace Incivility*, Organizational Dynamics, (2000), https://www.researchgate.net/profile/Christine-Porath/publication/228079608_Assessing_an_attacking_workplace_incivility/links/5663616108ae192bbf8ef07a/Assessing-an-attacking-workplace-incivility.pdf.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*

welcome and encourage feedback on uncivil behavior in the workplace and take corrective action on the issues raised.[185]

Christine Porath, Georgetown University

Christine Porath is an Associate Professor at Georgetown University's McDonough School of Business and also serves as a speaker and consultant. Porath's scholarship focuses on civility and is featured in numerous articles and the subject of two books: *Mastering Civility: A Manifesto for the Workplace* (2016) and *The Cost of Bad Behavior – How Incivility Damages Your Business and What You Can Do About It* (2009, co-authored with C.M. Pearson).[186] Notable among Porath's speaking and consulting clients are Google, United Nations, Pixar, Ford, AT&T, Expedia, the World Bank, Marriott, the Department of Justice, and Verizon.[187]

From over 20 years of research and polling workers, Porath has found that incivility is rampant in the workplace (98% of workers had experienced uncivil behavior).[188] Moreover, incivility was on the rise; in 2011, half of respondents stated they were treated badly at least once a week (up from a quarter in 1998).[189] Given the inescapable reality that every workplace deals with incivility in some manner, Porath's work seeks to do two things: (i) quantify and show the costs of incivility, and (ii) devise strategies and recommendations for how to fix it.

Porath defines incivility as disrespect or rudeness; this definition includes a multitude of behaviors that may vary in meaning for different people (what is rude to one person may not be to another).[190] In the workplace, incivility leads to tangible costs. Workers on the receiving end of incivility intentionally decrease effort (48%), quality (38%), and time spent (47%) at work; lose time worrying (80%) or avoiding the offender (63%); experience a decline in performance (66%) or commitment to the organization (78%); take

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[185] *Id.*
[186] Christine Porath Faculty Page, https://gufaculty360.georgetown.edu/s/contact/00336000014ReyuAAC/christine-porath.
[187] Christine Porath Website, http://www.christineporath.com/.
[188] *An Antidote to Incivility*, Harvard Business Review, April 2016, https://hbr.org/2016/04/an-antidote-to-incivility.
[189] *Id.*
[190] *Why being respectful to your coworkers is good for business*, Ted Talk, Oct. 24, 2018, https://www.youtube.com/watch?v=YY1ERM-NIBY.

frustration out on customers (25%); and quit (12%).[191] Further, individuals who experience incivility are less creative, perform worse, and are less likely to help out teammates or collaborate.[192] The effects of incivility also extend to those simply observing incivility, with customers found to be less likely to purchase from a company after witnessing uncivil conduct.[193] Overall, incivility is expensive and costly for a company.

Porath finds the usual responses to incivility—retaliation, direct discussion, avoidance—often fall short.[194] While these approaches can help in certain situations, confrontation usually makes the dynamic worse and avoidance is not sustainable.[195] Instead, companies should take a holistic approach where the best remedy for incivility is to improve the well-being of the office (rather than one offender) as a whole.[196] On a personal level, individuals who are thriving are less affected by the negative consequences of incivility. Thriving takes a two-pronged approach: (i) thriving cognitively, focused around growth, momentum, mentorship, and continued learning both at and outside of work, and (ii) thriving affectively, which is centered around feeling healthy, well rested, and experiencing passion and excitement at work and outside of it.[197] On an organizational level, company leadership should model good behavior, ask for feedback (including post-departure interviews), pay attention to progress, include civility as a factor in hiring, teach and train employees on what it means to be civil, create group norms and expectations, reward good behavior, and punish bad behavior.[198] Greater civility in a company benefits not only the people, but also the bottom line.[199]

Thomas G. Reio, Jr., Florida International University

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[191] *The Price of Incivility*, Harvard Business Review, January-February 2013, https://hbr.org/2013/01/the-price-of-incivility.
[192] *Id.*
[193] *Id.*
[194] *An Antidote to Incivility*, *supra* note 186.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*; *The hidden toll of workplace incivility*, McKinsey Quarterly, Dec. 14, 2016, https://www.mckinsey.com/business-functions/organization/our-insights/the-hidden-toll-of-workplace-incivility#.
[199] *Why being respectful to your coworkers is good for business*, *supra* note 5; Christine Porath Website, *supra* note 185.

Thomas G. Reio, Jr. is a Professor of Adult Education and Human Resource Development at Florida International University.[200] Reio's research concerns taking a sociocultural view of curiosity and risk-taking motivation and their links to learning and development across the lifespan, socialization practices (*e.g.*, mentoring), and workplace incivility.[201] Reio has published numerous academic articles and was awarded multiple awards for work on workplace incivility and conflict management.[202]

Much of Reio's work builds off of what management strategies companies can take after acknowledging that incivility in the workplace is prevalent and harmful. In a study on the effects of supervisor and coworker incivility, Reio confirmed that incivility had a strong, direct negative effect on job satisfaction and employees' emotions.[203] However, Reio found that emotion management—the process to modify one's emotions to fit the appropriate responses for environmental and organizational demands (*e.g.*, suppressing negative emotions or faking positive emotions)—lessened the negative effects of incivility on job satisfaction.[204] Thus, organizations should not only be aware of the ill effects of incivility, but also develop positive emotional management strategies and educate employees.

Reio has also studied the effects of different styles of conflict management in dealing with workplace incivility. Reio found that dominant conflict management style—low levels of concern for others and high focus on yourself—was negatively associated with organizational commitment and retention.[205] However, Reio found that integrative conflict management style—high levels of concern for yourself and others that creatively uses information to achieve mutually-satisfactory results—had positive relations

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[200] Thomas Reio Jr. Faculty Page, https://case.fiu.edu/about/directory/profiles/reio-thomas.html.
[201] *Id.*
[202] *Id.*
[203] Opengart, Rose,et al., *Workplace Incivility and Job Satisfaction: Mediating Role of Emotion Management*, IJAVET vol.10, no.2 2019. http://doi.org/10.4018/IJAVET.2019040101.
[204] *Id.*
[205] Reio, Jr., Thomas G. and Jeannie Trudel, *Workplace Incivility and Conflict Management Styles: Predicting Job Performance, Organizational Commitment, and Turnover Intent*, Adult Education and Vocational Training in the Digital Age, edited by Viktor Wang, IGI Global, 2017, pp. 217-240. http://doi:10.4018/978-1-5225-0929-5.ch013.

to job performance, organizational commitment, and turnover.[206] Thus, Reio encourages companies to seek to use more integrative conflict management styles when dealing with workplace incivility.

Jayne Reardon, Illinois Supreme Court Commission on Professionalism

Jayne Reardon is the Executive Director of the Illinois Supreme Court Commission on Professionalism.[207] Reardon oversees programs and initiatives to increase the civility and professionalism of attorneys and judges, create inclusiveness in the profession, and promote increased service to the public.[208] Reardon has written articles and given various presentations on civility and professionalism within the legal enterprise.[209]

Reardon has defined civility within the legal profession to be a code of decency in conduct and behavior that is a condition of lawyer licensing.[210] Reardon finds that despite attorney's professional obligations to civility, it is rampant in the legal community with the vast majority of Illinois lawyers having experienced unprofessional behavior by other lawyers, whether blatant rudeness in comments or interactions, to more strategic incivility in opposing counsel employing uncivil behaviors in an attempt to gain an upper hand in litigation.[211] However, the research clearly shows the benefits to civility: (1) civil lawyers are more effective and achieve better outcomes; (2) civil lawyers build better reputations; (3) civil lawyers have greater job satisfaction; and (4) civil lawyers have less chances of discipline.[212]

To promote civility among lawyers, Reardon proposes bringing lawyers together for training and mentoring. To that end, the Commission on Professionalism has created a lawyer-to-lawyer mentoring program for new lawyers using a guided curriculum on how attorneys can build careers based

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[206] *Id.*
[207] Illinois Supreme Court Commission on Professionalism Website, https://www.2civility.org/about/our-team/jayne-reardon/.
[208] *Id.*
[209] *Id.*
[210] Civility as the Core of Professionalism, American Bar Association, Sept. 18 2014, https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/.
[211] *Id.*
[212] *Id.*

on integrity and professionalism.[213] Further, the Commission has created CLE programs on civility, expert interviews and tips, and a host of other resources to train and educate attorneys and the entire legal profession on civil behavior.[214]

Bob Sutton, Stanford University

Bob Sutton is a Professor of Management Science and Engineering and Professor of Organizational Behavior at Stanford University.[215] Sutton co-founded the Stanford Technology Ventures Program and the Hasso Plattner Institute of Design.[216] Sutton studies organizational change, leadership, innovation, and workplace dynamics and has received numerous honors and recognitions as a leader in management.[217] Sutton is widely published in academic journals and has authored seven books (including *The No Asshole Rule* (2010) and *The Asshole Survival Guide* (2017)).[218]

Sutton has been influential in popularizing both the costs and negative effects of incivility in the workplace, but also in working to create different solutions for transforming organizational culture. Sutton defines the workplace jerk as someone that makes others feel oppressed, humiliated, de-energized, belittled, or worse about themselves after interacting with them.[219] Sutton then quantifies the total costs of jerks for a company by looking at the damage to victims and witnesses (*e.g.*, distraction, loss of motivation, stress), damage to the jerks (*e.g.*, retaliation from victims, humiliation, unable to work with others), consequences for management (*e.g.*, time lost dealing with jerks and their fallout), legal and HR costs, and negative organizational effects (*e.g.*, reduced creativity, impaired cooperation, less effort).[220] In response, Sutton advocates for the no-jerks rule and five practices for companies to utilize when following it: 1) make the rule public by what you say and do for accountability; 2) employ the rule in hiring and firing

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[213] Illinois Supreme Court Commission on Professionalism Website, *supra* note 205.
[214] *Id.*
[215] Bob Sutton Website, https://www.bobsutton.net/about-bob/.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Building the civilized workplace*, McKinsey Quarterly, May 1, 2007, https://www.mckinsey.com/business-functions/organization/our-insights/building-the-civilized-workplace.
[220] *Id.*

decisions; 3) teach people how to constructively disagree and argue; 4) apply the rule to customers and clients; and 5) manage the little moments as ways to repeatedly practice the rule.[221]

After writing extensively on how organization's may utilize the no-jerks rule to transform company culture, Sutton has also researched its application specifically to senior management. People in positions of power are more likely to act uncivil in their behavior whether it is because they are overworked, insecure, distanced, or drunk on power.[222] Because of this, leaders have to be especially self-reflective and cognizant of whether they are the source of incivility in the organization.[223] Sutton proposes a five-point plan to help top executives strive to treat others with respect: 1) make sure you are not surrounded by jerks because rudeness is contagious and can spread; 2) be aware of how you wield your influence and power and practice humility and giving credit to others; 3) understand the risks of overload and addiction to technology, which often has the indirect effect of causing unintentionally uncivil conduct; 4) when you behave like a jerk, make sure to apologize correctly and personally (don't delegate); and 5) envision your actions from the future and reflect upon how you would like to behave looking back on your life.[224]

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[221] *Id.*

[222] *Memo to the CEO: Are you the source of workplace dysfunction?*, McKinsey Quarterly, Sept. 14, 2017, https://www.mckinsey.com/featured-insights/leadership/memo-to-the-ceo-are-you-the-source-of-workplace-dysfunction.

[223] *Id.*

[224] *Id.*

Appendix 5: Referral and Dispute Resolution Programs

Report On Civility Mediation Programs

TO: **Civility Task Force**

FROM: **Jeanne A. Fugate and Alan M. Mansfield**

DATE: **July 29, 2021**

RE: **Referrals and Dispute Resolution Subgroup Final Report**

The Civility Task Force is exploring potential programs, procedures, and rule changes to increase civility in the legal profession in the State of California. Our subgroup was tasked with investigating examples of attorney referral programs utilized by other State Bars as well as to explore examples outside the context of the legal profession, such as conflict resolution programs adopted by public and private entities. We looked specifically for programs addressing *incivility* in the legal profession and/or the workforce, as opposed to programs that deal with ethical violations or address claims of illegal conduct in the workforce (discrimination, harassment, etc.).

Below we briefly summarize the programs that we have located. Each of the programs discussed below share common characteristics: They are confidential and voluntary, and are not part of any formal disciplinary body. The sessions are mediated by a neutral third party—usually a volunteer but in one example below a professional and paid mediator. There tend to be civility rules (or workplace conduct rules) against which to gauge behavior. And there tends to be a limitation in geographic scope.

Based upon our research and discussions with the Task Force, we also attached hereto as Exhibit "1" our recommendations, should there be interest in implementing a similar program in California.

I. ATTORNEY REFERRAL PROGRAMS

At least four states have adopted some form of lawyer professionalism and/or civility referral programs: (1) New Jersey, (2) Utah, (3) Colorado, and (4) Florida. Both Illinois and Michigan have engaged in a sustained effort to promote civility, but do not appear to have adopted formal referral programs.

We also saw references to similar programs in Arizona, Georgia, and North Carolina, but so far have been unable to locate detailed information about them.

A. New Jersey

In 1997, New Jersey implemented a "Professionalism Counseling Program." https://tcms.njsba.com/PersonifyEbusiness/Default.aspx?TabID=2009. According to their website, the Commission on Professionalism in the Law asked county bar associations across New Jersey to take the lead through the establishment of Professionalism Committees that would have the ability to identify and counsel lawyers whose conduct falls short of accepted levels of professional behavior or competence.

The Professionalism Counseling Program addresses conduct by lawyers that does not rise to the level of a violation of the ethics rules (the Rules of Professional Conduct). Thus, it does not handle any matter that is within the jurisdiction of a District Ethics Committee. For instance, the program deals with such things as harassing conduct, abusive litigation tactics, incivility, inappropriate courtroom conduct, and repeated lack of respect for colleagues, judges, and court staff. The program is educational in nature. No discipline or sanctions are imposed, and all matters are confidential. The only records kept are those relating to the type of complaint addressed.

The program is operated through local Professionalism Committees appointed by county bar associations. The precise composition, structure and operation of a committee is left to the bar association to establish, and different approaches have been taken. Some committees operate under formal operational rules; others deal with complaints on a more ad hoc basis. Another committee has established a mediation program to deal with disputes between lawyers. The commission encourages such experimentation and leaves it to bar associations to determine what type of program best fits the needs of the bench and bar of that county.

The Commission has, however, set some basic guidelines for the local Professionalism Committees to follow:

- Each committee, and a committee chair, should be appointed by the county bar president.
- Lawyer members of committees should be highly regarded and experienced members of the bar with reputations for competence, integrity and civility. Judges, both sitting and retired, are encouraged to participate and should exhibit the same qualities.

The program should offer assistance in the following circumstances:

- A lawyer requests assistance in dealing with another lawyer, or in addressing specific conduct of another lawyer
- A lawyer requests assistance in dealing with a professionalism issue
- A judge requests assistance in dealing with a lawyer, or in addressing specific conduct of a lawyer
- The Appellate Division encounters unprofessional behavior and refers an opinion to the Commission, for referral to the appropriate county bar committee.
- The program shall not handle complaints from clients, or members of the public.

Generally, complaints are directed to the chair of the Professionalism Committee. The evaluation of complaints is done pursuant to committee rules and guidelines. Most committees will ask a member to look into a complaint by talking with the lawyers involved. If further action is deemed necessary, committee members will be assigned to counsel the lawyer in question, or the lawyer will be asked to appear before the committee. If a lawyer is reluctant to cooperate, the assignment judge (pursuant to Court Directive #1-97) may be asked to intercede and assist in ensuring the lawyer's cooperation.

Currently, almost all of New Jersey's twenty-one county bar associations have adopted some form of professionalism counseling. Committees may also refer lawyers to other programs, if the circumstances so warrant. For instance, such referrals have been made in cases where substance abuse problems have been uncovered.

B. Utah

Utah has adopted a "Program of Professionalism," pursuant to the Utah Supreme Court Standing Order No. 7 (amended June 12, 2012). The program is administered pursuant to Rule 14.303 of the Utah Supreme Court Rules of Professional Practice, a copy of which is included in our Appendix.

The program consists of seven members in staggered 3-year terms, appointed by the Supreme Court, to server on a "Professionalism and Civility Counseling Board." The purpose of the Board is to "(1) counsel members of the Bar, in response to complaints by other lawyers, referral from judges or referrals from counsel in the Office of Professional Conduct, (2) provide counseling to members of the Bar who request advice on their own obligations under the Standards, (3) provide CLE on the Standards and (4) publish advice and information relating to the work of the Board." One member of the Board has small firm or solo practitioner experience, and one has transactional experience. The Board does not consider complaints from clients or the public.

The Board addresses most matters in panels of three, based on written complaints or referrals (which are not to be anonymous in terms of the person making the referral). If they find the matter warrants a response, is submitted in good faith and not for purposes of harassment or to attain a strategic advantage, they are to let the complainant know that a complaint or referral has been received, and gives them a description of how the Board intends to address the issue. The contents of any complaint or response is to remain confidential, and Board members are free to investigate such claims. They may, but are not required to, inform the lawyer of the relevant factual assertions and provide them a copy of the complaint prior to issuing an advisory or taking any other action.

Resolution may be a written advisory to the attorney, or a face-to-face meeting with the lawyers or through counsel. The Board may also advise relevant supervisors, employers, agencies or judges of the disposition if it is a written advisory, and may also publish the advisory for the benefit of the Bar and the public, while keeping the names of the persons involved confidential.

The Board reports annually to the Utah Supreme Court concerning its operations, the standards it has interpreted, the advice it has given, any trends it believes are important for the Court to know and suggestions as needed to modify the standards. These results are also to be published in the Utah Bar Journal and on a website, in a database of advisories for reference for the benefit of practicing lawyers.

C. Colorado

Colorado has implemented a "Peer Professionalism Assistance Group." https://www.cobar.org/For-Members/Professionalism-Resources/Peer-Professionalism-Assistance-Group

According to the PPA's website, the PPA provides free confidential coaching to individual attorneys, informal mediation assistance to attorneys and education to groups of attorneys. The PPA is confidential and any communications are not shared with any regulatory agency, court, or professional association.

The PPA, which apparently is staffed by volunteer attorneys, (1) provides one-on-one confidential advice to individual attorneys on how to handle an unprofessional situation; (2) communicates with opposing counsel upon request of the calling attorney to discuss and help resolve professionalism issues; (3) meets jointly with and provides informal mediation services to both/all attorneys experiencing professionalism issues (either upon request of the attorney(s) or when ordered by the court); and (4) receives referrals from judges and magistrates to eliminate unprofessional behavior in courtrooms; and (5) provides Continuing Legal Education seminars.

D. Florida

Florida has taken a variety of approaches to address civility issues, mostly on a local Bar level, although it also has enforced formal civility complaints through the State Bar and published decisions. As one example, the Palm Beach County Bar Association has created a "Professionalism Panel," to meet with attorneys who have conducted themselves in a manner inconsistent with The Florida Bar Professionalism Expectations or the Palm Beach County Bar Association Standards of Professional Courtesy and Civility. The purpose of the Panel is to discuss their conduct and counsel them to avoid such conduct in the future. The Panel has no authority to discipline attorneys or to compel an attorney to appear before it. The Bar

provides an online form that can be submitted to the Panel, a copy of which is included in our Appendix.

E. Illinois

The Illinois Supreme Court has created a formal Commission on civility and professionalism, which has created a website devoted to lawyer civility issues and is an excellent clearinghouse of information our committee should review for ideas and resources: https://www.2civility.org/civility/. We confirmed via email with Executive Director Jayne R. Reardon that it does not utilize any form of referral program. According to Ms. Reardon, "The Commission on Professionalism is charged with promoting professionalism above the floor required by the Rules of Professional Conduct. . . . We do not have any involvement in referral for dispute resolution."

F. Michigan

Michigan has similarly created a clearinghouse of information on civility, based on an October 2018 summit on civility by bench and bar leaders throughout Michigan that resulted in the creation of a clearinghouse for civility information and a presentation to the State Supreme Court of Michigan in October 2019 of "Professionalism Principles for Lawyers and Judges." https://www.michbar.org/file/professional/pdfs/Professionalism-Letter.pdf

Michigan considers the Principles to be "aspirational," and address no possible enforcement or disciplinary process. There is not a formal referral program within these principles. We found interesting, however, the below, which the Michigan State Bar identified as "The Top Ten Most Shared Recommendations" to encourage civility:

- Encourage bar associations, lawyer organizations, and judicial groups to conduct similar summits.
- Consider the adoption of Michigan specific civility guidelines for lawyers and judges and use them more deliberately.
- Review The Lawyer's Oath more frequently and include it in a State Bar curated clearinghouse and professionalism tool kit.
- Focus on personal relationship building, inclusion, and more thoughtful communication, especially when using technology.

- Focus on lawyer wellness.
- Recognize lawyers and judges practicing civility and professionalism through awards, social media, and other methods designed to celebrate those who exemplify good practice.
- Create more court ombudsman programs to invite communications regarding judges and lawyers who may be struggling with civility in the courtroom.
- Send the message through mentorship and similar efforts that uncivil conduct unfavorably affects time management, economics of law practice, and personal credibility.
- Encourage the public and the business community to look for attorneys with civility and professionalism qualities.
- Involve the public in this conversation and invite community organizations to have public speakers on the subject.

Above we summarize the programs in place in New Jersey, Utah, Colorado, and Florida, as well as describe programs to promote civility in Illinois and Michigan. Please let us know if further research would be helpful as to these or other attorney referral programs.

II. PRIVATE/PUBLIC ORGANIZATION EXAMPLES

We also investigated dispute resolution mechanisms in the public and private sector. As an initial note, we have not been able to identify any private sector program, despite wide inquiries in that regard. It is the authors' suspicion that private sector programs are often more focused on discipline and risk mitigation (and most HR functions would operate confidentially) and thus we have not yet identified any private sector programs that could be interest to the Task Force.

However, we were able to identify several public sector organizations that have implemented, or are in the process of implementing, dispute resolution programs. We have spoken with representatives of the County of Los Angeles, the City of San Francisco, and the City of Los Angeles, who have shared their programs and/or aspirations. Of them, the County of Los Angeles program has been in place the longest and may provide the most guidance.

A. County of Los Angeles

We interviewed two representatives from LA County's Department of Human Resources: William Gomez, Senior Manager for Civil Service Advocacy Division; and Diane Woo, Deputy Compliance Officer, Dispute Resolution Mediation. Ms. Woo is considered to be a subject matter expert as she has been involved in the County's program for the past 15 years.

The program was created to deal with miscommunications between supervisors and line staff, escalation of workplace tensions, etc. The program is voluntary for its participants, and is entirely confidential. According to a Resource Guide, the process is initiated by a supervisor contacting the DRM section for consultation. The supervisor then meets with a professional facilitator (who is paid by the County, at $100 per hour). The professional facilitator then drafts a plan of action and holds a confidential meeting with the employees who are the subject of the referral.

Ms. Woo reported that she believed the most important attributes of their program (and of any similar program) are: (1) that it be voluntary, with willing participants, (2) that is be entirely confidential, (3) that it not be tied to discipline, and (4) to obtain participants' views on what worked and what didn't to continually improve the program.

Materials in Appendix include the DCO Resource Guide, and Program Flyer.

B. City of San Francisco

We spoke with Jacqueline Joseph-Veal, who goes by "jjv," the Diversity, Equity, and Inclusion Director of the City of San Francisco to learn about their program. The San Francisco program has just launched as a pilot project for four departments. Like the Los Angeles County program, the program is entirely voluntary and confidential. Also similar to LA County, the program starts with a referral, followed by a pre-meeting with the participants, and a formal mediation session, subject to a confidentiality agreement.

Unlike Los Angeles County with pays professional mediators to lead session, the "facilitators" in San Francisco are volunteers from the City. The City received 243 applications from employees, narrowed to the top 70 based on highest scores and manager approval, and eventually chose 50 employees with the top scores to be the mediators.

jjv reports that employees are very excited about the program – they have adopted a slogan, "be part of the solution," that has gained a lot of traction. It is still early in the program, and jjv offered to speak again after the program ahs been in place for longer to give more feedback. She agreed, however, the important attributes are: (1) voluntariness, (2) confidentiality, and (3) that the "facilitator" be outside the supervisory chain of the participants. It is also not a disciplinary program.

Materials in the Appendix include a Powerpoint summary of the Program and an exemplar Confidentiality Agreement

C. City of Los Angeles

We spoke with Malaika C. Billups, Chief Diversity, Equity & Inclusion Officer of the City of Los Angeles. The City is in the process of creating its own dispute resolution program. It is looking at both the LA County and San Francisco programs described above. Ms. Billups had several observations: (1) there needs to be an agreed upon set of rules/conduct to measure the participants' conduct against, (2) the program needs to be voluntary, confidential and separate from discipline.

III. CONCLUSION

Upon the request of the Task Force, attached hereto as Exhibit 1 are our recommendations, should there be interest in pursuing dispute resolution program in California.

Exhibit 1
Key Attributes of Peer Review Counseling Program

1. Program would be overseen and coordinated by local bar associations in contrast to state-wide organization such as California State Bar.

2. Program would be staffed by volunteers with experience in mediation, similar to voluntary mediation programs operated by local Bar associations. If there could be a source of funding, it would be ideal to pay mediators a nominal hourly or daily fee, but question as to who would provide the source of that funding.

3. Referrals to program would be by other attorneys and local state and federal court judges, not clients, and participation in any referral to the Program would be voluntary

4. Format of Program would be more in form of mediation than a formal proceeding, with results not being formally transcribed or reported. Results of the mediation would be confidential.

(a) Question how to provide participants the results from participation in the program (i.e., would there be a written letter or report generated from the mediation, or entirely oral summary), and if the matter has been referred to the Program by a judge, would the results of that mediation be provided to the judge either orally or in writing.

(b) Results would not be reported to State Bar of California or other relevant jurisdiction

5. Program would be promoted in monthly bar and bench journals, bar organizations, and possibly through a centralized website containing updated information on civility programs, such as maintained in Illinois and/or Michigan

6. Program would develop a template for local bar associations to use for referrals and general rules to follow in process, which would be modified by local bar as appropriate to match/fit local needs. A template is attached as Ex. 1-A

EXHIBIT 1-A

REQUEST FOR REFERRAL TO
PEER REVIEW COUNSELING PROGRAM

Important: Please read the instructions on the next page.

A. Your Information:

Name: _____

Address: _____

E-mail address: _____

Telephone no.: _____

B. Lawyer or Staff Person Complained About:

Name of lawyer: _____

Name of staff person: _____

Firm name: _____

Address: _____

C. Nature of Conduct Complained of (*check all that apply*):

_ Dishonesty, lack of candor

_ Unfair or dilatory tactics

_ Disruptive in court or other oceeding

_ Disorganized/unprepared

___ Rude, discourteous, disrespectful, uncivil

___ Bullying, badgering, abusive, insulting

___ Profanity, obscene gestures, facial expressions

___ Lack of decorum

___ Other

Did the conduct occur in connection with litigation? ___Yes ____No.

If yes:

Case caption: _____

Court:_____

Case No. _____

D. Specific Conduct. The specific conduct complained of is described on the attached sheet(s).

E. **Declaration, Request, and Signature.** By signing below, I declare that I believe in good faith that the information that I am providing is true and complete, and I request that this matter be referred to the Peer Review Counseling Program.

_____

Date: _____ Name: _____

INSTRUCTIONS FOR REFERRAL FORM

Purpose: The Peer Review Counseling Program was established pursuant to a Civility outreach program established by the State Bar of California. Its purpose is to meet with attorneys who have conducted themselves in a manner inconsistent with Standards of Professional Courtesy and Civility to discuss their conduct and counsel them to avoid such conduct in the future.

The Panel has no authority to discipline attorneys or to compel an attorney to appear before it. Likewise, neither the mediator overseeing the referral or the County Bar Association can intervene on your behalf in a civil or criminal case or give you legal advice.

Completion of Form: Please submit no more than **ten pages,** including the referral form and attachments**.** Do not include this instruction page. You may indicate that additional evidence or exhibits are available upon request. Please type or print legibly, using only black typeface or ink.

Conduct in Question: Describe in detail the conduct about which you are complaining, supplying dates where possible. Please be aware that simply alleging conclusions unsupported by facts may result in the rejection of your request or a delay in its disposition.

Signature: You must sign the form where indicated. Unsigned forms will be returned for signature.

Submission of Form: Please e-mail your completed form and accompanying pages to _____, Executive Director of the County Bar Association Peer Review Counseling Program, at _____

Thank you for your interest in promoting the professionalism of attorneys in this County.

Appendix 6: Bias-Driven Incivility

BIAS AND INCIVILITY

By Esther K. Ro, Bradley S. Pauley, Mike H. Madokoro, Marisa Hernandez-Stern[i]

I. Bias-driven incivility in the legal profession

Notwithstanding efforts to minimize the effects of implicit bias in the legal profession, diverse attorneys continue to face "bias-driven incivility," a distinct form of incivility resulting from expressions of explicit and implicit biases.[225] In this section, we define and provide examples of bias-driven incivility; explain the negative effects of bias-driven incivility on attorneys who are directly impacted and on the legal profession; and make recommendations for intervention through MCLE programming.

II. What is bias-driven incivility?

Bias-driven incivility is uncivil conduct resulting from expressions of implicit and explicit biases,[226] including the unconscious expression of an

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[225] Although this section primarily focuses on the experiences of attorneys, we recognize that other legal professionals face bias-driven incivility. An attorney's duty of civility extends beyond their treatment of other attorneys and encompasses an attorney's treatment of all members of the legal profession, including but not limited to legal staff, judicial officers, and court staff. Additionally, attorneys should be mindful of their civility obligation to clients and the public. (California Attorney Guidelines of Civility and Professionalism, p. 3, https://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf.) When clients or the public witness or are subjected to incivility, it "perpetuate negative perceptions and stereotypes about lawyers and the legal system—namely that lawyers are arrogant, rude, obstreperous, and obnoxious jerks, and the client with the most abhorrent lawyer in the case will prevail." (Gernardo, *A Lesson in Civility* (2019) 32 Georgetown J. L. Ethics 135, 146; see Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 237 [incivility undermines public confidence in the legal profession].)

[226] "Bias" is generally defined as a prejudice in favor of or against one person or group compared with another, usually in a way considered to be unfair. California State Bar Rule 2.72(B)(2) states a non-exhaustive list of

internal bias or a covert manifestation of a discriminatory preference.[227] When biases are openly expressed through words or conduct, the persons against whom the biases operate may experience the behavior as uncivil conduct. Bias-driven incivility may occur between opposing counsel or colleagues at a firm, at work, or at social functions. A correlation exists between bias-driven incivility and power dynamics, with people in positions of authority more likely to engage in bias-driven incivility, though some forms of bias-driven incivility are more common between peers.[228] Attorneys

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biases experienced because of one's "sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation . . . ." More generally, biases are rooted in prejudices and stereotypes caused by racism, sexism, homophobia, ableism, and ageism, among other causes.

Implicit biases are unconsciously held attitudes and stereotypes about someone. Explicit biases are consciously held attitudes and stereotypes about someone.

The American Bar Association has issued reports comprehensively detailing and documenting the biases and obstacles experienced by women attorneys, attorneys of color, LGBTQ+ attorneys, and attorneys with disabilities, including You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession (2018), prepared jointly with the Minority Corporate Counsel Association; Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color (2020); and Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers who Identify as LGBTQ+ (2020).

[227] Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579, 1580-1581. Workplace incivility is generally defined by the academic literature as "low-intensity deviant behavior with ambiguous intent to harm the target, in violations of norms of workplace mutual respect. Uncivil behaviors are characteristically rude and discourteous, displaying a lack of regard for others." (Andersson & Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace* (1999) 24 Acad. Mgmt. Rev. 452, 457.)

[228] Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 255–256; Kim et al., *Microaggression Theory: Influences and Implications, The 360-Degree Experience of Workplace Microaggressions: Who Commits Them? How Do Individuals Respond? What*

may unintentionally engage in uncivil behavior because their conduct arises from an implicit bias or from a lack of awareness that their conduct is offensive. Regardless of the intentions of the attorney behaving this way, the persons against whom biases or ignorance operate continue to experience bias-driven incivility.

Common acts of incivility, such as interrupting one's opposing counsel during an oral argument or a negotiation, may constitute bias-driven incivility in certain circumstances. For example, if the attorney being interrupted is a young, Latinx woman, the attorney interrupting may be motivated by a combination of biases held against women, people of color, and young attorneys.[229] Importantly, recognizing these incidents as bias-driven incivility validates, rather than minimizes,[230] the experiences of diverse attorneys and helps to explain why they face greater exposure to incivility in legal practice.

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are the Consequences? in Microaggression Theory: Influences and Implications (Torino et al. edits., 2019) pp. 164-166.

[229] Applying an intersectionality framework to our understanding of bias-driven incivility recognizes that each person is comprised of overlapping identities. Legal scholar Kimberle Crenshaw coined the term "intersectionality" to explain that people may be subjected to unique forms of discrimination based on others' biases towards their overlapping identities, as opposed to a single-axis framework that silos one's various identities and assumes, for example, that all Black people experience racism in the same way or that all women experience sexism in the same way. (See *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (1989) 1989 Univ. Chi. Legal Forum 139.)

[230] For example, telling a woman attorney that she is imagining being interrupted more frequently or that "everybody gets interrupted sometimes" are examples of minimizing her experience. Notably, one study documents that female Justices of the Supreme Court are interrupted three times as often as their male colleagues. (Gender Equality is Part of the Civility Issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; see generally The Universal Phenomenon of Men Interrupting Women https://www.nytimes.com/2017/06/14/business/women-sexism-work-huffington-kamala-harris.html.)

Bias-driven incivility can occur through microaggressions. Microaggressions are "the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership."[231] Microaggressions "communicate bias and can be delivered implicitly or explicitly."[232] Being mistaken for a nonlawyer is a common example of a microaggression in the legal profession and is often based on biases about what an attorney should look like.[233] One study, conducted by the American Bar Association, found that women of color are mistaken for law firm, court, or janitorial staff at a rate 50 percentage points higher than White men; White women reported rates 44 percentage points higher, and Black men reported rates 23 percentage points higher.[234] The higher rates at which attorneys of color experience this kind of incivility demonstrates the effect of implicit and explicit biases on the experiences of attorneys with intersectional identities. Further, an attorney's choice to wear religious garb (e.g., a Sikh turban or a hijab) or to present in gender nonconforming ways may also

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231 https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2019/july-august/unconscious-bias-implicit-bias-microaggressions-what-can-we-do-about-them/.

232 Torino et al., *Everything You Wanted to Know About Microaggressions but Didn't Get a Chance to Ask* in Microaggression Theory: Influences and Implications (2019) p. 3.

233 This kind of bias-driven incivility can be expressed, for example, by asking a woman lawyer to perform administrative tasks, mistaking a Black woman lawyer at the deposition as the court reporter, or assuming a Latinx male lawyer is the defendant in the case. (See https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer; https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf; Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 31.)

234 https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf.

increase the chances of being misidentified as a nonlawyer.[235] This kind of bias-driven incivility can be harmful to an attorney's ability to make interpersonal connections, which can affect their professional progression, as well as their sense of belonging in the legal profession.[236]

Attorneys subjected to bias-driven incivility often experience incivility in the form of professional discrediting, including having their competence challenged, being addressed unprofessionally (for example, using pet names), and being critiqued on their physical appearance and attire.[237] Bias-motivated conduct may be overtly uncivil.[238] Attorneys also report experiencing incidents based on their identities, which may not be overtly uncivil, but have the effect of excluding, "othering," or otherwise relying on stereotypes associated with that attorney's identity.[239] Professional exclusion from advancement or social events also can be bias-driven incivility.[240]

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235 Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 9–14.

236 https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer.

237 Gender Equality is part of the civility issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer.

238 Using phrases like "that's so gay," making fun of an attorney's disability, and commenting on the physical appearance of a woman attorney are examples of overtly uncivil conduct. See https://www.360advocacy.com/wpcontent/uploads/2015/10/ChangChopraArticle-1.pdf.

239 For example, continually confusing two attorneys with similar backgrounds, commenting to a Muslim colleague that "he is no fun" because he abstains from drinking for religious reasons, or serving pork as the main dish at a firm event without consideration of the dietary restrictions of Jewish, Muslim, or Buddhist attorneys are incidents that may exclude or "other." Joking to an Asian American colleague that she should work on a case involving accounting fraud because "all Asians are good at math" is an example of implicating a stereotype associated with Asian Americans.. (See Cooper, *The Appearance of Professionalism* (2019) 71 Fla. L.Rev. 1, 31;

III. Effects of bias-driven incivility on impacted attorneys and the legal profession

Bias-driven incivility has profound effects on individual attorneys as well as on the legal profession. Bias-driven incivility negatively impacts the well-being and career trajectories of diverse attorneys. Additionally, individual experiences of bias-driven incivility, when considered collectively, have negative repercussions on the overall environment of legal workplaces.

Bias-driven incivility is uniquely harmful for attorneys who experience it. Because the legal profession remains one of the least diverse professions in the nation,[241] diverse attorneys typically experience bias-driven incivility in

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Gender Equality is part of the civility issue, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2015/micro-aggressions-boardroom-courtroom-presidential-campaign-trail/; E. Chung, S. Dong, J. Hu, C. Kown, G. Liu, A Portrait of Asian Americans in the Law, pp. 29, 31, https://www.apaportraitproject.org/ [" 'Asians work hard and do not say no to their superiors. With that, somehow I was the only one staying back to cover the team assignments...' "].)

[240] For example, excluding women attorneys from attending a basketball game because of a perception that they would not be interested, or failing to promote a Black woman associate to partnership because she is being held to a higher standard of performance and being over penalized for past mistakes are examples of exclusion motivated by biases. (Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 246–247; Gender Equality is part of the civility issue, pp. 1–2, https://abtl.org/report/la/articles/ABTL_LA_Summer19_EdmonJessner_Reprint.pdf; https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html.)

[241] https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ (providing statistics); https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf (explaining California state's attorney population does not reflect its diversity). For example, in 2013, 20.2% of partners nationally were women; 2.3 % were women of color nationally and in many cities, women of color made up only 1% of partners. (IILP Review 2014: The State of Diversity and Inclusion in the Legal Profession, p. 14,

predominantly White, male, cisgender, non-disabled spaces. Against this backdrop, attorneys who are subjected to bias-driven incivility often expend emotional and mental labor to determine what role their identity played in their mistreatment, to process their mistreatment, and to protect themselves accordingly.[242] Protecting oneself from bias-driven incivility may result in additional identity performances by the affected diverse attorney that can further impact his or her psychological well-being.[243] Moreover, when acts of bias-driven incivility occur, the onus typically falls on the diverse attorney to speak up or to explain why the conduct was problematic.[244] This burden adds to the already higher emotional and mental labor shouldered by diverse attorneys.

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https://theiilp.wildapricot.org/Resources/Documents/IILP_2014_Final.pdf.) Additionally, Latinas, who constitute 7% of the total U.S. population, make up 2% of associates, 0.4% percent of equity partners, and only 0.6% of general counsels at Fortune 500 companies. (Los Puentes y Las Barreras: Latinas in the Legal Profession, The Federal Lawyer (2017) p. 37, https://www.fedbar.org/wp-content/uploads/2017/01/Latinas-pdf-1.pdf.) LGBTQI+ attorneys represented only 2% of all equity partners and less than 1% were persons with disabilities. (2019 NAWL Survey Report, p. 5.)

[242] Torino et al., *Everything You Wanted to Know About Microaggressions but Didn't Get a Chance to Ask* in Microaggression Theory: Influences and Implications (2019) p. 5 (explaining that microaggressions are more stressful than everyday incivilities because "[w]hen individuals of historically marginalized groups . . . are aware of historical or systemic discrimination or have experienced microaggressions in the past, they may be more conscious of how their identity impact interpersonal dynamics").

[243] See generally Carbado & Gulati, Acting White? Rethinking Race in "Post-Racial" America (2015) (discussing the costs and burdens of identity performances including the work performed to negate stereotypes); Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256–257.

[244] Evans & Moore, *Impossible Burdens: White Institutions, Emotional Labor, and Micro-Resistance* (2015) 62 Soc. Probs. 439, 441 (explaining "how participation in white institutional spaces requires particular forms of emotional labor and management of emotions from people of color, resulting from the stark contradiction between their racialized experiences in these institutions, on the one hand, and the dominant discourse that minimizes and delegitimizes their experiences on the other hand").

Studies have shown that incivility can result in adverse psychological effects such as stress, anxiety, depression, burnout, or a loss in self-esteem.[245] Additionally, experiencing incivility can negatively impact job performance, satisfaction, and commitment, and it can lead to leaving the job.[246] Women attorneys and attorneys of color often report having to work harder in order to overcome biases and stereotypes and receive the same recognition or respect as their colleagues.[247] They also report being penalized more harshly for mistakes.[248] As a result, bias-motivated incivility discourages diverse attorneys from actively participating or joining the community and reduces the inclusiveness of the legal profession.[249]

From an organizational perspective, workplace incivility "can negatively affect organizational performance because employees may reduce work efforts, be less likely to work collaboratively, avoid extra-role behaviors or simply exit the organization. When it affects women and employees of color specifically, workplace incivility can place them on the margins of everyday

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245 Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579; Estes & Wang, *Workplace incivility: Impacts on individual and organizational performance* (2008) 7 Hum. Res. Dev. R. 218.

246 Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256-257; Cortina et al., *Selective Incivility as Modern Discrimination in Organizations: Evidence and Impact* (2013) 39 J. Mgmt. 1579; Estes & Wang, *Workplace incivility: Impacts on individual and organizational performance* (2008) 7 Hum. Res. Dev. R. 218; Pearson et al., *Assessing and attacking workplace incivility* (2000) 29 Organizational Dynamics 123; Hershcovis & Barling, 2010.

247 https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf.

248 https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer; https://www.nytimes.com/2018/09/06/us/lawyers-bias-racial-gender.html.

249 https://hbr.org/2013/01/the-price-of-incivility?registration=success.

work life, further disadvantaging historically marginalized groups."[250] On the other hand, studies have shown that increased diversity and inclusion boost law firm and corporate profitability.[251] Thus, for law firms and corporations, to the extent bias-driven incivility causes diverse attorneys to seek other employment or reduce their productivity, failing to address bias-driven incivility can adversely affect their bottom line. Studies also demonstrate that workplaces that encourage open discussion about problems, foster social connections, and practice empathy are more productive.[252] Accordingly, an organization's productivity objectives are aligned with efforts to minimize bias-driven incivility and to foster a more inclusive environment, including open and honest conversations about bias-driven incivility.

For the profession generally, bias-driven incivility impedes the goal of increasing diversity and inclusivity. It negatively impacts the entry, retention, and promotion of those impacted by biases and stereotypes in the workplace, which in turn affects the number of diverse attorneys remaining in the law or rising to supervisory and leadership levels within law firms, government agencies, in-house legal departments, and other C-Suite positions.[253] Thus, addressing bias-driven incivility helps legal employers who aim to promote diversity and inclusion as a core value of their organizations.

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[250] Smith et al., *Gender, Race, and Experiences of Workplace Incivility in Public Organizations* (2020) R. Pub. Pers. Admin. (citations omitted) <https://journals.sagepub.com/doi/10.1177/0734371X20927760>.

[251] https://www.abajournal.com/columns/article/demographics-as-destiny-making-the-case-for-law-firm-diversity-and-inclusion; https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2014/diversity-inclusion-profit-drivers/.

[252] https://hbr.org/2015/12/proof-that-positive-work-cultures-are-more-productive.

[253] For example, one study found that 52% of lawyers of color leave their law firms by the third year and 85% leave by the fifth year. (IILP Review 2014: The State of Diversity and Inclusion in the Legal Profession, p. 66, https://theiilp.wildapricot.org/Resources/Documents/IILP_2014_Final.pdf; see https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf, p. 13 [70% of female lawyers of color report leaving or considering leaving the legal profession].) Many diverse attorneys attribute retention issues to the

IV. Interventions through MCLE programming

Education about bias-driven incivility through MCLE programming can be an effective way to reduce incidents of bias-driven incivility and to address it when it does happen. Although existing MCLE requirements include Recognition and Elimination of Bias,[254] programming typically focuses on increasing awareness of one's own implicit biases and how to minimize the impact of implicit biases on decision making, for example, hiring and promoting attorneys. While related, bias-driven incivility is a distinct problem that requires a distinct form of education.

Programming should seek to educate attorneys about what bias-driven incivility is and its adverse impacts on diverse attorneys and on the legal profession. One way to do this is to elevate the narratives of diverse attorneys who have experienced bias-driven incivility, including the repercussions such conduct has had on their careers and on their sense of belonging in the legal profession. Further, all attorneys should be encouraged to become more

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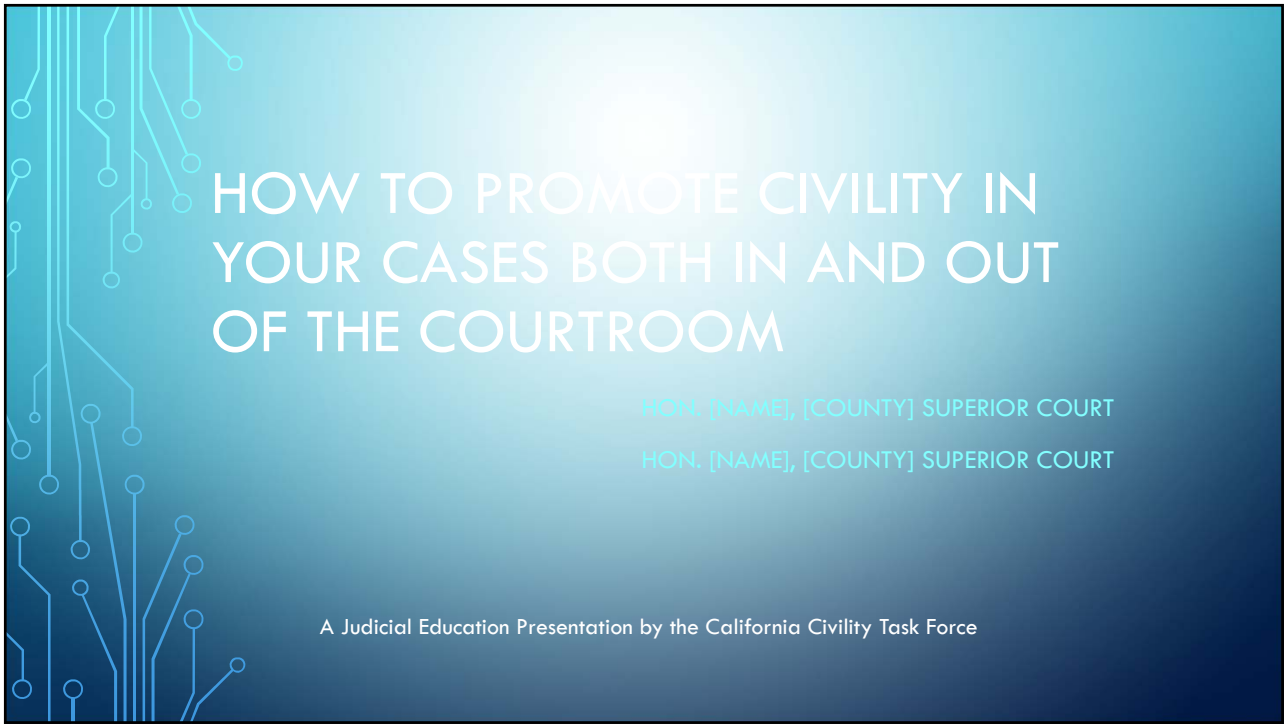
effects of bias-driven incivility, including biased performance reviews, unequal distribution of work assignments, lack of mentorship opportunities, and work/life balance issues. (See IILP Review 2014, at p. 67; https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2507&context=law-faculty-publications, pp. 193–194.) Indeed, an ABA study found that women reported microaggression and negative stereotypes contributed to their desire to leave the legal profession. (https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf, pp. 4–9, 12–13; see also Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts* (2002) L. & Soc. Inquiry 235, 256–257 [study finds increased experience of incivility leads to attorneys leaving the legal profession].)

[254] The State Bar currently requires at least one hour of MCLE devoted to Recognition and Elimination of Bias in the Legal Profession and Society ("elimination of bias"). As of January 1, 2022, all licensed attorneys must complete "at least two hours dealing with the recognition and elimination of bias in the legal profession and society . . . ." (State Bar rule 2.72(B)(2)(a)(ii).) "Of those two hours, at least one hour must focus on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system . . . ." (*Ibid.*).

knowledgeable about the problem through self-education. Self-education is an important tool because it helps to relieve the burden shouldered by diverse attorneys of having to explain why bias-driven incivility is harmful, which may place them in a sensitive or difficult position.

Once a foundational understanding has been achieved, programming should focus on training so that each attorney feels equipped to address bias-driven incivility when it happens. Programming can be tailored to focus on the various perspectives involved in any incident: the attorney directly impacted by bias-driven incivility, the attorney who engaged in bias-driven incivility, and bystanders. These conversations can be difficult for a multitude of reasons, including a power imbalance between the attorneys involved and a concern about professional repercussions. Providing attorneys with the tools and language to productively communicate about bias-driven incivility will encourage all members of the legal profession to engage in meaningful and impactful conversations to further promote civility in the practice of law.

Appendix 7: Sample Judicial Education Program on Promoting Civility


HOW TO PROMOTE CIVILITY IN YOUR CASES BOTH IN AND OUT OF THE COURTROOM
HON. [NAME], [COUNTY] SUPERIOR COURT
HON. [NAME], [COUNTY] SUPERIOR COURT
A Judicial Education Presentation by the California Civility Task Force

"It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law."

People v. Chong (1999) 76 Cal.App.4th 232, 243

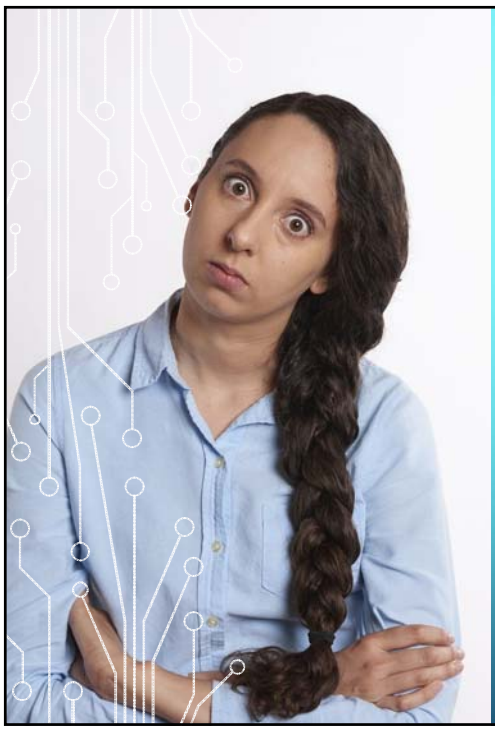
In Re S.C. (2006) 138 Cal.App.4th 396, 412

"In situations involving the misconduct of lawyers in court or settlement conferences, the judge's obligation to take action may be difficult and embarrassing to the offending lawyer. The consequences of not acting, however, could result in the appearance of tacit approval of the conduct, creating an invitation for further like conduct."
Rothman, Fybel, MacLaren and Jacobson, California Judicial Conduct Handbook (California Judges Association, 2017) at §2.11, pg. 75

"'The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.' [citations]. 'However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides.'"

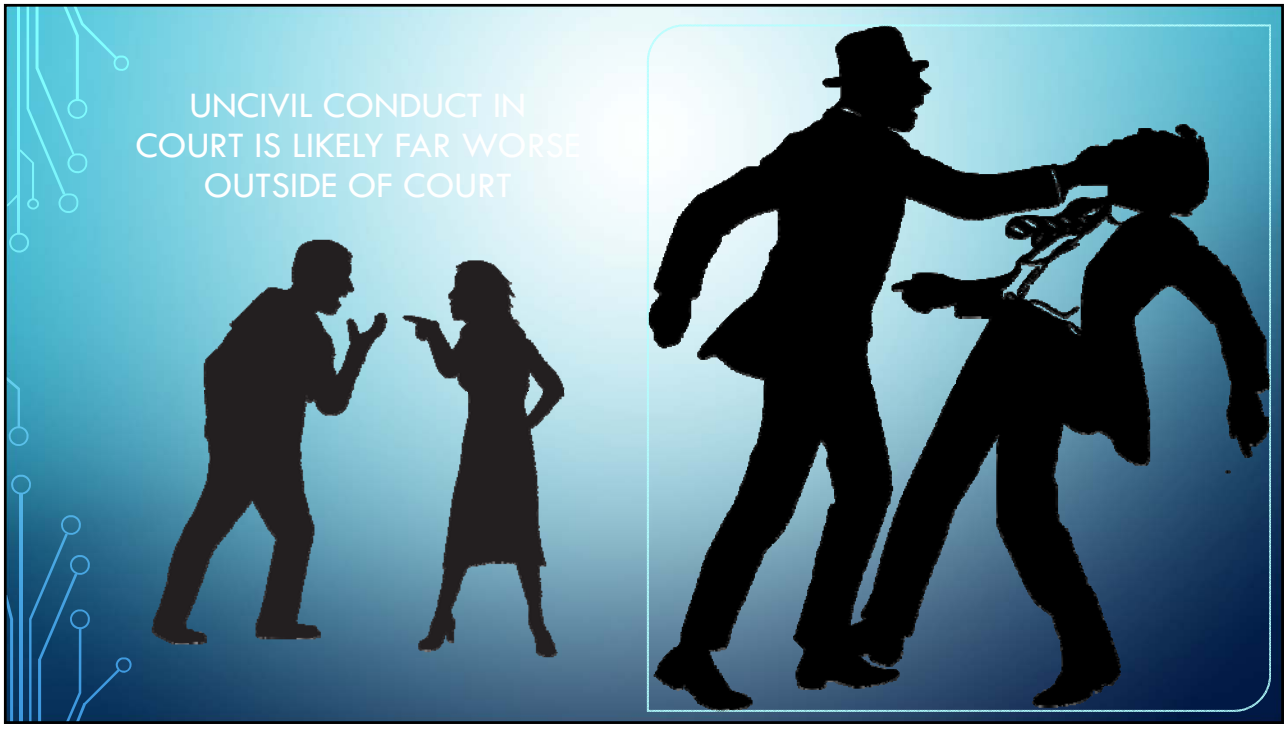
In re Paul M. Mahoney (2021) 65 Cal. App. 5th 376 at *5

(citing *In Re Ciraolo (1969) 70 Cal.2d 389, 394-95.*)

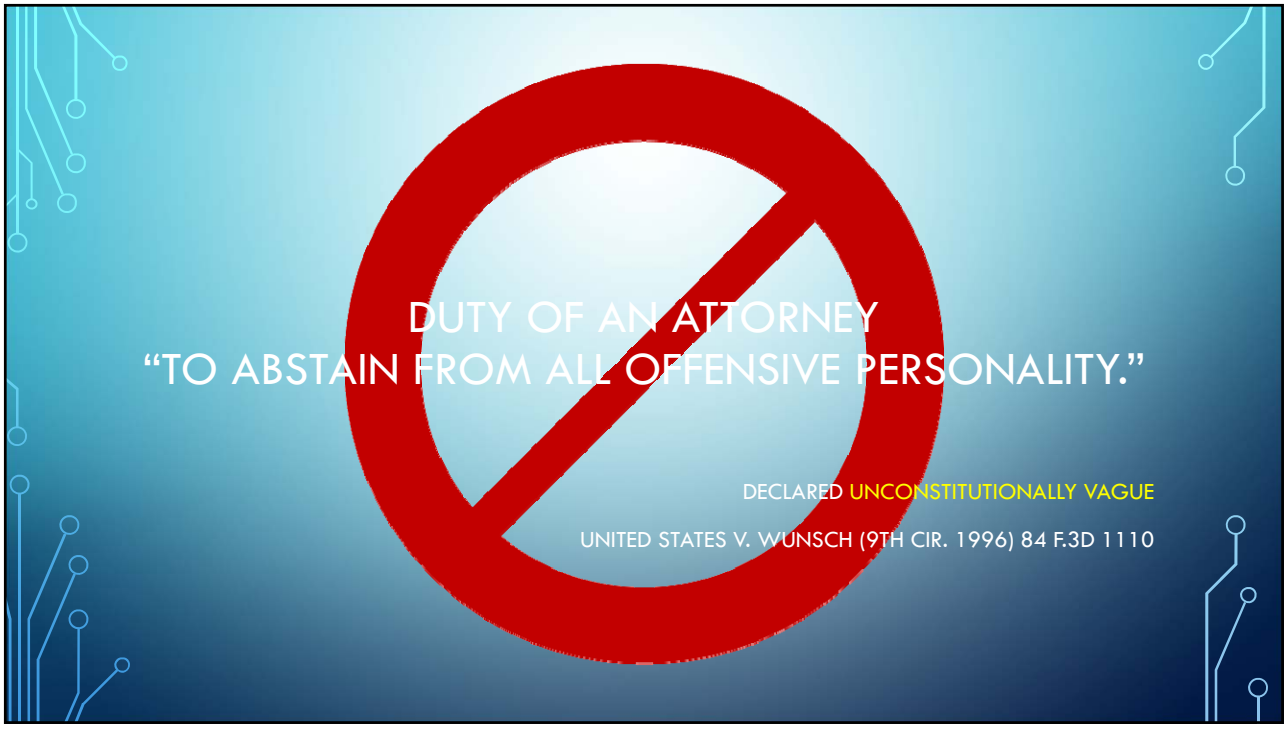


PROBLEM AREAS FOR INCIVILITY

- Discovery disputes
- Abusive and uncivil communication outside court
- Lack of professional courtesies resulting in acrimonious and unnecessary motion practice
- Conducting meaningful meet and confers as required by law
- Counsel working together to prepare trial documents
- Improper use of sanctions requests to intimidate and bully


UNCIVIL CONDUCT IN
COURT IS LIKELY FAR WORSE
OUTSIDE OF COURT

LEGAL BASIS FOR REQUIRING CIVILITY


DUTY OF AN ATTORNEY
"TO ABSTAIN FROM ALL OFFENSIVE PERSONALITY."
DECLARED UNCONSTITUTIONALLY VAGUE
UNITED STATES V. WUNSCH (9TH CIR. 1996) 84 F.3D 1110

BIAS IN THE COURTROOM

CA CODE OF JUDICIAL ETHICS CANON 3

- A judge shall perform judicial duties without bias or prejudice. Canon 3B(5)
- A judge shall require lawyers in proceedings before the judge to refrain from (a) manifesting by words or conduct, bias, prejudice or harassment. Canon 3B(6)

CA RULES OF PROF. CONDUCT RULE 8.4.1(A)

In representing a client…a lawyer shall not (1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.

"DON'T RAISE YOUR VOICE AT ME. IT'S NOT BECOMING OF A WOMAN..."

"A sexist remark is not just a professional discourtesy, although that in itself is regrettable and all too common. The bigger issue is that comments like Bertling's reflect and reinforce the male-dominated attitude of our profession. A recent ABA report found that 'inappropriate or stereotypical comments' towards women attorneys are among the more overt signifiers of the discrimination, both stated and implicit, that contributes to their underrepresentation in the legal field. When an attorney makes these kinds of comments, 'it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.' …. [T]he court finds that Bertling's conduct was in bad faith…the remark was emblematic of an unacceptably disrespectful attitude towards Plaintiffs' counsel."

Hon. Paul Grewal (ret.), ordering donation to Women Lawyers Assoc. of Los Angeles Foundation

Claypole v. County of Monterey (Jan. 12, 2016), 2016 WL 145557

TWITTER POSTS IN ANOTHER LAW FIRM'S NAME ETHICS VIOLATION?

- "Dennis Block & Associates is helping to #MAGA by evicting one latino at a time!"
- My associate Nasti Hasti really needs to start wearing longer skirts to court. Or underwear. Or [omitted]"
- "A client called to complain that our Manisha Bajaj was 'dressing like a prostitute'. I told him wait until he sees 'Nasti Hasti' Rahsepar!'").

JUDGE'S ETHICAL RESPONSIBILITIES

"Judicial ethics require a judge to 'be patient, dignified, and courteous to litigants ... [and] ... lawyers ... and ... require similar conduct of lawyers ... under the judge's direction and control." (Cal. Code Jud. Ethics, canon 3(B)(4).)"

Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal. App. 4th 994

"As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

CRC Rule 9.7 (fka Rule 9.4)

Attorney Oath of Office (eff. May 23, 2014)

Loyola Law School Swearing In Ceremony, 12/2/2019
https://www.lls.edu/thellsdifference/facesoflls/swearinginfall2019/swearinginfall2019.html

Applies only to those taking the attorney oath after its adoption in 2014

CODE OF CIVIL PROCEDURE 583.130

"It is the policy of the state…that all parties shall cooperate in bringing the action to trial or other disposition"

FAMILY CODE 271(A)

"…the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."

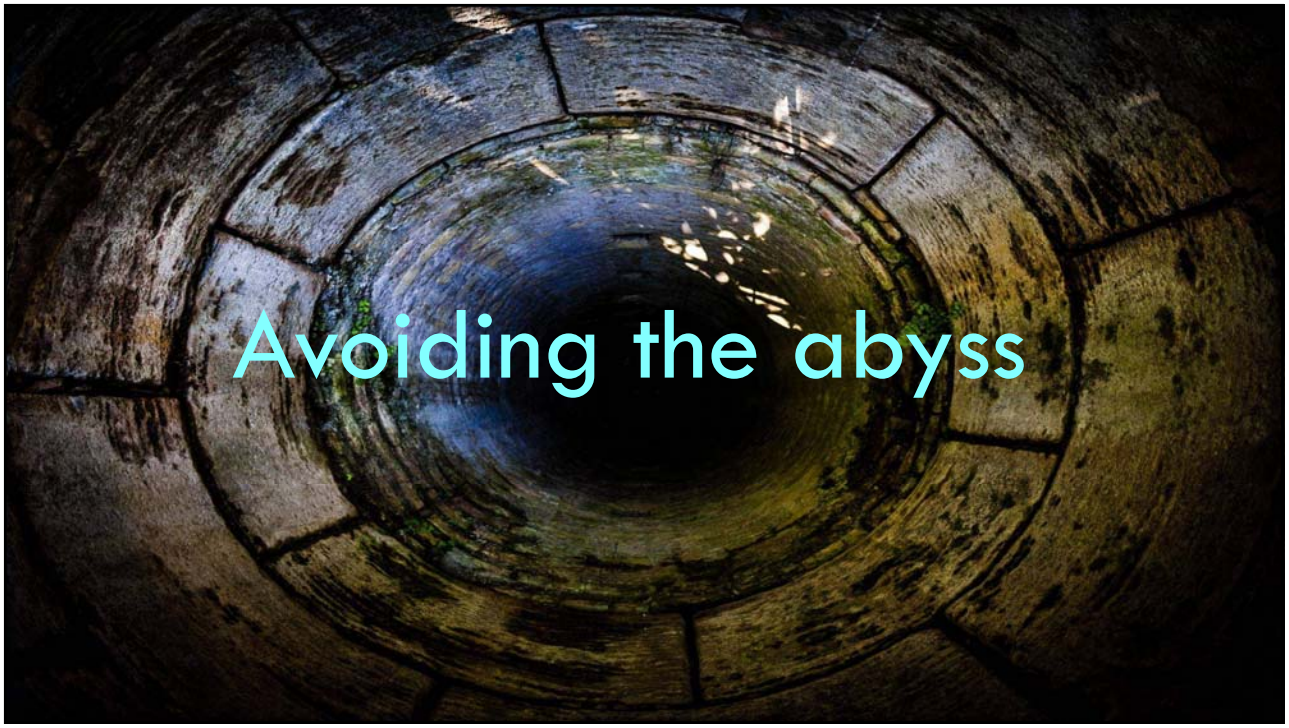
BUSINESS & PROFESSIONS CODE 6068

It is the duty of an attorney to do all of the following:…

(b) To maintain the respect due to the courts of justice and judicial officers…

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged…

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.


Avoiding the abyss

LOCAL GUIDELINES

- LASC Civility Guidelines, Appendix 3.A of Local Rules
  - "…Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility. Section (I)(2)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

CHAPTER THREE
CIVIL DIVISION

APPENDIX 3.A

GUIDELINES FOR CIVILITY IN LITIGATION

(a) CONTINUANCES AND EXTENSIONS OF TIME.

(1) First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted as a matter of courtesy unless time is of the essence. A first extension should be allowed even if the counsel requesting it has previously refused to grant an extension.

(2) After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

(3) A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough".

(4) A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

(5) A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

(b) SERVICE OF PAPERS.

(1) The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

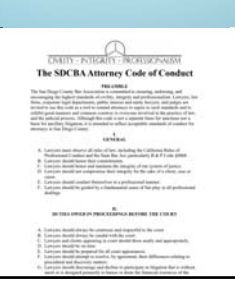
(2) Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

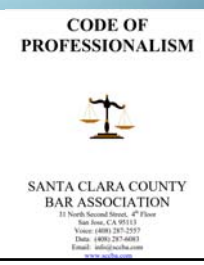
(3) Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

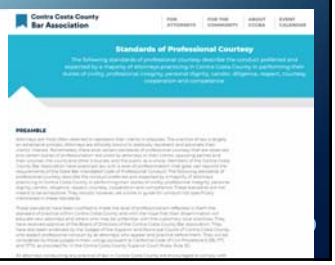
(4) Service should be made personally or by facsimile transmission when it is likely that

PROFESSIONAL ASSOCIATION GUIDELINES

http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Attorney-Civility-and-Professionalism







HYPOTHETICAL

- Fee dispute between attorney acting as SRL and contractor – total payment to date $92,651
- Contractor is unlicensed
- Attorney SRL files suit, and prevails
- Attorney files attorney fee motion seeking $271,530 in fees
- Court permits briefing with 10 pages of text filing. Attorney SRL files:
  - 11 pages of text, plus 400 pages of supplemental papers
  - Increases fee request
  - Accuses defense counsel of witness tampering, making frivolous comments, and improper tactics "typical" of those employed by defense counsels

How would you rule on fee motion?

REDUCTION OF FEE AWARDS TO UNCIVIL COUNSEL

"Attorney skill is a traditional touchstone for deciding whether to adjust the lodestar… Civility is an aspect of skill. Excellent lawyers deserve higher fees and excellent lawyers are civil…. It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook."

- Counsel lacked objectivity and appropriate scale of litigation
- $300k request reduced to $90K
- *Karton v. Ari Design & Const., Inc.* (2021) 61 Cal. App. 5th 734, 747

HYPOTHETICAL

- Attorney serves defendant and 36 days later (on a Friday), warns defendant that she had until following day to respond or he would file default
- Defaulted the following Monday
- Defendant motion to set aside default denied
- Default judgment entered 1 year later, for $1 million. Defendant appeals.

Was the trial court correct in denying motion to set aside?

REVERSAL OF THE ORDER OBTAINED THROUGH UNCIVIL CONDUCT

The mantra "this is a business" has been repeated so much in the legal field that counsel have "lost sight that the practice of law is *not* a business. It is a profession and those who practice it carry a concomitantly greater responsibility than businesspeople."

"'[L]awyers who know how to think but have not learned how to behave are a menace and a liability ... to the administration of justice.... [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.'"

- Stealth default vacated, unreasonable deadline, set up defendant for failure

LaSalle v. Vogel (2019) 36 Cal.App.5th 127, 134, 141

(*quoting* [CJ] Burger, *Address to the American Law Institute, 1971)*

HYPOTHETICAL

- Male plaintiff's counsel believes female defense counsel uses intimidation tactics during depositions
- Brings his own video camera to deposition to tape opposing counsel, without giving notice
- When on second day defense counsel refused to permit taping, a verbal altercation ensued
- Defense counsel terminates the deposition
- Cross motions for sanctions are filed

How do you rule?

DISCOVERY SANCTIONS

"If this case is an example, the term 'civil procedure' is an oxymoron."

"Both the legal profession and the courts would be better served if litigation arose from legitimate disputes between the litigants instead of wasteful bickering between their attorneys."

- Plaintiff counsel sanctioned $950

Green v. GTE California, Inc. (1994) 29 Cal.App.4th 407, 408, 410

HYPOTHETICAL

- Defense attorney obtains order compelling Plaintiffs to attend deposition.
- Subsequently attempts to enforce order with OSC re Contempt against Plaintiffs
- Plaintiffs file separate suit for malicious prosecution, NIED, and IIED against defense attorney.

On defense attorney's demurrer, how to do you rule?

DISCOVERY SANCTIONS IN PRIMARY LITIGATION IS PROPER REMEDY, NOT MALICIOUS PROSECUTION

"It seems clear that this litigation arose from a fit of pique between counsel in the underlying action. Frivolous litigation, or that brought for purposes of harassment, has no place in our overburdened court system. The taxpayers who bear the cost of providing our judicial system should not have to shoulder the burden of providing a forum for frivolous or absurd litigation."

- Affirms order sustaining demurrer to IIED and NIED without leave
- Finds demurrer to malicious prosecution should also have been sustained

Lossing v. Superior Court (1989) 207 Cal.App.3d 635

NON-DISCOVERY MONETARY SANCTIONS

- Code of Civil Procedure 177.5
  - A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification.
- Code of Civil Procedure 128.5/128.7
  - 128.5: reasonable expenses, including attorney's fees due to actions or tactics in bad faith, frivolous or solely intended to cause unnecessary delay
  - 128.7: pleading certification
  - Beware tactical weaponization of these motions
    - These are reportable sanctions if over $1000

HYPOTHETICAL

- New attorney with little family law experience files unnecessary motions and excessive evidence that does not prove claims, without meeting and conferring, and engages in hostile and rude communications with opposing counsel.
- New attorney tells judge he was taught to litigate "with unbridled aggression."
- Sanctions motion pursuant to Family Law Code 271 filed.

How do you rule?

FAMILY CODE 271 SANCTIONS AGAINST NEW ATTORNEY "TAUGHT" TO LITIGATE WITH "UNBRIDLED AGGRESSION"

"all counsel, regardless of practice, regardless of age—that zealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility."

- $100,000 sanctions imposed
- $304,387 awarded for opposing attorney fees

Marriage of Davenport (2011) 194 Cal.App.4th 1507, 1537

HYPOTHETICAL

- Defendants appeal default judgment, arguing evidence did not support the judgment granted
- On appeal, Plaintiff's counsel requested extension stating he needed more time to research under penalty of perjury
- Plaintiff's counsel subsequently files verbatim duplicate brief of one previously filed with court, referencing facts not in the current case (i.e. he copied it from another case)

WOULD YOU TAKE ACTION, AND IF SO, WHAT?

SANCTIONS FOR DISHONESTY OF COUNSEL

"it is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term "officer of the court," with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance. While some might find these to be only "little" lies, we feel the distinction between little lies and big ones is difficult to delineate and dangerous to draw. The corrosive effect of little lies differs from the corrosive effect of big lies only in the time it takes for the damage to become irreversible."

- Default overturned, not enough evidence, court is gatekeeper for appropriate claims
- $10,000 sanction imposed

Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267

REFERRAL TO STATE BAR

"I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit."

- Fee dispute between prior counsel and successor counsel
- $6000 monetary sanctions for a frivolous appeal
- Referral to State Bar of CA

DeRose v. Huerlin (2002) 100 Cal. App. 5th 158

HYPOTHETICAL

- Counsel files documents with the following statements:
  - Insinuation that party may have prevailed because it had contracts with a third party "who … wields a lot of legal and political clout in [County]"
  - "… [B]ecause of a judicial slight [sic] of hand with no factual basis, this court has altered the landscape and created a windfall for [Party A]."
  - "court did not 'follow the law,'" "ignores the facts," "indiscriminately screw[ed]" [Party B]
- Legitimate advocacy? Or improper conduct?

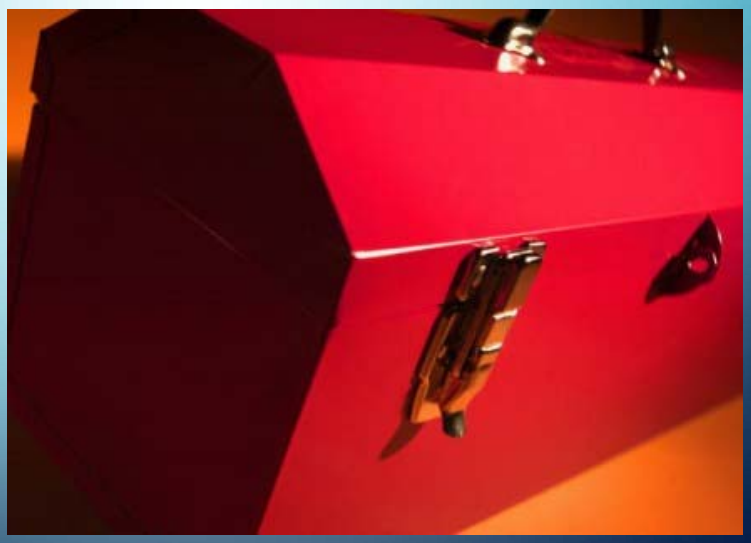
IN RE PAUL M. MAHONEY
(2021) 65 CAL. APP. 5TH 376

"Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a sine qua non."

- Found to be in direct contempt on two counts
- fined $2,000 Code of Civil Procedure §1209 and §1218
- forwarding copy of the judgment of contempt to the State Bar

- Code of Civil Procedure 178 - Punishment
- Code of Civil Procedure 128 – Powers
- Code of Civil Procedure Sections 1209 -1222 – Of Contempts
- *In re Paul M. Mahoney* (2021) 65 Cal. App. 5th 376

"SOFT" TOOLS FOR YOUR TOOLKIT



COURTROOM STANDING ORDERS/GUIDELINES

"I. **EXPECTATIONS OF CIVILITY**

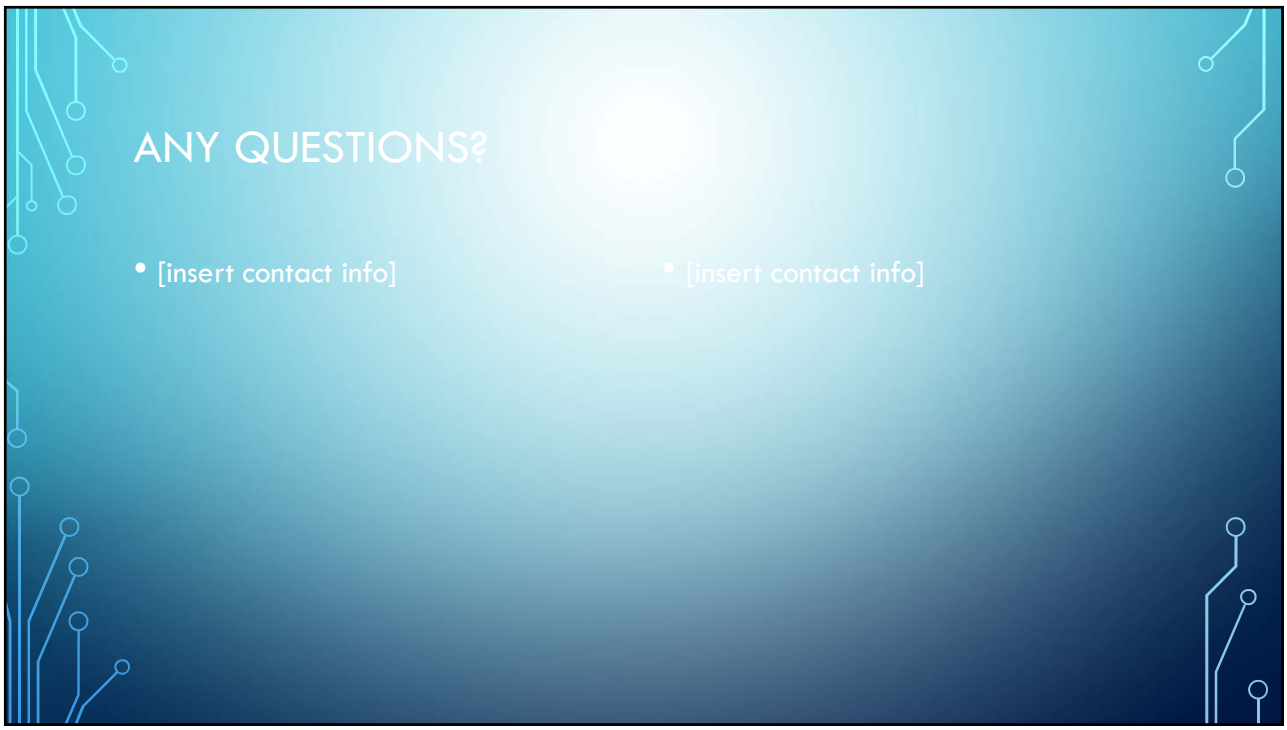
The Court will consistently provide all parties with a reasonable opportunity to be heard prior to any rulings being made. Interruptions when someone else has been recognized to speak will not be tolerated. Personal attacks and raised voices shall also be prohibited. Counsel are reminded of California Rules of Court, Rule 9.7, which includes the following language: "[T]he oath to be taken by every person on admission to practice law is to conclude with the following: 'As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.'" Litigants should review and be familiar with the Los Angeles Superior Court's Guidelines for Civility in Litigation, Appendix 3.A to the LASC Local Rules, which establish the minimum standard of courtesy and civility expected of attorneys who appear in this court." Hon. Stuart M. Rice, Los Angeles Sup. Crt.

OTHER TOOLS

- The bench officer sets the tone for civility - model civil behavior
- Informal discovery conferences
- Order meet and confers and enforce the requirement
- Appoint a Discovery Referee
- Sanctioning both sides
- Notice and inform
- Admonish
- Require appearance of firm managing lawyers when subordinates repeatedly fail to comply with ethics and civility standards

AVOID EMBROILMENT WITH THE HIGH CONFLICT PERSONALITY (HCP)

- Educate yourself on HCP
- Set boundaries: time, issues
- Avoid blame, criticism
- Seek kernel of truth
- Maintain professional distance
- Listen
- Control expectations
- Don't argue
- Be respectful
- Know yourself and your triggers
- Remain cautious and stay calm
- Create a flexible plan for managing
- Maintain procedural formalities
- Avoid deviating from rules
- Look for small agreements
- Take a break


ANY QUESTIONS?
• [insert contact info]
• [insert contact info]

Appendix 8: Proposed Civility Revisions to the California Rules of Professional Conduct

PROPOSED CHANGES TO RULES OF PROFESSIONAL CONDUCT

Rule 1.0.1 Terminology

Add the following definition:

(*) "Incivility" means discourteous, abusive, harassing, or other significantly unprofessional conduct.

Rule 1.2 Scope of Representation and Allocation of Authority

(a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. **A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.**[255]

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255 Numerous other states have similar language in their equivalent version of California's Rule 1.2. See, e.g., *Massachusetts* ("A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process."); *Michigan* ("A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the

(b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*

Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.

(b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Comment

[1] This rule addresses only a lawyer's responsibility for his or her own professional diligence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.1 with respect to a lawyer's duty to perform legal services with competence.

[3] A lawyer's duty to act with reasonable diligence does not eliminate a lawyer's other professional obligations and lawyers

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rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics."); *New York* ("A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process."); *Ohio* ("A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.").

should strive to treat all persons involved in the legal process with courtesy and respect.[256]

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256 Numerous other states have similar language in their equivalent version of California's Rule 1.3. See, e.g., *Alaska* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Arizona* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Colorado* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Delaware* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *District of Columbia* ("The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the lawyer's duty to pursue a client's lawful objectives zealously does not prevent the lawyer from acceding to reasonable requests of opposing counsel that do not prejudice the client's rights, being punctual in fulfilling all professional commitments, avoiding offensive tactics, or treating all persons involved in the legal process with courtesy and consideration."); *Florida* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Hawaii* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Illinois* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Massachusetts* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Minnesota* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *New Mexico* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not:

(1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has

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respect."); *New York* ("Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect."); *South Carolina* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Utah* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Washington* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Wyoming* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *ABA Model Rules* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.").

engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client.

(e) In appearing as a lawyer before a tribunal,* a lawyer shall not:

(1) engage in a pattern of incivility;

(2) intentionally or habitually violate any established rule of procedure or of evidence; or

(3) engage in conduct intended to disrupt the tribunal.* [257]

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other

257 At least one other state has similar language in its equivalent version of California's Rule 3.3. See, e.g., *New York* ("In appearing as a lawyer before a tribunal, a lawyer shall not: (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply; (2) engage in undignified or discourteous conduct; (3) intentionally or habitually violate any established rule of procedure or of evidence; or (4) engage in conduct intended to disrupt the tribunal.").

material having potential evidentiary value. A lawyer shall not counsel or assist another person* to do any such act;

(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably* incurred by a witness in attending or testifying;

(2) reasonable* compensation to a witness for loss of time in attending or testifying; or

(3) a reasonable* fee for the professional services of an expert witness;

(e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

(f) A lawyer shall not ask any question intended to degrade a witness or other person except where the lawyer reasonably* believes that the question will lead to relevant and admissible evidence;[258]

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258 Numerous other states have similar language in their equivalent version of California's Rule 3.4. See, e.g., *Texas* ("A lawyer shall not … ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or (5) engage in conduct intended to disrupt the proceedings."); *Virginia* ("A lawyer shall not … assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."). See, also, *Delaware*, in its Notes to Decision for Rule 3.4, citing to a particular case where a lawyer's behavior

(g) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or

(h) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Rule 3.5 Contact with Judges, Officials, Employees, and Jurors

(a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court;

(2) with the consent of all other counsel and any unrepresented parties in the matter;

(3) in the presence of all other counsel and any unrepresented parties in the matter;

(4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or

(5) in ex parte matters.

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was uncivil ("New trial was granted where defense counsel's comments to jury included an unjustified attack on the integrity of opposing counsel.").

(c) A lawyer shall not engage in a pattern of incivility that is degrading to a tribunal.* [259]

(d) As used in this rule, "judge" and "judicial officer" shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(e) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(f) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(g) During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

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259 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Alaska* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal."); *Delaware* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."); *Hawaii* ("A lawyer shall not harass a judge, juror, prospective juror, discharged juror, or other decision maker or embarrass such person in such capacity."); *Kansas* ("A lawyer shall not ... engage in undignified or discourteous conduct degrading to a tribunal."); *Michigan* ("A lawyer shall not ... engage in undignified or discourteous conduct toward the tribunal."); *Ohio* ("a lawyer shall not ... engage in undignified or discourteous conduct that is degrading to a tribunal."); *South Carolina* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal;"); *ABA Model Rules* ("A lawyer shall not ... engage in conduct intended to disrupt a tribunal.").

(h) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(i) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(j) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(k) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(l) This rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(m) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to

adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.*

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure section 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. In the event that any judicial officer is impatient, undignified, or discourteous, the lawyer may continue to advocate on behalf of the client and stand firm in the position of the client, but this shall not provide justification for the lawyer engaging in any violations of this rule.[260]

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260 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Alaska* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Colorado* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is

no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Delaware* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *District of Columbia* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Florida* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Hawaii* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Illinois* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Massachusetts* ("The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Michigan* ("The lawyer may not engage in improper conduct during the communication.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Minnesota* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can prevent the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *New Mexico* ("Refraining from abusive or obstreperous conduct is a corollary of the advocates right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *New York* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's misbehavior is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *South Carolina* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); Utah ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); Virginia ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer must stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Washington* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for

[5] The duty to refrain from incivility applies to any proceeding of a tribunal,* including a deposition.[261]

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;

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subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Wyoming* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *ABA Model Rules* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. … An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.").

261 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Colorado* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Delaware* ("The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition."); *New Mexico* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *South Carolina* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Utah* ("The duty to refrain from disruptive conduct applies to any proceedings of a tribunal, including a deposition."); *Washington* (""The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Wyoming* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *ABA Model Rules* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.").

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or

(e) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See In re Kelley (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the

lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] **A lawyer violates paragraph (d) by repeated incivility while engaged in the practice of law or related professional activities.**[262]

[7] This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

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[i] The authors would like to acknowledge the significant contributions received from Megan S. Wilson, a Fellow at Horvitz & Levy LLP.

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262 Numerous other states have similar language in their equivalent version of California's Rule 8.4. See, e.g., *District of Columbia* ("A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."); *Florida* ("Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct."); *Utah* ("The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).").

Labor and Employment Litigation Update

Thursday, Oct. 17, 2024

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Labor and Employment Litigation Update

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Labor and Employment Litigation Update Fall 2024

Elizabeth Tom Arce, Partner & Jennifer M. Rosner, Partner
Liebert Cassidy Whitmore

I. INTRODUCTION

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

The recent case decisions discussed in this paper cover a wide range of employment issues that public agencies commonly face. Amongst these decisions we saw several cases brought by employees alleging State wage violations under the Labor Code and Fair Employment and Housing Act ("FEHA") violations. In particular, the California Supreme Court provided guidance on what conduct constitutes severe and pervasive racial discrimination and when an employer's remedial efforts fall short, triggering liability. In another opinion, the Court clarified the applicability of the Labor Code wage provisions and the Private Attorney's General Act to public agencies. The United States Supreme Court clarified the standard for harm an employee must demonstrate to prevail on a discrimination claim. We also saw cases from the Ninth Circuit and the Court of Appeal concerning numerous topics relevant to public agencies and employers related to the Fair Labor Standards Act and a case concerning the California Public Records Act.

The next section includes cases with key developments in labor and employment law. We broke down these cases into six categories: (1) State wage laws under the Labor Code; (2) Discrimination, Retaliation and Harassment; (3) Due Process; (4) Fair Labor Standards Act; (5) California Public Records Act, and (6) Labor Law.

II. CASES AND LEGISLATION

Chapter 1: Labor Code and Wage and Hour

Stone v. Alameda Health System*, ___ Cal.___ ___ (2024) – *California Supreme Court Clarifies the Labor Code and PAGA's applicability to Public Employers

In *Stone v. Alameda Health System*, the California Supreme Court held State meal and rest break laws do not apply to public agencies. The Court also found that Labor Code penalties under the California Private Attorneys General Act do not apply to public agencies. Finally, the Court's ruling clarified that the definition of "municipal corporation" in Labor Code 220(b) includes all public employers.

Alameda Health Systems ("AHS") is a public agency established by the County of Alameda to provide health services to the people of Alameda County. AHS was established under California Health and Safety Code Section 101850, as a "hospital authority" – a government entity separate and apart from the County.

In March 2021, AHS employees Tamelin Stone and Amanda Kunwar brought a class and PAGA representative action against AHS in superior court asserting violations of the California Labor Code on behalf of themselves and others for (1) failure to provide off-duty meal periods, (2) failure to provide off-duty rest periods, (3) failure to keep accurate payroll records, (4) failure to provide accurate itemized wage statements, (5) failure to pay wages, (6) failure to timely pay wages, and (7) civil penalties under PAGA.

In the trial court, AHS moved to dismiss the plaintiffs' complaint, arguing that AHS was exempt from plaintiffs' state law wage and hour claims due to its status as a public agency. AHS relied on the holding established in *Johnson v. Arvin-Edison Water Storage District* (2009) 174 Cal.App.4th 729, 736, that absent express words to the contrary, public agencies are excluded from coverage under the Labor Code's provisions. The trial court agreed with AHS and dismissed the complaint's wage and hour claims, concluding that as a public agency, AHS was not subject to the state law wage and hour claims pled in plaintiffs' action. The court also dismissed the PAGA claim. It reasoned that public entities like AHS are not "person[s]" subject to PAGA penalties pursuant to Labor Code section 18 and that the PAGA claim here derived from Labor Code violations that are not applicable to public entities. AHS also argued that PAGA damages are akin to punitive damages, which cannot be awarded against public agencies. The trial court agreed, and Plaintiffs appealed the decision to the Court of Appeal.

In a February 2023, the Court of Appeal reversed most of the trial court's decision, thus permitting most of plaintiffs' claims to go forward. As to plaintiffs' meal/rest break and recordkeeping claims, the Court of Appeal concluded that application of California's meal/rest break and recordkeeping laws did not infringe on any sovereign power of AHS, and thus the claims could proceed. As to plaintiffs' claims that it did not receive prompt payment, the Court of Appeal allowed them to go forward because it held that AHS was not a "municipal corporation" under Labor Code 220(b), and thus that section's exclusion did not apply. The Court of Appeal also allowed plaintiffs' PAGA claim to proceed holding that these damages

were not analogous to punitive damages (which cannot be awarded against public agencies). The Court of Appeal sustained the dismissal of plaintiffs' wage statement claims. AHS filed a petition for review of the Court of Appeal decision to the California Supreme Court, which granted review of the decision in May 2023.

On August 15, 2024, the California Supreme Court reversed the Court of Appeal's decision, holding that plaintiffs' meal/rest break, PAGA, and other Labor Code claims were inapplicable to AHS and other public agencies. The Court first clarified that California meal and rest break laws do not apply to public agencies, unless they specifically state they apply to public agencies, because the statutory language, context and history show that the legislature intended to exclude public employers from those obligations.

Labor Code sections 226.7 and 512 address the requirements for California employers to provide meal and rest breaks. Specifically, the Labor Code imposes meal and rest break obligations on "employers," and an "employer" must be a "person" as defined in Section 18 of the Labor Code. Based on this definition, the Court concluded that a public agency is not a "person" subject to the aforementioned meal and rest break requirements. The Court reasoned that if the legislature intended meal and rest break laws to apply to government employers, it would have expressly stated so in the statute, as it has for other provisions that apply to public agencies.

The Court also rejected the Court of Appeal's exclusion of AHS from the Wage Orders' public agency exclusion. The Court found that the legislature intended the definition of "political subdivision" in the Wage Orders to be broad, and as a public agency, AHS is included within that definition.

The Court then examined the applicability of PAGA to public agencies. PAGA allows an employee to pursue "defined penalties" (penalties set forth in specific Labor Code provisions) and "default penalties" (for each iteration of a violation) against an employer on behalf of themselves and employees so aggrieved, for Labor Code violations. However, like the meal and rest break laws, the PAGA statute defines employer as a "person" under Labor Code section 18. Following its reasoning above, the Court concluded that public employers are not subject to PAGA and as such, public employers cannot be liable for penalties under PAGA. The Court also cited to legislative history and public policy, writing that PAGA penalties are akin to punitive damages and that the "potentially quite large" costs public entities could incur if subject to PAGA suits – including prevailing plaintiff's attorney fees – would be an unjustified "drain on public funds."

Finally, the Court clarified that Labor Code Section 220(b) exempts local government employers from the requirements of some wage payment laws. Section 220(b) states: "Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation." The Court of Appeal held that AHS was not a municipal corporation and thus Labor Code 220(b) did not exempt AHS from those sections. However, the California Supreme Court rejected the Court of Appeal's reasoning, holding that section 220(b) should be read

broadly to encompass all government employers (except the State, which is covered by section 220(a), including AHS, within the definition of a "municipal corporation."

Stone is a significant victory for public employers. Not only does it provide much needed clarity on the applicability of State meal and rest breaks laws to public agencies, this decision reinforces the principle that public entities are not subject to Labor Code provisions unless they expressly state so. Public employers are also not subject to liability for civil penalties imposed by PAGA cases.

Chapter 2: Discrimination, Retaliation and Harassment

Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024) – *US Supreme Court Says Employee Need Only Show Some "Disadvantageous" Change to Support Discrimination In Job Transfer*

Sgt. Muldrow worked as a plainclothes officer in the St. Louis Police Department's specialized Intelligence Division for nearly 10 years. She investigated public corruption and human trafficking cases, and oversaw the Gang Unit and Gun Crimes Unit. By virtue of her position, Sgt. Muldrow was also deputized as a Task Force Officer with the FBI, had FBI credentials, an unmarked take-home vehicle, and the authority to pursue investigations outside of St. Louis.

Sgt. Muldrow's job performance was exceptional. In 2017, the outgoing commander of the Intelligence Division referred to her as a "workhorse" and considered her his most reliable sergeant. But the new Intelligence Division commander told the Department that he wanted to replace Sgt. Muldrow with a male officer. The new commander – who often referred to Sgt. Muldrow as "Mrs." rather than "Sergeant" – testified that a male officer seemed like a better fit for the Division's dangerous work.

The Department approved the transfer of Sgt. Muldrow to a uniformed position. While her rank and pay remained the same, her responsibilities, perks, schedule, and wardrobe choices changed. Sgt. Muldrow no longer worked with high-ranking officials on priority matters in the Intelligence Division. Instead, she supervised the day-to-day activities of neighborhood patrol officers and handled various administrative matters. Sgt. Muldrow lost her FBI status and vehicle, and her work week went from Monday-through-Friday to a rotating schedule that included weekend shifts.

Sgt. Muldrow sued the city under Title VII to challenge the transfer. The District Court granted the city's request for summary judgment and held that Sgt. Muldrow needed to show that her transfer effected a "significant" change in working conditions and resulted in a "material employment disadvantage" - a heighted standard that Sgt. Muldrow could not meet. Sgt. Muldrow appealed, and the U.S. Court of Appeals for the Eighth Circuit affirmed. The U.S. Supreme Court granted certiorari.

In a unanimous decision, the Court held that an employee who is challenging a job transfer under Title VII need not show that the allegedly discriminatory transfer resulted in a

significant employment disadvantage. Rather, an employee need only show that the transfer brought some harm with respect to an identifiable term or condition of employment.

Not only did the Court's decision overturn the Eighth's Circuit ruling, the decision also overturned precedent in other circuits requiring employees challenging a transfer under Title VII to satisfy a heightened threshold of harm requirement described as "significant," "serious," "materially adverse," or similar terms. As the Court explained, to demand "significance" where the law does not require it adds requirements that Congress did not enact. The law only requires that employees show an allegedly discriminatory transfer brought about some "disadvantageous" change in employment terms or conditions.

Sgt. Muldrow's transfer was a significant change in assignment for a long-time, respected police sergeant. The Court found that Sgt. Muldrow's allegations, if proven true, "left her worse off several times over," and noted that it did not matter that her rank and pay remained the same or that she could still advance to other jobs. Title VII prohibits making a transfer based on sex with the consequences Sgt. Muldrow described.

Muldrow is important to employers as it lowers the threshold of harm that an employee must demonstrate under Title VII with respect to an alleged discriminatory transfer. This case demonstrates that a plaintiff must only show that the alleged discriminatory transfer disadvantaged the plaintiff and overturned prior circuit court decisions that required that a plaintiff demonstrate that the transfer caused significant or materially adverse harm.

Twanda Bailey v. San Francisco District Attorney's Office*, 16 Cal.5th 611 (2024) – *A Coworkers Use of a Single Racial Epithet May Suffice to Establish a Claim of Harassment

In *Twanda Bailey v. San Francisco District Attorney's Office*, the California Supreme Court held that that an isolated act of harassment may be actionable if it is sufficiently severe in light of the totality of the circumstances, and that a coworker's use of an unambiguous racial epithet may be found to suffice. The Court also found that a course of conduct that effectively seeks to withdraw an employee's means of reporting and addressing racial harassment in the workplace is actionable in a claim of retaliation, and such conduct may constitute an adverse employment action.

In 2001, Twanda Bailey began working at the San Francisco District Attorney's Office as a clerk in the records department. The office promoted her in 2011 to an investigative assistant position. Bailey worked alongside Saras Larkin, another investigative assistant. The two sat next to each other in the records room. Bailey is African American. Larkin is Fijian/East Indian. On January 22, 2015, while in the records room, Larkin told Bailey that she saw a mouse run under Bailey's desk, which startled Bailey who jumped out of her chair. After this, Larkin quietly commented to Bailey about her being startled, using a racial slur in reference to Bailey.

Immediately following this incident, Bailey left her office and told three coworkers what Larkin had said. Bailey was crying and upset. Although Bailey was offended by Larkin's use of the racial slur, she did not immediately complain to human resources because she feared harassment and retaliation. This fear was based on Bailey's understanding that other employees

had been harassed and discriminated against following incidents with Larkin. Bailey understood that Larkin was best friends with the office's department personnel officer, Evette Taylor-Monachino, and that Larkin's actions against other African American women caused them to be reassigned or separated from the District Attorney's Office.

On January 23, Bailey's supervisor, Alexandra Lopes, overheard a conversation about the incident between Bailey and Larkin. Lopes told Bailey that she planned to notify HR and on January 28, Lopes reported the incident to Sheila Arcelona, the assistant chief of finance and administration. Arcelona conferred with Taylor-Monachino and Eugene Clendinen, the chief administrative and financial officer, who reported directly to the district attorney. They agreed Arcelona should meet with Bailey and Larkin separately, and that Taylor-Monachino, as the department personnel officer, should attend the meetings.

Arcelona and Taylor-Monachino met with Bailey, who reiterated that Larkin had used an offensive racial slur and confirmed that this was the only time she had heard Larkin use such language. Arcelona and Taylor-Monachino then met with Larkin, who "did not admit to making the alleged remark." Arcelona counseled Larkin on the city's "Harassment-Free Workplace Policy" and informed her that use of the alleged language was "unacceptable." Although Taylor-Monachino was the HR representative charged with reporting incidents of workplace harassment to the city's Department of Human Resources, she did not file a formal complaint as city policy required.

On March 23, Bailey asked Taylor-Monachino for a copy of the complaint regarding the January 22 incident. Taylor-Monachino informed Bailey that no complaint existed. When Bailey requested that a complaint be filed, Taylor-Monachino refused. Taylor-Monachino stated that Bailey should not have told her coworkers about the incident with Larkin, adding that, by doing so, Bailey could cause a hostile work environment for Larkin.

After the March 23 meeting, Bailey noticed a shift in Taylor-Monachino's behavior toward her, including ignoring, laughing at, and making rude comments, such as mocking Bailey's workers' compensation claim. Bailey testified that this conduct was ongoing and occurred daily, although she did not believe it was racially motivated. However, it was acknowledged that Taylor-Monachino's actions were in retaliation for Bailey's complaint against Larkin. In April, DHR received a report regarding Bailey's allegations against Larkin, and in May, Bailey formally reported that Larkin harassed her based on race. She also claimed that Taylor-Monachino retaliated against her after the March 23 incident.

Bailey's performance review in July rated her as "Met Expectations," similar to previous years. However, the review noted areas for improvement in attendance and responsiveness to supervisors. Bailey disagreed with this assessment, stating that her absences and challenges in performing her duties stemmed from the stress caused by her interactions with Larkin and fear of being accused of creating a hostile work environment. Bailey's stress, exacerbated by Taylor-Monachino's behavior, led her to avoid walking near her office. In July, DHR informed Bailey that her complaints did not meet the threshold for harassment or retaliation, and the department would not investigate further.

In August, Bailey reported that she was threatened by Taylor-Monachino while waiting in her car outside the office. Bailey reported that Taylor-Monachino pulled up alongside Bailey, rolled down her window, and gestured in a manner Bailey perceived as threatening. Although Bailey could not hear the words spoken, she claimed she saw Taylor-Monachino saying "you are going to get it." Bailey reported the incident immediately. Bailey felt increasingly intimidated by Taylor-Monachino's behavior, which included ignoring her, chuckling in her presence, and making dismissive comments about her workers' compensation claim. Bailey formally reported feeling threatened for the first time to Clendinen on August 12. Later that month, Bailey's psychiatrist confirmed treatment for severe anxiety and depression due to workplace stress. DHR investigated Bailey's allegations against Taylor-Monachino but found the evidence inconclusive, though Taylor-Monachino was disciplined for a separate incident.

In December, Bailey filed a lawsuit against the City, claiming racial discrimination, harassment, and retaliation. The trial court determined that the only race-related incident was Larkin's single use of a racial slur, which it ruled did not constitute severe or pervasive racial harassment. The trial court held that Bailey's performance review and the alleged mistreatment by Taylor-Monachino were also not sufficient to prove adverse employment actions, as social ostracism was not enough to rise to the level of a materially adverse action. As a result, Bailey's claims were dismissed, and the trial court ruled in favor of the City. In an unpublished opinion, the Court of Appeal affirmed the trial court's grant of summary judgment and the California Supreme Court granted review.

The City argued to the Supreme Court that a single racial slur used by a coworker, over a 14-year period, did not meet the standard of severe or pervasive harassment. The Court, however, disagreed. The Court stated that the severity of the harassing conduct should be assessed from the perspective of a reasonable person in the plaintiff's position. The Court indicated that in some cases, racially motivated actions or comments may appear more offensive to a certain targeted group.

The Court noted that case law has consistently shown that isolated incidents, especially those involving racial epithets, can be severe enough to create a hostile work environment depending on the totality of the circumstances. Federal courts, as well as FEHA, recognize that the slur used here carried a history of racial violence and subjugation, making it far more than a mere offensive utterance. Those courts have ruled that even one-time use of such slurs by supervisors or coworkers can be sufficient to establish a hostile work environment, especially when they are deeply humiliating and degrading.

While the Court of Appeal placed weight on the fact that the racial slur was used by a coworker, not a supervisor, the totality of the circumstances must be considered. A coworker's influence or the nature of workplace relationships can still create an abusive environment, even without direct managerial authority. In this case, the single use of the slur by Larkin, coupled with its specific direction at Bailey, raised a triable issue about whether this isolated incident was severe enough to alter the work environment. The Court highlighted the importance of evaluating the context and impact of offensive language, especially when racial slurs are involved.

The Court also considered whether the City could be held liable for the harassment Bailey experienced, given that a genuine issue of material fact was raised regarding the severity of the conduct. If a supervisor is involved in the harassment, the employer is strictly liable. However, if the harasser is a nonsupervisory employee, the employer's liability hinges on whether it took immediate and appropriate corrective action upon knowing about the harassment. The Court found that a significant dispute arose over whether the City took "immediate and appropriate corrective action" and whether Taylor-Monachino's actions undermined the City's efforts to take remedial action on the reported harassment.

Turning to Bailey's retaliation complaint, the City argued, and the lower courts agreed, that Taylor-Monachino's conduct and comments in Bailey's June 2015 performance review did not constitute an adverse employment action. However, Bailey argued that the lower court failed to consider the broader context and the cumulative effect of the conduct. The Supreme Court agreed with Bailey, noting that the totality of the circumstances must be considered when assessing whether an adverse action occurred, and remanded the case for further evaluation.

This case establishes that even an isolated act of harassment in the workplace can be actionable and is a critical reminder to employers to have policies in place to comply with FEHA and all applicable anti-harassment laws. Employers must also be vigilant in discouraging employees from engaging in any conduct that could be perceived as harassment, and investigate all discrimination, retaliation and harassment complaints.

Paleny v. Fireplace Products U.S., Inc.*, 103 Cal.App.5th 199 (2024) – *No Discrimination for Employee Undergoing Egg Retrieval Under FEHA

Paleny began working for Fireplace Products as a full-time administrative assistant in May 2018. In October 2018, she informed her employer that she was undergoing egg retrieval procedures. This process continued through her termination in February 2019. In November 2018, the appellant's supervisor, Salah, expressed disapproval of these procedures. The appellant claimed that this led to workplace harassment, particularly in relation to needing time off for medical appointments. The tension reportedly escalated when Paleny disagreed with Salah's negative stance on the procedures.

In February 2019, Paleny notified Salah that she needed additional time off for another appointment related to her egg retrieval process. According to Paleny, Salah became angry, and Fireplace Products terminated her employment shortly thereafter. Paleny's complaint included ten causes of action, mainly alleging violations under the California Fair Employment and Housing Act (FEHA), including claims of harassment, discrimination, and retaliation based on sex (pregnancy), as well as wrongful termination.

Fireplace Products moved for summary judgment, arguing that Paleny did not have a protected characteristic under the FEHA because she was neither pregnant, attempting to become pregnant, nor disabled during her employment. They pointed out that Paleny's egg donation and freezing procedures were elective and unrelated to an immediate pregnancy or disability. The employer also noted that Paleny did not request accommodations, sick time, or leave related to a pregnancy or disability during her employment.

The trial court ultimately ruled in favor of the employer, granting their motion for summary judgment. The court concluded that the procedures Paleny underwent were not covered under the FEHA as pregnancy-related medical conditions. Paleny's decision to freeze her eggs for potential future use was deemed too indirect to establish a claim for pregnancy discrimination or harassment. Additionally, the trial court found that Paleny could not establish that she was disabled or engaged in protected activity under the FEHA.

In upholding the trial court's ruling, the Court of Appeal held that section 12945 of the FEHA necessitates proving a disability from pregnancy or a related condition or requesting accommodations for such a condition, but since Paleny was not pregnant and had no related disability, she failed to meet this criteria for her claims. The Court found that Paleny was not pregnant, disabled by pregnancy or suffering from a medical condition related to pregnancy. For those reasons, the Court held that her FEHA claims failed.

While *Paleny* demonstrates some limitations on protections for employees under FEHA, it is possible that if this case was filed after SB 523 took effect, the outcome could have been different. In 2022, the California Legislature passed Senate Bill ("SB") 523. SB 523 expanded the FEHA to include "reproductive health decision-making" in the list of classifications protected by the FEHA. Reproductive health decision-making means, without limitation, "a decision to use or access a particular drug, device, product, or medical service for reproductive health."

Ververka v. Department of Veterans Affairs*, 102 Cal.App.5th 162 (2024) – *FEHA Mixed-Motive Standard Does Not Apply to Whistleblower Retaliation Cases

Donald Ververka worked for the California Department of Veterans Affairs ("CalVet") as the administrator of the veterans' home in Yountville, CA. Ververka sued his employer for violation of Labor Code section 1102.5, allegedly for terminating him in retaliation for his reporting of health and safety issues about the home to an independent state agency and to his supervisor. Days after Ververka reported his safety concerns, his supervisor recommended Ververka's removal due to poor management of the home.

At trial, the jury found that Ververka's disclosures constituted protected activity and that his protected activity was a contributing factor in his termination under Labor Code section 1102.5. However, the jury still found in favor of CalVet because CalVet had proven by clear and convincing evidence that it would have made the same decision for "legitimate, independent reasons" as specified in Labor Code section 1102.6.

At the California Court of Appeal, Ververka argued that because the jury found his protected activities were a contributing factor in his termination, he was entitled to declaratory relief, injunctive relief, and reasonable attorney's fees and costs based on the California Supreme Court's opinion in *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203. In *Harris*, the California Supreme Court held that proof that an adverse employment decision was substantially motivated by discrimination may be grounds for a *judicial declaration* of employer wrongdoing, *injunctive relief* to stop discriminatory practices, and *reasonable attorney's fees and costs* for litigation for which the employer's own wrongdoing has been shown to be substantially

responsible. However, *Harris* also held employees are not entitled to *damages* and *back pay* under the FEHA if the employer proves it would have made the same decision for non-discriminatory reasons.

The Court of Appeal disagreed with Ververka. The Court concluded that the analysis in *Harris, supra,* was specific to the language in the FEHA and did not extend to Labor Code section 1102.5 whistleblower claims, which must be evaluated under the standard described in section 1102.6.

In January 2022, the California Supreme Court held that Labor Code section 1102.6, not the *McDonnell-Douglas* burden-shifting test, is the proper framework for litigating section 1102.5 whistleblower claims, reasoning that section 1102.6 describes the standards and burdens of proof for both parties in a section 1102.5 retaliation case. (*Lawson v. PPG Architectural Finishes, Inc.,* (2022) 12 Cal.5th 703.) *Ververka* also shows the continued trend by courts to distinguish the legal standard applicable to section 1102.5 claims and is a reminder that defenses applicable to FEHA claims may not apply to whistleblower retaliation claims.

Meyer Kama v. Alejandro N. Mayorkas*, 107 F.4th 1054 (9th Cir. 2024) – *56-Day Gap Between EEO Complaint and Termination Did Not Establish Retaliation

Meyer Kama sued the administrator of his former employer, the Transportation Security Administration ("TSA"), alleging Title VII retaliation. The TSA terminated Kama's employment based on his failure to cooperate in an investigation into whether he received illegal compensation for assisting other employees during internal agency investigations.

Kama did not dispute that the TSA's reason for terminating him was a legitimate and non-retaliatory reason, but instead claimed that the reason was merely pretext to cover up unlawful retaliation. To establish this claim, Kama relied primarily on the temporal proximity between the date of his last formal EEO complaint and the date of his termination. Kama argued that the 56-day interval established illegal pretext by proximity alone. He also cited other circumstantial evidence to support his pretext claim. The District Court disagreed and granted TSA's motion for summary adjudication. Kama appealed.

The Ninth Circuit Court of Appeals affirmed the District Court's decision and held that the temporal proximity between Kama's last formal EEO complaint and the date of his termination was not sufficient, by itself, to support his claim. The 56-day period was considerably longer than the time periods in nearly all of the cases that Kama relied upon. Also undermining Kama's temporal proximity argument was the fact that there was a strong temporal link between his noncooperation and his termination. The Court also rejected Kama's list of circumstantial evidence.

This case is a reminder that the temporal proximity between an employee's protected conduct and an employer's alleged retaliatory conduct is like other types of circumstantial evidence. If it is particularly strong, it can establish pretext on its own; otherwise, more evidence is required.

Lindsay Okonowsky v. Merrick B. Garland*, 109 F.4th 1166 (9th Cir. 2024) – *Courts Must Look at Conduct Occurring Outside of the Physical Work Environment, Including Social Media, as Part of a Hostile Work Environment Claim if an Employee Can Show an Effect on the Workplace

Lindsay Okonowsky, a psychologist, worked in the Special Housing Unit ("SHU") of the Federal Correctional Complex Lompoc in California. Steven Hellman, a corrections Lieutenant, supervised custody staff in the SHU. Hellman was not Okonowsky's direct supervisor. Hellman was responsible for the safety of inmates and staff, including staff members like Okonowsky. Around January 2020, Hellman and Okonowsky had apparent disagreements and Hellman believed that Okonowsky made it "impossible" for him and other corrections officers "to do their job" in the SHU.

During this time, on January 6, 2020, Hellman created an Instagram page titled "8_and_hitthe_gate." The page did not name or identify its creator. The page contained hundreds of posts, many of which were overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes that explicitly or impliedly referred to the Bureau of Prisons, Lompoc staff, and Lompoc inmates. The page was followed by more than one hundred Lompoc employees, including the Human Resources Manager, the Union President, and a member of the prison's Special Investigative Services.

Posts or comments on Hellman's page referred to interactions between the SHU custody team, the SHU psychologist, and/or SHU inmates or inmates, strongly suggesting that the person who ran the page worked in the SHU. Some of the posts displayed or suggested violence against and/or sexual contacts with female co-workers, or violence against women generally, were suggestive of rape and physical harassment, and depicted scenes of violence against women in general, but also against "the SHU psychologist" specifically. Okonowsky forwarded images from the page to her supervisor, Carl Clegg and also messaged the prison's Acting Safety Manager, Robert Grice, on Instagram to express her concern that he was following the page, "liking" posts, and commenting on posts. Manager Grice responded to her on Instagram, saying that the posts were funny, that he was "Sorry, not sorry," and that Okonowsky needed to toughen up or get a sense of humor.

Okonowsky voluntarily transferred from Lompoc's medium security facility to Lompoc's low security facility. Special Investigative Agent Victor Gonzales, who was Hellman's supervisor, opened an investigation and referred the matter to the Bureau's Office of Internal Affairs. Later that day, a post appeared on the "8_and_hitthe_gate" page threatening Okonowsky and sexually debasing her. The post also included a sexually obscene hashtag reference and it was clear that someone had alerted Lieutenant Hellman to Okonowsky's complaint.

Okonowsky no longer felt safe at work. Okonowsky sent Warden Engleman a copy of the menacing post. The Warden never responded to or contacted Okonowsky. Gonzales called Okonowsky but told her that he had reviewed the Instagram page and didn't "really see anything that's a problem".

Okonowsky felt ostracized and concerned that she could be in danger in her physical workspace. Hellman continued to post disturbing content on his Instagram page, including posts that targeted and intimidated Okonowsky for reporting Hellman to prison management. When she raised the issue of Hellman's page with Human Resources Manager Taulbee McGinnis, who was an active follower of the page, McGinnis told Okonowsky that he thought the memes were "funny." Okonowsky's productivity suffered. Okonowsky and her supervisor, Clegg, met with Associate Warden Gutierrez to discuss Hellman's conduct. Clegg expressed his concern for Okonowsky's safety and suggested that the prison convene a workplace violence Threat Assessment Team, however, Warden Engleman decided it was not warranted.

In early April 2020, two months after Okonowsky first complained of Hellman's conduct, a new warden, Barbara Von Blanckensee, arrived at Lompoc. On April 13, 2020, Warden Von Blanckensee convened a six-member Threat Assessment Team to investigate Okonowsky's complaint. The Threat Assessment Team interviewed Okonowsky and Hellman. The Threat Assessment Team issued its report and recommendation to Warden Von Blanckensee on April 16, 2020. In its report, the Threat Assessment Team concluded that numerous employees knew that Hellman was the Instagram page's owner, and found Hellman's denial that he directed any posts at Okonowsky unconvincing. The Team concluded that Hellman's conduct constituted impermissible "harassing conduct" within the Bureau of Prisons' definition and that Hellman's conduct likely violated the Bureau's standards of conduct for supervisors and law enforcement officers. The Team recommended that management take a variety of responsive actions, including maintaining the separation of Hellman and Okonowsky, and issuing a letter to Hellman from his supervisor ordering him to cease posting in violation of the Bureau's Anti-Harassment Policy and Standards of Employee Conduct.

The prison issued Hellman a cease and-desist letter stating that his posts on social media appeared to have violated the Bureau's Anti-Harassment Policy. The letter ordered Hellman to stop such conduct immediately and stated that any failure to comply with the letter would not be tolerated and could result in removal. For at least three weeks after receiving the letter, Hellman continued to make near daily posts on his Instagram page, including posts mocking the prison psychology department and the Threat Assessment Team and posts suggesting sexual relations with and/or sexually harassing behavior toward female co-workers.

Okonowsky alerted prison management to Hellman's continued conduct. The prison never responded, and Hellman's conduct continued. He made additional posts mocking the Threat Assessment Team, and made sexually overt posts targeting female co-workers. On January 24, 2021, because of the harassment she experienced at Lompoc, Okonowsky transferred to a Bureau facility in Texas.

Okonowsky filed suit in 2021, asserting a single claim under Title VII of the Civil Rights Act of 1964 for discrimination on the basis of sex. The District Court granted the Government's Motion for Summary Judgment. The District Court limited its consideration of the evidence to just five posts made on the Instagram account that, in the District Court's view targeted Okonowsky specifically and did so because of her sex. The District Court concluded that the five posts "occurred entirely outside of the workplace" because the posts were made on a staff member's personal Instagram page and none of the five posts was ever sent to Okonowsky,

displayed in the workplace, shown to Okonowsky in the workplace, or discussed with Okonowsky in the workplace without her consent. Okonowsky appealed.

The Ninth Circuit disagreed. The Court explained that to determine whether Okonowsky was subjected to a sexually hostile work environment, it would look to: 1) whether Okonowsky was subjected to verbal or physical conduct of a sexual nature; 2) whether the conduct was unwelcome; and 3) whether the conduct was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Focusing on the third factor, the Court looked at the totality of the circumstances and determined that conduct that takes place outside of the physical work environment is part of the totality of the circumstances.

The Ninth Circuit rejected the government's argument that conduct occurring entirely separate from and unrelated to the workplace cannot, standing alone, suffice to preclude summary judgment in favor of the employer on a hostile work environment claim. The Court opined that the relevant standard is whether harassing conduct had an unreasonable *effect* on the *working environment* and, if so, to consider whether and how the employer responded to that effect. Thus, even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment.

Under this analysis, the Court emphasized that social media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear and that regardless of where Hellman was, Lompoc employees who followed the page were free to view, "like," comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere.

The Court also noted that conduct occurring outside of the physical work environment is part of the totality of the circumstances analysis. The Supreme Court has instructed courts to consider a non-exhaustive list of the circumstances and characteristics of alleged harassment which does not distinguish between conduct occurring on or off the physical or digital worksite.

Here, the Court found that under the circumstances, Okonowsky produced ample evidence that Hellman's sexually discriminatory conduct made it more difficult for her to do her job, to take pride in her work, and to make her want to stay in her position. The Court also found that the Bureau's lackluster response to Okonowsky's complaint "reinforced rather than remediated" Hellman's sexually harassing conduct, cementing the discriminatory effect of his behavior within the workplace. The Court found that the District Court's view was too narrow by not considering all Instagram posts and the conduct of the prison management, and therefore, the Bureau was not entitled to summary judgment. Finally, the Court found that the Bureau's remedial efforts were wholly inadequate and that a reasonable juror could conclude that the prison failed to take prompt and effective remedial action to address Okonowsky's hostile work environment.

This case demonstrates that employers must look at conduct occurring outside of the physical work environment as part of the totality of the circumstances analysis and that off duty

conduct, including on personal social media accounts, can contribute to an employee's hostile work environment claim if the employee can show an effect on the workplace.

Purushothaman Rajaram v. Meta Platforms, Inc.*, 105 F.4th 1179 (2024) – *42 U.S.C. § 1981 Prohibits Discrimination Against United States Citizens in Hiring, Based on Their Status as a United States Citizen

42 U.S.C. § 1981, entitled "Statement of equal rights," provides: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The H-1B program, allows employers to hire qualified foreign workers for specialty occupations when there is a shortage of skilled workers authorized to work in the United States. Purushothaman Rajaram is a naturalized United States citizen and an information technology professional. On several occasions between 2020 and 2022, he unsuccessfully applied to work at Meta Platforms, Inc. (owners of Facebook, Instagram, and WhatsApp, among other online services) ("Meta").

Rajaram alleged that Meta refused to hire him because Meta prefers to hire noncitizens holding H-1B visas to whom it can pay lower wages. Rajaram brought a putative class action asserting a single claim: that Meta violated 42 U.S.C. § 1981 by discriminating against United States citizens in hiring. The District Court dismissed the complaint, holding that section 1981 "does not bar discrimination based on U.S. citizenship." Rajaram appealed.

The Ninth Circuit disagreed, finding that Rajaram stated a claim under section 1981. The Court noted that while the statute does not expressly provide a cause of action for those injured by violations of the nondiscrimination principle it sets out, it impliedly affords a federal remedy against discrimination in private employment. Further, while a plaintiff bringing a claim under section 1981 must initially identify an impaired 'contractual relationship' under which the plaintiff has rights," section 1981 protects the would-be contractor along with those who already have made contracts.

The Court looked to the plain language of the statute, reasoning that an employer that discriminates against United States citizens gives one class of people—noncitizens, or perhaps some subset of noncitizens—a greater right to make contracts than "white citizens." The Court opined that if some noncitizens have a greater right to make contracts than "white citizens," then it is not true that "[a]ll persons" have the "same right" to make contracts as "white citizens."

The Court rejected Meta's argument that the statute's "protections are limited to discrimination based on race or alien status, not discrimination based on U.S. citizenship." The Court reasoned that the language of section 1981 was unambiguous. The Court also noted that this case, concerned citizenship discrimination, not racial discrimination, before explaining that

section 1981 combines a portion of section 1 of the Civil Rights Act of 1866 with section 16 of the Enforcement Act of 1870.

This ruling provides a basis for an applicant or employee to sue an employer for discrimination based on U.S. citizenship, which is independent and distinct from the prohibition against discrimination on the basis of race. This ruling is also a reminder for employers to make hiring and employment decisions based on legitimate business reasons.

Chapter 3: Due Process

LaMarr v. Regents of the University of California, 101 Cal.App.5th 671 (2024) – *No Right to Skelly After Employee Voluntarily Accepted A Demotion In Lieu of Termination*

June LaMarr was a medical office services coordinator ("Coordinator") level V at the University of California Davis Medical Center (University). In 2014, LaMarr's supervisor, Walter Knowles, suspended her for three days for performance issues. When the performance issues persisted, Knowles prepared, but did not issue, a "Letter of Intent to Dismiss" ("Letter"). Knowles' supervisor, Chris Jackson believed that the dismissal was unusually expedited. In addition, LaMarr had told Jackson that she was having difficulty with Knowles. To diffuse the situation, Jackson sought to transfer LaMarr.

Jackson was unable to find a coordinator level V position in any other departments, so Jackson offered LaMarr a Coordinator level III position in a different department on a "temporary" basis at her normal level V salary. LaMarr was not yet aware of the Letter Knowles had prepared, but had not issued. LaMarr and Jackson moved forward with the temporary transfer in September 2014.

LaMarr later confirmed to Jackson that her new supervisor was pleased with LaMarr's performance and was comfortable making the role permanent. Jackson told LaMarr that the University was unable to keep LaMarr's level V salary permanently. Jackson gave LaMarr the following three options, and in doing so informed LaMarr of the Letter Knowles had prepared: 1) Stay in her new position at a level III salary; 2) Return to her former position at a level III salary; or 3) Return to her former position and salary, where she would be issued the Letter and dismissed. LaMarr was surprised to learn about the Letter. She responded that she "would love" to return to her former job, but she could not return to a hostile environment where every decision she made could be questioned or grounds for her dismissal. LaMarr chose to remain in her new position at the lower salary in consideration of her health and stress. LaMarr felt that she was forced to accept the lower pay. She felt her only two choices were to be "demoted or fired." But, LaMarr admitted that if she had chosen to return at her former salary and the University had dismissed her, she would have had a right to a *Skelly* conference.

LaMarr sued the University. The trial court framed the issue as: Whether LaMarr was deprived of due process on March 10, 2015, when, without offering her a pre-deprivation *Skelly*

hearing, her employer proposed to either transfer her to a non-supervisory position with reduced pay or return her to her higher paying supervisory position and face termination proceedings.

The trial court decided in favor of the University. First, the University had never actually issued the Letter to LaMarr, and thus, no *Skelly* rights had been triggered. Second, although LaMarr undoubtedly felt she was under duress, there was no legal authority supporting the proposition that feelings of duress trigger due process protections, such as those under *Skelly*. LaMarr appealed.

The Court of Appeal affirmed. The Court reasoned that the unissued Letter did not trigger LaMarr's *Skelly* rights and that her transfer was voluntary. While the transfer was a demotion (which would trigger *Skelly* rights), *Skelly* was not required because LaMarr voluntarily agreed to the demotion. Though taking the demotion was a difficult choice for LaMarr, the Court decided that a difficult choice is not the same as an involuntary choice.

LaMarr also argued that she was owed *Skelly* before having to choose between the demotion and the dismissal. The Court said LaMarr misunderstood the *Skelly* requirement. The Court found that the University could not violate LaMarr's due process until it took an adverse employment action without providing the *Skelly* safeguards. It was LaMarr's prerogative to either risk termination and receive a *Skelly* hearing, or voluntarily accept the transfer and not have a *Skelly* hearing. Under the facts of this case, the law did not allow her to have both.

This case demonstrates the importance of timing and having clear, documented communications when an employee voluntarily accepts a demotion in lieu of termination. Had the University issued the Letter of Intent to Dismiss before it gave LaMarr the option to demote, the outcome of this case would likely have been different.

Chapter 4: Fair Labor Standards Act

Cariene Cadena v. Customer Connexx LLC, 107 F.4th 902 (2024*) – Time Spent Booting Up and Shutting Down Computers May be Compensable Under the FLSA*

Customer Connexx ("Connexx") operates a customer service call center in Las Vegas, Nevada. Connexx employees worked as call center customer service agents who supervised and monitored the calls of the call center and quality assurance agents. The employees were required to use timekeeping software to clock in and out for each shift.

Connexx instructed its workers to clock in before opening any other computer program necessary to perform their call center roles, and its policies prohibited off-the clock work. To clock in using the timekeeping software, the employees needed to turn on their computer, log in with their username and/or password, open the timekeeping system and clock in. The employees did not have permanently assigned workstations, and they choose a workstation each shift on a first come, first served basis. While some of the computers were fast, others were "old and slow" and employees sometimes had to try different work-stations before finding a workable computer.

Connexx required its call center workers to be clocked in and ready to accept calls at the scheduled start time of each shift. Because it took additional time to boot up a computer before it was possible to clock in, the employees had to arrive at the call center some amount of time before the scheduled start time of each shift. Compensable work time was computed by rounding to the nearest quarter-hour.

At the end of each shift, employees generally finished any ongoing call, closed out of non-timekeeping programs that were open on the computer, and then clocked out. After clocking out, the employees had to log off the computer or turn it off. The parties disputed how long it generally took employees to boot up and shut down the computers at the beginning and end of each shift. They also disputed whether Connexx required the employees to wait until the computer was fully powered down before leaving for the day.

Cariene Cadena and Andrew Gonzales filed a collective action complaint alleging that Connexx owed its call center employees unpaid overtime wages under the Fair Labor Standards Act ("FLSA") for booting up and shutting down their computers before and after clocking in to the company's timekeeping software program each shift. The District Court granted summary judgment to Connexx and the plaintiffs appealed.

The Ninth Circuit initially remanded, finding that the time call-center employees spent booting up computers is compensable under the FLSA because it is an "integral and indispensable" part of their duties. The Court also noted that in *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220 (2014), the Supreme Court "questioned the application of the *de minimis* doctrine to the FLSA and declined to resolve whether the doctrine continues to apply. The Court remanded the case for the District Court to determine whether: (1) the time spent shutting down computers is compensable; (2) the time spent booting up or shutting down computers was de minimis such that Connexx is not liable for payment of overtime wages for that work under the FLSA; and (3) Connexx had no knowledge of the overtime work and, therefore, is not liable for that alternative reason.

On remand, the District Court granted summary judgment to Connexx once again. The Court concluded the *de minimis* doctrine is applicable notwithstanding *Sandifer*. The Court further held Connexx was not liable for payment of overtime wages because, assuming that both shut down and boot up time are compensable, the time spent on booting up and shutting down the computers was *de minimis* under the three-factor test established in *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984.) Because the time spent was de minimis, the District Court concluded, Connexx was not liable for overtime wages. In the alternative, the District Court held that to the extent any of the time in question was not *de minimis*, Connexx was not liable because Cadena had not met her burden of establishing that Connexx failed to pay for that overtime, in light of the evidence indicating the plaintiffs could request adjustments to their time records. Plaintiffs appealed again.

Cadena argued that the Supreme Court's ruling in *Sandifer*, brings into question the continued validity of the *de minimis* rule. The Ninth Circuit disagreed. The Court found that under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc), a three-judge panel cannot overrule a prior panel's decision in light of subsequent Supreme Court precedent unless the prior

decision is irreconcilable. The Court held that there was no such irreconcilable conflict between the Ninth Circuit's *de minimis* case law and *Sandifer.*

The Court concluded that the plaintiffs had raised triable issues of fact as to whether the time in question was *de minimis*. Thus, summary judgment on this basis was improper.

This case is a reminder that employers may be obligated to compensate employees for pre-shift and post-shift activities when such time is integral and indispensable to core job functions. The compensability of pre-shift and post-shift time should be analyzed on a case-by-case basis to determine if such work is necessary to perform core job functions and, if so, the amount of time it takes.

Chapter 5: California Public Records Act

Doe v. Regents of the University of California, 102 Cal.App.5th 766 (2024*) – UCLA Required To Disclose Investigation Report Into Former Professors' Misconduct*

In January 2018, the University of California Los Angeles received a whistleblower complaint alleging that three UCLA professors had participated in serious misconduct. UCLA retained an outside law firm to investigate.

In May 2020, a 60-page investigation report stated that: 1) the professors violated UCLA policy prohibiting improper governmental activities; 2) two of the professors violated UCLA policy and California conflict of interest laws; 3) one of the professors retaliated against another faculty member via 'improper governmental activity' in violation of the UCLA Code of Conduct, and 4) that another professor was "involved in harassing activities."

UCLA issued notices of intent to dismiss two of the professors effective July 2020. All three professors settled their pending disciplinary proceedings with no findings of misconduct, no adjudication regarding the report, and no admissions of liability or unlawful conduct. The professors resigned their employment in connection with their settlements.

In March 2021, a former UCLA employee, requested the report under the California Public Records Act ("CPRA"). The Regents of the University of California notified the former professors, who objected to the release of the report. Each of them sought a writ of mandate to withhold disclosure of the report, known as a "Marken" claim, and the cases were consolidated. The trial court denied the petitions for writ of mandate and a preliminary injunction, allowing the Regents to release the report (with certain redactions).

The trial court found that while the disclosure of the report would likely compromise substantial privacy interests, the report found that the professors committed serious misconduct and provided supporting evidence to substantiate the findings. Thus, the professors did not meet their burden of establishing that the potential harm to their privacy interests outweighed the public interest in disclosure. The trial court postponed the time for release of the documents to allow the former professors to seek appellate review. Two professors appealed.

Before the appeal was heard, the Los Angeles Times (which was not a party in the original proceeding) made its own CPRA request. The Times requested the report, the subsequent settlement agreements between each of the three professors and UCLA, and the notices of intent to dismiss the professors. The trial court determined that the additional documents the Times requested related to well-founded and substantial claims of public employee misconduct and were not exempt from disclosure under the CPRA. The Court of Appeals preliminarily ordered the Regents not to disclose the report or any portion of it to anyone pending resolution of the appeals.

Ultimately, the Court of Appeals affirmed the trial court's orders allowing the Regents to disclose the report, the notices of intent, and the settlement agreements. The Court reasoned that the professors failed to demonstrate that they were likely to prevail in blocking the release of the reports. According to the Court, the "strong public policy supporting transparency in government" inherent in the CPRA outweighed the professors' privacy concerns, so the documents at issue would need to be made subject to disclosure.

This case is a good reminder that a court will apply a balancing test when deciding between the disclosure of arguably private public employee personnel records and the strong public policy supporting transparency in government.

Chapter 6: Labor Law

People ex rel. International Association of Firefighters Local 1319 v. City of Palo Alto,* 102 Cal. App. 5th 602 (2024) – *Court Invalidates Voter Approved Ballot Measure Because City Did Not First Consult In Good Faith With Public Safety Unions

In 2010, the Palo Alto City Council considered altering a provision in its charter. That provision required that certain labor disputes with its public safety unions be resolved through binding interest arbitration. The City believed that the Meyers-Milias-Brown Act (MMBA), at Government Code section 3507, did not require prior good faith consultation with its public safety unions.

The City Council adopted resolution 9189, which proposed that City voters amend the City Charter at article V to repeal binding interest arbitration and replace it with other dispute resolution procedures. The City held a special election in November 2011, and the voters passed Measure D, to repeal binding interest arbitration.

The firefighters' union sued. In prior decisions, the Court of Appeal and the Public Employee Relations Board (PERB) both concluded that the City violated section 3507 by enacting resolution 9189 and submitting Measure D to the voters without having first consulted in good faith with the firefighters' union. The Court of Appeal remanded the case to PERB to determine the remedy.

PERB rejected the City's objections that the City's constitutional home-rule privileges insulated the voter approved Measure D from PERB's remedial reach. PERB ruled that the

City's action to refer Measure D to the voters was void, and directed the City to consult in good faith with the firefighter's union upon request. Both the firefighters' union and the City, however, disagreed about whether the City complied with PERB's orders. The City did not reinstate the charter provision as it existed prior to the passage of Measure D.

The firefighters' union then requested the California Attorney General ("AG") to bring a quo warranto action to decide the remedy to the MMBA violation. The AG may authorize the use of the quo warranto procedure, under Code of Civil Procedure section 803, to sue on behalf of the people to determine whether any corporation – including a municipal corporation – has unlawfully held or exercised any franchise within the state. The AG authorized leave to sue, noting that the public has an interest in ensuring that City Charter amendments are validly enacted.

The firefighters' union filed the quo warranto complaint. The union argued that the trial court should invalidate Measure D because the City failed to consult in good faith before placing it on the ballot. The City argued that the voter's election was not an unlawful exercise of a franchise, and that the City's MMBA violation should not invalidate the will of the electorate.

The trial court did not invalidate Measure D. Instead, it retained jurisdiction for the limited purpose of issuing a final judgment invalidating Measure D if: the City and the firefighters' union agreed to use alternative procedures to binding interest arbitration; or the City passed a resolution to pursue a charter amendment alternative to Measure D; or PERB determined that the City failed to consult in good faith with the affected public safety unions. The firefighters' union appealed. The Court of Appeal concluded that once the trial court determined that the City's submission of Measure D to the voters violated the MMBA, the trial court abused its discretion by failing to invalidate Measure D. The Court remanded the case to the trial court to: 1) order the City to restore the re-amendment portion of article V to the City's Charter; 2) invalidate Measure D; and 3) provide any other appropriate relief.

This case is a critical reminder that public agencies with represented employees must engage in the meet and confer process when modifying charter provisions or policies that impact represented employees or are within the scope of representation.

County of Santa Clara*, PERB Decision No. 2900-M (2024, judicial appeal pending) – *PERB Says Prevailing Party Is Not Entitled to Attorney's Fees Absent Special Circumstances

SEIU, Local 521 and Santa Clara County were parties to a memorandum of agreement ("MOA") regarding physician assistants ("PAs"). PAs were required to maintain certain professional certification standards.

In 2019, the County disciplined a PA for allegedly failing to maintain the professional certification that the County bylaws required. The PA filed a grievance and won. The County then substantially revised the certification bylaws.

SEIU filed a PERB unfair practice charge alleging violations of the Meyers-Milias-Brown Act ("MMBA"). SEIU claimed that the County unlawfully refused to bargain before its

Board of Supervisors ("BOS") approved the County's bylaw revisions. Those revisions included new certification standards for SEIU-represented employees. PERB held that that the County violated its bargaining duties both with respect to the BOS' decision and its effects, because the certification bylaws were within the scope of representation.

However, PERB rejected SEIU's request to include attorney's fees as a standard, make-whole remedy. PERB explained that, except in cases in which there is a statutory right to attorney's fees, a successful party cannot require the other party to pay its fees. A party in a PERB case seeking fees must normally show that its opponent pursued a claim, defense, or motion, or used a tactic without arguable merit and in bad faith.

PERB rejected the idea that, as a matter of course, a successful charging party should receive reimbursement of litigation expenses. PERB rejected SEIU's request for attorney's fees in this case as the County did not assert a frivolous, or bad faith defense.

The takeaway for employers in this case is that regarding an award of attorney's fees, PERB will not automatically award attorney's fees just because the employee organization ultimately prevails. Rather, this decision demonstrates PERB can follow the "American Rule," pursuant to which a successful party normally has no claim to fee shifting. Under this rule, a party in a PERB case seeking to recover attorney fees and costs must show that its opponent maintained a claim, defense, or motion, or engaged in another action or tactic, that was without arguable merit and pursued in bad faith.

Oakland Unified School District*, PERB Decision No. 2906-E (2024, judicial appeal pending) – *A Union May Rebut the Presumption Against a Pre-Impasse Strike When an Employer's Unfair Practices Provoke the Strike

In *Oakland Unified School District*, PERB held that the right to strike is qualified, and that one qualification restricts pre-impasse strikes pressuring an employer to make concessions in collective bargaining. As a result, there is a presumption against pre-impasse strikes that a union may rebut by showing that an employer's unfair practices materially provoked the strike.

In March 2019, the Oakland Unified School District ("District") implemented a Nine-Month Notice Policy for school closures that the Union had long sought. In 2022, the District reversed course, scheduling school closures without the nine-month notice period. In response, the Oakland Education Association ("OEA") brought an unfair practice charge alleging that the District failed to meet and confer over its decision to close schools without adhering to the Nine-Month Notice Policy. In *Oakland Unified School District* (2023) PERB Decision No. 2875 ("UPC 1"), PERB resolved the school closure charge in OEA's favor finding that the District violated the Educational Employment Relations Act ("EERA") when it failed to afford OEA notice and an opportunity to bargain over the District's decision.

While the charges in the aforementioned UPC 1 were pending, the District began implementing the school closures at issue, without adhering to the Nine-Month Notice Policy. The Union organized a one-day strike in response to what it perceived to be unfair labor practices, specifically, refusal to meet and confer over the failure to adhere to the Nine-Month

Notice Policy. The union's strike announcements, notices, and other materials specifically referenced the District's refusal to adhere to their policy as a reason for the strike. The strike also occurred while the District was implementing the school closures.

The District argued that the strike was illegal and sought injunctive relief against OEA's planned one-day strike. The administrative law judge denied the District's request for injunctive relief but a complaint was issued in the instant case, No 2906-E, ("UPC 2"). OEA appealed the issuance of the complaint to PERB.

On June 28, 2024, PERB issued its ruling on UPC 2. PERB began by giving a detailed history of the evolution of the right to strike for public employees. PERB explained that the EERA (like the Meyers-Milias-Brown Act ("MMBA"), and all other statutes PERB enforces) provides employees with the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations, which confers a qualified, statutory right to strike, including a "right to strike in protest against unfair practices." PERB explained that the nature of the qualified right has changed over time, but even the California Supreme Court relied on the MMBA and other authority to find that public employees have a "basic right to strike" unless doing so imminently and substantially threatens public health or safety (citing *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564).

PERB continued by explaining that since *County Sanitation*, the Legislature has vested PERB with jurisdiction over labor relations at California cities, counties, and local agencies covered by the MMBA. In 2010, the California Supreme Court decided *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597 (*"San Jose"*), which cemented the Court's recognition of PERB's exclusive jurisdiction to interpret the labor relations statutes under its jurisdiction to determine which strikes are lawful and protected and which constitute statutory violations.

PERB noted that the Court's ruling in *San Jose* also highlighted that, following legislative changes that transferred to PERB jurisdiction over the MMBA, PERB's role includes determining the scope of strike protections and prohibitions under the MMBA. This move, PERB explained, was intended to integrate existing precedents into PERB's jurisdiction, thus ensuring that the principles governing strikes under the EERA would similarly apply to the MMBA. The Court in *San Jose* rejected arguments that the right to strike was solely a common law principle, affirming that it is an integral part of labor relations statutes and must be interpreted in light of broader statutory goals. PERB also explained how subsequent PERB rulings have consistently upheld this qualified right, reinforcing that while public employee strikes are protected to some extent, they are subject to limitations based on good faith bargaining and other statutory requirements.

PERB noted that recent appellate decisions have further reinforced the statutory protection of strikes. For instance, in *County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, the court found that actions discouraging future strike activities were discriminatory and interfered with protected rights.

However, PERB emphasized that the right to strike remains qualified, with restrictions such as avoiding substantial threats to public health and safety, maintaining the status quo as per no-strike agreements, and refraining from bad faith bargaining tactics. Applying these principles to the issues in UPC 2, PERB reasoned that the current complaint against OEA centers on whether their strike constituted a pre-impasse pressure tactic rather than an imminent threat to public welfare.

PERB found that here, the District failed to establish OEA violated its duty to bargain. PERB reasoned that OEA had no duty to bargain because the District failed to provide notice and opportunity to bargain in good faith over its decision to waive the nine-month requirement before closing or consolidating schools. OEA, therefore, had no duty to pursue negotiations.

PERB continued to explain that a union's duty to bargain in good faith qualifies its right to strike. One qualification restricts pre-impasse strikes pressuring an employer to make concessions in collective bargaining. As a result, there is a presumption against pre-impasse strikes, but a union may rebut the presumption by showing that employer unfair practices materially provoked the strike. Here, PERB found that OEA rebutted the presumption because District unfair practices materially provoked the strike.

PERB also took the opportunity to explain the factors relevant to assessing a strike's motivation, explaining that the determination of whether an unfair practice at least partially motivated a strike requires reviewing the totality of circumstances. Looking at the union's strike announcement or notices, and other materials, is a good indicator as to the strike's context and purpose, according to PERB. Here, the materials centered on the District's conduct as the motivation for the Strike. PERB also noted that a strike's timing relative to the employer's alleged violation is relevant, a factor here that favored OEA. PERB overruled decisions indicating that a pre-impasse strike must be seen as a "last resort" by the union, finding that factors such as the violation's nature and seriousness, and whether the union opposed the violation, as more relevant to determining a strike's purpose.

Applying these factors here to the totality of the circumstances, PERB found that OEA rebutted any such presumption because the District's unfair practices materially caused OEA's strike.

This decision is noteworthy because it provides a rare and valuable summary of the law concerning a public employee's right to strike, as well as clarifying and describing the factors and standards PERB will consider when analyzing a pre-impasse strike based on an employer's alleged unfair practices. Another important take away for employers is that while the employer in this case was a school district that was found to have violated the EERA, PERB based much of its decision on authority made under the MMBA. This demonstrates that a similar challenge under the MMBA directly would likely lead to a similar result.

Homeless Enforcement in Light of *Boise*, *Grants Pass*, and Supreme Court Review!

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Homeless Enforcement in Light of *Boise, Grants Pass*, and Supreme Court Review!

I. Introduction

The enforcement of laws concerning homelessness has come under intense legal scrutiny, particularly following the pivotal decisions from the Ninth Circuit in the *Martin v. City of Boise* ("*Boise*")[1] and *Johnson v. City of Grants Pass* ("*Johnson*")[2] cases. Those cases redefined the landscape for municipalities attempting to address the complex issue of homelessness while balancing constitutional rights. Unequivocally, homeless encampments have created serious health, safety, and welfare hazards for communities throughout the nation, but nowhere as much as in California.

The legal framework shifted again this year, with the United States Supreme Court ("USSC") reversing the Ninth Circuit's precedent in the *Grants Pass*[3] case. That ruling reopened the discussion on how municipalities can manage homelessness-related enforcement actions without violating the Constitution. The issue has been further complicated in California with the Governor's issuing of his Executive Order[4] regarding homeless encampments.

This whitepaper explores the evolving legal framework (including the USSC's *Grants Pass* ruling), analyzes the central constitutional arguments, and discusses practical methods for municipalities to manage homelessness enforcement. It also highlights recent developments that could influence how cities and counties address homelessness in light of these legal changes.

II. Legal Background

1. ***Boise* (2018)**. In *Boise*, the Ninth Circuit ruled that municipalities cannot criminalize individuals for sleeping or camping on public property if no alternative shelter bed is available. The court held that enforcement of anti-camping ordinances in such circumstances violated the Eighth Amendment's prohibition on cruel and unusual punishment. This ruling significantly limited local governments' ability to remove homeless individuals from public spaces without providing adequate shelter bed options. Those shelter beds often came at extreme cost due to peripheral costs for robust equipment and furnishings, personal storage, animal control, personal safety protection, vandalism, drug use, security, disease control, medical treatment, drug treatment, mental health treatment, food, water, trash, social services, legal services, environmental controls, power, etcetera.

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[1] *Martin v. City of Boise* ["*Boise*"] (9th Cir. 2018) 920 F.3d 584 [rev'd *City of Grants Pass, Oregon v. Johnson* ["*Grants Pass*"] (2024) 144 S.Ct. 2202].
[2] *Johnson v. City of Grants Pass* ["*Johnson*"] (9th Cir. 2022) 72 F.4th 868 [rev'd *City of Grants Pass, Oregon v. Johnson* ["*Grants Pass*"] (2024) 144 S.Ct. 2202].
[3] *City of Grants Pass, Oregon v. Johnson* ["*Grants Pass*"] (2024) 144 S.Ct. 2202.
[4] Cal. Governor's Exec. Order No. N-1-24 (July 25. 2024).

2. ***Johnson* (2022)**. Building on the *Boise* decision, the *Johnson* case further solidified the Ninth Circuit's position, affirming that even civil penalties, such as administrative fines, imposed on homeless individuals for sleeping outdoors are unconstitutional if the municipality does not offer sufficient shelter bed alternatives. The *Johnson* case also expanded the scope of the "right to exist" reasoning in *Boise* to rudimental protections from the elements. The *Johnson* case expanded potential liability for cities, as it applied not only to criminal sanctions but also to civil penalties targeting homelessness, and to the right of the homeless to retain and use rudimentary protections from the elements on public property.

3. ***Grants Pass* (2024)**. In a landmark decision, the USSC reversed the Ninth Circuit's rulings in *Boise* and *Johnson* in early 2024. The USSC held that municipalities have the authority to enforce public camping bans and related ordinances, even when no alternative shelter bed is available. However, the ruling was based upon the inapplicability of the Eighth Amendment's Cruel and Unusual Punishment clause to homeless anti-public camping enforcement. The USSC held that typical homeless anti-public camping enforcement is neither cruel nor unusual. The Court's ruling leaves open, and arguably even invites, potential scrutiny of the same issues under the Fourteenth (Due Process) and Fourth (Seizure) Amendments.

4. **Governor's Executive Order (2024)**. Following the USSC's *Grants Pass* decision, Governor Newsom ordered State agencies to begin humane enforcement against homeless encampments. The Executive Order only applies to State agencies, but the Governor encourages California cities and counties to follow a similar model. The Governor's model requires 48-hour pre-removal notices, the offering of housing and supportive services, and a 60-day hold on personal property. The Executive Order is an attempt to balance the important health and safety concerns posed by homeless encampments to both the general public and the homeless alike, requiring strict enforcement, but humanely balancing it with basic notices, services, and property protections as well.

III. Key Findings in the USSC's *Grants Pass* Decision

The USSC's *Grants Pass* ruling outlined several key points that now govern how municipalities can approach homelessness enforcement:

1. **Narrowing of the Eighth Amendment**. The USSC clarified that the Eighth Amendment's prohibition against cruel and unusual punishment should not be interpreted as a blanket ban on enforcing public camping ordinances. The majority opinion emphasized that the Eighth Amendment applies only in cases where enforcement involves punitive measures or inhumane treatment, and not to the general regulation of public spaces. However, the

USSC left open whether the same right to sleep, right to rudimentary protections from the elements, and right to exist protections may exist under the Fifth, Fourteenth, and Fourth Amendments.

2. **Public Safety & Order**. The USSC recognized the legitimate interest of municipalities in maintaining public safety, order, and sanitation. It affirmed that local governments could enact and enforce anti-camping ordinances that regulate where individuals can sleep or camp, as long as those regulations are reasonable and applied fairly. Importantly, the *Grants Pass* decision gives cities and counties the authority to resume enforcement actions aimed at addressing the public health and safety concerns posed by homeless encampments.

3. **Shelter Bed Availability Not a Prerequisite for Enforcement**. Unlike the Ninth Circuit's rulings, the USSC found that enforcement of anti-camping ordinances does not require municipalities to offer alternative shelter beds. The USSC ruled that, while offering shelter is encouraged, the absence of available shelter beds does not automatically trigger constitutional violations under the Eighth Amendment.

4. **Focus on Humane Treatment**. The USSC did leave room for future challenges if enforcement actions are carried out in a manner that constitutes inhumane treatment or unnecessarily harsh conditions for those affected. Cities and counties must still ensure that their enforcement methods are not unduly punitive and that they respect the basic dignity of individuals experiencing homelessness.

IV. Recent Developments Post-Ruling

Since the USSC's reversal of *Boise* and *Johnson*, municipalities and states have begun adjusting their policies and enforcement strategies. Some of the most significant recent developments include:

1. **Restoration of Public Anti-Camping Ordinances**. Several cities in the Ninth Circuit, including Los Angeles, Seattle, and Portland, have already begun reinstating and expanding public camping ordinances that were previously unenforceable under the *Boise* precedent. These cities are now focusing on managing public encampments, with a renewed emphasis on protecting public safety and sensitive sites where camping may be prohibited outright.

2. **Revisions of State Laws**. In Oregon, lawmakers have responded by reviewing the implications of the USSC's ruling on state-level laws. While Oregon had mandated that enforcement actions be "objectively reasonable" following *Boise*, the USSC's decision provides states with the opportunity to revisit and potentially revise those types of regulations. States are undergoing reviews to adjust their legal frameworks.

3. **New Challenges for Advocacy Groups**. Homeless advocacy organizations have expressed concern over the ruling, arguing that it may lead to an increase in the displacement of homeless individuals and exacerbate homelessness without addressing its root causes. Several groups are preparing new legal challenges, particularly focused on ensuring that enforcement actions do not lead to inhumane treatment or disproportionately affect vulnerable populations. The USSC's ruling in *Grants Pass* expressly reserved the issue of whether these challenges may be brought under the Fifth, Fourteenth, and Fourth Amendments based on Due Process and Seizure protections.

4. **Increased Use of Alternative Enforcement Strategies**. While the USSC ruling allows for more flexibility, some cities are taking a cautious approach by developing non-punitive enforcement strategies. Programs that emphasize providing services, safe parking areas, and designated camping zones are gaining traction, as they balance enforcement with humanitarian considerations. For example, San Francisco and Denver have both expanded "safe camping" sites, which allow homeless individuals to set up temporary shelter in designated areas without the fear of immediate enforcement actions.

5. **Governor's Homeless Encampment Enforcement Executive Order**. As mentioned above, Governor Newsom has already issued an Executive Order following the USSC's *Grants Pass* ruling. The Executive Order only addresses homeless "encampments" (not all homeless public camping), and it only applies to State agencies. However, the Governor encourages cities and counties to follow the same model. The Governor's Order emphasizes effective but humane enforcement, with a tight 48-hour or less timeline combined with the offering of housing and support services as well as storage of personal property for up to 60-days. Of course, that approach would have worked under the previous *Boise* and *Johnson* rulings as well, and the Order does not address how to overcome the extreme costs associated with providing the recommended housing and supportive services.

V. Constitutional & Public Policy Arguments Post-Ruling

The USSC's *Grants Pass* decision reignites the constitutional debate surrounding homelessness enforcement, particularly as it pertains to the balance between public safety and individual rights. Key arguments on both sides include:

1. **Support for the *Grants Pass* Ruling**:

    - **Municipal Authority Restored**. Proponents of the ruling argue that it appropriately restores the power of municipalities to manage public spaces and address the negative externalities of homelessness, such as public health hazards, economic impacts on local businesses, and the safety of the unhoused.

- **Flexibility in Enforcement**. The decision provides local governments with the legal clarity they need to enforce ordinances without being constrained by the availability of shelter beds. This flexibility is seen as crucial in managing growing homelessness populations and reclaiming public spaces for broader community use.

- **Democratic Experiment**. The ruling will allow different jurisdictions to test various approaches that will allow the political process to resolve what solutions work best by region. Through differentiated experimentation, diverse jurisdictions will find and test new and creative solutions to address an unsolved systemic problem.

2. **Criticism of the Ruling**:

- **Risk of Inhumane Treatment**. Opponents of the ruling argue that it risks criminalizing poverty and disproportionately affects vulnerable populations. Advocacy groups fear that cities and counties may resort to aggressive enforcement tactics without addressing the systemic causes of homelessness, such as a lack of affordable housing, mental health services, and employment opportunities.

- **Potential for Increased Litigation**. The ruling expressly leaves open the ability for advocacy groups to challenge the exact same issues under the Due Process and Seizure clauses of the Fifth, Fourteenth, and Fourth Amendments. Further, advocacy groups may still challenge specific enforcement actions on the grounds of inhumane treatment or violations of local and state regulations. The ruling leaves open the possibility of lawsuits based on the manner in which ordinances are enforced, particularly if they are seen as targeting homeless individuals unfairly.

VI. Practical Impacts of the USSC's Decision

The USSC's *Grants Pass* ruling has created a more favorable environment for municipalities to resume enforcing public anti-camping ordinances. Key practical impacts include:

- **Reinstatement of Ordinances**. Many cities and counties are already reintroducing and strengthening their anti-public camping regulations, particularly in sensitive areas where public safety concerns are high. These ordinances are likely to focus on regulating specific sensitive areas, such as government service sites, schools, parks, and business districts.

- **Increased Focus on Zoning & Public Health**. Cities and counties may implement more nuanced zoning policies to determine where camping can and cannot occur, with a focus

on maintaining public health and safety. These policies may also be accompanied by increased sanitation measures in areas with high homeless populations.

- **Collaborative Service-Based Approaches**. While enforcement flexibility has been restored, some cities and counties are continuing to focus on outreach programs and collaborations with non-profits and service providers to offer housing, mental health services, and job training to homeless individuals. These programs are increasingly seen as essential to reducing the long-term strain on public services and addressing the root causes of homelessness.

VII. **Conclusion**

The USSC's reversal of the Ninth Circuit's *Boise* and *Johnson* rulings in the *Grants Pass* case marks a significant shift in how municipalities can address homelessness enforcement. By granting cities and counties more flexibility to regulate public spaces and enforce ordinances, the ruling offers municipalities a broader range of tools to address the challenges posed by homelessness. However, the ruling also raises new questions about how enforcement can be balanced with compassion and respect for the rights of homeless individuals. As emphasized by Governor Newsom's Executive Order on homeless encampment enforcement, cities and counties must now navigate these complex issues by implementing enforcement strategies that protect public health and safety while ensuring that individuals experiencing homelessness are treated humanely.

As the legal landscape continues to evolve, municipalities will need to remain mindful of both the constitutional and public policy dimensions of this critical issue. While the USSC's ruling was immediately favorable for local anti-public camping enforcement, the USSC left room for the Ninth Circuit and the State Legislature to reinstate homeless public camping protections through legislation and through potential application of the Due Process and Seizure clauses of the Fourteenth and Fourth Amendments.

Municipal Tort and Civil Rights Litigation Update

Friday, Oct. 18, 2024

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I. CIVIL RIGHTS-LAW ENFORCEMENT LIABILITY

A. *Hart v. Redwood City*, 99 F.4th 543 (9th Cir. 2024)

- **Officer's use of deadly force against armed and non-responsive individual did not violate individual's Fourth Amendment rights**

Officers Gomez and Velez responded to a call involving a man attempting suicide with a knife in his backyard. When they arrived, they found the man's wife covered in blood and frantically pleading for help. The man had been actively cutting his arms and neck with the knife prior to the arrival of the officers. At her urging, the officers went to the backyard, where they found Hart holding a knife. They told him to drop the knife, but instead of doing so he began moving towards them while raising the knife. As Hart neared the officers, Officer Velez deployed her taser, but it was ineffective. With Hart approaching closely and wielding a knife, Officer Gomez took action to protect himself and his partner, shooting Hart. Medical assistance was called for Hart, but he ultimately passed away in the emergency room. Hart's family brought suit alleging that Gomez, Velez, and the City of Redwood City violated their and Hart's constitutional and state law rights. The parties filed cross-motions for summary judgment, and as relevant here, the district court found that Officer Gomez was not entitled to qualified immunity.

The district court found that facts were in dispute regarding whether the Officers' conduct was objectively unreasonable. "Hart had committed no offense, was suicidal, was not a flight risk, did not pose a threat to others, and a dispute exists regarding whether an adequate warning that force would be used by the officers was given."

Upon review, the appellate court examined whether Officer Gomez' conduct was objectively reasonable. To assess the reasonableness of a particular use of force, the court balances the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake. Use of deadly force is the ultimate intrusion, and the court thus would examine whether the state interest was sufficient to justify the use of force.

The Supreme Court has provided three factors for determining the strength of the government's interest: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Conner*, 490 U.S. at 386, 396 (1989). The "most important" of these factors is "whether the suspect posed an immediate threat to the safety of the officers or others." *Lal v. California*, 746 F.3d 1112, 1117 (9th Cir. 2014).

Here, the Court found that Hart posed an immediate threat to Officer Gomez. Although there were some disputed facts as to where exactly Hart was located in the yard at the time of the Officers' arrival and how he was holding the knife at that time, the Court found these disputes to be immaterial. The material facts were undisputed: Plaintiff was holding the

knife and advanced toward the Officers wielding the knife and refused to comply with commands to drop the knife.

Plaintiffs also argued that because Hart had already harmed himself when the officers arrived, he presented less of a threat. Plaintiffs cited *Tan Lam v. City of Los Banos* for the proposition that one who is wounded may no longer present an immediate threat. 976 F.3d 986, 999 (9th Cir. 2020). In *Tan Lam*, the individual stabbed an officer with scissors. Id. The officer then shot the individual. *Id*. This court found that first shot to be an objectively reasonable use of force. Id. But then, after the individual "was injured and was [no longer] approaching [the officer] with scissors," the officer shot him again. *Id*. (emphasis added). At that point, the court determined that the individual was no longer an immediate threat. *Id*. Perhaps if Hart's injuries had made it so he could no longer approach the officers with the knife, then as in *Tan Lam*, Hart would not have been an immediate threat. But it was uncontroverted that Hart was able to approach at least at a brisk walk, while wielding the knife in front of him.

Regarding the Officers' pre-shooting conduct, the Court noted that California state law does factor pre-shooting conduct into whether an officer acts "reasonably when using deadly force," *Hayes v. County of San Diego*, 736 F. 3d 1223 (9th Cir. 2013), "[t]he Fourth Amendment is narrower and places less emphasis on pre[-]shooting conduct," *Vos v. City of Newport Beach*, 892 F. 3d 1024, 1037 (9th Cir. 2018).

Finally, the Court held that Hart's mental illness did not change the outcome. While "whether the suspect has exhibited signs of mental illness is one of the factors the court will consider," this court has "refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals."

Ultimately, the Court held that there was no constitutional violation and even if there were, Officer Gomez would have been entitled to qualified immunity as he did not violate clearly established law.

Significance: The idea that subjects undergoing a mental health crisis should be treated differently when use of force is at issue has become relatively ubiquitous. This case is significant in establishing that a subject can and should be considered an immediate threat notwithstanding the appearance of mental illness.

B. *Scott v. Smith*, 109 F. 4th 1215 (9th Cir. 2024)

- **Officers were not entitled to qualified immunity when placing a bodyweight restraint on an unarmed and cooperative subject who lost consciousness and died as a result of the restraint**

On March 3, 2019, Roy Scott called the police for help claiming that assailants were trying to enter his home with a saw to harm him. Las Vegas Metropolitan Police Department Officers Kyle Smith and Theodore Huntsman came to the scene. Scott was unarmed and in mental distress. Though he complied with the officers' orders and was not suspected of a

crime, Smith and Huntsman initiated physical contact, forced Scott to the ground, and used bodyweight force to restrain him. Shortly after, Scott lost consciousness and he was later pronounced dead. Scott's daughter and a representative of Scott's estate sued the officers and the Department for violating their constitutional rights, including the Fourth Amendment right to be free from excessive force and the Fourteenth Amendment right to familial association. The trial court denied the Officers' motion for summary judgment on grounds of qualified immunity and the Officers appealed.

When the Officers arrived at Scott's apartment and Scott came to the door, he was holding a metal pipe. He was ordered to drop the pipe, which he did. The Officers ordered Scott to stand by a near by wall. Scott also complied with this order. He was asked if he had any other weapons, at which time he pulled a knife from his pocket and handed to the Officers. The Officers were shinning a flashlight at Scott who asked them to turn off the light and acknowledged that he had paranoid schizophrenia.

The Officers grabbed Scott's arms and took him to the ground. Initially, Scott was on his back with his arms at his side. For over two minutes, Scott screamed and begged the Officers to leave him alone. The Officers turned Scott to his stomach with his hands restrained behind his back. Officer Huntsman then placed his body weight on Scott's back for one to two minutes. During this time, Scott became more incoherent and his breathing more labored. Scott was then handcuffed and rolled to his side. His face was bloodied from contact with the ground, and he then essentially stopped moving. He was pronounced dead shortly thereafter.

In reviewing the trial court's denial of the Officers' motion for summary judgment, the Court analyzed the reasonableness of the Officers' conduct. First, the body weight restraint was considered to be deadly force. In analyzing the second prong, the government's interest in the force used, the Court did consider Scott's apparent mental illness and the fact that he had not committed any crime. The Court suggested that further de-escalation should have been considered by the Officers. Scott was not an immediate threat as he had relinquished both the knife and the pipe on the command of the Officers.

As to the third prong, a balance between the gravity of the intrusion on the individual and the government's need for that intrusion, the Court found that deadly force was completely unnecessary under the circumstances. Thus, under the *Graham* reasonableness test, the force used was not reasonable and Scott's Fourth Amendment rights were violated by the Officers.

The Court then examined whether Scott's Fourth Amendment rights were clearly established. In determining that said rights were clearly established, the Court leaned heavily on the case of *Drummond ex rel. Drummond v. City of Anaheim,* 343 F. 3d 1052 (9th Cir. 2003). In *Drummond*, officers "pressed their weight against [an individual's] torso and neck, crushing him against the ground." They "maintained that pressure for a significant period of time" while the suspect was prone, handcuffed, "offered no resistance," and "repeatedly told the officers that he could not breathe and that they were choking him." The Court found that

Officers were not entitled to qualified immunity and that ruling clearly established the unconstitutionality of the of the Officers in this matter.

Next, the Court reviewed Scott's 14th Amendment claim. To show a violation of the right to familial association under the Fourteenth Amendment based on an officer's use of force, a plaintiff must establish that an officer's conduct "shocks the conscience."

Two tests govern whether an officer's conduct "shocks the conscience." *Ochoa v. City of Mesa*, 26 F.4th 1050, 1056 (9th Cir. 2022). "Which test applies turns on whether the officers had time to deliberate their conduct." *Id*. The "deliberate-indifference test" applies when a situation "evolve[s] in a time frame that permits the officer to deliberate before acting." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). The more demanding "purpose-to-harm test" applies when a situation " 'escalate[s] so quickly that the officer must make a snap judgment." Here, the Court found that the Officers had time to deliberate and that the deliberate indifference standard would apply. The Court found that the Officers violated Plaintiff's 14th Amendment rights.

However, the Court could not point to an analogous prior appellate case that would have clearly established this violation of Plaintiff's 14th Amendment rights. On those grounds, the Court reversed the trial court's denial of qualified immunity as to the 14th Amendment claim.

***Significance*:** Be very wary of your department's use of body weight restraints on prone individuals, particularly to those subjects who are already restrained. Also, this case has clearly established a 14th Amendment violation regarding the Officers' conduct.

C. *Rosenbaum v. City of San Jose*, 107 F. 4th 919 (9th Cir. 2024)

- **Officers not entitled to qualified immunity when a police K9 was deployed on Plaintiff and continued to bite him for nearly 20 seconds after surrendering and laying prone on his stomach**

On September 10, 2019, five SJPD Officers responded to a domestic violence call. One of the Officers was K9 handler with his police K9 "Kurt." When the officers arrived at the subject home, they observed Plaintiff standing on a landing on the second floor. For approximately six minutes, they engaged in a dialogue with Plaintiff wherein they repeatedly ordered him to come down the stairs. Plaintiff refused to comply and come down the stairs. An officer advised him that if he did not come down, the K9 would be deployed to apprehend him and that he would be bitten.

Approximately nine minutes after entering the home, Kurt was deployed up the stairs to apprehend Plaintiff. When the officers reached the second story, the found the unarmed Plaintiff seated with his back against a wall while Kurt was biting his right forearm. Plaintiff was offering no resistance. Kurt then dragged Plaintiff onto his stomach. One of the officers had his gun pointed at Plaintiff, another was standing on his legs, while another was pulling his left arm behind his back. At this time, Kurt was still biting Plaintiff's right arm. Body

camera footage captured the incident and confirmed that Kurt continued biting Plaintiff for approximately twenty seconds after he had clearly surrendered before Kurt was ordered to release his hold. Plaintiff sustained severe and permanent injuries to his right arm because of the incident.

In reviewing the trial court's denial of qualified immunity, the Court noted that it has been clearly established that when an officer allows a police dog to continue biting a suspect who has fully surrendered and is under officer control, it is a violation of Plaintiff's 4th Amendment rights. In some cases, such as this one, the conduct is so clearly a violation, that on-point appellate authority is not even necessary. This case was distinguishable from others where qualified immunity was granted but in those cases, the K9 was released as soon as it was determined that the subject was not armed. Here, it was clear that Plaintiff was unarmed and had surrendered, however, Kurt stayed on the bite for another twenty seconds before he was ordered to release.

The officers argued that it was not clear that Plaintiff had surrendered. However, the body camera footage supported Plaintiff's version of the events and whether surrender was clear is a factual issue to be decided by the jury.

Significance: This case exemplifies that the Court will occasionally find some conduct so egregious that the typical qualified immunity two-step analysis is rendered to be unnecessary.

D. *Chinaryan v. City of Los Angeles*, 113 F.4th 888 (9th Cir. 2024)

- **It is clearly established that reasonable suspicion by police officers that a vehicle is stolen does not justify a high-risk, 24-minute traffic stop during which the plaintiff was asked to exit the car at gunpoint in front of her passenger and teenage daughter and asked to lay flat on her stomach on the ground**

Plaintiff was driving home from a family celebration with her teenage daughter and a friend when an LAPD police officer saw her and mistakenly suspected that she was driving a stolen vehicle. The mix-up was due to several unfortunate coincidences, including an error by the Department of Motor Vehicles, which had issued the wrong license plates. Although Plaintiff drove normally and in compliance with all traffic laws while being followed by a police car for more than ten minutes, officers from LAPD decided to conduct a "high-risk" felony stop involving about a dozen officers and a helicopter unit. The officers ordered Chinaryan out of the vehicle at gunpoint and commanded her to lie prone on the street with her arms outstretched. The officers, again at gunpoint, ordered the passengers out of the vehicle with their hands in the air. All three were handcuffed and seated on the street while the officers investigated. After the officers determined the unfortunate mix-up and that Plaintiff's vehicle was lawfully registered to her husband, Plaintiff and her children were released from detainment. The duration of the entire encounter was approximately 24 minutes.

Plaintiff and her passengers sued the officers, the LAPD, and the City of Los Angeles for illegal seizures, excessive force, and a failure to properly train the officers. The district court granted partial summary judgment in favor of the officers, and a jury subsequently rejected plaintiffs' municipal liability claims against the LAPD and the City. Plaintiffs appealed the trial court's granting of summary judgment.

In review of Plaintiffs' Fourth Amendment claim, the Court recognized that the degree of intrusiveness was severe. Plaintiff was ordered out of the car at gunpoint, forced to prone herself on the ground, and was handcuffed. Although vehicle theft can be considered a "severe" crime, the officers had no articulable basis that Plaintiffs posed a threat to them or to anyone else. Plaintiffs were fully cooperative at all times. Furthermore, Plaintiff remained in handcuffs for a period of time even after the officers became aware of the error. The Court held that the officers' reasonable suspicion that plaintiffs had stolen the Suburban, standing alone, was not enough to justify such intrusive tactics.

The Court then examined the second prong of the QI analysis; whether it was clearly established that the officers' tactics violated plaintiffs' Fourth Amendment rights. The Court looked to the case of *Green v. City and County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014). Denise Green, a 47-year-old Black woman with no criminal record, was driving her car when an automated license plate reader misread her license plate number by one digit and erroneously identified the plate as belonging to a stolen vehicleThe officers with the reader were unable to respond, so "they radioed the hit to dispatch" for other officers to follow up. Dispatch determined that the license plate number belonged to a gray GMC truck, whereas Green was observed driving a burgundy Lexus sedan.

A nearby officer who had heard the radio traffic observed Green's vehicle pass him and did not realize that her license plate differed by one digit from the number reported to dispatch. The officer called for backup, and after three to five additional officers arrived, they made a high-risk stop of Green's vehicle. The officers ordered Green out of her car, drew and pointed their weapons at her, ordered her to her knees, and handcuffed her. "Green was wholly compliant and nonresistant for the entirety of the stop and ... there was no indication that she was armed." Officers searched Green's vehicle, performed a pat-down search of her person, and after a record check of her correct plate number revealed they had made a mistake, uncuffed her. The trial court granted the officers' QI motion for summary judgment but the 9th Circuit reversed holding that it was a question for the jury to determine if the tactics used were justified in light of the circumstances.

Relying on *Green,* the Court held that Plaintiff's Fourth Amendment rights were clearly established and the trial court's order granting qualified immunity was reversed.

Significance: Reasonable suspicion of vehicle theft alone is not enough to justify the intrusive tactics used by the officers in this case.

E. *Sanderlin v. Dwyer*, 2024 WL 4033065 (9th Cir. 2024)

- **Officer was denied qualified immunity when he struck Plaintiff in the groin with a deployed foam bullet at a George Floyd protest**

On May 29, 2020, at around 2:00 p.m., a protest started at San Jose City Hall. Police officers patrolling the scene initially reported that the crowd remained peaceful for the first hour or so. The crowd eventually marched from City Hall down Santa Clara Street onto Highway 101, temporarily blocking both northbound and southbound lanes. Additional officers were dispatched to assist in the response, as some members of the crowd began engaging in violent behavior, including smashing vehicles with rocks and throwing objects at officers from an overpass.

Officer Panighetti arrived on the scene at around 3:30 p.m., equipped with a 40mm launcher, capable of firing foam baton rounds. According to then-existing San Jose Police Department (SJPD) policy, SJPD officers had blanket authority to use 40mm foam baton rounds throughout the protests as defensive weapons against "specific individuals who posed a threat of serious injury to the officers or others."

At about 4:30 p.m., officers issued dispersal orders to the crowd. The crowd then began to make its way back toward City Hall. Officer Panighetti was standing behind a skirmish line when protestors again began to throw objects at the officers. He noticed two subjects who were throwing objects at officers. He observed the subjects pick up what appeared to be paint cans and Officer Panighetti believed that they were preparing to throw the cans at officers. At that point, Plaintiff moved onto the sidewalk between Officer Panighetti and the two subjects holding a sign over his head. Panighetti ordered Plaintiff to move and warned him that he would "hit" him if he did not move. Plaintiff refused to move. Panighetti fired one foam bullet round at Plaintiff striking him in the groin. The injury was severe and required an emergency surgery.

Sanderlin filed suit against Panighetti under 42 U.S.C. § 1983, alleging that Panighetti had used excessive force against him because he was protesting the police and that Panighetti's acts therefore violated his rights under the First and Fourth Amendments of the United States Constitution. Defendants moved for summary judgment on grounds of qualified immunity which the trial court denied.

To establish a claim for retaliatory violation of the First Amendment, Sanderlin must show (1) that he was engaged in a constitutionally protected activity; (2) that Panighetti's actions would "chill a person of ordinary firmness from continuing to engage in the protected activity;" and (3) that "the protected activity was a substantial or motivating factor in [Panighetti's] conduct." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020).

Panighetti argued that Plaintiff was obstructing him from carrying out his duties, i.e., blocking him from the two subjects he was trying to apprehend, is not a constitutionally protected activity. However, the Court noted that this was a dispute of fact and therefore had

to be rendered in favor of Plaintiff. According to Sanderlin, he was merely standing peacefully on the sidewalk holding the sign. Resolving the disputed facts in Sanderlin's favor, he was engaged in protected First Amendment activity.

The third element turns on the same factual dispute. If a factfinder concludes that there was no legitimate justification for Panighetti's actions, they could reasonably infer that those actions were motivated by retaliatory animus. Thus, when all factual disputes are resolved and all reasonable inferences are drawn in Sanderlin's favor, Panighetti's acts violated clearly established law. It is clearly established that police officers may not use their authority to retaliate against individuals for protected speech.

As to Plaintiff's Fourth Amendment claim, the Court first had to determine whether Plaintiff was "seized" within the meaning of the Fourth Amendment. A Fourth Amendment seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied. The Court found that Panighetti effectuated a seizure of Plaintiff when he fired a foam bullet at him which knocked him to the ground restricting his movement.

One it was deemed that a seizure of Plaintiff had occurred, the Court next examined if the seizure was unreasonable. The reasonableness of the force used by Panighetti would turn on "how the jury interprets the video footage, and whether the jury credits Panighetti's testimony that Sanderlin was blocking the police from targeting the two individuals." To the extent that the jury discredits Panighetti's account or believes that Panighetti failed to consider other less intrusive tactics, it could determine that the use of force was unreasonable which would be a violation of Plaintiff's rights under the Fourth Amendment.

Going to the second prong of the QI analysis, the Court evaluated whether the right was "clearly established." In stating that right was clearly established, the Court relied on the case of *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012). There, the police ordered a group of students at a large disturbance to disperse, and when the students failed to comply, the police fired pepperball projectiles at them. The Nelson court held that "the firing of a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors ... constitute[d] unreasonable force in violation of the Fourth Amendment." *Id*. at 886. Given the factual similarities between *Nelson* and this case, Panighetti was on notice that his use of force was excessive.

***Significance*:** Chaos can occasionally result from protected protest activity. While police engage in tactics to control unruly crowds, they must still be cognizant of the constitutional rights of protestors.

F. *Black Lives Matter Los Angeles v. City of Los Angeles*, 113 F.4th 1249 (9th Cir. 2024)

- **Certification of a putative class requires commonality where issues can be resolved together.**

In the summer of 2020, protests related to the death of George Floyd occurred in Los Angeles for approximately ten consecutive days. Some of these protests were peaceful. Others were not. In response, the Los Angeles Police Department (LAPD) set curfews, declared demonstrations unlawful, used non-lethal force to control crowds, and arrested thousands of people.

About a week after the protests began, the plaintiffs filed this putative class action against the City and then-LAPD Chief Michel Moore, alleging that the LAPD used excessive force, arrested protestors without probable cause, and restricted their First Amendment rights. The trial court granted protestors' motion for certification of three classes seeking damages from city and fourth class seeking injunctive relief against department. City appealed.

FRCP 23 requires that the members of the class have the burden of proving by a preponderance of the evidence that they have common questions that can be resolved together, and these common questions predominate over individual ones. This kind of rigorous analysis is especially important in a case such as this, where classes bring fact-specific constitutional claims challenging a wide variety of LAPD's actions across Los Angeles. The question of whether reasonable force was used on the entire class depended on the facts of many different, individual situations. Thus, the plaintiffs did not adequately prove that they have raised a question which can be solved on a class-wide basis because the different claims arise in various different circumstances of alleged police brutality.

The court vacated and remanded to the trial court, finding that further analysis of commonality and predominance was required before these classes could be certified.

***Significance*:** Protest cases can find "strength in numbers." We have seen Protest Plaintiffs with very little or no damages attempt to coalesce in the formation of a class action or file with multiple Plaintiffs in a single lawsuit. It gives the appearance that the use of force was pervasive and indiscriminate. This case is helpful in requiring a true commonality of force used and injuries sustained.

II. CIVIL RIGHTS-HOMELESSNESS

A. *City of Grants Pass v. Johnson*, 144 S.Ct. 2202 (2024)

- **The Eighth Amendment's protections against cruel and unusual punishment does not prohibit local governments from passing or enforcing ordinances banning sleeping or camping on public property.**

In 2019, the Ninth Circuit issued a decision in *Martin v. City of Boise* holding that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." The underlying reasoning was that the Supreme Court had previously ruled in *Robinson v. California* that it violated the Eighth Amendment's Cruel and Unusual Punishment Clause to criminalize a person's status, rather than their conduct (in Robinson, the statute criminalize

the status of being a drug addict, not using drugs). The Ninth Circuit concluded that broad prohibitions on sleeping or sitting essentially prohibited unhoused people from merely existing in public spaces (at least at certain hours) if there were no alternative shelters for people to go to, meaning it was their status of homelessness that was being criminalized.

The City of Grants Pass, Oregon, had a series of ordinances on the books that prohibited camping—which it defined as sleeping with any form of protection from the elements—in any public space. A violation of these ordinances resulted in a minimum $295 fine. Multiple violations of the ordinance could lead to exclusion orders from parks or other public spaces, a violation of which could then result in a criminal trespass charge.

In the wake of *Martin*, several unhoused individuals in Grants Pass filed a class action lawsuit to prevent the City from enforcing these ordinances. At the time, the city's unhoused population well exceeded the number of available shelter beds. A federal district court enjoined enforcement of these ordinances saying that, under *Martin*, these ordinances effectively criminalized the status of homelessness in violation of the Punishment Clause. The district court also ruled that the fines imposed on homeless people under these ordinances violated the Eighth Amendment's Excessive Fines Clause.

The City appealed the District Court's injunction on Punishment Clause grounds to the Ninth Circuit (without addressing the Excessive Clause findings). The Ninth Circuit affirmed the injunction, at which point the City appealed to the U.S. Supreme Court.

The USSC majority took the position that the ordinances at issue in *Grants Pass* were distinguishable from *Robinson* because they criminalized conduct (i.e., sleeping, camping, using a blanket) rather than status (i.e., being homeless). Instead, the majority looked to *Powell v. Texas*, in which the Court found that a law criminalizing public intoxication was not the same as criminalizing someone's status as an alcoholic. As the *Powell* court reasoned, it was the act of being drunk in public, not the compulsion to drink, that was being criminalized.

In analyzing cases under the Cruel and Unusual Punishment Clause, the majority found that fining people for sleeping in public was neither cruel (because it did not cause "terror, pain, disgrace" or other "atrocious" punishments) nor unusual (in that punishing such behavior was commonplace around the country). Therefore, prohibiting sleeping or camping in public did not violate the Cruel and Unusual Punishment Clause.

The Court reversed the Ninth Circuit ruling on the Cruel and Unusual Punishment Clause and remanded it "for further proceedings consistent with the opinion."

Significance: Although the case provides no panacea to the issue of homelessness, it does allow municipalities to take a more active approach in removing the unhoused from public spaces.

III. CIVIL RIGHTS-FIRST AMENDMENT

A. *Lindke v. Freed*, 601 U.S. 187 (2024)

- **A public official who prevents someone from commenting on the official's social-media page engages in state action under 42 U.S.C. § 1983 only if the official both (1) possessed actual authority to speak on the state's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.**

James Freed created a private Facebook profile that was originally intended to connect with family and friends. Eventually, he grew too popular for Facebook's 5,000-friend limit on profiles. So Freed converted his profile to a "page," which has unlimited "followers" instead of friends and is public so that anyone may "follow" it. Freed designated the page category as "public figure."

In 2014, Freed was appointed city manager for Port Huron, Michigan, so he updated his Facebook page to reflect that new title. On his page, he shared both personal updates about himself and his family and professional updates, including directives and policies he initiated in his official capacity.

Kevin Lindke came across Freed's page and did not approve of how Freed was handling the pandemic. He posted criticism of Freed in response to Freed's Facebook page, and Freed deleted the comments and ultimately "blocked" Lindke.

Lindke sued Freed under 42 U.S.C. § 1983 for violating his First Amendment rights by deleting his comments and blocking him. The district court granted summary judgment to Freed, and the U.S. Court of Appeals for the Sixth Circuit affirmed.

In a unanimous opinion, the Court held that for section 1983 to apply to a city manager, the state action doctrine required that the city manager both had actual authority to speak on the behalf of the state, and that he purported to exercise that authority.

"The distinction between private conduct and state action turns on substance, not labels: private parties can act with the authority of the state, and state officials have private lives and their own constitutional rights." Lindke v. Freed, 601 U.S. 187, 197 (2024). The fact that Freed's page has government information does not necessarily mean it is an official conduit of state authority. For the actions of a private person to be covered by section 1983, the state has to be responsible for the person's conduct. Because the Sixth Circuit did not apply this test, the Court vacated and remanded.

***Significance*:** While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights, and by excluding from liability acts of officers in the ambit of their personal pursuits, the state-action requirement of § 1983 protects a robust sphere of individual liberty for those who serve as public officials or employees.

B. *Gonzalez v. Trevino*, 602 U.S. 653 (2024)

Sylvia Gonzalez, a resident of Castle Hills, Texas, was elected to the city council in 2019. During her campaign, she learned of widespread dissatisfaction with the current city

manager. After taking office, she organized a nonbinding petition calling for the manager's removal. The petition was presented at a contentious council meeting, after which Mayor Edward Trevino questioned Gonzalez about the petition's location, found in her binder. Two days later, Trevino initiated a criminal complaint against Gonzalez for allegedly stealing the petition. Despite an atypical legal process involving Police Chief John Siemens and special detective Alex Wright, Gonzalez was arrested and spent a night in jail. She is no longer on the council and has refrained from public political activity.

Gonzalez sued Trevino, Siemens, Wright, and the city (collectively, the Defendants) for violating her First and Fourteenth Amendment rights. She argued that the arrest was in retaliation for engaging in conduct protected by the First Amendment, but she conceded that there was probable cause for the arrest. In support of her retaliation claim, she cited a decade-long review of misdemeanor and felony data in Bexar County that showed no similar cases.

The Defendants moved to dismiss her lawsuit on grounds of the independent-intermediary doctrine and qualified immunity, but the district court allowed Gonzalez's claims to proceed. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed, finding that the outcome was controlled by the U.S. Supreme Court's decision in *Nieves v. Bartlett*, holding that, in general, the existence of probable cause will defeat a retaliatory arrest claim. The Fifth Circuit noted that Gonzalez's facts did not trigger the narrow exception recognized in Nieves, under which a plaintiff need not plead lack of probable cause "where officers have probable cause to make arrests, but typically exercise their discretion not to do so."

In its holding, the USSC stated that requiring petitioner Sylvia Gonzalez to provide specific comparator evidence to support her retaliatory arrest claim, the Fifth Circuit did not properly apply the principles of *Nieves v. Bartlett*, 587 U. S. 391 (2019). The only express limit the Court described in *Nieves* was that the evidence a plaintiff presents must be objective.

Justice Samuel Alito concurred with the Court's decision but wrote separately to provide additional guidance on the scope of the Nieves exception, emphasizing that it is a narrow exception to the no-probable-cause requirement for retaliatory arrest claims and that the rule applies to all such claims, not just those involving split-second decisions.

Justice Brett Kavanaugh concurred with the per curiam opinion but argued that Gonzalez's case does not actually involve the Nieves exception, as her claim is about probable cause regarding her mental state rather than a conduct-based comparison, making the Court's grant of certiorari misplaced.

Justice Ketanji Brown Jackson, joined by Justice Sonia Sotomayor, concurred with the per curiam opinion but emphasized that plaintiffs can use various types of objective evidence beyond surveys to satisfy the Nieves exception, including unusual arrest procedures or indications of retaliatory motives in arrest documents.

Justice Clarence Thomas authored a dissenting opinion, arguing that plaintiffs bringing First Amendment retaliatory-arrest claims under § 1983 should be required to prove a lack of probable cause. He asserted that the common-law torts most analogous to retaliatory-

arrest claims (false imprisonment, malicious arrest, and malicious prosecution) all required proving absence of probable cause. Thus he rejects the abuse-of-process analogy and criticized the Court for expanding the Nieves exception, asserting that there is no historical basis for this exception and that the Court should not craft § 1983 rules as a matter of policy.

Significance: The decision means that more plaintiffs may be able to bring a retaliatory arrest claim under the Nieves exception by utilizing any form of objective evidence.

IV. LAND USE

A. *Scheetz v. County of El Dorado*, 601 U.S. 267 (2024)

- **The Fifth Amendment's takings clause does not distinguish between legislative and administrative land-use permit conditions.**

The County of El Dorado, California, has a Traffic Impact Mitigation (TIM) Fee Program that imposes a traffic-impact fee on any property owner applying for a building permit. The fee consists of two components: the "Highway 50 Component" and the "Local Road Component," and is determined by the geographic zone in which the project is located and the type of construction proposed. The fee is mandatory regardless of the actual impact the project may have on existing or future roads. The TIM Fee Program stipulates that new developments bear the full cost of road construction and widening, even though these roads are used and benefitted from by existing residents and non-residents alike. In 2012, the County Board passed a resolution establishing new TIM Fee rates, which were subsequently applied to George Sheetz's project.

Sheetz applied for a building permit in July 2016 to construct a 1,854-square-foot manufactured house for his family. The County required him to pay $23,420 in traffic-mitigation fees based on the type and location of his project, even though no individualized assessment was made to correlate the fee with the project's actual impact on local or state roads. Sheetz paid the fee under protest and later filed a legal action against the County, alleging the fee was an unconstitutional condition under the Nollan and Dolan standards and seeking a refund of the fee paid.

Under the unconstitutional-conditions doctrine, "the government may not deny a benefit to a person because he exercises a constitutional right." The U.S. Supreme Court in *Nollan v. Cal. Coastal Comm'n* (1987) and *Dolan v. City of Tigard* (1994) recognized that land-use permit applicants "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." Under those cases, the government may condition approval of a land-use permit on the owner's dedication of property to public use if the government can prove that an "essential nexus" and "rough proportionality" exist between the demanded property and the impacts of the owner's project.

The superior court ruled against Sheetz, concluding that legislative exactions are exempt from Nollan/Dolan review. The California Court of Appeal affirmed.

The Fifth Amendment's Takings Clause does not distinguish between legislative and administrative land-use permit conditions. Justice Amy Coney Barrett authored the opinion for a unanimous Court, holding that the California Court of Appeal erred in holding that the Nollan/Dolan test does not apply to permit conditions imposed by legislatures.

The Takings Clause requires the government to provide just compensation when it takes private property for public use, and this applies equally to all branches of government. Neither the text of the Constitution, the historical understanding of eminent domain (the power of the government to take private property for public use), nor the Court's own precedents support exempting legislatures from the requirements of the *Nollan/Dolan* test. This test, which is based on the unconstitutional conditions doctrine, requires that permit conditions have an "essential nexus" to a legitimate government interest and be "roughly proportional" to the impact of the proposed development. These principles apply consistently across physical takings, regulatory takings, and the unconstitutional conditions doctrine, regardless of whether the condition is imposed by a legislature or an administrative agency.

Justice Sonia Sotomayor authored a concurring opinion, in which Justice Ketanji Brown Jackson joined, pointing out an antecedent question that was not raised in this case: whether the permit condition would be a compensable taking if imposed outside the permitting context.

Justice Neil Gorsuch authored a concurring opinion to argue that the Nollan/Dolan test cannot operate differently when an alleged taking affects a "class of properties" rather than "a particular development."

Justice Brett Kavanaugh authored a concurring opinion, in which Justices Kagan and Jackson joined, clarifying that the Court has not previously decided—and in this case explicitly declined to decide—whether "a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development."

Significance: Legislatively imposed conditions on development are not exempt from scrutiny under the Takings Clause. Following *Sheetz*, it is now clear that legislatively imposed conditions on development must engage in some form of nexus and proportionality analysis under *Nollan* and *Dolan*.

B. *Center for Biological Diversity et al. v. County of San Benito, et al.* (2024) 104 Cal.App.5th 22

- **The limitations period to initiate a CEQA challenge does not begin until a final Notice of Determination has been issued**

The case involves the proposed development of the Betabel Project by the McDowell Trust, which includes a large commercial roadside attraction in San Benito County. The County's Board of Supervisors certified an Environmental Impact Report (EIR) and approved a conditional use permit for the project. The Center for Biological Diversity and the Amah

Mutsun Tribal Band opposed the project, arguing that the EIR violated the California Environmental Quality Act (CEQA) and that the project approval violated state planning and zoning laws. They filed a petition for a writ of mandate to challenge the project approval.

The San Benito County Planning Commission initially approved the project and filed a Notice of Determination (NOD) on October 14, 2022. The Center and the Amah Mutsun Tribal Band appealed this decision to the County Board of Supervisors, which denied the appeals and filed a second NOD on November 10, 2022. The trial court sustained the McDowell Trust's demurrer, agreeing that the CEQA causes of action were time-barred because the petitions were filed more than 30 days after the first NOD.

The California Court of Appeal, Sixth Appellate District, reviewed the case and concluded that the trial court erred. The appellate court determined that the 30-day limitations period for filing a CEQA challenge began with the second NOD filed on November 10, 2022, following the final decision by the Board of Supervisors. The court emphasized that the Planning Commission's decision was not final due to the timely appeals. Therefore, the writ petitions filed on December 9, 2022, were within the 30-day period. The appellate court reversed the judgments of dismissal and remanded the case to the trial court with directions to overrule the demurrer.

Significance: The limitations period for a CEQA challenge does not begin until a final decision is made by the Planning Commission.

V. UTILITIES

A. *City of Gridley v. Superior Court*

The City of Gridley operates an electric utility and approved reduced electric rates for residential users in September 2020. Plaintiffs, residential ratepayers, challenged these rates, alleging they resulted in charges exceeding the reasonable cost of providing electric service, thus constituting a tax without voter approval in violation of article XIII C of the California Constitution. They also claimed the rates violated the state and federal takings clauses under the unconstitutional conditions doctrine. Plaintiffs sought a writ of mandate and class action complaint, alleging the City set rates higher than necessary and transferred excess revenues to its general fund.

The Superior Court of Butte County denied the City's motion for summary judgment, finding triable issues of fact regarding whether the rates resulted in excessive charges and whether plaintiffs had a property interest in continued electric service. The court rejected the City's argument that article XIII C was inapplicable because the City did not impose, extend, or increase a tax when it approved reduced rates. The court also found that the unconstitutional conditions doctrine could apply to plaintiffs' takings claim.

The California Court of Appeal, Third Appellate District, reviewed the case and concluded that the City was entitled to relief. The court found article XIII C inapplicable

because the City did not impose, extend, or increase any tax by reducing its electric rates. The court also found the unconstitutional conditions doctrine inapplicable, as it applies only in the land-use permitting context, not to user fees like the electric rates in question. Consequently, the court directed the trial court to set aside its order denying the City's motion for summary judgment and to enter a new order granting the motion. The City's motion for summary judgment was granted, and the stay of proceedings in the trial court was vacated.

Significance: A reduction in utility rates do not require voter approval.

VI. EMINENT DOMAIN

A. *City of Ontario v. We Buy Houses Any Condition,* (2024) 103 Cal.App.5th 1212

- **Under Eminent Domain, a public entity must identify a specific project supporting the condemnation**

The City of Ontario filed an eminent domain action to acquire properties owned by We Buy Houses Any Condition, LLC, located near the Ontario International Airport. The City argued that the properties did not conform to land use requirements and suffered from airport-related impacts and blight. The City held a public hearing and adopted a resolution of necessity to commence eminent domain proceedings, citing the mitigation of airport impacts and elimination of blight as public uses. However, the resolution did not describe any specific proposed project.

The Superior Court of San Bernardino County granted summary judgment in favor of We Buy Houses, finding that the City had not articulated a proposed project as required to exercise its power of eminent domain. The court concluded that the City's resolution of necessity was insufficient because it did not describe a specific project, which is necessary to determine public interest, necessity, and compatibility with the greatest public good and least private injury. The court also granted We Buy Houses's request for attorney fees, making certain reductions to the requested amounts.

The Court of Appeal, Fourth Appellate District, Division One, reviewed the case and affirmed the lower court's decision. The appellate court held that the City failed to identify a proposed project with sufficient specificity in its resolution of necessity, as required by the Eminent Domain Law. The court found the City's arguments unpersuasive and concluded that the trial court properly rejected the City's effort to exercise eminent domain. Additionally, the appellate court found no abuse of discretion in the trial court's award of attorney fees to We Buy Houses, affirming the fee award.

Significance: A public entity must provide specific information as to what it intends to do with condemned property.

VII. MANDATORY DUTY

A. *Danielson v. County of Humboldt* (2024) 103 Cal.App.5th 1

- **County dog control ordinances did not create mandatory duty and the County and its officer were thereby immune from suit.**

The plaintiff, Candis Danielson, was seriously injured by dogs owned by Donald Mehrtens. She filed a lawsuit against several parties, including Mehrtens and the County of Humboldt. Danielson claimed that the County failed to discharge certain mandatory duties regarding dangerous and unvaccinated dogs under both state law and the Humboldt County Code, which she argued led to her injuries. The trial court sustained the County's demurrer without leave to amend, leading to Danielson's appeal.

The trial court found that the duties Danielson identified were not mandatory within the meaning of Government Code section 815.6, and therefore, the County was immune from liability as a matter of law. The court reasoned that even if the Humboldt County Code had created a mandatory duty to hold a potentially dangerous dog hearing, it was uncertain that the hearing would have resulted in the dog's destruction or quarantine. The court also concluded that the vaccination statutes created a mandatory duty to set up an impoundment system, but did not mandate the impound of any specific, unvaccinated animals.

The Court of Appeal of the State of California First Appellate District Division One affirmed the trial court's decision. The appellate court agreed that the duties identified by Danielson were not mandatory and that the County was immune from liability. The court also found that Danielson failed to identify any statute creating a mandatory duty which was breached by the County, and agreed with the trial court that her claim raised a serious question of causation.

Significance: Public entities are immune from liability for legislative action or discretionary law enforcement activity.

A Comprehensive Update on the Evolving Landscape of Tenant Protections

Friday, Oct. 18, 2024

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COMPREHENSIVE UPDATE ON THE EVOLVING LANDSCAPE OF TENANT PROTECTIONS

League of California Cities
Annual Conference, City Attorney Track
Long Beach, California
October 18, 2024

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I. Introduction

It is no secret that California suffers from high housing costs, an issue that has consistently worsened since 1970.[1] The housing market is particularly challenging for renters. Across the state, lower-income renters struggle with housing instability and unsafe, unsanitary housing conditions due to extreme rent burden and overcrowding. As a result, these renters are more vulnerable than ever to housing instability, displacement from their communities, and ultimately, homelessness.

In 2018, California enacted Assembly Bill 686, imposing a state mandate for public agencies to go beyond combating discrimination to affirmatively furthering fair housing ("AFFH"). "Affirmatively furthering fair housing" means "taking meaningful actions that, taken together address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws."[2] A major part of the State's AFFH mandate relates to preparation of localities' housing elements and implementation and administration of the policies and programs identified therein.[3]

The AFFH's mandate not only requires that local jurisdictions plan and implement policies that give low-income families the opportunity to live in high resource and affluent areas, but also to adopt policies that address disproportionate housing needs of protected classes.[4] Affordable housing advocates have long touted the "three Ps" approach to the housing affordability crisis: **protect** tenants from displacement, **preserve** existing affordable housing, and **produce** new (affordable) housing. While production and, to a lesser extent, preservation, have taken the forefront, the COVID-19 pandemic, more than any occurrence before, shined a light on the importance of protection.

This paper seeks to provide a foundational understanding of the duty to affirmatively further fair housing and the legal landscape related to landlord-tenant law, tenant protections and other anti-displacement policies.

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[1] Taylor, Mac. "California's High Housing Costs: Causes and Consequences," Legislative Analyst Report. March 17, 2015, available at https://www.lao.ca.gov.
[2] Gov. Code § 65583(c)(5) and Gov. Code Section 8899.50(a)(1).
[3] Gov. Code § 65583(c)(5); § 65583(c)(5) (c)(9) and Gov. Code § 65583.2(a).
[4] Gov. Code § 65583(c)(5).

II. Affirmatively Furthering Fair Housing in Housing Element Law

State law requires each city and county in the state to adopt a housing element endeavoring to provide for the housing needs of all economic segments of its community.[5] Over the years, Housing Element Law has "substantially strengthen[ed] the requirements of the housing element component of local general plans."[6] Several components of the housing element are mandatory,[7] including "an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement and development of housing."[8] Each jurisdiction is required to review its housing element for the appropriateness of its housing goals, objectives and policies and revise its housing element in accordance with the statutory schedule.[9]

The most recent cycle of revisions – the sixth cycle – started on January 1, 2021. Beginning with the sixth cycle, the state mandated local jurisdictions to "affirmatively further fair housing" in their housing element policies and programs as follows[10]:

- **Outreach**. A local agency's preparation, adoption, and implementation of the housing element must include, throughout the planning period, diligent efforts to include public participation from all economic segments of the community, including lower income residents, persons and households with special needs, and members of protected classes.[11]
- **Assessment of Fair Housing**. Each jurisdiction's housing element must include an assessment of the jurisdiction's housing needs, including analysis of household characteristics (e.g., housing cost burden, overcrowding), housing conditions, and the special housing needs of certain populations (e.g., the elderly, persons with disabilities, large families, unhoused individual and families).[12] The housing needs assessment must incorporate "an assessment of fair housing in the jurisdiction" that contains the components specified in Housing Element Law.[13]

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[5] Gov. Code § 65580.
[6] *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 425, 445.
[7] *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1164, 1182.
[8] Gov. Code § 65583.
[9] Gov. Code § 65588(a)-(b).
[10] Although there are AFFH requirements associated with a jurisdiction's duty to identify adequate sites to meet housing needs, we do not detail those here since they do not relate to anti-displacement or tenant protections. (Gov. Code § 65583(a)(3); *see also* Gov. Code §§ 65583(c)(1), 65583.2(c).)
[11] Gov. Code § 65583(c)(9); (c)(10)(A)(ii).
[12] Gov. Code § 65583(a)(2); (a)(7).
[13] Gov. Code § 65583.

- **Prioritization of Contributing Factors.** Each housing element must include a "statement of the community's goals, quantified objectives, and policies relative to affirmatively furthering fair housing"[14] and identify "the jurisdiction's fair housing priorities and goals, giving highest priority to those factors identified…that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance" and "the metrics and milestones for determining what fair housing results will be achieved."[15]
- **Goals and Actions.** Finally, the housing element program must "promote and affirmatively further fair housing opportunities and promote housing throughout the community or communities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, color, familial status, or disability and other characteristics" protected by FEHA.[16] Strategies and actions to implement the jurisdiction's fair housing priorities and goals, include "enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, and *protecting existing residents from displacement*."[17]

Since the sixth cycle was the first housing cycle where jurisdictions were required to address the AFFH requirements, many jurisdictions have committed to studying anti-displacement strategies and tenant protections in an effort to address these requirements.

III. Landscape of Landlord-Tenant Law in California

While in practice "rent control" is just one policy that may be used to promote housing stability, its historical origins and the legal challenges to its enactment have shaped the entire landlord-tenant law landscape in California. As such, rent control has colloquially come to refer to a suite of regulations governing the landlord-tenant relationship.

As far back as the 1970s, local officials in some California cities responded to the challenging rental market by enacting rent control. Today, California has statewide rent caps and just cause requirements for evictions, as established by the Tenant Protection Act of 2019.[18] In addition, many California cities and counties have adopted local policies that generally limit the

[14] Gov. Code § 65583(b)(1).
[15] Gov. Code § 65583(c)(10)(A)(iv).
[16] Gov. Code § 65583(c)(5).
[17] Gov. Code § 65583(c)(10)(A)(v).
[18] Assembly Bill 1482 (2019), codified at Cal. Civ. Code §§ 1946.2, 1947.12, 1947.13.

amount and frequency of rent increases, and require a just cause basis for eviction, while several others impose other tenant protections or anti-displacement policies, such as minimum lease requirements, relocation assistance, mediation programs and anti-harassment policies.[19]

A. Jurisdiction: Police Power

Rent control programs have been recognized as a legitimate exercise of a City's police power since the California Supreme Court's ruling in *Birkenfeld v. City of Berkeley* in 1972.[20] The *Birkenfeld* decision upheld the regulation of residential rents, reasoning that "[i]t is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good."[21] Nonetheless, the California Supreme Court in *Birkenfeld* concluded that Berkeley's 1972 rent control charter amendment violated due process because of its "inexcusably cumbersome rent adjustment procedure."[22]

To address the Court's concerns, Berkeley voters enacted a new rent control charter amendment in 1980, which guaranteed each landlord a fair return on their investment.[23] The fair return guarantee was fulfilled via two methods to rent adjustment: annual general adjustments granting increases based on a formula to be determined by the rent board, and a process for property-wide petitions to increase rent where necessary to ensure the landlord a fair return.[24] Following another challenge by Berkeley landlords, the Supreme Court concluded that the fair return guarantee addressed "every major procedural failing" identified in the *Birkenfeld* case.[25]

B. The Takings Clause

The California Supreme Court has also verified that local rent controls do not violate the takings clause in the U.S. and California Constitutions.[26]

In *Kavanau v. Santa Monica Rent Control Board*[27], the Court concluded that rent control is not a *per se* taking of property nor does it not constitute a regulatory taking of property so long as the "future rent ceiling [ ] will maintain financial integrity, attract necessary capital, and fairly

[19] "Updates on California Rent Control and Rent Stabilization Laws" (Nolo), last updated Aug. 30, 2024, *available at* https://www.nolo.com/legal-encyclopedia/california-rent-control-law.html.
[20] *Birkenfeld*¸17 Cal. 3d at 140-143.
[21] *Id.*
[22] *Id*. at 173.
[23] *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 651-52.
[24] *Fisher*, 37 Cal. 3d at 653; 688-690.
[25] *Id.* at 690.
[26] U.S. Const. Amend. V; Cal. Const. art. I, § 19.
[27] *Kavanau*, (1997) 16 Cal. 4th 761, 780.

compensate [a landlord] for the risks he has assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable."[28]

Two years later, the Court addressed a different claim of regulatory takings, which argued that Santa Monica's rent control program did not substantially advance a legitimate governmental purpose. In *Santa Monica Beach v. Superior Court*, [29] the California Supreme Court upheld the city's rent control law, finding that it was not an arbitrary regulation of property rights, and noting that rent control withstands heightened scrutiny even though the rational basis test controls (*i.e.* the Court noted that local rent control substantially advances a legitimate governmental purpose).[30]

More recently, takings challenges have been levied against other policies in the rent control suite. In *Ballinger v. City of Oakland,* landlords challenged the City of Oakland's tenant relocation assistance ordinance on the basis that the relocation fee requirements constituted an unlawful physical taking and an unlawful exaction in violation of the takings clause of the U.S. Constitution.[31] The Oakland ordinance requires, upon certain terminations of a tenancy, landlords to pay their tenants a relocation payment. The Ninth Circuit panel held that the relocation assistance ordinance was not an unconstitutional physical taking of a specific and identifiable property interest, but merely regulated the landlords' use of their land by regulating the landlord-tenant relationship.[32] The landlords had voluntarily chosen to lease their property and thereafter to evict their tenants; the ordinance simply imposed a transaction cost on their decision to terminate the tenancy. Relocation fees are a monetary obligation triggered by the landlord's actions with respect to their elected use of their property, not a burden on the landlord's property interest.[33][34]

C. Other Constitutional Challenges

California rent control programs and landlord-tenant regulations have been subjected to judicial challenges based on other constitutional provisions:

[28] *Id.* at 785.
[29] *Santa Monica Beach* (1999) 19 Cal. 4th 952.
[30] *Id.* at 967.
[31] *Ballinger v. City of Oakland*, 24 F.4th 1287 (9th Cir. 2022).
[32] *Id.* at 1293.
[33] *Id.* at 1293-94.
[34] See, e.*g., Southern California Rental Housing Assn. v. Cnty of San Diego*, 550 F.Supp.3d 863 (S.D. Cal. 2021); *Williams v. Alameda County*, 642 F.Supp.3d 1001 (N.D. Cal 2022), both holding COVID-19 eviction moratoria did not constitute per se or regulatory taking of property.

Equal Protection. In *Pennell v. City of San Jose* [35], the U.S. Supreme Court denied an equal protection challenge to a provision of San Jose's rent control law that authorized hearing officers to consider individual tenant hardships when reviewing a landlord petition for a rent increase. The Court concluded that the regulation did not burden a suspect class or fundamental interest, and that protecting tenants facing hardships served a legitimate purpose, so the resulting differential treatment of certain landlords based on whether or not they house hardship tenants was rational.[36]

California Courts of Appeal have also upheld the differential treatment of similarly situated persons or entities in the rent control context. In *Cotati Alliance for Better Hous. v. City of Cotati*, the court rejected an argument that the use of a "return on investment" standard in Cotati's rent stabilization ordinance denied equal protection because it would "lead to the imposition of different rent ceilings for identical rental units." [37] Similarly, the Court concluded in *Interstate Marina Development Company v.* County *of Los Angeles* that generally applicable rent controls do not deprive landlords of equal protection of the laws.[38]

Right to Privacy. In *Hotop v. City of San Jose*, landlords challenged rental registration requirements on the basis that they violated the Fourth Amendment's guarantee against unreasonable government searches and seizures and the right to privacy under the California Constitution[39], by requiring disclosure of certain information via annual registration of rent stabilized units in the city.[40] The court concluded that plaintiffs would need to possess a reasonable expectation of privacy, which they did not, in the contents of the documents before the government's conduct could be deemed a "search."[41]

First Amendment. Finally, in a recent case, *Yim v. City of Seattle*, the Ninth Circuit addressed a challenge to Seattle's Fair Chance Ordinance.[42] In that case, plaintiffs challenged Seattle's complete prohibition on a landlord's ability to "inquire about" and "take adverse action based on" a prospective tenant's criminal history. The court reviewed the "inquiry" and "adverse

[35] *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).
[36] *Id.*
[37] *Cotati Alliance for Better Hous. v. City of Cotati* (1983) 148 Cal.App.3d 280, 291.
[38] (1984) 155 Cal. App. 3d 435, 441; *see also Berman v. Downing* (1986) 184 Cal. App. 3d Supp. 1.
[39] *Hotop v. City of San Jose*, 982 F.3d 710 (9th Cir. 2020).
[40] *Hotop*, *supra*, 982 F.3d at 713-14.
[41] *Id.* at 714; see also *San Francisco Apartment Ass'n v. City and Cnty of San Francisco*, 881 F.3d 1169 (9th Cir. 2018) (holding requirement to provide buyout agreements to city in publicly searchable database did not violate right to privacy under California Constitution).
[42] *Yim*, *supra*, 63 F.4th 783 (9th Cir. 2023).

action" provisions separately.[43] Commercial speech receives a lower level of protection (intermediate scrutiny) than all other speech (strict scrutiny).[44] Without determining if the targeted speech was commercial or not, the court in *Yim* applied an intermediate scrutiny standard to the "inquiry" provision struck down the "inquiry" provisions as an overbroad regulation of speech.[45] The court noted that a more "narrowly tailored" ordinance, such as San Francisco's,[46] *might* withstand intermediate scrutiny.[47] On the other hand, the court upheld the "adverse action" provision as a proper regulation of conduct because landlords do not have a fundamental right to exclude people from their property.[48] Applying rational basis review, the court found that the city had a legitimate governmental interest in prohibiting the landlords from taking adverse action against prospective tenants based on their criminal history.[49]

D. State Law Constraints

While the constitutionality of rent control programs is well established, state laws prohibit specific aspects of local rent control.

1. Rent Stabilization and the Costa-Hawkins Rental Housing Act

The Costa-Hawkins Rental Housing Act imposes several restrictions on the right of jurisdictions to adopt rent control. The Act limits regulation of the housing units that received an initial certificate of occupancy prior to February 1, 1995.[50], and effectively deregulated detached single-family homes.[51] The Act mandates that a landlord can freely set the rent for a vacant rent regulated unit when a new tenancy begins. Because Costa-Hawkins prohibits cities and counties from setting the initial rent in multifamily housing, local programs are essentially limited to regulating the amount and frequency of rent increases for existing tenancies.

2. Exiting the Rental Market and the Ellis Act

The Ellis Act was adopted in 1985 to supersede a 1984 California Supreme Court decision

[43] *Id.* at 791.
[44] *Id.* at 793-94.
[45] *Id.* at 795-96.
[46] San Francisco's ordinance provides that a landlord may inquire about or require disclosure of (but may not take adverse action based on) misdemeanor convictions within the last 3 years, felony convictions within the last 7 years and "unresolved arrests."
[47] *Yim*, *supra*, 63 F.4th 797-99.
[48] *Id.*
[49] *Id.*
[50] Civil Code § 1954.52(a)(2).
[51] Civil Code § 1954.52(a).

that effectively allowed a city to require rental property to continue to be used as rental property until a demolition or removal permit was issued by the city.[52] The Act expressly gives landlords the unequivocal right to terminate tenancies in order to exit the residential rental market.

While granting right to landlords to exit the rental market, the Ellis Act provides specific authority for cities and counties to regulate aspects of a landlord's exit. Cities and counties must affirmatively enact ordinances to enable those protections. First, the Ellis Act allows local jurisdictions to require that landlords provide tenants with additional notice of a termination of tenancy that relies on the Act.[53] Generally, state law requires landlords provide at least 30 days' notice to terminate a tenancy of less than one year, and 60 days to terminate a longer tenancy.[54] The Ellis Act allows a local jurisdiction to require a 120-day notice to terminate a tenancy based on the landlord's withdrawal of the property from the rental market. The 120-day notice can be extended to one year for seniors over the age of sixty-two and persons with disabilities.

Second, the law authorizes local jurisdictions to require that landlords mitigate the impacts of the withdrawal on tenants, for instance, by paying relocation assistance to tenants.[55] Numerous published decisions explore the outer limits of relocation assistance that landlords can legally be required to pay departing tenants.[56]

Finally, the Ellis Act authorizes local jurisdictions to strictly regulate re-entry of previously withdrawn units to the rental market.[57] Cities and counties can impose penalties if the property is returned to the rental market within two years of withdrawal; can require re-control of the rents for units returned to the rental market within five years of withdrawal at the last monthly rental amount plus annual general adjustments; and can require landlords provide former tenants with a first option to re-rent units returned to the rental market up to ten years from withdrawal.[58]

3. Just Cause for Eviction and Preemption of Procedural Requirements

The essence of a "just cause for eviction" law is that tenants cannot be evicted unless it is for one or more enumerated reasons. The bases for just causes are often split into two categories:

[52] Gov. Code §§ 7060 – 7060.7; *see e.g.* Gov. Code § 7060.7 & *Nash v. City of Santa Monica* (1984) 37 Cal. 3d 97.
[53] Gov. Code § 7060.4.
[54] Civ. Code §§ 1946-1946.1.
[55] Gov. Code § 7060.1(c).
[56] *Pieri v. City and County of San Francisco* (2006) 137 Cal. App. 4th 886 (upholding relocation payments of up to $13,500 per unit with additional payments of $3,000 if household included senior or disabled person); *Levin v. City and County of San Francisco* (2014) 71 F. Supp. 3d 1072 (striking down as "prohibitive" requirement that landlords pay twenty-four times difference between tenant's current rent and fair market value of comparable unit in city).
[57] Gov. Code § 7060.2.
[58] *Id.*

at-fault causes and no-fault causes. Common at-fault causes include nonpayment of rent, failure to cure a breach of a material term of a lease, maintenance of a nuisance, engaging in criminal activity, or using the rental unit for an illegal purpose. Typical no-fault causes include owner move-in, necessary and substantial repairs, demolition, or removal of the unit from the rental housing market. Where there are just cause requirements, each eviction or termination notice must expressly state the reason.

While a jurisdiction's police powers to enact regulations are broad, local regulation cannot conflict with the general laws of the state of California.[59] In *Birkenfeld,* the Berkeley ordinance restrained evictions both by (1) limiting the grounds upon which a landlord could seek to recover possession of a rental unit and (2) requiring landlords to obtain a certificate of eviction from the rent control board before seeking such eviction.[60] The landlords challenged both provisions alleging conflict with state unlawful detainer statutes.[61] The *Birkenfeld* court upheld the just cause for eviction provisions, reasoning that "[t]he mere fact that a city's exercise of the police power creates [a defense in unlawful detainer proceedings] does not bring it into conflict with the state's statutory scheme."[62] On the other hand, the court struck down the certificate requirement, finding that unlike the limitations on the grounds for eviction, which can affect summary repossession proceedings only by making substantive defenses available to the tenant, the requirement of a certificate of eviction raises procedural barriers between the landlord and the judicial proceeding."[63]

4. The Tenant Protection Act of 2019

In 2019, the California Legislature passed AB 1482 (2019), the Tenant Protection Act of 2019 ("TPA").[64] The TPA went into effect on January 1, 2020.

The TPA provides just cause for eviction protections to most tenants in the state who have been living in their units for at least twelve months (or where at least one tenant has occupied the unit for at least 24 months if a new tenant is added to the unit).[65] Under the TPA, a landlord who

[59] Cal. Const., Article XI, § 5.
[60] *Birkenfeld*, *supra*, 17 Cal.3d 148.
[61] *Id.* at 149; *see also* Code of Civ. Pro. §§ 1159, et seq.
[62] *Birkenfeld*, *supra*, 17 Cal.3d at 149.
[63] *Id.* at 151.
[64] In 2021, the TPA was amended by Assembly Bill 798 to extend just cause for eviction protections and rent caps to tenancies of any mobilehomes owned by management of a mobilehome park, as those terms are statutorily defined. In 2023, the TPA was amended by Senate Bill 567 to address certain loopholes in the just cause for eviction provisions related to "substantial renovations" and "owner move-in."
[65] Civ. Code § 1946.2.

seeks to terminate a tenancy based on a no-fault just cause must provide relocation assistance to the tenant equal to one months' rent.[66] The TPA also caps rent increases to no more than 5% plus inflation according to the regional Consumer Price Index, or 10%, whichever is lower,[67] with no more than two rent increases in any twelve-month period.[68]

TPA exempt certain types of housing its requirements.[69] Of significance, the rent caps do not apply to housing that is subject to local rent control.[70] The just cause provisions also do not apply to residential real property subject to either a local just cause for termination ordinance adopted on or before September 1, 2019, or to a local just cause ordinance adopted after September 1, 2019 that is "more protective" than the TPA.[71] An ordinance is "more protective" than the TPA if (a) the just cause is consistent with the TPA, (b) the ordinance further limits the reasons for terminations of a residential tenancy, provides for higher relocation assistance amounts, or provides additional tenant protections that are not prohibited by any other provision of law, and (c) the local government has made a finding that their local ordinance is more protective than the TPA.[72] A local just cause ordinance adopted after September 1, 2019 that is less protective than the TPA is unenforceable.[73] Therefore, it is important for a local jurisdiction to ensure any local just cause ordinance meets the "more protective" definition in the TPA.

5. Other Relevant State Laws

In addition to these statutes, several other state laws either directly or indirectly impact a local jurisdiction's ability to legislate in the landlord-tenant field, including laws relating to mobilehome park and mobilehome tenancies[74], hiring of real property[75], sealing of unlawful

[66] *Id.* at subd. (d).
[67] Civ. Code § 1947.12(a)(1).
[68] *Id.* at para. (a)(2).
[69] *See, generally*, Civ. Code §§ 1946.2(e); 1947.12(d).
[70] Civ. Code. § 1947.12(d)(3).
[71] Civ. Code § 1946.2(i)(1).
[72] *Id.*
[73] *Id.*
[74] Mobilehome Residency Law (Civ. Code § 798, et seq.), Mobilehome Parks Act (Health & Safety Code § 18200, et seq.), Manufactured Housing Act (Health & Safety Code § 18000, et seq.), Recreational Vehicle Park Occupancy Law (Civ. Code § 799.20, et seq.), and Special Occupancy Parks Act (Health & Safety Code § 18860, et seq.)
[75] Civ. Code §§ 1940-1954.06 (regulating key topics related to rental housing and the landlord-tenant relationship, including prohibitions on retaliation against or harassment of tenants, limitations on security deposits, limitations on rental housing application fee, landlord's right of entry to rental units, and tenant screening and credit reporting).

detainer records[76], habitability of rental housing[77], fair housing[78], and land use.[79] It is critical for local jurisdictions to refer to these laws when enacting policies that regulate the rental housing business and the landlord-tenant relationship.

IV. Comprehensive Review of Anti-Displacement Policies

A. Rental Registries and Affordable Housing Portals

Rental registration programs are designed to collect basic information about the rental housing market in a jurisdiction. Rental registration programs are used generally used to monitor compliance in jurisdictions with just cause programs. The jurisdiction-specific data provided by rental registration helps to better inform further policymaking and tailor policies to local needs.

Rental registration policies may require either or both of the following: (1) that rental registration information be updated annually or (2) that rental registration information be updated upon any change. Appendix A lists a sample of the rent registry information collected by various jurisdictions.

Because rental registration programs require the collection of tenant information, questions and concerns about public disclosure due to California's Public Records Act requests are a concern. To address the concerns, jurisdictions often include language to address the handling of personal information.[80]

To increase compliance with rental registration requirements, jurisdictions that require rental housing operators to secure a business license often tie the registration requirements to the licensing requirement. Jurisdictions without a business license requirement use several other

[76] Civ. Pro. Code § 1161.2.
[77] Civ. Code §§ 1941-1941.7; Health & Safety Code §§ 17920; 17920.3.
[78] Fair Employment and Housing Act (Gov. Code §§ 12900, et seq.), Unruh Civil Rights Act (Civ. Code §§ 51, et seq.), Ralph Civil Rights Act of 1976 (Civ. Code § 51.7), and Disabled Persons Act (Civ. Code §§ 54, et seq.)
[79] Housing Crisis Act (Gov. Code § 66330.5).
[80] Sample language might read: "The City Council recognizes that some of the Rental Registry Information constitutes Personal Identifying Information (PII) or proprietary information of a Landlord that could create a competitive disadvantage for every Landlord required to comply with this Chapter. The City Council also recognizes that the Public Records Act (Government Code §§ 6250, et seq.) generally requires that the City make available to the public information in its possession that relates to the conduct of the public's business. The Public Records Act contains several exceptions intended to protect the privacy of individuals and the proprietary information of businesses that is in the City's possession only because of a legal requirement to provide it to the City in connection with a regulatory program. Except for the Rental Registry Information to be made available via the public database, the City Council declares that all other Rental Registry Information shall be received in confidence, and that the public interest in nondisclosure of such Rental Registry Information clearly outweighs the public interest in disclosure."

enforcement tools, including late fees, affirmative defense to unlawful detainer based on a failure to register, and administrative citations to enforce the requirement.

B. Building on TPA

As noted, local just cause for termination ordinances adopted after September 1, 2019, must be "more protective" than the TPA.[81] The various policies outlined below could be adopted by various entities to strengthen the protections in the TPA.

1. Anti-Price Gouging

The applicability of the rent caps in the TPA is greatly limited by the six (6) categories of exemptions.[82] To the extent permitted by state law, a jurisdiction could readopt the rent caps in the TPA and apply them to more types of rental housing than authorized by the TPA. These provisions of the TPA could also benefit from local enforcement, such as a requirement to register regulated units and provide the jurisdiction with notice of any rent increases for those units.

2. Tenant Relocation Assistance

A jurisdiction may elect to strengthen the relocation assistance provisions of the TPA. For example, greater relocation assistance could be required where a tenant is displaced either temporarily or permanently and based on a no-fault just cause. In instances where substantial renovations cause displacement, a jurisdiction might require temporary relocation assistance in the form of comparable replacement housing, rent differential payments, and per diem compensation for food, or transportation.

In addition, a local agency might provide for an increased permanent relocation assistance amount to mitigate the effects on a tenant where the tenant is to be permanently displaced from their unit based on a no-fault just cause. Relocation assistance policies typically feature at least some of the following:

- To cover expenses associated with first month's rent, security deposit and moving expenses, relocation payments of up to 2 to 3 months of rent or additional, payments for lower-income households, households that have resided in their unit for longer, or households with children, disabled persons, seniors, or terminally ill individuals;
- An unlimited 60-day subscription to a rental listing service; and
- Personalized relocation assistance services from a relocation specialist/agency.

[81] Civ. Code § 1946.2(i)(1).
[82] Civ. Code § 1947.12(d).

In crafting a permanent relocation assistance program, jurisdictions should consider a disbursement schedule for rental assistance payments that fairly balances the interests of the landlord in ensuring the tenant vacates the unit and the interests of the tenant in ensuring adequate resources to complete a move. Local agencies should also consider who will monitor and administer the relocation assistance program. Finally, ongoing engagement with stakeholders will be necessary for the jurisdiction to tailor the policy to specific jurisdictional needs. For example, there may be local interest in creating a tiered system of relocation payments based on length of tenancy or size of landlord portfolio or an expressed need to develop a loan, grant, or waiver program to assist low-income, low asset and special needs landlords with meeting relocation assistance obligations.

C. Limiting At-Fault Just Causes

Some jurisdictions have sought to prevent displacement and homelessness (particularly in the post-COVID era) by limiting the scope of at-fault just causes. For example, several jurisdictions require landlords to first provide tenants with a "notice to cease" requesting that the tenant cease the violative behavior within a reasonable time after receipt of the notice before seeking to evict the tenant.[83]

Perhaps most creatively, the City of Los Angeles adopted an ordinance amending its just cause for eviction provisions to establish a "minimum rent arrears" threshold for evictions based on non-payment of rent.[84] In essence, the ordinance restricts a landlord's ability to evict a tenant for non-payment of rent where the tenant owes rent in an amount equal to or less than one month's worth of fair market rent. For the purposes of the ordinance, "fair market rent" means the fair market rent in Los Angeles County, as published annually by the U.S. Department of Housing and Urban Development, for an equivalent sized rental unit (based on number of bedrooms) as that occupied by the tenant. The theory is that lower-income tenants often experience displacement (and its life-changing effects) due to a single unexpected expense, such as a medical emergency, a car accident, or the sudden death of a family member. Providing these tenants with the "buffer" of a minimum threshold for amounts in arrears can provide them with invaluable time to recover from these economic setbacks and to seek and receive rental assistance.

[83] See *Rental Housing Association of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741; *San Francisco Apartment Assn. v. City and County of San Francisco* (2018) 20 Cal.App.5th 510.
[84] Los Angeles Municipal Code §§ 151.09; 165.03.

D. Tenant Screening and Fair Chance Ordinances

Tenant screening practices are often a major barrier to accessing otherwise affordable housing. Landlords may consider any number of details in a prospective tenant's background check, including their credit score, criminal record, or eviction history, as a disqualifier, regardless of the recency or accuracy of that information. Residential landlords have been known to use eviction history and records, consumer credit reports, and algorithmic or automated tenant screening in evaluating tenants for their rental properties. These sources of information may contain misleading, incomplete, or inaccurate information, and ultimately serve as a barrier to otherwise qualified tenants seeking to access housing.[85]

In many cases, landlords do not even see the report detailing the issues flagged in the tenant's background. Rather, a landlord enters the applicant's information into a tenant screening program that uses an algorithm and publicly available records to inform the landlord whether they should rent to this person. There is no opportunity for the tenant to challenge the validity or relevance of the information. As a result, some jurisdictions have sought to limit the information that can be used by a landlord in making rental decisions.

Attempts to make rental selection a more open process started with "fair chance" laws, i.e. policies seeking to eliminate the unique barriers that prevent formerly the incarcerated and other individuals who have interacted with the criminal justice system from accessing housing. Other limitations on landlord practices for screening of prospective tenants that a jurisdiction may consider include:

- Requiring that a landlord establish uniform eligibility criteria for applicants;
- Prohibiting the use of algorithmic or automated tenant screening services;
- Prohibiting inquiry or adverse action based on certain tenant information; or
- Requiring a process that allows applicants to dispute or rebut information used as the basis for and adverse action.

The policy could provide that a landlord will not inquire about or base an adverse action on any of the following: (1) a prospective tenant's failure to pay rent or utility bills during the COVID-19 emergency period; (2) a prospective tenant's participation in a rental assistance

[85] Liewant, Matthew H., "Locked Out: How Algorithmic Tenant Screening Exacerbates the Eviction Crisis in the United States," 6 Geo. L. Tech. Rev. 1 (2022).

program; (3) a prospective tenant's eviction history; (4) a prospective tenant's criminal history; or (5) a prospective tenant's consumer credit history.

E. Prohibition on Algorithmic Rent Setting

As with the algorithmic tenant screening services described above, the use of algorithmic rent-setting devices and platforms poses unique problems in a housing market that is already experiencing historic rent levels. In 2022, ProPublica published a report about RealPage's Yieldstar, a software that uses data analytics to suggest daily prices for open units based on data from clients, including private information on what nearby competitors are charging.[86] As the ProPublica report noted: "For tenants, the system upends the practice of negotiating with apartment building staff. RealPage discourages bargaining with renters and has even recommended that landlords in some cases accept a lower occupancy rate in order to raise rents and make more money."[87]

On September 3, 2024, San Francisco became the city in the nation to pass a law banning the sale or use of devices to set rents or occupancy levels. There are some exemptions, including software that establishes rent or income limits for the city's affordable housing program and products that use trade association reports of anonymous renter data. Landlords who violate the law may be subject to civil penalties of up to $1,000 per violation and fines that cover damages, restitution and attorneys' fees. The law also authorizes the city to sue landlords and software providers who continue to use these algorithmic programs.

F. Anti-Retaliation and Anti-Harassment Policies

Many jurisdictions have adopted ordinances prohibiting landlords from harassing or retaliating against tenants. "Tenant harassment" means actions by a landlord against a tenant that are intended to upset the tenant and make them want to move out. "Retaliation" is a related concept referring to adverse actions by a landlord against a tenant after the tenant has exercised a right or otherwise engaged in a protected activity. Protected activities may include complaining about violations of applicable laws, requesting maintenance or repairs, forming a tenants' association or union, displaying political speech, etc. Some common acts that may be considered harassment and retaliation are listed in Appendix B.

[86] Vogell, Heather, "Rent Going Up? One Company's Algorithm Could Be Why.," ProPublica (October 15, 2022), available at https://www.propublica.org/article/yieldstar-rent-increase-realpage-rent.
[87] *Id.*

In these ordinances, the remedies for a landlord's violation of anti-harassment and anti-retaliation often include an affirmative defense to an unlawful detainer or other action to recover possession of a rental unit, damages assessed per day or per violating act, administrative fines, and in particularly egregious cases, criminal prosecution of the offending landlord.

G. Summary of Other Related Policies

1. Mediation Programs

Mediation programs provide landlords and tenants with a neutral forum for resolving common disputes and disagreements without the need to resort to costly, time-consuming court proceedings. Cases suitable for landlord-tenant mediation include security deposit disputes; rent increase or repayment negotiations; tenant buyout agreements; negotiations related to repairs and maintenance of a rental unit; and renegotiation of rental leases or provisions. Jurisdictions looking to establish a mediation program can either contract with a local agency or an organization that already provides these services or create their own city-run program.

For instance, in 2017, the Marin County Board of Supervisors adopted the Rental Housing Dispute Resolution Ordinance, requiring mediation of disputes related to cumulative rent increases in excess of five percent (5%) in any twelve-month period, if requested by either the landlord or tenant. Although participation is mandatory if mediation is requested by any party, it may result in either a voluntary mediation agreement or a nonbinding mediation statement from a neutral third party.[88] There are no direct costs to participating landlords or tenants for the mediation services.

2. Legal or Counseling Services

As a response to the pandemic, the cities of San Jose and Mountain View created Eviction Help Centers where tenants and landlords could receive information on local laws, assistance to apply for rent relief and legal aid. These cities have now made the centers a permanent tenant/housing resource center post-pandemic. Relatedly, language barriers can keep many communities from accessing the housing opportunities and services they need. Taking steps to increase the city's capacity to engage under multiple languages can improve those outcomes.

Some jurisdictions, such as San Francisco and the City of Los Angeles, have gone beyond counseling to provide tenants with eviction defense services. Typically referred to as a "right to counsel," these programs contribute public funds (typically to third-party legal service providers) to provide tenants with legal assistance in eviction cases.

[88] Marin County Code § 5.95.050.

3. Rental Housing Habitability/Code Enforcement Inspection Programs

Poor housing conditions are a significant cause of tenant displacement. Numerous jurisdictions, particularly those with rent control and just cause, have established programs whereby local code enforcement officers routinely inspect the rental housing inventory and notify property owners of conditions that violate state and local housing and building codes, or otherwise threaten the health and safety of residents. The development of rental housing inspection programs may also help jurisdictions satisfy new state requirements related to code enforcement, including new rules on cities and counties related to the enforcement of complaints of substandard conditions or lead hazard violations pursuant to Assembly Bill 838 (2019) and mandates that cities and counties expand their code enforcement programs to require building-wide inspections where major problems are identified in one unit under AB 548 (2023).

4. No-Net-Loss and "Right to Return"

SB 330 (the Housing Crisis Act of 2019) requires that protected units are replaced one-for-one in cases of the redevelopment of a rental property and that lower-income tenants are provided with an opportunity to return to the newly constructed units at an affordable housing cost. These provisions are currently mandated by state law through January 1, 2030, but local jurisdictions could adopt permanent no-net-loss and "right to return" policies. These policies would protect critical sources of housing affordable for lower-income families and incentivize higher-density infill redevelopment when paired with land use policies to support the feasibility of this redevelopment.

5. Vacancy Tax

A vacancy tax is an annual tax on vacant property, intended to incentivize property owners to make their properties available for rent and reduce the number of underutilized homes.

The Empty Homes Tax was approved by San Francisco voters on November 8, 2022, and went into effect on January 1, 2024. Generally, the tax is imposed on certain residential units that remain vacant for more than 182 days in a year. For the first year that the property is determined to be vacant, the tax ranges between $2,500 and $5,000 based on the square footage of the residential unit and increases to $20,000 by the third year.

San Francisco's tax was immediately challenged by property owners upon its adoption. The property owners have argued that the vacancy tax measure should be disqualified as an "illegal special tax" because they have a right to keep their properties vacant under the Fifth Amendment

and because the Ellis Act prohibits the city from penalizing property owners for refusing to offer units for rent. Most recently, the superior court judge rejected the city attorney's motion to dismiss the lawsuit and the case remains pending.

V. The Role of Anti-Displacement Policies in AFFH

The tenant protections and anti-displacement policies outlined above can be utilized by jurisdictions to address the several elements of their duty to affirmatively further fair housing.

Addressing Disparities in Housing Needs and Access to Opportunities. Housing Element law requires "analysis and documentation of household characteristics, including level of payment compared to ability to pay, housing characteristics, including overcrowding, and housing stock condition"[89] and "analysis of any special housing needs, such as those of the elderly; persons with disabilities" and others.[90] Rental registration policies can assist jurisdictions in better understanding the conditions of the rental housing marketing, their existing rental housing inventory, the characteristics of their renter households, and ultimately, their jurisdiction's rental housing needs. Rental registration data often results in analyses of rent burden, housing stock and special housing needs that highlight fair housing issues.

Policies such as tenant screening policies, bans on algorithmic rent-setting software, and unified affordable housing portals may ultimately help public agencies to meet their duty to affirmatively further fair housing by removing historical barriers to accessing affordable housing, particularly for vulnerable groups. Rent control and just cause help to keep units affordable, ensuring that lower-income tenants are not further rent-burdened.

Replacing Segregated Living Patterns with Integrated. AFFH policies can also help replace segregated living patterns with integrated and balanced living patterns. Gentrification and its consequent displacement are one cause of resegregation throughout the state.[91] Rent control and just cause stabilize housing costs for existing tenants in changing neighborhoods, thereby contributing to community stability, and minimizing segregation caused by displacement.

No net loss, the right to return, and tenant relocation assistance can help to ensure that any necessary displacement is temporary, allowing long-term community members to return to revitalized communities. Anti-displacement polices also help keep tenants in place when new investment in racially and ethnically concentrated areas of poverty could displace existing tenants.

[89] Gov. Code § 65583(a)(2).
[90] Gov. Code § 65583(a)(7).
[91] Fair Housing Imperative to Address the Displacement Crisis, Anne Bellows, Civil Rights Insider 2018, pp 5-6.

Policies such as rent stabilization, just cause, tenant relocation assistance, and no-net-loss stabilize lower-income communities, preserve affordable housing, and prevent displacement, enabling lower-income tenants to reap the benefits (e.g., jobs, education, transportation, community spaces) of new investment.[92]

Fostering Public Participation Throughout the Housing Element Cycle. Tenant protections can help meet the requirement for public participation throughout the housing element cycle. Housing element law requires a "diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element."[93] For one, tenants, particularly those who are low-income, have demanded protections for decades.[94] A jurisdiction's responsiveness to these demands would undoubtedly demonstrate meaningful engagement with lower- and even moderate-income community members.

Rent control and just cause can give lower-income community members more housing stability to help them participate in decision-making. These policies also naturally facilitate communication between the public agency and stakeholders, including landlords, tenants, realtors, and advocacy organizations. They also foster relationships between the public agency and other third-party service providers, who hold valuable information and data.

Preserving Existing Affordable Housing Stock. The assessment of fair housing must include strategies and actions to preserve existing affordable housing and protect existing residents from displacement.[95] Housing element law also requires that local governments plan to "conserve and improve the condition of the existing affordable housing stock."[96] Rent control and just cause prevent landlords from increasing rent at a rate that renders their units unaffordable and help conserve and improve affordable housing stock. Enhanced relocation assistance ensures tenants can remain in their communities, where unsafe or uninhabitable conditions are being addressed

[92] Urban Habitat case studies available at: https://urbanhabitat.org/sites/default/files/UH%202018%20Strengthening%20Communities%20Through%20Rent%20Control_0.pdf.
[93] Gov. Code §§ 65583(c)-65583(c)(8).
[94] See, e.g., Center for Popular Democracy: https://www.populardemocracy.org/news/publications/our-homes-our-future-how-rent-control-can-build-stable-healthy-communities; Pasadena Now: https://www.pasadenanow.com/main/tenant-groups-expand-push-for-rent-control-in-pasadena/; Public Advocates: https://www.publicadvocates.org/wp-content/uploads/PA-comments-on-HUD-regulatory-reform-notice-6.14.17.pdf Spectrum News: https://spectrumnews1.com/ca/orange-county/election/2020/09/16/renters--advocates-push-for-prop--21-rent-control-initiative; and Tenants Together rent control ordinance map: https://www.tenantstogether.org/resources/list-rent-control-ordinances-city.
[95] Gov. Code § 65583(c)(10)(A)(v).
[96] Gov. Code § 65583(c)(4).

through substantial repairs and replacement. Anti-harassment and anti-retaliation empower tenants to enforce state and local habitability requirements. Proactive inspections of rental housing stock can prevent not only displacement of tenants due to unsafe or unsanitary conditions, but also the degradation of a jurisdiction's existing affordable housing units.

APPENDIX A

SELECT RENT REGISTRY INFORMATION

- Property ownership and management information;
- The Assessor's Parcel Number(s) for the property;
- The number of buildings and rental units on the property;
- The street address of each rental unit;
- The year the property (or the rental unit(s)) received their initial certificate of occupancy;
- The size of each rental unit (e.g., square footage, number of bedrooms and bathrooms);
- The occupancy status of each rental unit (e.g., vacant or occupied);
- For each occupied rental unit, the date of commencement of the existing tenancy;
- For each occupied rental unit, the current amount the monthly rent received for the unit, including the amount of any charges or fees for utilities and housing services;
- For a rental unit in a condominium or other common interest development, the amount of the homeowners' association fees, regular and special assessments, or other similar charges paid to an association;
- Whether or not the tenant receives a housing voucher or other rental subsidy;
- Any change in a rental unit's ownership or management, or a change in the owner's or manager's contact information;
- Any change in the monthly rent for a rental unit, including the amount of the rent change, the effective date of the rent increase, and the new monthly rent amount;
- Any other change in the terms of the rental agreement;
- Information regarding evictions or terminations of tenancies, including copies of relevant notices and unlawful detainer filings;
- A change in the occupancy status of a rental unit, including the reason for which the prior tenancy was terminated.

APPENDIX B

COMMON ACTS OF HARASSMENT

- Taking away services provided in the lease (such as parking or laundry).
- Shutting off utilities to the tenant's unit.
- Entering the apartment without proper notice.
- Using lies or intimidation intended to make a tenant move out.
- Giving a "three-day notice" or other eviction notice that's based on false charges, where the landlord does not intend to take the case to court.
- Using fighting words or threatening bodily harm.
- Making sexual or unwanted advances.
- Refusing to do repairs that are required by law.
- Intentionally disturbing a tenant's peace and quiet.
- Interfering with a tenant's right to privacy.
- Refusing to acknowledge receipt of a lawful rent payment.

Surplus Land Act (Part 2)

Friday, Oct. 18, 2024

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Surplus Land Act (Part 2)*

League of California Cities
2024 Annual Conference

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**Please note that this paper follows up on a paper by the same authors titled "Introduction to the New Surplus Land Act", which was prepared for the League of California Cities' Spring 2024 City Attorney conference.*

Surplus Land Act (Part 2)

In late 2023, Gov. Gavin Newsom signed Senate Bill 747 and Assembly Bill 480 ("New Legislation") into law to make common-sense revisions to the Surplus Land Act ("Act") that provide clarity and additional flexibility to local public agencies[1] and private developers.

The New Legislation took effect on January 1, 2024. As a result, the Department of Housing and Community Development's ("HCD") Surplus Land Act Guidelines issued in 2021 ("2021 Guidelines"), which interpret and implement the Act, became outdated. On February 23, 2024, HCD published draft updated Guidelines ("Draft Updated Guidelines"), intended to align with the New Legislation. After a 30-day public comment period, HCD evaluated public comments, prepared responses to the same, incorporated changes to the Draft Updated Guidelines, and ultimately issued final updated Guidelines ("Final Updated Guidelines") on August 1, 2024.

HCD published the Final Updated Guidelines on its webpage for Public Lands for Affordable Housing Development. In addition, HCD published (1) responses to the public comments received on the Draft Updated Guidelines and (2) a redline showing the differences between the Draft Updated Guidelines and the Final Updated Guidelines. While the redline is helpful in showing how HCD incorporated public comments into the Final Updated Guidelines, it does not highlight the numerous changes between the 2021 Guidelines and the Final Updated Guidelines, which are the changes that agencies most urgently need to understand to ensure they remain compliant. Our office has prepared a redline showing these changes, available here.

This paper summarizes and analyzes some of the key aspects of the Final Updated Guidelines. Please note that this is not an exhaustive analysis of all changes. Agencies, in consultation with legal counsel, should closely review the Final Updated Guidelines to ensure they remain compliant with the Act.

General Applicability and Definitions

The New Legislation made several changes to the general applicability of the Act and the definitions set forth therein. The Final Updated Guidelines not only incorporate these updates, but also expand on certain changes.

Leases

The New Legislation clarified that the Act only applies to leases of more than 15 years and in which development or demolition will occur, which was a significant change from the 2021 Guidelines which had asserted that the Act applied to leases of as little as 5 years (subject to some exceptions). The Final Updated Guidelines not only incorporate this clarification but also expand on it by addressing the impact of renewal terms and purchase options and defining "development" and "demolition".

[1] For clarity, the Act generally applies to local public agencies in California, which we will refer to herein as "agencies". Certain agencies (e.g., districts) are able to utilize streamlined procedures pursuant to specific provisions in the Act, as further discussed herein.

Renewals, Extensions, and Purchase Options

Section 102(i)(1) of the Final Updated Guidelines states that the term disposition, as used in the Act, includes the entering of a lease for surplus land for a term longer than 15 years, inclusive of any extension or renewal options included in the terms of an initial lease entered into on or after January 1, 2024. A lease with a term of 15 years or less that includes an option to extend or renew is a disposition if the sum of the term of the original lease and the extension or renewal is greater than 15 years. The Final Updated Guidelines also assert that a lease that is for a term of 15 years or less that includes an option to purchase is considered a disposition of surplus land at the time the lease is executed.

The inclusion of renewal and extension terms in calculating the length of a lease is not particularly surprising. However, deeming execution of a short-term lease that includes a purchase option a "disposition" under the Act seems odd. A purchase option is a continuing, irrevocable offer to sell property to an optionee within the time constraints of the option contract. It is often not an offer to sell the property immediately. Rather, the option may not become exercisable unless and until the tenant has leased the property for a minimum amount of time or some other condition precedent occurs. This creates some tension with the Final Updated Guidelines. Specifically, if execution of a lease with a purchase option is a "disposition" under the Act, the agency would need to go through the offer process immediately, even if the sale contemplated by the option would not happen for several years. Would the agency's notice of availability offer the property for sale immediately? Or, would the agency be permitted to draft the notice of availability such that it essentially offered an option contract rather than an immediate sale? These questions are not answered in the Final Updated Guidelines. Further, couldn't the agency simply execute an option contract with its short-term tenant and make the option subject to the agency's compliance with the Act, such that compliance with the Act was a condition precedent to the optionee exercising the option? The Final Updated Guidelines seem to prohibit such a structure, even though it would arguably comport with the Act.

Development and Demolition

Notwithstanding Section 102(i)(1), Section 102(i)(2) of the Final Updated Guidelines provides that "disposition", as that term is used in the Act, does not mean (i) the entering of a lease for surplus land for a term of 15 years or less, inclusive of any extension or renewal options included in the terms of the initial lease, or (ii) the entering of a lease for surplus land on which no development or demolition will occur, regardless of the term of the lease. The Final Updated Guidelines then provide that "development" means the process of changing the character of the land from its existing condition to a more useable condition by constructing or placing a building or buildings on the land, preparing the land for such construction, or reusing an existing building for a purpose other than the purpose for which it was originally built or designed, while "demolition" means the deliberate dismantling, destruction, or removal of an entire building or significant portions of a building, rendering it unfit for use. The Final Updated Guidelines also state that development and demolition do not include making improvements, renovations, or updates to an existing building, while preserving its structural integrity, or replacing an existing

building that has reached the end of its structural life with a building that will be used for the same purpose.

In light of Section 102(i)(2), a lease of 14 years would not be subject to the Act, even if it included development or demolition. A lease of 16 years, on the other hand, would be subject to the Act if it included development or demolition, but it would not be subject to the Act if it did not include development or demolition. Taking this term length rule together with the definitions of development and demolition, it seems that the Act (as interpreted by HCD) is intended to prevent transactions such as ground leases, where a developer-tenant constructs a new improvement on agency-owned land. This type of transaction is not uncommon for agencies – for example, we have seen agencies use a ground lease model to allow a tenant to construct a hotel and a fitness club on agency-owned land. Moving forward, agencies will need to conduct a surplus land act analysis prior to using such a transaction structure.

Agency's Use

The New Legislation also clarified that property that is used for the "agency's use" (and therefore not surplus land) includes: (i) property owned by a port that is used to support logistic uses, sites for broadband equipment or wireless facilities, and waste disposal sites, and (ii) property owned by certain districts and disposed of for commercial or industrial uses or activities or for the sole purpose of investment or generation of revenue, provided that the disposition will directly further the express purpose of the agency or is authorized by statute. The Final Updated Guidelines incorporate and expand on this change.

Specifically, Section 104 of the Final Updated Guidelines redefines "agency's use" to align with the recent changes to the Act. It states "'agency's use' shall include, but not be limited to, land that is being used for agency work or operations, land that an agency plans to use for agency work or operations pursuant to a written plan adopted by the agency's governing board, or land that is disposed of for agency work or operations." It also defines "agency work or operations" as including, but not being limited to, utility sites; watershed property; land being used for conservation purposes; land for demonstration, exhibition, or educational purposes related to greenhouse gas emissions, property owned by a port that is used to support logistics uses, sites for broadband equipment or wireless facilities, buffer sites located near sensitive governmental uses, including, but not limited to, wastewater treatment plants, and waste disposal sites.

Section 104 also clarifies that "agency's use" shall not include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development. For non-district agencies, the utility of the "agency's use" exemption is likely limited. Non-district agencies can only use this exemption if the land is being used, planned to be used, or disposed of for agency work or operations, which cannot include commercial or industrial activities. Thus, a non-district agency likely cannot use this exemption to lease land for the purpose of raising revenue to support the agency's operations, since the lease would be for the purpose of generating revenue. However, an agency with clear statutory authority to develop and operate energy facilities may be able to lease land to a developer for the purpose of developing an energy facility that is ultimately owned by the agency, since the lease would be in furtherance of the agency's work and operations.

In the case of an agency that is a district[2], excepting those whose primary mission or purpose is to supply the public with a transportation system, "agency's use" may include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development; or may be used for the sole purpose of investment or generation of revenue if such use either (i) directly furthers the express purpose of the district's work or operations, or (ii) is expressly authorized by a statute governing the district, provided the district complies with Government Code section 54233.5 where applicable and takes action in a public meeting declaring that the use of the site meets one of these two requirements. For these districts, the "agency's use" exemption is likely to have a broader impact. In fact, one could argue that nearly every disposition by a district is for the agency's use, provided that the disposition produce revenue and that revenue be used to further district work or operations. However, a more conservative interpretation would be that only dispositions in which the transferee's use of the land furthers the agency's work or operations would constitute a disposition for the "agency's use". It is unclear what interpretation HCD will take. It will be interesting to see how HCD reviews and responds as agencies begin submitting exempt surplus determinations to HCD based on this "agency's use" exemption.

In addition to further defining "agency's use", the Final Updated Guidelines add two procedural requirements related to this exemption, which will apply both to districts and non-district agencies, to the extent they use the "agency's use" exemption. First, the Final Updated Guidelines require that an agency that plans to dispose of land for the agency's use shall provide documentation to HCD that the land meets the definition of agency's use in Section 104(a) at least 30 days prior to disposition. An agency that is using or plans to use the land for the agency's use but is not disposing of the land, as defined in Section 102(i) of the Guidelines, is not required to send documentation to HCD. These provisions are generally not surprising – HCD will have the right to review and approve exempt surplus declarations prior to a disposition, but HCD is less concerned with such a determination if no disposition is occurring.

Second, the Final Updated Guidelines provide that, in cases where an agency (including districts) will only use a portion of land for the agency's use, the agency must comply with the Act when disposing of the portion of land not being used for the agency's use, even if revenue generated on that portion of the land is used to support the development on the portion of land that qualifies as agency's use. An agency may issue an NOA that includes reasonable conditions or restrictions, as provided in section 202(a)(2)(D)(iv), noting that a portion of the land will be used for agency's use. This requirement that agencies essentially bifurcate their properties when only a portion will be used for "agency's use" will likely be challenging to implement. For example, if an agency wants to lease out an existing building on a piece of property and determines that the lease of the building is for the agency's use, can the agency also lease out the parking lot, even if the tenant parking in the parking lot in and of itself does not support the agency's use? Or, would the agency be limited to only leasing out the building, wherein the tenant's activities will directly support the agency's work and operations? If the latter, what can the agency do with the parking lot? Where will the tenant park? These questions are not answered by the Final Updated Guidelines.

[2] As used herein and in the Act, "district" means all districts within the state, including, but not limited to, all special districts, sewer, water, utility, and local and regional park districts, and any other political subdivision of the state that is a district.

Agency's Surplus Declaration and Offer Process

The New Legislation also made several changes to how agencies declare property surplus (or exempt surplus) and offer surplus property to the requisite entities. The Final Updated Guidelines not only incorporate these changes to the Act, but also expand on certain changes.

Administrative Declarations

The New Legislation authorized agencies to declare certain categories of exempt surplus land publishing a 30-day notice finding that the land is exempt surplus, rather than making such a finding in a public meeting. However, the New Legislation did not include any detail regarding the process to publish such a notice. Thankfully, the Final Updated Guidelines add significant detail regarding what this process is required to look like.

Specifically, Section 400(e) of the Final Updated Guidelines provides that an agency declaring land exempt surplus via a 30-day public notice must comply with the following:

- The notice must include a citation to the exemption (e.g., Government Code section 54221(f)(1)(A) for an affordable housing project), a contact name and email for public comments, and findings/reasons the land meets the exemption.

- HCD will accept online or newspaper publishing of the notice with evidence it was published and made available for 30 days (daily publication is not necessary).

- For newspaper publication, HCD will accept a notice published in a newspaper of general circulation in the agency's area.

- For online publication, the notice must be available for the full 30 days, at minimum.

Additionally, pursuant to Section 103(c)(1) of the Final Updated Guidelines, a copy of the notice needs to be provided to all of the entities identified in Section 201(a) of the Final Updated Guidelines (i.e., the priority offer recipients under the Act).

The additional detail regarding the process to administratively declare property surplus is helpful and is generally consistent with what many agencies assumed the process would require.

Participating in Negotiations

As we are all aware, the Act requires agencies to negotiate in good faith for at least 90 days with entities that respond to the agency's notice of availability. The New Legislation identified certain activities that do not constitute "participating in negotiations," including activities such as obtaining an appraisal or issuing a request for proposal in accordance with certain exempt surplus

designations. Under the New Legislation, these steps do not constitute "participating in negotiations." Section 103(f) of the Final Updated Guidelines further provides that "participating in negotiations" does not include any of the following:

- Issuing an RFP or RFQ to the entities identified in Government Code section 54222(a) for the purposes of meeting the affordable housing exemptions in Government Code section 54221(f)(1)(A), (F), (G), (H), and (I);

- Negotiating a lease, exclusive negotiating agreement, or option agreement for the purposes of meeting the affordable housing exemptions in Government Code section 54221(f)(1)(A), (F),(G), (H), and (I); or

- Negotiating with a developer to determine if the lease provisions of Government Code section 54221(d)(2) can be met.

While this provides clarity for agencies, it may not be helpful clarity. To elaborate, prior to the New Legislation and the Final Guidelines, the ambiguity as to what constituted participating in negotiations could sometimes be helpful to agencies, since they could point to a variety of activities as arguably evidencing participation in negotiations and thus count it towards their 90 day requirement. Now, with the new clarifications, there is less ability to make such an argument. As a result, agencies may ultimately conduct negotiation type activities for much longer than 90 days.

The Final Updated Guidelines also include two other notable provisions related to the negotiation process. First, Section 200(a) provides that an agency may not solicit or accept offers to purchase or develop surplus land until the agency has first sent out notices of availability, and, if the agency receives any responses to the notice of availability, completed negotiations with those parties. It is unclear what "solicit" and "accept" mean. If an agency posts its notice of availability on its website, as many agencies do, is that considered an impermissible solicitation? If a private entity sees a notice of availability on HCD's website or an agency's board materials and submits a response to the agency, even though the private entity is not a priority respondent under the Act, is the agency's receipt of such an offer an impermissible "acceptance"? Could the agency hold the offer until the statutory offer process is complete and then respond? Or, would the agency need to completely ignore the offer, even after the statutory process is complete? These issues are not addressed in the Final Updated Guidelines.

Additionally, Section 202(a)(1)(C) states that, for the purpose of disposition of surplus land in Section 400(b)(1) of these Guidelines, the agency must establish and document that good faith negotiations have taken place with each respondent. The following activities are listed as examples of demonstrating good faith negotiations (and thus are activities that agencies should aim to document): making a serious effort to meet at reasonable times and attempt to reach agreement; responding to letters of interest; responding to and considering reasonable offers to purchase or lease; not requiring that development proposals significantly deviate from the notice of availability; and not "arbitrarily" ending active negotiations after 90 days. You may be wondering how does an agency evidence these activities?: Document, document, document. Agencies will be well-served to build detailed files showing all meeting activity, email correspondence, etc. that

shows the agency's engagement in the offer and negotiation process. However, it may be challenging to show that an agency did not "arbitrarily" end active negotiations after 90 days, particularly since "arbitrarily" is not defined in the Final Updated Guidelines. This language seems to grant HCD significant discretion to subjectively judge whether an agency's activities during negotiations were "enough", which (in our humble opinion at least) arguably exceeds the scope of HCD's authority.

Enforcement and Penalties

The New Legislation also made minor amendments to the Act's provisions on enforcement and penalties. The Final Updated Guidelines incorporate said amendments and also generally update and restructure the prior language on enforcement and penalties.

HCD's Review Process

Under the 2021 Guidelines, HCD would review the various materials submitted by agencies in accordance with the 2021 Guidelines and issue a "Notice of Violation" if HCD determined that the proposed transaction would violate the Act. The Final Updated Guidelines amend HCD's review process and require HCD to prepare additional written documentation as part of its review process.

Specifically, HCD will:

- Issue a "Determination Letter" if HCD concurs with the agency that the proposed transaction is consistent with the Act.
- Issue a "Findings Letter" if HCD believes the transaction may violate the Act.
- After reviewing an agency's response to a Findings Letter, issue either a Determination Letter (if HCD has been convinced that the transaction actually does comply with the Act) or a Notice of Violation (if HCD still believes the transaction violates the Act and the agency apparently intends to proceed anyway).

The new HCD review process also adds two new requirements for agencies.

Specifically:

- If an agency receives a Findings Letter from HCD, the agency must either correct the identified issues, prepare a response regarding how the agency will correct the issues, and/or provide written findings disputing the Findings Letter.
- If an agency receives a Notice of Violation from HCD, the agency must hold an open public meeting to review the Notice of Violation. In addition to all legally required public meeting noticing requirements, the agency must also

> post the public notice to the agency's website (if applicable), post the notice in a conspicuous public place in the agency's office, and send the public notice to HCD via the Surplus Land Act Portal no later than the time of posting required by the Brown Act (commencing with Government Code section 54950). An agency is not required to disclose information conducted during closed sessions at this meeting.

Practically, HCD's review process and an agency's response likely will not change all that much under the Final Updated Guidelines, as HCD and agencies typically engaged in this sort of back and forth under the 2021 Guidelines. However, the requirement that an agency hold a public meeting to review a Notice of Violation is a significant new addition. While many agencies may have already been agendizing Notices of Violation in one way or another, *requiring* agencies to do so arguably exceeds HCD's authority and improperly hinders agency discretion.

Private Right of Enforcement

Prior to the New Legislation, both the Act and the 2021 Guidelines provided for a private right of enforcement, but the Final Updated Guidelines further define this right and make it more clear. For example, public or private entities wishing to bring an action to enforce the Act against an agency now must submit a "Notice of Alleged Violation" to the agency and HCD 60 days prior to commencing the action. Additionally, if a public or private entity issues a Notice of Alleged Violation, HCD can essentially skip the "Findings Letter" step of the HCD process and instead jump straight to issuing a Notice of Violation (assuming HCD agrees with the Notice of Alleged Violation). Although, neither of these steps is a major change from the 2021 Guidelines, but they do formalize the process.

Penalties

Consistent with the New Legislation, the Final Updated Guidelines also include minor updates to the penalty provisions, including explaining how to calculate a property's "disposition value" for purpose of calculating penalties and authorizing agencies to elect for penalties to be deposited into the Building Homes and Jobs Trust (rather than the agency's local housing trust fund), if the agency so elects.

While the Final Updated Guidelines provide clarity in some instances, they also add new complexities and challenges in others. How the Final Updated Guidelines will interplay with an agency's disposition is an extremely fact specific analysis that hinges on both the type of agency as well as the unique facts of the contemplated disposition. Agencies should review the Final Updated Guidelines and consider how the same may impact their surplus property plans moving forward.

Updated Surplus Land Act Guidelines ~~FINAL~~

Final

(Modified)

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Updated Surplus Land Act Guidelines

OVERVIEW

Article I summarizes the purpose and scope of the Surplus Land Act (SLA) by identifying the objectives of ~~the~~these Guidelines and defining key terms within the law. This section also defines lands exempt from the provisions of the SLA.

Article II describes the mechanisms for identifying and disposing of surplus lands. This Article also describes requirements for developments built upon disposed surplus land, surplus land in which no sale took place under the auspices of the SLA, and requirements for affordable housing on surplus land that is developed at a later date.

Article III identifies the affordable housing requirements for developments built upon disposed surplus land.

Article IV summarizes the notification, recording, and reporting requirements to the California Department of Housing and Community Development (HCD) under the SLA.

Article V explains HCD's obligations to monitor local agency compliance with the SLA and identifies the escalating penalties associated with noncompliance.

Updated Surplus Land Act Guidelines

ARTICLE I. PROGRAM OVERVIEW

Assembly Bill (AB) 1486 (Statutes of 2019, Chapter 664) and AB 1255 (Statutes of 2019, Chapter 661) made changes to the SLA found in **Government Code, Title 5, Division 2, Part 1, Chapter 5, Article 8. Surplus Land.** Generally, the purpose of the amendments is to promote affordable housing development on ~~unused or underutilized public~~surplus land throughout the state to respond to the existing affordable housing crisis. The amendments to the SLA adopted with AB 1486 and AB 1255 clarify and strengthen reporting and enforcement provisions of the SLA to promote increased compliance with the SLA. Moreover, some of the changes in these updated Guidelines are the result of subsequently enacted legislation.

AB 1486 took effect on January 1, 2020.

As of that date, HCD began reviewing notices that local agencies are required to send by email or certified mail pursuant to Government Code ~~Section~~section 54222(a)(1) and examining complaints and other information received or requested to confirm compliance with the SLA pursuant to Government Code ~~Section~~section 65585.1. As of that date, HCD also began collecting (in Table G of the Housing Element Annual Progress Report (APR)) information on ~~jurisdiction- owned~~jurisdiction-owned sites identified in the housing element sites inventory, and subsequently disposed of by the jurisdiction.

As of January 1, 2021, HCD was required to begin implementing Government Code ~~Section~~section 54230.5, including, but not limited to, adopting these Guidelines; reviewing each local agency's description of the notices of availability sent, description of negotiations conducted with any responding entities, and copies of any restrictions to be recorded against the property pursuant to Government Code ~~Sections~~sections 54233 or 54233.5; submitting written findings to local agencies; and, if necessary, assessing penalties, in conjunction with the Attorney General, to local agencies that dispose of surplus property in violation of the SLA.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 54222, ~~Section~~section 54230, ~~Section~~section 54230.5, subdivision (b)(2)(A), ~~Section~~section 54233, ~~Section~~section 54233, ~~Section~~section 54233.5, ~~Section~~section 65585.1.

Section 100. Applicability

These updated SLA Guidelines (hereinafter "Guidelines") apply on or after the date adopted as shown on the cover page. The application of these updated Guidelines to the disposition of surplus land shall be determined by the date of issuance of the Notice of Availability (NOA). The applicability of these updated Guidelines to exempt determinations shall be determined by the date that the property was declared exempt surplus land. Regardless of when Guidelines were adopted, the Surplus Land Act as amended is applicable to local agencies upon the date amendments went into effect.

Section 101. Guidelines

(a) These SLA Guidelines ~~(hereinafter "Guidelines")~~ implement, interpret, and make specific the text of the SLA. The forms linked in the Appendices of these Guidelines may be updated from time to time upon approval by the Director of HCD or the Director's designee.

Updated Surplus Land Act Guidelines

(b) These guidelines establish and revise terms, conditions, forms, and procedures for the proper identification and disposition of various types of surplus land, as well as provide

detail on expectations and sanctions related to SLA compliance. Major actors and their responsibilities include, but are not limited to:

(1) Local agencies:

(A) Provide ~~notices of availability~~NOAs of surplus land for lease or purchase to local public entities and housing sponsors as required by Government Code ~~Section~~section 54222 on the form provided in Appendix A;

(B) Where applicable, receive notices of interest from entities desiring to purchase or lease surplus land and negotiate with entities in good faith;

(C) Provide HCD with descriptions of the ~~notices of availability sent, and~~NOAs sent, proof of sending the NOA to the CalHFA-certified housing sponsor list and local public entities within whose jurisdiction the surplus land is located, and description of negotiations conducted with any responding entities~~,~~ regarding the

disposal of the ~~parcel of~~ surplus land on the form provided in Appendix B;

(D) Forward to HCD a copy of any restrictions recorded or to be recorded against the surplus land pursuant to Government Code ~~Section~~section 54233 or 54233.5, whichever is applicable, in the form prescribed by HCD in Appendix B; and

(E) If the local agency is a city or county, beginning April 1, 2021, the local agency must report annually information about all locally owned surplus land sites pursuant to Government Code ~~Section~~section 54230. Reporting shall be in table H of the Annual Progress Report (APR) in accordance with APR instructions.

(2) Housing sponsors, as defined by ~~Section~~section 50074 of the Health and Safety Code, may notify HCD of their interest in surplus land pursuant to Government Code ~~Section~~section 54222(a)(1) using the survey in Appendix D.

(3) HCD will maintain updates of interested housing sponsors and inventories of publicly owned surplus land and a list of ~~notices of availability~~NOAs.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 54221, ~~Section~~section 54222, ~~Section~~section 54230, ~~Section~~section 54230.5, subdivision (b)(2)(A), ~~Section~~section 54230.5, subdivision (b)(2)(D), ~~Section~~section 54233, ~~Section~~section 54233.5; Health and Safety Code ~~Section~~section 50074.

Section 102. Definitions

All terms not defined below shall, unless their context suggests otherwise, be interpreted in accordance with the meanings of terms provided in the SLA and Article 10.6 of Government Code ~~Sections~~sections 65580 – 65589.11 (housing elements). For terms defined in statute, any changes to the statutory definition shall supersede the definition in these Guidelines.

(a) **"Affordable housing"** means housing available at affordable housing cost, as defined in ~~Section~~section 50052.5 of the Health and Safety Code, to lower-income

households, or affordable rent, as defined in ~~Section~~section 50053 of the Health and Safety Code, to ~~lower- income~~lower-income households, as defined in ~~Section~~section 50079.5 of the Health and Safety Code.

(b) **"Affordable housing cost"** means that for owner-occupied housing, the sales price ~~at~~ is restricted for a minimum of 45 years, and 50 years for housing located on tribal trust lands. The ~~which the~~ monthly ownership cost, including principal, interest, taxes, insurance, and utilities, equals:

(1) For extremely low-income households, the product of 30 percent times 30 percent of the area median income (AMI) adjusted for family size appropriate for the unit.

(2) For very low-income households, the product of 30 percent times 50 percent of the ~~area median income~~AMI adjusted for family size appropriate for the unit.

(3) For lower-income households whose gross incomes exceed the maximum income for very low-income households and does not exceed 70 percent of the ~~area median income~~AMI adjusted for family size, the product of 30 percent times 70 percent of the ~~area median income~~AMI adjusted for family size appropriate for the unit. In addition, for any lower-income household that has a gross income that equals or exceeds 70 percent of the ~~area median income~~AMI adjusted for family size, it shall be optional for any state or local funding agency to require that affordable housing cost not exceed 30 percent of the gross income of the household.

(4) For moderate-income households, affordable housing cost shall not be less than 28 percent of the gross income of the household, nor exceed the product of 35 percent times 110 percent of ~~area median income~~AMI adjusted for family size appropriate for the unit. In addition, for any moderate-income household that has a gross income that exceeds 110 percent of the ~~area median income~~AMI adjusted for family size, it shall be optional for any state or local funding agency to require that affordable housing cost not exceed 35 percent of the gross income of the household.

(c) "**Affordable rent"** means that~~, including~~ for rental housing, the rent is restricted for a minimum of 55 years, and 50 years for housing located on tribal trust lands. Including a reasonable utility allowance, rent shall not exceed:

(1) For extremely low-income households, the product of 30 percent times 30 percent of the ~~area median income~~AMI adjusted for family size appropriate for the unit.

(2) For very low-income households, the product of 30 percent times 50 percent of the ~~area median income~~AMI adjusted for family size appropriate for the unit.

(3) For ~~lower income~~lower-income households whose gross incomes exceed the maximum income for very low-income households, the product of 30 percent times 60 percent of the ~~area median income~~AMI adjusted for family size appropriate for the unit. In addition, for those lower-income households with gross incomes that exceed 60 percent of the ~~area median income~~AMI adjusted for family size, it shall be optional for any state or local funding agency to require that affordable rent be established at a level not to exceed 30 percent of the gross income of the household.

(4) For ~~moderate income~~moderate-income households, the product of 30 percent times 110 percent of the ~~area median income~~AMI adjusted for family size appropriate for the unit. In addition, for those moderate-income households whose gross incomes exceed 110 percent of the ~~area median income~~AMI adjusted for family size, it shall be optional for any state or local funding agency to require that affordable rent be established at a level not to exceed 30 percent of the gross income of the household.

~~(d) **"Agency's use".** Except as provided below, "agency's use" shall include, but not be limited to, land that is being used, or is planned to be used pursuant to a written plan adopted by the local agency's governing board for agency work or operations, including, but not limited to, utility sites, watershed property, land being used for conservation purposes, land for demonstration, exhibition, or educational purposes related to greenhouse gas emissions, and buffer sites near sensitive governmental uses, including, but not limited to, waste water treatment plants as described in Government Code Section 54221(c)(1).~~

~~(1) Agency's use shall not include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development. Property disposed of for the sole purpose of investment or generation of revenue shall not be considered necessary for the agency's use.~~

~~(2) In the case of a local agency that is a district, excepting those whose primary mission or purpose is to supply the public with a transportation system, "agency's use" may include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development, or be for the sole purpose of investment or generation of revenue if the agency's governing body takes action in a public meeting declaring that the use of the site will do one of the following:~~

~~(A) Directly further the express purpose of agency work or operations.~~

~~(B) Be expressly authorized by a statute governing the local agency, provided the district complies with Government Code Section 54233.5 where applicable.~~

(~~e~~d) **"APR"** means the Annual Progress Report from each city or county detailing the agency's implementation of the housing element of its general plan submitted to and using forms and definitions adopted by HCD.

(~~f~~e) **"Assisted unit"** means a unit that is subject to rent and/or occupancy restrictions, as a result of financial assistance, as specified in a regulatory agreement.

(~~g~~f) **"CalHFA"** means the California Housing Finance Agency.

(g) "**Description of negotiations**" means a written summary of the negotiations that occurred between the local agency and each entity which responded to an NOA. The written summary must be accompanied by copies of written correspondence (e.g., emails, letters, etc.) that include, if applicable, (1) the respondent's interest in the surplus land, (2) the local agency's request for additional information from the respondent, (3) any responses to such requests, (4) a description of any significant changes proposed by the respondent, (5) confirmation from the local agency to the respondent indicating negotiations have concluded, and (6) if applicable, a copy of the draft Purchase and Sale Agreement, Disposition and Development Agreement, Lease Agreement or Exclusive Negotiating Agreement. This information shall be provided to HCD in a form prescribed by HCD in Appendix B.

(h) **"Determination Letter"** is a letter that HCD sends to a local agency when HCD finds that the local agency has corrected all issues identified by HCD in a Findings Letter or if HCD concurs that the local agency's process for disposing of surplus land complies with the SLA.

(~~h~~i) "**Disposition of surplus land.**" ~~means the sale or lease of local agency-owned land formally declared surplus.~~

(1) Disposition means:

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(c) The sale of surplus land, including land exchanged for necessary for nonmonetary consideration.

(B) The entering of a lease for surplus land for a term longer than 15 years, inclusive of any extension or renewal options included in the terms of the initial lease, entered into on or after January 1, 2024. A lease with a term of 15 years or less that includes an option to extend or renew is a disposition if the sum of the term of the original lease and the extension or renewal is greater than 15 years. A lease that is for a term of 15 years or less that includes an option to purchase is considered a disposition of surplus land at the time the lease is executed.

(2) Disposition does not mean:

(A) The entering of a lease for surplus land for a term of 15 years or less, inclusive of any extension or renewal options included in the terms of the initial lease.

(B) The entering of a lease for surplus land on which no development or demolition will occur, regardless of the term of the lease.

(~~1~~i) For the purposes of this ~~subsection, "lease" shall not include a lease of land on which no development or demolition will occur or which has a term that is less than five (5) years (including any extensions, amendments or options). However, an enforceable option to lease, as defined by these Guidelines, will qualify as a lease for purposes of these Guidelines.~~section, development means the process of changing the character of the land from its existing condition to a more useable condition by constructing or placing a building or buildings on the land, preparing the land for such construction, or reusing an existing building for a purpose other than the purpose for which it was originally built or designed.

(ii) For the purposes of this section, demolition means the deliberate dismantling, destruction, or removal of an entire building or significant portions of a building, rendering it unfit for use.

(iii) Development and demolition do not include making improvements, renovations, or updates to an existing building, while preserving its structural integrity, or replacing an existing building that has reached the end of its structural life with a building that will be used for the same purpose.

(~~2~~3) If a local agency is unsure whether a transaction involving local ~~agency owned~~agency-owned land meets this definition, they are encouraged to seek

additional guidance from HCD via the Surplus ~~Lands~~Land Act Portal. ~~Prior to September 6, 2023, submissions were accepted at PublicLands@hcd.ca.gov.~~

(j) **"Disposition and Development Agreement (DDA)"** means an agreement between a developer and a local agency that binds the developer to construct a specific development

and the local agency to dispose of the property to the developer if permits and other entitlements for the project are obtained and other applicable conditions are met.

(k) "District" includes all districts within the state, including, but not limited to, all special districts, sewer, water, utility, and local and regional park districts, and any other political subdivision of the state that is a district. The California State Controller provides information about districts at https://districts.bythenumbers.sco.ca.gov/#!/year/default.

(j) **"Exclusive Negotiating Agreement (ENA)"** means a legally binding agreement that binds a prospective buyer and seller under which the seller cannot make any

~~similar deals with other potential buyers for a specified period.~~

(l) **"Exclusive Negotiating Agreement (ENA)"** means a legally binding agreement that binds a prospective buyer and seller under which the seller cannot negotiate with, entertain offers from, or make any similar deals with other potential buyers for a specified period regarding a particular property.

(~~k~~m) **"Expression-of-interest list"** means the list maintained by HCD on its website of developers that have notified HCD of their interest in purchasing or leasing surplus property.

(~~l~~n) **"Fair market value"** is the price a particular parcel would sell for on the open market when certain conditions are met. Those conditions are: (1) the parties involved ~~areaware~~are aware of all the facts, (2) are acting in their own interest, (3) are free of any pressure to buy or sell, and (4) have ample time to make the decision. In cases where fair market value has not been established, the parties may seek a broker's opinion of value, or an appraisal may be conducted. If, following a single appraisal, consensus on fair market value remains absent, a second appraisal is frequently obtained. If consensus on fair market value is not reached after the second appraisal, the parties may average the results of the two appraisals, or a third appraisal may be obtained. Nothing in these Guidelines prevents a local agency from selling or leasing surplus land for fair market value or fair market rent or less than fair market value or fair market rent.

(o) **"Findings Letter"** is the initial letter HCD sends to a local agency informing the local agency whether it is potentially in violation of the SLA. A local agency may respond to a Findings Letter that notifies the local agency of potential violations by either providing evidence and arguments it is not in violation of the SLA or by providing a plan to cure and correct the violations identified in the Findings Letter.

(~~m~~p) **"Good faith negotiation"** means to deal honestly and fairly with the other party throughout the negotiation process whether or not the negotiation results in a contract. For specific documentation requirements, see Section 202(a).

(~~n~~q) **"HCD"** means the California Department of Housing and Community Development.

(~~o~~r) **"Housing sponsor"** means any individual, joint venture, partnership, limited partnership, trust, corporation, limited equity housing cooperative, cooperative, local public entity, duly constituted governing body of an Indian reservation or rancheria, tribally designated housing entity, or other legal entity, or any combination thereof, certified by CalHFA pursuant to rules and regulations of CalHFA as qualified to either own, construct, acquire, or rehabilitate a housing development, whether for profit, nonprofit, or organized for limited profit, and subject to the regulatory powers of CalHFA pursuant to rules and regulations of CalHFA and other specified terms and conditions. A developer can become a self-certified housing sponsor in accordance with CalHFA's procedures on the form as provided at https://www.calhfa.ca.gov/apps/HSC. "Housing sponsor" includes persons and families of low or moderate income who are approved by CalHFA as eligible to own and occupy a housing development and individuals and legal entities receiving property improvement loans through CalHFA.

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(ee) "**Local agency**" means every city, whether organized under general law or by charter,

county, city and county, district, including school, sewer, water, utility, and local and regional park districts of any kind or class, joint powers authority, successor agency to a former redevelopment agency, housing authority, or other political subdivision of this state and any instrumentality thereof that is empowered to acquire and hold real property.

(t) **"Local Public Entity"** means any county, city, city and county, the duly constituted governing body of an Indian reservation or rancheria, tribally designated housing entity as defined in Section 4103 of Title 25 of the United States Code and Section 50104.6.5, redevelopment agency organized pursuant to Part 1 (commencing with Section 33000) of Division 24, or housing authority organized pursuant to Part 2 (commencing with Section 34200) of Division 24, and also includes any state agency, public district, or other political subdivision of the state, and any instrumentality thereof, that is authorized to engage in or assist in the development or operation of housing for persons and families of low or moderate income. "Local public entity" also includes two or more local public entities acting jointly.

(~~q~~u) **"Lower-income households**" means persons and families whose income does not exceed the qualifying limits for lower-income families as established and amended from time to time pursuant to Section 8 of the United States Housing Act of 1937 and published by HCD pursuant to section 50093 of the Health and Safety Code. Lower-income households includes very low-income households, as defined in Health and Safety Code ~~Section~~section 50105, and extremely low-income households, as defined in Health and Safety Code ~~Section 50106.~~section 50106. The income limits published by HCD can be found at https://www.hcd.ca.gov/grants-and-funding/income-limits.

(v) **"Notice of Alleged Violation"** is a written communication sent to a local agency (with a copy to HCD) by a public (not HCD) or private entity alleging violations of the SLA.

(w) **"Notice of Violation (NOV)"** is a letter sent by HCD to a local agency after a Findings Letter has been sent, informing the local agency it is in violation of the SLA and the local agency may be subject to further enforcement if the local agency does not cure or correct the violations within 60 days, including but not limited to referral to the California Office of the Attorney General and financial penalties.

(~~r~~x) **"Open-space purposes**" means the use of land for public recreation, enjoyment of

scenic beauty, or conservation or use of natural resources.

(~~s~~y) **"Option to lease"** means a contract by which a local agency enters an agreement with another entity to allow the latter to lease surplus land at a specified rate for a specified term, or within a reasonable time in the future, but without imposing an obligation to lease upon the option holder.

(~~t~~z) **"Option to purchase"** means a contract by which a local agency enters an agreement with another entity to allow the latter to purchase surplus land at a specified price, or within a reasonable time in the future, but without imposing an obligation to purchase upon the option holder.

(~~u~~aa) **"Persons and families of low or moderate income**" means persons and families whose income does not exceed 120 percent of ~~area median income~~AMI adjusted for family size by HCD in accordance

with adjustment factors adopted and amended from time to time by the ~~United States~~U.S. Department of Housing and Urban Development pursuant to Section 8 of the United States Housing Act of 1937. The income limits published by HCD can be found at https://www.hcd.ca.gov/grants-and-funding/income-limits.

(~~v~~bb) **"Planning period"** means the time period between the due date for an agency's preparation or update of its housing element and the due date for the next housing element according to the applicable schedule described in paragraphs (2) and (3) of subdivision (e) of Government Code ~~Section~~section 65588. Generally, the "Planning period" is eight years.

(~~w~~cc) **"RHNA"** means the Regional Housing Needs Allocation to be developed by HCD in consultation with each council of governments, where appropriate, which shall determine the existing and projected need for housing for each region.

(~~x~~dd) **"Surplus land"** means land owned in fee simple for which a local agency's governing body takes formal action at a regular public meeting declaring land to be surplus and not necessary for a local agency's use (as defined in section 104 of these Guidelines). Land must be declared either "surplus" or "exempt surplus" as supported by written findings before a local agency may take any action to dispose of it consistent with an agency's policies or procedures. A local agency, on an annual basis, may declare multiple parcels as "surplus" or "exempt surplus."

(~~y~~ee) ~~"~~ "**Transitional housing**~~"~~" means a rental housing development operating under programmatic constraints that ~~requires~~require the termination of assistance after a specified time or event, in no case less than six months after initial occupancy, and the re-renting of the assisted unit to another eligible participant.

(~~z~~ff) **"Unit"** means a residential unit that is used as a primary residence by its occupants, consistent with the definition of a unit as ~~utilizedby the US~~utilized by the United States Census Bureau and the California Department of Finance, including efficiency units, residential hotel units, and units used as transitional housing.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 54221, ~~Section~~section 54222, ~~Section~~section 54222.5, ~~Section~~section 54223, ~~Section~~section 54226, ~~Section~~section 54230, ~~Section~~section 54230.5, ~~Section~~section 54233, ~~Section~~section 54233.5, ~~Section~~section 54234, ~~Section~~section 65400, ~~Sections~~sections 65580 – 65589.11; Health and Safety Code ~~Section~~section 50052.5, ~~Section~~section 50053, ~~Section~~section 50074, ~~Section~~section 50079.5, section 50093;

Public Resources Code, Division 13 (~~Section~~section 21000 et seq.).

Section 103. Exemptions

(a) These Guidelines apply to the disposal of all surplus ~~lands.~~land and exempt surplus land, as defined in Government Code section 54221. However, exempt surplus land is not subject to Articles II and III of these Guidelines.

(b) Surplus land that meets one or more of the following conditions ~~is exempt from~~in this subsection is not subject to Articles II and III of these Guidelines~~:~~

, but ~~(1) An ENA or legally binding agreement to dispose of property that meets the requirements of Government Code Section 54234 is not~~is still subject to the ~~requirements of AB 1486 and must comply with~~provisions of the SLA as it existed on December 31, 2019~~.~~:

(1) Land for which the local agency entered into an ENA or legally binding agreement to dispose of property as of September 30, 2019, provided the disposition is completed by December 31, 2027.

(~~A~~2) ~~Surplus land subject to~~Land related to the Metro North Hollywood Joint Development Project for which the local agency entered into an ENA or legally binding agreement to dispose of ~~property is not subject to Articles II and III of these Guidelines so long as the local agency entered into the ENA or legally binding agreement on or before~~the property as of September 30, 2019, and the disposition of the property to the party that had entered into such an agreement, or its successors or assigns, is completed by December 31, ~~2022~~2027.

(3) Land for which the local agency has, by September 30, 2019, issued a competitive request for proposals (RFP) for the development of property that includes at least 100 residential units with at least 25 percent of the total residential units restricted to lower-income households with an affordable housing cost or affordable rent for a minimum of 55 years for rental housing, 45 years for ownership housing and 50 years for rental or ownership housing located on tribal trust lands; and the local agency enters into a disposition and development agreement (DDA) by December 31, 2027.

(A) A joint development involving multiple parcels for which the local agency has issued a single competitive RFP by September 30, 2019, is exempt from Articles II and III of these Guidelines so long as the joint development meets all the other requirements in paragraph (3) above.

(B) ~~The disposal of any surplus land pursuant to a qualifying ENA or legally binding agreement to dispose of property must still comply with the SLA as it existed on December 31, 2019.~~Paragraph (3) above does not apply to land held in the Community Redevelopment Property Trust Fund pursuant to section 34191.4 of the Health and Safety Code, or that has been designated in a long-range property management plan pursuant to section 34191.5 of the Health and Safety Code.

(~~C~~4) The deadline for disposal of property set out in ~~Paragraph (A~~paragraphs (1), (2), and (3) above shall be extended if the disposition of the property, the local agency's right or ability to dispose of the property, or a development project for which such property is proposed to be transferred~~,~~ is the subject of judicial challenge~~,~~ by petition for writ of mandate, complaint for declaratory relief or otherwise~~, to the date that is~~. Such extension shall be six months following the ~~final~~ conclusion of such litigation.

~~(D) If a legally binding agreement to dispose of property is either an enforceable option to lease or option to purchase and the option is exercised or expires after December 31, 2022, the local agency must notify HCD, in writing, within 30 days of the option's execution or the option's expiration.~~

(~~2~~5) Land held in the Community Redevelopment Property Trust Fund or designated in a long-range property management plan ~~is not subject to the requirements of these Guidelines if both~~, provided the disposition of the property meets one of the following ~~apply~~:

(A) ~~An~~Land for which the local agency entered into an ENA or legally binding agreement ~~for disposition~~to dispose of the property ~~is entered into not later than~~as of December 31, 2020, and the disposition of the property to the party that had entered into such agreement, or its successors or assigns, was completed by December 31, 2027.

~~(B) The disposition is completed by December 31, 2022.~~

(~~C~~B) The deadline for disposal of the property set out in ~~Paragraph (B~~paragraphs (5) and (5)(A) above shall be extended if the land subject to the Community Redevelopment

Property Trust Fund or the long-range property management plan is the

subject of litigation, including, but not limited to, litigation challenging the disposition of such property, the right or ability to dispose of the property, or a development project for which such property is proposed to be transferred~~, the date specified in Paragraph (B)~~. Such extension shall be ~~extended to the date that is~~ six months following the ~~final~~ conclusion of such litigation.

(6) HCD has no authority to waive or amend the statutory deadlines specified in paragraphs (1)-(5) above.

(7) Reviving Terminated Agreements. If a local agency failed to qualify for one of the grandfathering provisions found in a prior version of Government Code section 54234 because the final disposition of surplus land proposed for sale in an ENA, DDA, or other legally binding agreement was not completed before a prior statutory deadline (generally December 31, 2022), a local agency may seek, at its sole reasonable discretion, to revive the previous ENA, DDA, or legally binding agreement along substantially similar terms and qualify for the new December 31, 2027, deadline established in statute.

(~~3~~c) Land declared to be exempt surplus land by the local agency. ~~Other land may be exempt from these Guidelines provided that~~With the exception of the exemptions identified in 103(c)(1) below, the governing board of a local agency ~~declares~~must declare the property to be "exempt surplus land" at a regular public meeting and the declaration ~~is~~must be supported by written findings demonstrating that the land is of one or more of the following types:

~~(A) County or City Surplus Land Transferred for the Development of Affordable Housing with restrictions as described in Government Code Section 25539.4 or 37364.~~

(1) For exempt surplus land identified in Government Code section 54221(f)(1)(A), (B), (E), (K), (L), or (Q), a local agency may, instead, elect to identify the land in a public notice that is published by the local agency and available for public comment. Notice must also be provided to the entities identified in Section 201(a) of these Guidelines. The local agency must provide notice at least 30 days before the exemption takes effect.

(2) City- and County-Owned Land for Affordable Housing. County-owned surplus land transferred for the development of affordable housing must meet the requirements of Government Code section 25539.4. City-owned surplus land transferred for the development of affordable housing must meet the requirements of Government Code section 37364.

(A) Local agencies must, once a developer has been selected, submit to HCD a DDA, ENA or lease that confirms the requirements of Government Code section 54221(f)(1)(A) have been met.

(~~B~~3) Small Surplus Land Parcels ~~sold to an owner of contiguous land~~. Land that is:

~~(i) less than 5,000 square feet in area;~~

~~(ii) less than the minimum legal residential building lot size for the jurisdiction in which the parcel is located, or 5,000 square feet in area, whichever is less; or~~

(~~iii~~) ~~has no record access, is less than 10,000~~A) Less than one-half acre in area (21,780 square feet~~ in area,~~) and is not contiguous to land owned by a state or local agency that is used for open-space or low- and ~~moderate income~~moderate-income housing purposes.

(i) For the purposes of these Guidelines, each parcel of land shall be considered a distinct unit of exempt surplus land, except that contiguous parcels that are disposed of simultaneously to the same receiving entity,

or any entity working in concert with another receiving entity, shall be treated as a single unit of land.

(~~C~~4) Exchange of Surplus Land. Surplus land that a local agency is exchanging for another property or easement necessary for the local agency's use.

(~~D~~5) Local Agency to Agency Surplus Land Transfer. ~~Local agency surplus~~Surplus land that is transferred to another local, state, ~~or~~ federal agency, or federally recognized California Indian tribe for the transferee agency's use. Surplus land may also be transferred to a third party intermediary if that third party agrees to make no change in use to the property, and the third party acquires the land through a legally binding document that clearly binds the receiving local agency to use the property for the receiving agency's use and includes a date for eventual transfer of the property to the receiving agency within a reasonable time period.

(~~E~~6) Surplus Street Land. Surplus land that is a former street, right of way, or easement, and is conveyed to an owner of an adjacent property.

~~(F) Exempt Surplus Land for Affordable Housing. Land declared "exempt surplus land" that is advertised to all entities identified in subdivision (a) of Section 54222 of the Government Code and who are then invited to participate in the competitive bid process for either of the purposes identified below:~~

(7) Mixed-Use Developments for Affordable Housing. Land disposed for any of the purposes identified below:

(~~i~~A) A housing development (including mixed-use developments with ancillary commercial ground floor uses) that restricts 100 percent of the residential units to persons and families of low or moderate income, with at least 75 percent of the residential units restricted to

lower-income households as affordable housing pursuant to ~~Section~~section 102(a) of these Guidelines. In no event shall the maximum affordable sales price or rent level be higher than 20 percent below the median market rents or sales prices for the neighborhood in which the site is located. The requirements of Section 102(a) shall be contained in a covenant or restriction recorded against the surplus land at the time of sale that shall run with the land and be enforceable against any owner who violates the covenant or restriction and each successor in interest who continues the violation.

(i) For purposes of this subsection, neighborhood means the zip code in which the site is located. A local agency disposing of land for housing development pursuant to (i) above may use the most recent median market rents and sales price data for the zip code in which the site is located to calculate the affordable sales price and rent level of restricted units.

(~~ii~~B) A mixed-use development on surplus land that is more than one acre ~~in area, that includes~~but less than 10 acres in area. The land may be a single parcel or multiple adjacent or non-adjacent parcels. The development must include not less than 300 ~~housing~~residential units~~,~~ and ~~that restricts~~restrict at least 25 percent of the residential units to lower-income households~~, as defined in Health and Safety Code Section 50079.5~~ as affordable housing pursuant to ~~Section~~section 102(a) of these Guidelines. The requirements of Section 102(a) shall be contained in a covenant or restriction recorded against the surplus land at the time of sale that shall run with the land and be enforceable against any owner who

~~(iii) If used for one of the purposes described in Section 103(a)(3)(F)(i) and (ii) of these Guidelines, the local agency must put the land out for open, competitive bid. All entities identified in Section 202 must be invited to participate in the competitive bid process. If entities were invited to participate in the competitive bid process prior to the existence of HCD's expression-of-interest list, then noticing will be considered sufficient if reasonable efforts were made to include known interested parties.~~

~~(G) Validly Restricted Surplus Land. Surplus land that is subject to valid legal restrictions not imposed by the local agency such as covenants, or other restrictions that are and that would make housing prohibited, unless there is a feasible method to satisfactorily mitigate or avoid the prohibition on the site. An existing nonresidential land use designation is not per se a legal restriction that would make housing prohibited.~~

~~(H) Surplus Trust Lands. Surplus land that was granted by the state in trust to a local agency or that was acquired by the local agency for trust purposes by purchase or exchange, and for which disposal of the land is authorized or required subject to conditions established by statute.~~

violates the covenant or restriction and each successor in interest who continues the violation.

(i) To qualify for this exemption, a local agency must either follow the local agency's open, competitive solicitation process or put the property out to an open, competitive bid in which all entities identified in Section 201(a) of these Guidelines are invited to participate.

(C) Surplus land totaling 10 or more acres, consisting of either a single parcel or two or more adjacent or non-adjacent parcels combined for disposition to one or more buyers pursuant to a plan or ordinance adopted by the legislative body of the local agency or to a state statute if all of the following conditions are met:

(i) The completed development will consist of the greater of either:

I. 300 or more residential units, or

II. A number of residential units equal to 10 times the number of acres of the surplus land (e.g., a 40-acre development requires 400 residential units) or 10,000 residential units, whichever is less.

(ii) A local agency must either follow their local agency's open, competitive solicitation process or put the property out to an open, competitive bid in which all entities identified in Section 201(a) of these Guidelines are invited to participate.

(iii) The development restricts at least 25 percent of the residential units to lower-income households as affordable housing pursuant to Section 102(a) of these Guidelines. The requirements of Section 102(a) shall be contained in a covenant or restriction recorded against the surplus land at the time of sale that shall run with the land and be enforceable against any owner who violates the covenant or restriction and each successor in interest who continues the violation.

(iv) In mixed-use developments, residential housing must be constructed concurrently with non-residential development. If nonresidential development (e.g., commercial development) is included in the development, at least 25 percent of the total planned affordable units shall be made available for lease or sale and permitted for use and occupancy before or at the same time as at least 25 percent of nonresidential development is made available for lease or sale and permitted for use and occupancy.

I. Percent of nonresidential development is measured by computing the total square footage of the commercial component of the development, as identified in the final DDA, and multiplied by .25.

(v) Any violation of this Section 103(c)(7)(C) is subject to the penalties

described in Government Code section 54230.5. A local agency shall only dispose of land pursuant to this subsection through a disposition and development agreement that includes an indemnification clause that provides that if an action occurs after disposition that violates this subsection, the person or entity that acquired the property shall be liable for the penalties.

(D) A mixed-use development in rural areas of California, consisting of one or more parcels, that meets all the following conditions:

(i) The development restricts at least 25 percent of the residential units to lower-income households as affordable housing pursuant to Section 102(a) of these Guidelines. The requirements of Section 102(a) shall be contained in a covenant or restriction recorded against the surplus land at the time of sale that shall run with the land and be enforceable against any owner who violates the covenant or restriction and each successor in interest who continues the violation.

(ii) At least 50 percent of the square footage of the new construction is designated for residential use.

(iii) The development is not located in an urbanized area, as defined in Section 21094.5 of the Public Resources Code, which defines "urban" as either an incorporated city or an unincorporated area that is completely surrounded by one or more incorporated cities that meets both of the following criteria:

I. The sum of the population of the unincorporated area and the population of the surrounding incorporated cities is 100,000 or more.

II. The population density of the unincorporated area is equal to, or greater than, the population density of the surrounding cities.

(E) Where the surplus land consists of more than one parcel or is one parcel that will be subdivided into multiple contiguous parcels, and the parcel(s) are eligible for one of the exemptions under Section 103(c)(7)(A)-(D), the land can be treated as one parcel by a master developer. In addition, the affordable residential units must be constructed and completed not later than the unrestricted units and non-residential portion of the development. If the mixed-use development occurs in phases, the affordability requirement must be met in each phase.

(8) Land Subject to Valid Legal Restrictions. For land to qualify for this exemption, a local agency must establish that the surplus land is subject to a legal restriction pursuant to section (A) below and meets the following criteria: 1) the restriction was not imposed by the local agency, 2) the restriction makes housing a prohibited use, and 3) there is no feasible method to mitigate or avoid the prohibition of housing on the site.

(A) So long as the land meets all the criteria in this Section 103(c)(8), above, valid legal restrictions include, but are not limited to, the following:

(i) Existing contracts, including leases, agreed to prior to September 30, 2019.

(ii) Easements.

(iii) Source of Funding Restrictions. Restrictions imposed by the source of funding that a local agency used to purchase a property, provided that both of the following requirements are met:

I. The restrictions require the funds be spent only on non-housing purposes.

II. The proposed disposal of the land is consistent with the requirements imposed by the funding constraints.

(iv) Other valid legal restrictions may also include federal or state statutes or regulations.

(B) Avalid legal restriction shall be supported by documentary evidence establishing the valid legal restriction. Such evidence includes, but is not limited to, the following:

(i) Copies of contracts, leases, public or private grant deeds, easements, or federal or state statutes or regulations.

(ii) A written explanation describing how the legal restriction meets the criteria in section 103(c)(8).

(iii) It is not necessary for a local agency to acquire additional property rights or property interests belonging to third parties in order to attempt to mitigate housing prohibitions.

(C) Valid Legal Restrictions do not include the following:

(i) Existing nonresidential land use designations.

(ii) Covenants, restrictions, or other conditions on the property rendered void and unenforceable by any other law, including, but not limited to, Section 714.6 of the Civil Code.

(9) Surplus Trust Lands. Surplus land that was granted by the state in trust to a local agency or that was acquired by the local agency for trust purposes by purchase or exchange, and for which disposal of the land is authorized or required subject to conditions established by statute.

(A) A list of state granted trust lands may be found on the State Lands Commission website: https://www.slc.ca.gov/granted_lands/.

(B) A declaration of surplus trust land exempted pursuant to this subdivision must be supported by written findings that the land was granted by the state in trust or acquired by the local agency for trust purposes. The written findings must include the governing statute that sets the conditions for disposal of the trust land.

(~~I~~) 10) School District Surplus Land. Land that is subject to Education Code ~~Sections~~sections 17388, 17515, 17536, 81192, 81397, 81399, 81420, ~~and~~or 81422 of the Education Code and Part 14 of Division 31 of the Health and Safety Code commencing with Health and Safety Code ~~Section~~section 53570, unless compliance with the SLA is expressly required.

(~~J~~11) Real property that is used by a district for agency's use expressly authorized in Government Code ~~Section~~section 54221(c).

(~~K~~) 12) Transfers of Surplus Parking Lot Land. Surplus parking lot land that has been transferred before June 30, 2019, by the state to a local agency pursuant to Streets and Highways Code ~~Section~~section 32667 and has a minimum planned residential density of at least 100 dwelling units per acre and includes 100 or more residential units that are restricted to persons and families of low or moderate income pursuant to ~~Government Code~~ Section ~~54221~~102(~~f~~a)~~(1)(K)~~ of these Guidelines.

(13) Surplus land disposed of by a local educational agency, as defined by and pursuant to Government Code section 65914.7 (effective January 1, 2024).

(14) Surplus land that is a former military base that was conveyed by the federal government to a local agency and is subject to Article 8 (commencing with section 33492.125) of Chapter 4.5 of Part 1 of Division 24 of the Health and Safety Code, provided that all of the following conditions are met:

(A) The former military base has an aggregate area greater than five acres, is expected to include a mix of residential and nonresidential uses and is expected to include no fewer than 1,400 residential units upon completion of development or redevelopment of the former military base.

(B) The affordability requirements for residential units shall be governed by a settlement agreement entered into prior to September 1, 2020. Furthermore, at least 25 percent of the initial 1,400 residential units developed shall be restricted to lower-income households, as defined in section 50079.5 of the Health and Safety Code, with an affordable sales price or an affordable rent, as defined in sections 50052.5 and 50053 of the Health and Safety Code. Rental housing must be restricted for a minimum of 55 years; for-sale housing must be restricted for a minimum of 45 years; and rental or ownership housing located on tribal trust lands must be restricted for a minimum of 50 years.

(C) Prior to the disposition of the surplus land, the recipient has negotiated a project labor agreement consistent with the local agency's project stabilization agreement resolution, as adopted on February 2, 2021, and any succeeding ordinance, resolution, or policy, regardless of the length of the agreement between the local agency and the recipient.

(D) The agency includes in the annual report required by Government Code section 65400(a)(2) the status of development of residential units on the former military base, including the total number of residential units that have been permitted and what percentage of those residential units are restricted for persons and families of low or moderate income, as defined in section 50093 of the Health and Safety Code, or lower-income households, as defined in section 50079.5 of the Health and Safety Code.

(15) Sectional Planning Areas. Land subject to Government Code section 54221(f)(1)(P). HCD may request additional information to confirm land is eligible for the exemption.

(16) Surplus Land at Airport Facilities. Land that is owned by a California public-use airport in which residential housing is prohibited by Federal Aviation Administration (FAA) rules, grant deeds, or grant assurances. It is the responsibility of the local agency to identify the specific FAA rule, grant deed or grant assurance that prohibits housing.

(17) Land Transferred to a Community Land Trust. Land that is sold, leased, or transferred to a community land trust that meets all the following requirements:

(A) The land is, or will be, developed or rehabilitated for the purposes of housing.

(B) The housing that will be developed or rehabilitated will be occupied by low or moderate-income households as defined in Section 50093 of the Health and Safety Code for owner-occupied units or occupied by low-income households as defined in Section 50079.5 of the Health and Safety Code for rental units.

(C) The affordability requirements identified above shall be contained in a covenant, deed restriction, or equity sharing agreement pursuant to paragraph (11) of subdivision (a) of Section 402.1 of the Revenue and Taxation Code for owner-occupied units or pursuant to paragraph (2)(A) of subdivision (g) of Section 214 of the Revenue and Taxation Code for rental units, and recorded against the surplus land no later than January 1 of the year following the sale, that shall run with the land and be enforceable against any owner who violates the covenant or restriction and each successor in interest who continues the violation. A copy of the covenant or restriction shall be provided to the County Assessor.

(18) Mixed-use developments by Transportation Districts.

(A) Land owned by local agencies whose primary mission or purpose is to supply the public with transportation may be used to develop projects for

commercial or industrial uses, including nongovernmental retail, entertainment, or office

development or for the sole purpose of investment or generation of revenue, if the agency meets all the following criteria:

(i) The agency has an adopted land use plan or policy that designates at least 50 percent of the gross acreage covered by the adopted land use plan or policy for residential purposes and that plan proposes to develop the greater of either at least 300 residential units or at least 10 residential units per gross acre, averaged across all land covered by the land use plan or policy. Land use plans or policies include but are not limited to an adopted land use plan, land use program, joint development policy, transit-oriented development policy, or other similar policy.

(ii) The agency's adopted land use plan or policy requires that at least 25 percent of all residential units to be developed on the parcels covered by the adopted land use plan or policy are affordable pursuant to Section 102(a) of these Guidelines.

(iii) While the agency is required to develop all the affordable units in the agency's adopted land use plan or policy, before the agency is permitted to dispose of land for non-housing purposes, the agency must have in place a legally binding agreement(s), entered into since January 1, 2020, to dispose of at least 25 percent of the land pursuant to subparagraph (ii).

(B) Land disposed of for residential purposes shall:

(i) Be put out subject to the local agency's open, competitive solicitation process or put out to open, competitive bid by the local agency, provided that all entities identified in Government Code section 54222, subdivision (a), are invited to participate.

(ii) Include the appropriate affordability covenants or restrictions recorded against the surplus land that will be used to meet the plan's affordability requirements. At least 25 percent of the residential units proposed in the entirety of the land use plan or policy, but not necessarily on individual parcels, must be affordable pursuant to Section 102(a) of these Guidelines.

(19) Land subject to Government Code section 54222.3.1. HCD may request additional information to confirm land is eligible for the exemption.

(d) If the surplus land is located in one of the four locations below, an NOA for open space purposes must be sent via email or certified mail to the entities identified in Government Code section 54222(b) and HCD before a local agency may dispose of the land pursuant to Section 103(c)(2)-(8) and (10)-(19) of these Guidelines.

(1) The land is located within a coastal zone.

(2) The land is adjacent to a historical unit of the State Parks System.

(3) The land is listed on, or determined by the State Office of Historic Preservation to be eligible for listing on, the National Register of Historic Places.

(4) The land is located within the Lake Tahoe region as defined in Government Code section 66905.5.

(~~c~~e) ~~No~~ Exemption Determination: Any determination by a local agency that its surplus lands are exempt from the SLA must be supported by written findings and documentation, which shall be provided to HCD pursuant to ~~Section~~section 400(e) of these Guidelines.

(f) Pursuant to section 201 of these Guidelines, prior to disposing of surplus land or participating in negotiations to dispose of surplus land with a prospective transferee, a local agency shall send a written NOA. However, "participating in negotiations" does not include any of the following:

(1) Issuing an RFP or RFQ to the entities identified in Government Code section 54222(a) for the purposes of meeting the affordable housing exemptions in Government Code section 54221(f)(1)(A), (F), (G), (H), and (I);

(2) Negotiating a lease, ENA, or option agreement for the purposes of meeting the affordable housing exemptions in Government Code section 54221(f)(1)(A), (F), (G), (H), and (I); or

(3) Negotiating with a developer to determine if the lease provisions of Government Code section 54221(d)(2) can be met.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c)(2), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 54221, ~~Section~~section 54222, ~~Section~~section 54222.3, ~~Section~~section 54223, ~~Section~~section 54226, ~~Section~~section 54227, ~~Section~~section 54230, ~~Section~~section 54230.5, ~~Section~~section 54233, ~~Section~~section 54234, subdivisions (a)(2), (b)(1), (b)(2), ~~Section~~section 25539, ~~Section~~section 25539.4, ~~Section~~section 37364; Education Code ~~Section~~section 17388, ~~Section~~section 17515, ~~Section~~section 17536, ~~Section~~section 81192, ~~Section~~section 81397, ~~Section~~section 81399, ~~Section~~section 81420, and ~~Section~~section 81422; Health and Safety Code ~~Sections~~sections 53570 et seq.; Streets and Highways Code ~~Section~~section 32667.

Section 104. Agency's Use

(a) Except as provided below, "agency's use" shall include, but not be limited to, land that is being used for agency work or operations, land that a local agency plans to use for agency work or operations pursuant to a written plan adopted by the local agency's governing board, or land that is disposed of for agency work or operations.

(1) "Agency work or operations" includes, but is not limited to, utility sites; watershed property; land being used for conservation purposes; land for demonstration, exhibition, or educational purposes related to greenhouse gas emissions, property owned by a port that is used to support logistics uses, sites for broadband

equipment or wireless facilities, buffer sites located near sensitive governmental uses, including, but not limited to, wastewater treatment plants, and waste disposal sites.

(2) In cases where a local agency will only use a portion of land for agency's use, the local agency must comply with the SLA when disposing of the portion of land not being used for agency's use, even if revenue generated on that portion of the land is used to support the development on the portion of land that qualifies as agency's use. A local agency may issue an NOA that includes reasonable conditions or restrictions, as provided in section 202(a)(2)(D)(iv), noting that a portion of the land will be used for agency's use.

(3) Agency's use shall not include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development. Property disposed of for the purpose of investment or generation of revenue shall not be considered necessary for agency's use.

(4) In the case of a local agency that is a district, excepting those whose primary mission or purpose is to supply the public with a transportation system, agency's use may include commercial or industrial uses or activities, including nongovernmental retail, entertainment, or office development, or may be used for the sole purpose of investment or generation of revenue if either (a) such use directly furthers the express purpose of the district's work or operations, or (b) such use is expressly authorized by a statute governing the district, provided the district complies with Government Code section 54233.5 where applicable. Also, the district's governing body must take action in a public meeting declaring that the use of the site meets one of these two requirements.

(b) Land that a local agency disposes of pursuant to the Eminent Domain Law, Code of Civil Procedure section 1240.010 et seq., shall also constitute agency's use, as defined in section 104 of these Guidelines, under either of the following conditions:

(1) The land is transferred to another property owner for the purpose of mitigating impacts to the transferee property owner resulting from the local agency's project.

(2) The local agency acquired the land for the express purpose of transferring the land to another entity.

(c) Notice of Disposition for Agency's Use: A local agency that plans to dispose of land for agency's use shall provide documentation that the land meets the definition of agency's use in Section 104(a) to HCD at least 30 days prior to disposition. A local agency that is using or plans to use the land for agency's use but is not disposing of the land, as defined in Section 102(i) of these Guidelines, is not required to send documentation to HCD.

Note: Authority cited: Government Code section 54221, subdivisions (b)(1), (c)(1), (c)(2)(A), (c)(2)(B).

ARTICLE II. SURPLUS LAND

Section 200. Surplus Land Determination Process

(a) Land must be declared either “surplus land” or “exempt surplus land,”~~,~~

as supported by written findings, before a local agency may take any action to dispose of it consistent with an agency's policies or procedures. Prior to taking any action to dispose of surplus land or participating in negotiations to dispose of surplus land with a prospective transferee, a local agency shall send a written Notice of Availability (NOA). A local agency may not solicit or accept offers to purchase or develop surplus land until the agency has first sent an NOA and, if the agency receives any responses to the NOA, completed negotiations with those parties. However, “participating in negotiations” does not include any of the following:
~~dispose of it consistent with an agency's policies or procedures.~~

(1) Issuing an RFP or RFQ to the entities identified in section 54222(a) for the purposes of complying with Government Code sections 54221(f)(1)(A), (F), (G), (H), and (I);

(2) Negotiating a lease, ENA, or option agreement for the purposes of meeting the affordable housing exemptions in Government Code section 54221(f)(1)(A), (F), (G), (H), and (I); or

(3) Negotiating with a developer to determine if the lease provisions of Government Code section 54221(d)(2) can be met.

(b) Surplus land shall have the definition set forth in ~~Section~~section 102(~~w~~dd) of these Guidelines and exempt surplus land shall have the definition and meet the requirements set forth in ~~Section~~section 103(~~b)(3~~c) of these Guidelines.

(c) Beginning April 1, 2021, “a central inventory of all surplus land” shall be reported to HCD no later than April 1 of each year on Table H of the ~~city~~city’s or county’s APR submitted pursuant to Government Code section 65400(a)(2).

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c)(2), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 54230, ~~Section~~section 65400.

Section 201. Notice of Availability

Any local agency disposing of surplus land, prior to disposing of that property or participating in negotiations to dispose of that property with a prospective transferee, shall send a written ~~notice of availability (~~NOA~~)~~ to ~~certain~~all parties designated in ~~the SLA~~Section 201(a)-(d) below. The notice shall be in a form prescribed by HCD in Appendix A of these Guidelines and shall comply with the following.

(a) Low- and Moderate-Income Housing ~~Availability~~ Notice of Availability.

(1) A written ~~notice of the availability~~NOA of surplus land provided on the form contained in Appendix A of these Guidelines for the purpose of developing low- and moderate-income housing shall be sent to the following:

(A) HCD and any local public entity as defined in Health and Safety Code ~~Section 50079~~section 50079 and Section 102(t) of these Guidelines, within whose jurisdiction the surplus land is located. HCD will maintain on its website an up-to-date listing ~~of all notices of availability throughout the state.~~

of all NOAs throughout the state. NOAs shall be delivered to HCD via the SLA Portal or Certified Mail.

(B) Housing sponsors that have notified HCD of their interest in surplus land that is in the county in which the surplus land is located or in all California counties. Housing sponsors must notify HCD of their interest in surplus land by completing a survey provided by HCD. Those interested in receiving notices from local agencies based on HCD's expressions-of-interest list are responsible for keeping their addresses and contacts current.

(2) An entity not on HCD's list may also respond to an NOA.

(3) All responses shall be date and time stamped by the local agency as they are received.

(4) All NOAs shall be sent by certified mail or email and shall include the location and a description of the surplus land.

~~(5) A NOA cannot be sent before the governing body for the local agency has declared the land for which the notice is being issued to be "surplus land", and any such notice sent prematurely will not be deemed valid.~~

(b) Park, Recreation and Open Space availability notices shall comply with the conditions and follow the requirements as described in Government Code ~~Sections~~sections 54221, subdivision (f)(2), 54222, and 54227, subdivision (b).

(c) School facilities surplus land availability notices shall comply with the conditions and follow the requirements as described in Government Code ~~Section~~section 54222(c).

(d) Infill Opportunity Zone or Transit Village Plan surplus land availability notices shall comply with the conditions and follow the requirements as described in Government Code ~~Section~~section 54222(d).

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c)(2), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 54221, subdivision (f)(2), ~~Section~~section 54222, and ~~Section~~section 54227, subdivision (b); Health and Safety Code ~~Section~~section 50079.

Section 202. Disposal of Surplus Land for Affordable Housing

~~After~~Prior to taking any action to dispose of surplus land, the governing board of a local agency ~~has held~~must hold the required public meeting to declare property as surplus land, as described in Section 102(~~w~~dd) of these Guidelines, ~~a Low- and Moderate-Income Housing Availability Notice~~and an NOA described in Section 201(a) must be sent to interested housing sponsors identified by the expressions-of-interest list maintained by HCD and local public entities within whose jurisdiction the surplus land is located and must invite those interested to respond to the local agency with a notice of interest.

(a) Negotiating Disposition of Surplus Land for Affordable Housing

(1) Response to ~~a~~an NOA of surplus land for the development of affordable housing

(A) 60 Days to Respond.

An entity or association interested in developing surplus land for affordable housing must notify in writing the disposing agency of its interest in purchasing or leasing the land within 60 days after the agency's ~~notice of availability of the land~~NOA is sent via certified mail or provided via electronic mail.

(i) A local agency may not issue ~~a request for proposals~~an RFP on surplus land less than 60 days from the date that the local agency issues the NOA ~~of surplus land~~.

(ii) If a notice of interest is received in response to an NOA, ~~a request for proposals~~an RFP may not be issued until after the conclusion of the 90-day negotiation period.

(B) Upon Receipt of Notice of Interest.

If a local agency disposing of surplus land receives a timely notice of interest from a proper entity, then a ~~90-day~~ good faith negotiation period of at least 90 days begins on the first day after the end of the 60-day period in Government Code ~~Section~~section 54222(e). If the price or terms cannot be agreed upon after the full 90-day good faith negotiation period, then the local agency may dispose of the surplus land without further regard to the SLA but must still comply with Government Code ~~Section~~section 54233 or 54233.5, as applicable.

(C) 90-Day~~,~~ Good Faith Negotiation Period.

(i) For purposes of the 90-day good faith negotiation period, residential use of

the surplus land by the prospective transferee shall be deemed an acceptable use. ~~Terms~~Nothing in this subdivision shall restrict a local jurisdiction's authority or discretion to approve land use, zoning, or entitlement decisions in connection with the surplus land, except that terms agreed to as part of the 90-day good faith negotiation period must comply with the following:

~~(i)~~I. A local agency cannot prohibit residential use of the surplus land as a condition of a sale or lease.

~~(ii)~~II. A local agency cannot reduce the authorized number of residential units or the maximum lot coverage of the surplus land below what is allowed by zoning or general plan requirements.

~~(iii)~~III. A local agency may not require, as a condition of sale or ~~Lease~~lease, any design standards or architectural requirements that would have a substantial negative effect on the viability or affordability of a

housing development for very low-, low- or moderate-income households, other than the minimum standards required by general plan, zoning, and subdivision standards and criteria.

(ii) For the purpose of disposition of surplus land in Section 400(b)(1) of these Guidelines, the local agency must establish and document that good faith negotiations have taken place with each respondent.

(iii) HCD may request from local agencies a purchase and sale or lease agreement disposing of surplus land when good faith negotiations do not result in a disposition to an affordable housing entity.

(iv) Activities that demonstrate good faith negotiations include, but are not limited to:

I. Make a serious effort to meet at reasonable times and attempt to reach agreement;

II. Respond to letters of interest;

III. Respond to and consider reasonable offers to purchase or lease;

IV. Not require that development proposals significantly deviate from the NOA; and

V. Not arbitrarily end active negotiations after 90 days.

(D) For the purposes of complying with the SLA's requirements regarding NOAs, "participating in negotiations" does not include the commissioning of appraisals, due diligence prior to the sale or lease of the surplus land, discussions with brokers or real estate agents not representing a potential buyer, or other studies to determine value or best use of the surplus land, issuance of a request for qualifications, development of marketing materials, or discussions conducted exclusively among local agency employees and elected officials. ~~(Gov. Code Section 54222(f))~~

(E) If an entity believes a local agency has not negotiated with it in good faith pursuant to this section, the entity may notify HCD via the Surplus Lands Portal. ~~Prior to September 6, 2023, submissions were accepted at PublicLands@hcd.ca.gov.~~

(F) Sample negotiation process timeline. The following represents a sample timeline for a good faith negotiation per the definition in Section 102(m) of these Guidelines. Minor departures from this sample do not constitute per se bad faith, and differences in the timeline may be justified with prior notice to HCD.

- March 1, ~~2021~~2024 – disposing agency sends ~~a~~an NOA of surplus land as described in Section 201;
- ~~March 10, 2021 – first entity desiring to purchase or lease the surplus land sends notice of interest to disposing agency;~~
- March 12, ~~2021~~2024 – disposing agency receives notice of interest from first entity desiring to purchase or lease the surplus land;
- ~~March 20, 2021 – second entity desiring to purchase or lease the surplus land sends notice of interest to disposing agency;~~
- March 22, ~~2021~~2024 – disposing agency receives notice of interest from second entity desiring to purchase or lease the surplus land;
- April 30, ~~2021~~2024 – last day for an entity desiring to purchase or lease the surplus land to respond to the NOA;
- May 1, ~~2021~~2024 – 90-day, good faith negotiation period commences, as described in ~~Section~~section 202(a)(1)(C);
- July 30, ~~2021~~2024 – last day of 90-day, good faith negotiation period;
- July 31, ~~2021~~2024 – first day that disposing agency may dispose of the surplus land without regard to the amendments to the SLA, except that the disposing agency must still follow Government Code sections 54233 or 54233.5.

(2) Terms

(A) As part of the 90-day good faith negotiation period, a local agency and a

prospective transferee may agree to limitations on residential use or density if, without such limitations, the residential use or density would have a specific, adverse impact, supported by written findings, upon the public health or safety or upon the local agency's operation or facilities, and there is no feasible method to satisfactorily mitigate the impact.

(B) For low- and moderate-income housing purposes, a local agency may agree to a payment period of up to 20 years for a sale of surplus land in any contract of sale or sale by trust deed for the land. Such payment period may exceed 20 years but shall not exceed the term that the surplus land is required to be used for low- or moderate-income housing.

(C) A local agency may sell or lease surplus land at fair market value or fair market rent or less than fair market value or fair market rent.

(D) Agreement between the local agency and buyer.

(i) Failure to agree on sale/purchase price of land: If "fair market value" was determined by a single appraisal, a second appraisal value commissioned from a mutually acceptable firm may be averaged with the initial value to determine a sales price.

(ii) Partial lease/acquisition: A local agency may agree to a lease or

sale of part of the surplus land provided that the remaining parcel or parcels are disposed of as surplus land or exempt surplus land. A written justification for accepting a lease or sale of part of surplus land must accompany the Appendix B report to HCD.

(iii) Agency change of mind: A local agency may withdraw its NOA provided that no notices of interest have been received and a written "notice of withdrawal" is sent to all housing sponsors, local public entities, HCD, and any other developers to which the ~~notice of availability~~NOA was sent.

(iv) Conditions and restrictions required by the local agency as seller: A local agency may provide entities with reasonable conditions or restrictions for the surplus land in question, which must be included in the NOA, and should be reviewed by HCD pursuant to Section 400. The parties are required by the SLA to then negotiate in good faith. If ~~it appears that~~ the parties cannot resolve issues that would preclude a disposition within the 90-day negotiation period, the parties may discuss the issue(s) with HCD.

~~(b) Payment Period for Surplus Land Disposed of in Contract of Sale or Sale by Trust Deed~~

~~(1) If surplus land is disposed of for housing for persons and families of low and moderate income, the payment period shall not exceed the term that the land is required to be used for low- or moderate-income housing.~~

~~(2) If surplus land is disposed of for park or recreation purposes, for open-space purposes, or for school purposes, the local agency may provide for a payment period of up to 20 years.~~

(3) Multiple Notices of Interest

(A) A local agency may negotiate concurrently with all entities that provide notice of interest for the purpose of developing affordable housing that meets the requirements of Government Code ~~Section~~section 54222.5.

(B) In the event that any local agency disposing of surplus land receives a notice of interest to purchase or lease that land from more than one of the entities to which ~~a~~an NOA was given, the local agency shall give first priority to the entity

or entities that agree to use the site for affordable housing that meets the requirements of Government Code ~~Section~~section 54222.5, described as follows:

(i) Not less than 25 percent of the total number of units developed (which number includes density bonus units) shall be affordable housing as defined by Section 102(a) of these Guidelines.

~~(ii) If more than one entity proposes the same number of units that meet the requirements of Government Code Section 54222.5, priority~~

~~shall be given to the entity that proposes the deepest average level of affordability for the affordable units.~~

(~~C~~ii) If the local agency receives notices of interest from more than one entity that agrees to meet the requirements of Government Code ~~Section~~section 54222.5, then the local agency shall give priority to the entity that proposes to provide the greatest number of units that meet the requirements of Government Code ~~Section~~section 54222.5.

(iii) If more than one entity proposes the same number of units that meet the requirements of Government Code section 54222.5, priority shall be given to the entity that proposes the deepest average level of affordability for the affordable units.

(4) ~~Grounds for~~Following good faith negotiations, grounds for a local agency to reject an offer include, but are not limited to, the following:

(A) ~~A local agency may reject an offer when the~~The local agency and buyer/lessee cannot agree on the sales price and terms or lease terms.

(B) ~~A local agency may reject an offer when priority~~Priority is given to a competing offer that includes a greater number of affordable units or, in case of a tie in the number of units, the lowest average level of affordability consistent with Government Code ~~Section~~section 54222.5.

(C) ~~A local agency may reject an offer when the~~The interested entity is not responsive to a local agency's reasonable conditions or restrictions as described in the NOA, where consistent with these Guidelines and the SLA~~, and such conditions or restrictions are reviewed by HCD~~.

(~~c~~b) Requirements If Negotiations End with No Sale or Lease of Surplus Land

(1) Local Agencies That Are Not Districts.

(A) If the local agency does not agree to price and terms with any entity to which an NOA ~~of land~~ was given pursuant to these Guidelines, or if no entity to which a NOA was given pursuant to these Guidelines responds to that notice, then the land in question may be disposed of outside of the SLA, except that ~~Section 202(c)(1) and (2)~~this section shall apply.

In ~~such a case,~~all dispositions of surplus land in which the local agency does not agree to price and terms or in which no entity responds, an affordability covenant must still be recorded against the property. The covenant must state that if 10 or more residential units are developed on the property, not less than 15 percent of the total number of residential units developed on the ~~parcels~~property shall be sold or rented as affordable housing as defined by Section 102(a) of these Guidelines.

~~(B) The purchasing entity shall agree to the following additional requirements:~~

(i) Rental units shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 55 years. Ownership units shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 45 years. Rental or ownership housing located on tribal trust lands shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 50 years. The initial occupants of all ownership units on the surplus land shall be lower-income households and the unit shall be subject to an equity sharing agreement consistent with Health and Safety Code ~~Section~~section 65915(c)(2). Any subsequent occupants shall also be lower-income households, if necessary, for the unit to remain

occupied by lower-income households, for at least 55 years, 45 years, or ~~55~~50 years, respectively.

(ii) The requirements set out in this subdivision ~~(a)~~ above shall be contained

in a covenant or restriction to be recorded against the surplus land ~~at the time of sale, which by its express terms~~prior to land use entitlement, and the covenant or restriction shall run with the land and shall be enforceable by any of the following parties~~,~~ against any owner who violates the covenant or restriction and each successor in interest who continues the violation:

I. The local agency that disposed of the property.

~~I~~II. Any resident of an affordable ownership or rental unit

described in this subdivision ~~(a)~~.

~~II~~III. A resident's association with members who reside in units

described in this subdivision ~~(a)~~.

~~III~~IV. A former resident of a unit described in this subdivision ~~(a)~~ who

last resided in that unit.

~~IV~~V. An applicant seeking to enforce the covenants or restrictions

for a particular unit, ownership or rental, as described in this subdivision ~~(a)~~, if the applicant conforms to all of the following:

a. Is of low or moderate income, as defined in ~~Section~~section 50093 of the Health and Safety Code;

b. Is able and willing to occupy that particular unit; and

c. Was denied occupancy of that particular unit due to an alleged breach of a covenant or restriction implementing Government Code ~~Section~~ section 54222.5.

~~V~~VI. A person on an affordable housing waiting list who is of low or moderate income, as defined in ~~Section~~section 50093 of the

Health and Safety Code, and who is able and willing to occupy a unit subject to this provision of the Guidelines.

(~~C~~B) ~~A~~local A local agency shall provide a draft copy of any restrictions to be recorded against the surplus land to HCD as an attachment to the form prescribed by HCD in Appendix B.

(2) Districts.

(A) If a local agency that is a district, excepting those whose primary mission or purpose is to supply the public with a transportation system, disposes of surplus land where local zoning permits development of 10 or more

residential units or is rezoned within five years of the disposal to permit the development of 10 or more residential units, and 10 or more residential units are developed on the property, not less than 15 percent of the total number of residential units developed on the parcel shall be sold or rented as affordable housing as defined by Section 102(a) of these Guidelines, and the additional requirements contained in Section 202(c)(1)(~~B~~A)(~~i.iii~~i)-(ii) of these Guidelines shall apply.

(B) A local agency that is a district shall provide a draft copy of any restrictions to be recorded against the surplus land to HCD on the form prescribed by HCD in Appendix B of these Guidelines.

(C) This subsection shall not apply to projects as defined in Health and Safety Code ~~Section~~section 32121(j).

(c) Disposition of contiguous land.

(1) If a local agency seeks to simultaneously dispose of multiple contiguous parcels of surplus land to the same receiving entity, or any entity working in concert with another receiving entity, such that it would reduce the capacity of individual parcels to support at least ten housing units, the applicable affordability covenant must be applied such that the amount of affordable housing required is based on the aggregate capacity of the contiguous parcels.

(2) If the surplus land consists of multiple contiguous parcels or is one parcel that will be subdivided into multiple contiguous parcels, the land can be treated as one parcel by a master developer for the purpose of applying the applicable affordability covenant.

(d) Payment Period for Surplus Land Disposed of in Contract of Sale or Sale by Trust Deed.

(1) If surplus land is disposed of for housing for persons and families of low and moderate income, the payment period shall not exceed the term that the land is required to be used for low- or moderate-income housing.

(2) If surplus land is disposed of for park or recreation purposes, for open-space purposes, or for school purposes, the local agency may provide for a payment period of up to 20 years.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c)(2), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section 54221, Section 54222, Section 54222.5, Section 54223, Section 54225, Section 54226, Section 54227, Section~~section 54221, section 54222, section 54222, subdivision (f), section 54222.5, section 54223, section 54225, section 54226, section 54227, section 54233; Health and Safety Code ~~Section~~section 32121.

ARTICLE III. REQUIREMENTS TO BE PLACED ON SURPLUS LAND FOR AFFORDABLE HOUSING

Section 300. Requirements When an Entity Proposes to Use the Surplus Land for Developing Affordable Housing

(a) An entity proposing to use the surplus land for affordable housing shall agree to make no less than 25 percent of the total number of units developed on the parcels as affordable housing pursuant to Section 102(a) of these Guidelines. The entity shall ~~agree to~~comply with the following additional requirements:

(1) Rental units shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 55 years and 50 years for housing located on tribal trust lands.

(2) Ownership units shall remain at an affordable housing cost to, and occupied by, lower-income households for a period of at least 45 years and 50 years for housing located on tribal trust lands. The initial occupants of all affordable ownership units on the property shall be lower-income households and the ~~unit~~units shall be subject to an equity sharing agreement consistent with Health and Safety Code ~~Section~~section 65915(c)(2). Any subsequent occupants shall also be lower-income households, if necessary~~,~~ for the unit to remain occupied by lower-income households~~,~~ for at least 45 years and at least 50 years for housing located on tribal trust lands.

(3) The affordable residential units required under the covenant described in subdivision (b) below must be developed prior to or at substantially the same time as the unrestricted units and non-residential portion of the development. If the development occurs in phases, the affordability requirement should be met in each phase.

(b) The requirements set out in subdivision (a) above shall be contained in a covenant or restriction recorded against the surplus land at the time of sale, which by its express terms shall run with the land and shall be enforceable by any of the following parties, against any owner who violates the covenant or restriction and each successor in interest who continues the violation:

(1) The local agency that disposed of the property.

(2) Any resident of an affordable ownership or rental unit described in subdivision (a).

(3) A resident's association with members who reside in units described in subdivision (a).

(4) A former resident of a unit described in subdivision (a) who last resided in that unit.

(5) An applicant seeking to enforce the covenants or restrictions for a particular unit, ownership or rental as described in subdivision (a), if the applicant conforms to all of the following:

(A) Is of low or moderate income, as defined in ~~Section~~section 50093 of the Health and

Safety Code;

(B) Is able and willing to occupy that particular unit; and

(C) Was denied occupancy of that particular unit due to an alleged breach of a covenant or restriction implementing Government Code ~~Section~~section 54222.5.

(6) A person on an affordable housing waiting list who is of low or moderate income, as defined in ~~Section~~section 50093 of the Health and Safety Code, and who is able and willing to occupy a unit subject to this provision of the Guidelines.

(c) A local agency shall provide a draft copy of any restrictions to be recorded against the surplus land to HCD as an attachment to the form prescribed by HCD in Appendix B.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 54222.5, ~~Section~~section 54233; Health and Safety Code ~~Section~~section 50093, ~~Section~~section 65915.

ARTICLE IV. REPORTING REQUIREMENTS

Section 400. Local Agency Reporting Requirements

(a) Pre-Negotiation and Disposal Notice. A local agency must submit ~~a~~an NOA to HCD, ~~any~~ all ~~other~~ local public entities as defined in Health and Safety Code section 50079 within whose jurisdiction surplus land is located, and all interested housing sponsors that have provided notice to HCD.

(1) Prior to disposing of surplus land or participating in negotiations to dispose of surplus land with a prospective transferee, a written NOA shall be sent to HCD on the form in Appendix A pursuant to Section 201 of these Guidelines. If the NOA includes any local agency conditions or restrictions regarding development, local agencies are advised to send such conditions or restrictions ~~must be reviewed by HCD prior to the initiation of negotiations with any interested and qualified developer~~to HCD for review before sending the NOA to the required entities.

(b) Post-Negotiation Notice and Proposed Disposition Summary: A proposed disposition summary must be sent to HCD on Appendix B at the conclusion of negotiations ~~for~~at least 30 days before the disposition of surplus land. Local agencies are only required to fill out the sections of Appendix B that apply to the disposition. Not all sections will apply to every disposition.

(1) Prior to finalizing any agreements or disposing of any surplus land, the local agency shall provide to HCD a copy of the resolution (or other document recording formal action) declaring the property surplus, a description of the NOAs sent, a description of ~~the~~ negotiations conducted with any responding entities, including any non-solicited expressions of interest in regard to the disposal of the surplus land, ~~and a~~proof of delivery of the NOA to all CalHFA-certified housing sponsors and local public entities, and a draft copy of any restrictions to be recorded against the property pursuant to Government Code ~~Sections~~sections 54233 or 54233.5, whichever is applicable, ~~in a~~on the form prescribed by HCD in Appendix B. A sample covenant/restriction is provided in Appendix C. A local agency shall also provide HCD a copy of any recorded restrictions upon final disposition.

(A) Local agencies are not responsible for contacting housing entities that provided inaccurate or inactive emails or contact information within the CalHFA certified housing sponsors list. Affordable housing entities are responsible for maintaining current contact information.

(2) A local agency may submit this information to HCD after it has sent NOAs required by Government Code ~~Section~~section 54222 and concluded negotiations with any responding entities. Article V of these Guidelines provides details on HCD's required review of this information.

(3) If a local agency proposes to dispose of surplus land to an entity that does not have first priority and/or priority pursuant to Government Code ~~Section~~section 54227, the local agency is required to provide HCD an adequate written explanation.

(c) A local agency ~~shall provide HCD a copy of any restrictions to be recorded against the property pursuant to sections 202(d~~may submit disposition documents identified in Section 400(b)(1~~)(B) and 300(b~~) of these Guidelines ~~as an attachment to Appendix B.~~to HCD any time after the 60-day NOA period or, if applicable, the 90-day good

faith negotiation period. In cases where a local agency is seeking to dispose of surplus land, the local agency is required to submit complete disposition documentation to HCD and receive a Findings Letter from HCD only once, regardless of when a final disposition occurs.

(d) A local agency that is a city, county, or city and county shall submit an APR pursuant to Government Code section 65400 including the following information:

(1) A central inventory of all surplus land and all lands as of December 31 in excess of the local agency's foreseeable needs, if any, identified pursuant to Government Code ~~Section~~section 50569. Beginning in 2021, this inventory is to be submitted to HCD by April 1 of each year. This inventory will become part of the APR as Table H. Please reference ~~Section~~section 601 for web links which detail APR and ~~Housing Element~~housing element requirements.

(2) Jurisdiction-owned sites identified in the housing element sites inventory subsequently disposed of by the jurisdiction in Table G of the ~~Housing Element~~housing element APR.

(e) Notice of Exemption Determination: A local agency that determines that property is exempt from the SLA shall support such a determination with written findings and shall provide a copy of the written determination to HCD at least 30 days prior to disposition.

(1) A local agency must provide HCD with a copy of the resolution (or other document recording formal action) declaring the property exempt surplus land ~~that includes~~and written findings supporting such a declaration ~~will generally be considered sufficient documentation to meet this requirement~~.

(2) A local agency must provide written findings that describe which exemption applies to the surplus land and how the surplus land meets the requirements of that exemption. Additional documentation may be necessary to support those written findings.

(3) Local agencies declaring land identified in Government Code section 54221(f)(1)(A), (B), (E), (K), (L), or (Q) as exempt surplus land pursuant to Government Code 54221(b)(4) must do the following: The notice must include a citation to the exemption (e.g., Government Code section 54221(f)(1)(A) for an affordable housing project), a contact name and email for public comments, and findings/reasons the land meets the exemption. HCD will accept online or newspaper publishing of the notice with evidence it was published and made available for 30 days (daily publication is not necessary). For newspaper publication, HCD will accept a notice published in a newspaper of general circulation in the local agency's area. For online publication, the notice must be available for the full 30 days, at minimum.

(~~2~~4) Local agencies are encouraged to notify HCD via the Surplus Lands Portal prior to having the resolution approved in order to clarify whether land should be declared "surplus land" or "exempt surplus land~~"~~. ~~Prior to September 6, 2023, submissions were accepted at PublicLands@hcd.ca.gov.~~" HCD requires at least 30 days to complete the review.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 50569, ~~Section~~section 54221, ~~Section~~section 54222, ~~Section~~section 54230.5, ~~Section~~section 54233, ~~Section~~section 54233.5, ~~Section~~section 65400.

ARTICLE V. PERFORMANCE MONITORING AND PENALTIES

Section 500. HCD Monitoring, Recording, and Reporting

(a) Initiation of Monitoring. Beginning on January 1, 2021, HCD shall initiate monitoring of local agency compliance with certain requirements imposed by the SLA.

(b) Educational Materials and Technical Assistance. To assist agencies with SLA compliance, HCD will from time to time make available educational resources and materials regarding the SLA and these Guidelines to local agencies and the public. Local agencies may request technical assistance via the Surplus Lands Portal.

~~(c) HCD Findings:~~

(~~1~~c) ~~Review:~~HCD's Findings. HCD shall review the information and documents submitted by a local agency pursuant to Section 400 of these Guidelines.

~~(2) Notice of Violation (NOV):~~ HCD shall consider and make findings ~~on~~as to whether the local agency's proposed sale or lease of the ~~surplus~~ land will violate the SLA ~~and~~, including these Guidelines.

(1) If HCD determines that the proposed sale or lease will violate the SLA, HCD shall ~~make~~issue a Findings Letter that contains written findings ~~and provide them~~supporting HCD's determination. HCD shall send the Findings Letter to the local agency within 30 days of receipt of the local agency's submittal ~~of all of the following:~~ .

~~(i) a description of the notices of availability sent; (ii) a description of the negotiations conducted with any responding entities in regard to the disposal of the surplus land; and (iii) a copy of any restrictions to be recorded against the surplus land pursuant to Health and Safety Code Section 54233 or 54233.5, whichever is applicable, in a form prescribed by HCD (collectively "Complete Submittal")~~ A) HCD's 30-day response period will ~~not~~ begin to run ~~until~~when HCD receives ~~the Complete Submittal. HCD shall provide the local agency at least 60 days from the date that HCD sends the NOV to respond to the NOV before taking any other action.~~all the required documents and information listed in Section 400 of these Guidelines. HCD will immediately, and not more than 30 days after receipt of the required documents and information, notify the local agency in writing if HCD determines any required documents or information necessary for HCD's findings are missing.

(d) Response to HCD's Findings. The local agency shall consider HCD's written findings made in the Findings Letter pursuant to ~~Section 500~~subdivision (c) and ~~shall~~, within 60 days of receiving the Findings Letter, do one of the following:

(1) Correct any issues identified by HCD or explain how the local agency will correct issues identified by HCD.

(2) Provide written ~~responses to HCD prior to disposition of the surplus land~~findings explaining ~~how its~~the reason(s) the local agency's process for disposing of surplus land complies with the SLA~~ and addressing each of HCD's written findings~~.

(e) HCD's Final Determination. HCD shall evaluate any written findings, corrections, or proposals to correct provided by the local agency pursuant to subdivision (d) and provide the local agency with a Determination Letter or a Notice of Violation.

(1) Determination Letter. If HCD finds that the local agency has corrected all issues, or if HCD concurs that the local agency's process for disposing of surplus land complied with the SLA, HCD shall notify the local agency of its determination in a Determination Letter.

~~(e) HCD shall evaluate any written responses provided by the local agency pursuant to Section 500(d) to determine whether the local agency's findings are deficient in addressing the issues identified by HCD.~~

~~Note: Authority cited: Government Code Section 54230, subdivision (c), Section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code Section 54230.5~~

~~Section 501. Penalties~~

~~(a) Local agency's failure to adequately respond to HCD.~~

(~~1~~2) ~~If~~Notice of Violation. If HCD finds that the local agency ~~does~~has not ~~correct all the issues identified by HCD's written findings or does not provide written findings explaining the reason its~~corrected all issues, or if HCD finds that the local agency's process for ~~selling or leasing~~disposing of surplus land ~~complies~~ did not

comply with the SLA, HCD shall notify the local agency in a Notice of Violation, and may notify the Attorney General, that the local agency is in violation of the SLA. ~~HCD may seek to enforce the SLA and pursue remedies, including, but not limited to, injunctive or declarative relief.~~

~~(2) If the local agency provides written findings explaining the reason its process for selling or leasing surplus land complies with the SLA, but HCD determines that the findings are deficient pursuant to Section 500(e), HCD shall notify the local agency and may notify the Attorney General that the local agency is in violation of the SLA. HCD may seek to enforce the SLA and pursue remedies, including, but not limited to, injunctive or declarative relief.~~

(A) If a local agency receives a Notice of Violation, the local agency must hold an open public meeting to review the Notice of Violation. In addition to all legally required public meeting noticing requirements, the local agency must also post the public notice to the agency's website (if applicable), post the notice in a conspicuous public place in the local agency's office, and send the public notice to HCD via the Surplus Land Act Portal no later than the time of posting required by the Brown Act (commencing with Government Code section 54950). A local agency is not required to disclose information conducted during closed sessions at this meeting.

(B) A local agency is prohibited from finalizing the disposition of surplus land subject to a Notice of Violation until an open, public meeting is held pursuant to this Section.

(C) A local agency is exempt from subdivision (e)(2)(A) and (B) of this Section if the agency ceases the disposal of surplus land and informs HCD they have done so. If a local agency resumes the existing disposition of land at a later date, all the provisions of subdivision (e)(2)(A) and (B) of this Section apply.

(3) County of Orange and the Cities within the County of Orange—Additional Requirements. For the County of Orange or any city within the County of Orange, the following requirements apply in addition to the requirements described in subdivisions (c)-(e)(2):

(A) HCD shall make its Final Determination within 30 days of receiving the local agency's response to HCD's Findings Letter described in subdivision (d).

(B) If, pursuant to subdivisions (c) or (e), HCD issues a Findings Letter or Notice of Violation determining that the proposed disposition of surplus land will violate the SLA, the local agency shall not dispose of the surplus land until it has received a Determination Letter pursuant to subdivision (e)(1).

Note: Authority cited: Government Code section 54230, subdivision (c), section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code section 54230.5.

Section 501. Penalties

(a) HCD may seek to enforce the SLA and pursue all applicable legal and equitable remedies consistent with Government Code section 54230.6, including, but not limited to, injunctive or declaratory relief, if a local agency disposes of land, or attempts to dispose of land, in violation of the SLA.

(b) Local agency's violation of surplus land disposition requirements; ~~administrative~~ penalties.

(1) ~~A local agency that disposes of land in violation of the SLA~~If, after receiving a ~~NOV from HCD is in violation of the SLA pursuant to HCD's review~~Findings Letter or a Notice of Violation, as described in Section 500~~(c).~~ of these Guidelines, a local agency disposes of surplus land without correcting all violations identified in the Findings Letter or Notice of Violation, the local agency

~~(2) A local agency shall have 60 days from the date of the NOV to cure or correct an alleged violation before an action may be brought to enforce Government Code Section 54230.5, including penalties pursuant to Section 501(b)(3) of these Guidelines, unless the local agency disposes of the land before curing or correcting the alleged violation.~~

~~(3) If the local agency fails to correct the violation within 60 days from the date of the NOV, an administrative penalty of 30 percent of the final sale price of the land sold in violation of the SLA, or 50 percent for each subsequent violation, shall be invoiced by HCD to the local agency.~~

is liable for a penalty of 30 percent of the applicable disposition value of the land disposed of in violation of the SLA, and 50 percent of the applicable disposition value for each subsequent violation.

(A) These penalties shall not apply to clerical errors or violations of the SLA that do not impact the availability, priority, or construction of affordable housing (e.g., the amount of affordable housing provided) or the ultimate disposition of the land in compliance with the SLA. However, failure to issue an NOA, to notice the required entities, to provide at least 90 days of good faith negotiations, or to provide a recorded covenant to HCD may impact the availability, priority, or construction of affordable housing or the ultimate disposition of the land in compliance with the SLA. Any violations of the SLA that limit the opportunity of affordable housing entities to purchase non-exempt surplus land are not exempt from the penalties established in Government Code section 54230.5.

(B) For the purposes of this section, "applicable disposition value" means:

(i) In the case of a sale, the greater of the final sale price of the land or the fair market value of the surplus land at the time of sale, as determined by an independent appraisal of the surplus land sold in violation of the SLA. Appraised value should be determined by an independent, third-party appraisal prepared by a Member Appraisal Institute qualified appraiser and charged to the local agency no less than 60 days after receipt of a Notice of Violation.

(ii) In the case of a lease, the discounted net present value of the fair market value of the lease as of the date the lease was entered into, as determined by an independent appraisal of the lease of surplus land in violation of the SLA. The discounted net present value should be determined by an independent, third-party appraisal prepared by a Member Appraisal Institute qualified appraiser and charged to the local agency no less than 60 days after receipt of a Notice of Violation.

(2) The penalty shall be deposited into a local housing trust fund, except that the local agency may elect to instead deposit the penalty funds into the Building Homes and Jobs Trust Fund or the Housing Rehabilitation Loan Fund.

(A) The penalty shall not be paid out of funds already dedicated to affordable housing, including, but not limited to, Low and Moderate Income Asset Funds, funds dedicated to housing for very low-, low-, and moderate-income households, and federal HOME Investment Partnerships Program and Community Development Block Grant Program funds.

(B) The local agency shall commit and expend the penalty funds within five years of deposit into the local housing trust fund for the sole purpose of financing newly constructed housing units that are affordable to extremely low-, very low-, or low-income households.

(i) If the penalty funds deposited into the local housing trust fund have not

been expended within five years after deposit, the funds shall revert to the state and be deposited into the Building Homes and Jobs Trust Fund or the Housing Rehabilitation Low Fund for the sole purpose of financing newly constructed housing units located in the same jurisdiction as the surplus land and that are affordable to extremely low-, very low-, or low-income households.

(C) Expenditure of any penalty funds deposited into the Building Homes and Jobs Trust Fund or the Housing Rehabilitation Loan Fund pursuant to this section shall be subject to appropriation by the Legislature.

(43) ~~Upon receipt of HCD's invoice, the~~The local agency may appeal the penalty assessment to HCD's Director by submitting ~~to the Director~~ a written appeal to the Director. The written appeal shall be limited to a statement of relevant facts, arguments, and evidence demonstrating the alleged error of law, procedure, or fact upon which the appeal is based. ~~Pursuant to statute, penalties~~Penalties are mandatory in the absence of such error and cannot be waived or modified for grounds not stated in ~~Government Code Title 5, Division 2, Part 1, Chapter 5, Article 8~~the SLA.

(~~5~~4) Once the written appeal is submitted to the Director, HCD may request ~~but is not required to accept~~ additional information or materials from the local agency for consideration. Appeals are to be submitted to the Director at the following address:

California Department of Housing and Community Development
~~Division of Housing Policy Development~~
~~2020 W. El Camino Avenue, Suite 500~~
Division of Housing Policy Development
651 Bannon Street, Suite 400
Sacramento, ~~California 95833~~CA 95811

(~~6~~5) The Director will accept appeals delivered through a carrier service such as the U.S. Postal Service, UPS, FedEx, or other carrier services that provide date stamp verification of delivery. Deliveries must be received during HCD's weekday (non-state holiday) business hours of 9:00 a.m. to 5:00 p.m. Pacific Standard Time.

(~~7~~6) Appeals must be received by the Director no later than thirty (30) business days from the date of HCD's ~~invoice~~assessment of the ~~assessed administrative~~ penalty.

(~~8~~7) The Director shall render ~~the~~a written decision ~~in writing~~on the appeal within forty-five (45) business days after notice and hearing ~~in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code~~.

(~~9~~8) The Director's decision shall be HCD's final decision.

(c) A local agency that sells or leases surplus land without complying with Sections 200(a), 201, 202, 300, 400(a), and 400(b) of these Guidelines violates the SLA.

(d) HCD may take action pursuant to Government Code section 65585.1 if a city, county, or city and county violates the SLA.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c), ~~Section~~section 54230.5, subdivision (b)(2)(D). Reference cited: Government Code ~~Section~~section 6250 et seq., ~~Section~~section 54222, ~~Section~~section 54230.5, ~~Section~~section 65589.5.

Section 502. Private Enforcement

(a) ~~An~~A public or private entity identified in Government Code ~~Section~~section 54222, or a person who would have been eligible to apply for residency in any affordable housing developed, or a housing organization as defined in Government Code ~~Section~~section 65589.5, or any beneficially interested person or entity, may bring an action to enforce Government Code ~~Section~~section 54230.5.

(b) ~~At least 30 days prior to bringing an action pursuant to subdivision (a) above, a notice of intent to enforce the SLA shall be provided to the local agency and to HCD, identifying the alleged violations of these Guidelines and/or the SLA.~~A public or private entity seeking to enforce Government Code section 54230.5 shall send a Notice of Alleged Violation to the local agency and provide a copy to HCD. The local agency has 60 days from the date of the Notice of Alleged Violation to cure or correct before the public or private entity may take further action, unless the local agency disposes of the land before curing or correcting the alleged violation, or HCD notifies the local agency in a Determination Letter that it is not in violation of the SLA in less than 60 days of receipt of the Notice of Alleged Violation.

(c) If HCD has not issued a Findings Letter to the local agency, HCD shall review the Notice of Alleged Violation submitted by the public or private entity and take action as appropriate. HCD may send the local agency a Notice of Violation, send a Determination Letter notifying the local agency it is not in violation of the SLA, or decline to take any action on the Notice of Alleged Violation.

(~~c~~1) If HCD ~~has not issued a NOV, HCD shall review the notice of intent to enforce the SLA and within 30 days notify the local agency if it must cure or correct the alleged violation in subdivision (b)~~sends the local agency a Notice of Violation, HCD shall also provide a copy of the Notice of Violation to the public or private entity that submitted the Notice of Alleged Violation. The local agency shall have 60 days from ~~receiving this notification from HCD~~receipt of HCD's Notice of Violation to cure or correct ~~the alleged violation before an action may be brought, unless the local agency disposes of the land before curing or correcting the alleged violation, or HCD deems the alleged violation not to be a violation in less than 30 days.~~pursuant to Section 500 of these Guidelines before HCD or an entity identified in Section 502(a) of these Guidelines may take further action to enforce Government Code section 54230.5. Local agencies receiving a Notice of Violation from HCD must also hold an open, public meeting pursuant to Section 500(e)(2)(A) of these Guidelines.

(2) If HCD sends a Determination Letter notifying the local agency that it is not in violation of the SLA, HCD shall also send a copy of the Determination Letter to the public or private entity.

Note: Authority cited: Government Code ~~Section~~section 54230, subdivision (c), ~~Section~~section 54230.5,
subdivision (b)(2)(D). Reference cited: Government ~~Section~~Code section 54222, ~~Section~~section 54230.5, ~~Section~~section 65589.5.

Appendix A – Notice of Availability
~~Form~~**Forms**

Notice of Availability Cover Letter:
https://www.hcd.ca.gov/community-development/disaster-recovery-programs/docs/1.20.21.LS.SLA_TA_NoticeAvailability_CoverLetter.docx

Notice of Availability Property Description:
https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.hcd.ca.gov%2Fsites%2Fdefault%2Ffiles%2Fdocs%2Fplanning-and-community%2Fsla-ta-notice-availability-property-description.xlsx&wdOrigin=BROWSELINK

Appendix B – Description of Disposition Form

https://www.hcd.ca.gov/~~community-development/disaster-recovery-programs/docs/SLA_TA_DispositionDescriptionTemplate2~~sites/default/files/docs/planning-and-community/disposition-description-template.xlsx

Appendix C – Sample Covenant/Restriction

https://www.hcd.ca.gov/community-development/docs/1.20.LS.SLA_TA_SampleCovenantRestriction.docx

Appendix D – HCD Survey to Indicate Interest in Surplus Land

Housing sponsors, as defined by ~~Section~~section 50074 of the Health and Safety Code, may notify HCD of their interest in surplus land pursuant to ~~Section~~section Government Code section 54222(a)(1) using the survey at the link below:

https://~~www.surveymonkey.com/r/ZRCC3FL~~calhcd.service-now.com/csp?id=csm_sc_cat_item_public&sys_id=e2a1239747df355062339362736d4335

Summary report: Litera Compare for Word 11.2.0.54 Document comparison done on 8/5/2024 5:10:20 PM	
Style name: Default Style	
Intelligent Table Comparison: Active	
Original filename: sla-guidelines-final.pdf	
Modified filename: final-updated-surplus-land-act-guidelines-2024.pdf	
Changes:	
Add	750
~~Delete~~	539
~~Move From~~	0
Move To	0
Table Insert	0
~~Table Delete~~	0
Table moves to	0
~~Table moves from~~	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	1
Embedded Excel	0
Format changes	0
Total Changes:	1290