



## AGENDA

**LEGEND:** A - Action may be taken  
I - Information  
1 - Included  
2 - Handout  
3 - Separate  
4 - Verbal

**JPA:** ACCEL CLAIMS COMMITTEE MEETING

**DATE/TIME:** Wednesday, September 28, 2022 at 2:00 PM

**LOCATION:** Teleconference

Link: <https://alliantinsurance.zoom.us/j/94271090838?pwd=SXF3bVJEZ0szUERpdFFld0VnZDBGdz09>

Meeting ID: 942 7109 0838

Passcode: 378740

Dial: (669) 900-6833

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***In accordance with the requirements of the Brown Act, notice of this meeting must be posted in publicly accessible places, 72 hours in advance of the meeting, at the office of ACCEL's Secretary.***

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*Per Government Code section 54954.2, persons requesting disability-related modifications or accommodations, including auxiliary aids or services in order to participate in the meeting, are requested to contact Alliant Insurance Services at (415) 403-1400, 24 hours in advance of the meeting. Access to some buildings may require routine provision of identification to building security. However, ACCEL does not require any member of the public to register his or her name, or to provide other information, as a condition to attendance at any public meeting and will not inquire of building security concerning information so provided. See Government Code section 54953.3.*

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- MEMBER** • **City of Anaheim**, 201 South Anaheim Blvd., Suite 503, Anaheim, CA 92805
- LOCATIONS** • **City of Bakersfield**, 1600 Truxtun Ave., 5<sup>th</sup> Floor, Bakersfield, CA 93301
- VIA TELE -** • **City of Burbank**, 275 E. Olive Ave., Burbank, CA 91510
- CONFERENCE** • **City of Santa Cruz**, 333 Front St, Suite 200 Santa Cruz, CA 95060
- **City of Santa Monica**, 1685 Main Street, Room 131, Santa Monica, CA 90401

### PAGE

#### **A. CALL TO ORDER**

#### **B. CONSENT CALENDAR**

3-5

- 1 1. Approval of Minutes for the September 1, 2022 Claims Committee Meeting (A)  
*The Committee will review these minutes and will take action to approve or give direction.*

#### **C. REPORTS**

##### **1. CLAIMS COMMITTEE'S REPORT**

- 3 a) **CLOSED SESSION – Pursuant to Gov't Code 54956.95** (A)  
*Members will review the following Closed Session items and may take action or give direction.*
- i. ACCEL's Treatment of Reservation of Rights Letters
  - ii. Crawford v. Bakersfield
  - iii. Okamoto v. Bakersfield
  - iv. Ramirez/Segura v. Bakersfield
  - v. Lohman v. Mountain View
  - vi. Rios v. Ontario
  - vii. Tomaszewski v. Santa Barbara
  - viii. Jones v. Anaheim
  - ix. Committee Review – ACCEL Open Loss Run
  - x. George Hills Estimated Loss Payments



- 4 b) Verbal Update on ACCEL’s Claims Administration and Litigation Management Contract (A)

*The Committee directed George Hills to provide a revised proposed contract. The next Claims Committee Meeting is scheduled to be held on Tuesday, October 4, 2022 at 1:30 PM to discuss it with the George Hills team.*

- 6-22 1 c) Proposed Changes: ACCEL Claims Reporting and Handling Policy and Procedure (A)  
*The Committee will discuss proposed changes. Action may be taken to provide a recommendation to the Board or direction given.*

- 23-25 1 d) Member Attorney Rates (A)  
*The Committee will review the disclosed attorney rates for reasonableness and may take action or provide direction.*

- 26-35 1 e) Litigation Update (I)  
*George Hills will provide the Committee a litigation update.*

**D. PUBLIC COMMENTS (I)**

- 4 *The public is invited at this point to address the Committee on issues of interest to them.*

**ADJOURNMENT**



**MINUTES OF THE  
ACCEL CLAIMS COMMITTEE  
MEETING**

Item No. B.1  
Claims Committee  
September 28, 2022

**Thursday, September 1, 2022 at 10:00 AM**

**LOCATION:  
TELECONFERENCE**

Link: <https://alliantinsurance.zoom.us/j/97375986772?pwd=bDZ4YktDTUNCdTdaYTM1NzY2cm1jdz09>

Meeting ID: 973 7598 6772

Passcode: 808718

Dial: (669) 900-6833

**MEMBERS PRESENT:**

Tracey Matthews, City of Anaheim  
Jena Covey, City of Bakersfield  
Betsy McClinton, City of Burbank  
Ross Brandon, City of Santa Cruz  
Oles Gordeev, City of Santa Monica

**MEMBERS ABSENT:**

None

**GUESTS AND CONSULTANTS:**

Ben Oram, George Hills Company (*excused from the meeting at 10:15 AM and re-joined at 11:28 AM*)  
David Tratz, George Hills Company (*excused from the meeting at 10:15 AM and re-joined at 11:28 AM*)  
John Chaquica, George Hills Company (*excused from the meeting at 10:15 AM and re-joined at 11:28 AM*)  
Chris Shaffer, George Hills Company (*excused from the meeting at 10:15 AM and re-joined at 11:28 AM*)  
Conor Boughey, Alliant Insurance Services  
Lorissa Huey, Alliant Insurance Services  
Marcus Beverly, Alliant Insurance Services

**A. CALL TO ORDER**

Tracey Matthews called the meeting to order at 10:00 AM.

**B. Consent Calendar**

**B1. Approval of Minutes for the May 25, 2022 Claims Committee Meeting**

A motion was made to approve the consent calendar.

**MOTION:** Jena Covey      **SECOND:** Betsy McClinton      **MOTION CARRIED**



	Tracey Matthews	Jena Covey	Betsy McClinton	Ross Brandon	Oles Gordeev
Aye	X	X	X	X	X
Nay					
Abstain					

**C. REPORTS**

**C1. Claims Committee’s Reports**

**C1a. Election of Claims Committee Chair**

Every year the Claims Committee annually elects a Committee Chair. Conor Boughey opened the floor for nominations.

Jena Covey made a motion to elect Tracey Matthews as Claims Committee Chair.

**MOTION:** Jena Covey      **SECOND:** Oles Gordeev      **MOTION CARRIED**

	Tracey Matthews	Jena Covey	Betsy McClinton	Ross Brandon	Oles Gordeev
Aye		X	X	X	X
Nay					
Abstain	X				

**C1b. Claims Administration Renewal Contract**

Conor Boughey reminded the Claims Committee (CC) that at the June 2022 Board Meeting, the Board delegated authority to the CC to evaluate the proposed contract with George Hills (GH) and make a recommendation to the Board at the October 2022 Long Range Planning and Board Meeting.

John Chaquica from GH walked through the proposed contract with the CC, which was included in the agenda packet. Members asked questions, which were addressed.

John Chaquica, Chris Shaffer, Ben Oram, and David Trautz from GH were excused from the meeting while the Committee had a roundtable discussion about the proposed contract.

The GH team rejoined the meeting and the following feedback was provided:

- The CC is considering Option 2.
- GH to provide information on why Option 4 should be a compelling option for ACCEL's consideration.
- The CC gave direction to GH to modify the proposed contract to reflect:
  - o A three-year contract with two one-year options to extend.
  - o Effective date of January 1, with the first year an eighteen-month term.
  - o No claims cap.
  - o A new section that names the Key Personnel of Ben Oram and David Trautz.
  - o The ability to review and approve who the Senior Claims Adjuster will be.
  - o No additional fees so there is only one fixed fee that encompasses all the fees, bundled at a discount and increases annually.
- For travel expenses, it is understood that GH will not charge ACCEL for more than two claims personnel if they are required to travel to attend ACCEL's Board Meetings/Claims Committee Meetings.

Another CC Meeting will be scheduled prior to the October 2022 Long Range Planning and Board Meeting to discuss this item.

The Committee did not make a recommendation at this time.

### **C1c. Proposed Changes: ACCEL Claims Reporting and Handling Policy and Procedure**

This item was deferred to the next Claims Committee Meeting.

### **C1d. Closed Session – Pursuant to Gov't Code 54956.95**

This item was deferred to the next Claims Committee Meeting.

**D. PUBLIC COMMENTS** - No public comments were made.

### **ADJOURNMENT**

Tracey Matthews adjourned the meeting at 11:38 AM.



**Item No. C.1.c**  
**Claims Committee**  
**September 28, 2022**

**PROPOSED CHANGES:**  
**CLAIMS REPORTING AND HANDLING POLICY AND PROCEDURE**

**ISSUE:** At a prior Claims Committee (CC) Meeting, the CC reviewed the drafted proposed language by Ben Oram, ACCEL's Litigation Manager regarding adding new section about the Settlement Authority Process. The intent of this new language is to clarify ACCEL's process regarding Settlement Authority. The Committee did not want to adopt the proposed language.

The Committee agreed that there needs to be language that outlines the steps of ACCEL's current process to settle a claim and it requested that this item be brought back to today's meeting. The attached Policy and Procedure contains proposed changes to outline the current claims settlement authority process.

**RECOMMENDATION:** The Claims Committee may make a recommendation to the Board to adopt the proposed changes or give direction.

**Additional Consideration:**

**In favor:** The proposed changes to the P&P aim to provide more clarity on the process for settling claims in the ACCEL retained layers of coverage. The proposed changes, if approved, outline the responsibility of the Claims Administrator to obtain guidance from ACCEL prior to settlement.

**Against:** If the Committee does not want to adopt the proposed changes to the P&P, this would indicate that ACCEL can remain silent within the Claims Handling P&P, or should consider different language. Currently, the Bylaws require the Claims Committee to present settlement recommendations to the Board prior to agreeing to a final settlement.

**FISCAL IMPACT:** No financial impact is expected from the recommended action.

**BACKGROUND:** In January 2022, the Board approved most recent amendments to the P&P as summarized below:

1. Administrative clean up throughout.
2. Update the role of the claims committee to include the authority to request coverage opinions.

# ACCEL

## Authority for California Cities Excess Liability

c/o Alliant Insurance Services, Inc.  
 Corporation Insurance License No. 0C36861  
 560 Mission Street, 6th Floor, San Francisco, CA 94105



3. Update the reporting guidelines and requirements for the Claims Administrator.
4. Update coverage determinations, adding partial disclaimers of uncovered damages and changing the process for reservations of rights.

At the May 25, 2022 Claims Committee Meeting the Claims Reporting Handling Policy and Procedure (P&P) was discussed. The topics of discussion included:

1. Propose changes by adding a new section about the Settlement Authority Process:
  - Ben Oram, ACCEL's Litigation Manager drafted proposed changes as shown in the redlined P&P attached in that meeting's agenda packet. The intent of this new language is to clarify ACCEL's process regarding Settlement Authority.
2. Review Attorney Rates:
  - In March 2021, the Board adopted language that stated, "*ACCEL Members are advised to request approval from the Claims Committee for any attorney rates excess of \$400/hour. The Claims Committee will review rates for consideration and may take action or provide direction.*"
  - The Claims Committee should review the attorney rates annually to see if it would like to amend or leave as is. At the May 25, 2022 Meeting, the Committee agreed to leave as is.

**ATTACHMENT:** Claims Reporting and Handling Policy and Procedure – Redlined.

# ADMINISTRATIVE POLICY AND PROCEDURE

## SUBJECT: CLAIM REPORTING AND HANDLING

DATE: May 1, 1987

AMENDED DATE: January 20, 2022

REVIEWED DATE: ~~January 11, 2022~~ September 28, 2022

### TABLE OF CONTENTS

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- III. Role of Claims Administrator
- IV. Reporting Requirements for Member Agencies
- V. Coverage Determinations
- VI. Duty to Disclose a Potential Conflict of Interest
- ~~VI.~~ VII. Settlement Authority Process
- ~~VII.~~ VIII. Claims Reimbursement Requests
- ~~VIII.~~ IX. Claims Audits
- ~~IX.~~ X. Attachments

#### I. Statement

It is the policy of the Authority for California Cities Excess Liability Joint Powers Authority (hereinafter referred to as “Authority”) that:

1. Each Member Agency will report all occurrences, claims, and lawsuits (hereinafter referred to as “claims”) meeting the Authority’s reporting criteria to its Claims Administrator as soon as possible and in accordance with the Authority’s Memorandum of Coverage (“MOC”).
2. Each Member Agency will assume primary responsibility for managing all reported claims filed against the Member Agency. However, the Authority reserves right to associate in or participate with a Member Agency in the negotiation, investigation, defense, appeal, or settlement of a claim subject to the terms and conditions of the Authority’s MOC.
3. The Authority’s Claims Administrator is responsible for notifying the Authority’s excess insurance carriers of all Member Agency claims with the potential to exceed the Authority’s retained limit in accordance with excess carriers’ claims reporting and handling policies. However, each Member Agency is responsible for notifying and complying with all insurance policies unaffiliated with the Authority, and purchased individually by the Member Agency (i.e., Non-Authority purchased coverage).
4. Should a discrepancy arise between this document and the Authority’s MOC, the MOC will govern.

## **II. Role of Claims Committee**

The Claims Committee is composed of Board Members appointed by the Executive Committee and approved by the Authority; the Committee Chair is selected by Committee members. Committee membership shall not meet or exceed a quorum of the Board. The Claims Committee, with support from the Authority's claims management firm, is responsible for the following activities:

1. Monitoring all claims reported by Member Agencies to the Authority to ensure reserves are adequate, defense strategies are sound, coverage issues are promptly identified and communicated to Member Agencies, and excess carriers are promptly notified of claims with potential to exceed the Authority's retained limit;
2. Reporting key developments and/or concerns regarding active claims to the Authority's Board of Directors;
3. Providing recommendations to the Board of Directors on claims and claims matters requiring Authority action, including, but not limited to, coverage determinations, reserve levels, defense strategies, settlement offers, and decisions to try or appeal lawsuits;
4. When appropriate, soliciting and reviewing coverage opinions and other related coverage matters (e.g. reservation of rights letters). The Claims Committee Chair may approve releasing the coverage statement to the Member, to be ratified at the following Claims Committee Meeting;
5. Overseeing the activities of the Authority's claims management firm; and
6. Assisting with the selection of the Authority's claims management firm and claims auditor.

The Claims Committee will meet at least quarterly to fulfill its designated responsibilities.

## **III. Role of Claims Administrator**

The Authority will retain the services of a claims management firm to oversee all claims reported by its Member Agencies. The claims management firm, in turn, will assign a claims administrator to the Authority. The Claims Administrator will serve as the Authority's point of contact for all reported claims and be responsible for fulfilling the scope of work contained in the service contract between the Authority and the claims management firm. The Claims Administrator will notify the excess carriers of claims in accordance with excess carriers' claims reporting and handling policies.

It is the duty of the Claims Administrator to report any claim or occurrence to each excess carrier, without regard to liability, that meets the reporting requirements in each of the excess policies, (e.g. death, traumatic brain injury, paralysis, burns, and other severe injuries, or a reserve of half or more of the retention) or which meet ACCEL's reporting requirements in Section IV below.

#### IV. Reporting Requirements for Member Agencies

1. Member Agencies will report to the Authority's Claims Administrator as soon as possible all events meeting any of the criteria identified below, without regard to liability:
  - a. Claims<sup>1</sup> in which the ultimate net loss is estimated to exceed 25% of the Member Agency's retained limit.
  - b. Claims<sup>1</sup> falling within any of the following classifications:
    - i. one or more fatalities;
    - ii. spinal cord injuries (paraplegic or quadriplegic);
    - iii. amputations;
    - iv. loss of sight or hearing;
    - v. severe burns or disfigurement;
    - vi. serious head injuries;
    - vii. serious loss of use of any body part or function;
    - viii. allegations of sexual misconduct, molestation or similar;
    - ix. long term hospitalization (30 days or more); or
    - x. multiple claims arising out of the same occurrence in which the aggregate ultimate net loss is estimated to exceed 25% of the Member Agency's retained limit.
  - c. Lawsuits or writs involving employment practices liability.
  - d. Any class action lawsuits.
  - e. Demands in excess of \$250,000 arising out of any of the following settings:
    - i. Statutory demand;
    - ii. Post closed discovery (not expert) demand;
    - iii. Mandatory Settlement Conference demand;
    - iv. Mediation demand; or
    - v. Arbitration demand.
2. Member Agencies will ensure that the initial report provided to the Claims Administrator contains a brief description of what occurred, along with all available/relevant documents (e.g., claim, investigative reports, photos, medical reports, etc.) and a reserve recommendation.

Member Agencies will provide the initial report and all future reports to the Authority's Claims Administrator:

George Hills Company  
P.O. Box 278  
Rancho Cordova, CA 95741  
Phone: (855) 442-2357  
Attention: Ben Oram / David Trautz  
[Ben.Oram@georgehills.com](mailto:Ben.Oram@georgehills.com) / [David.Trautz@georgehills.com](mailto:David.Trautz@georgehills.com)  
(916) 269-4108 / (747) 282-2810

<sup>1</sup> See page 1 of this policy – the definition of “claim” includes occurrences, claims, and lawsuits.

Once a reported claim is litigated, Member Agencies will promptly advise the Claims Administrator of legal counsel selection and forward a copy of the lawsuit along with any additional relevant documents available that were not provided with the initial report.

3. Member Agencies will ensure that assigned legal counsel provides the Claims Administrator with a case analysis report (“CAR” – sample attached) or equivalent as soon as reasonably possible after receipt of the lawsuit and status reports every ninety days thereafter or when an action occurs that could change the value of a lawsuit, whichever occurs first. Further, Member Agencies will ensure that status reports are complete and contain sufficient information for the Claims Administrator to properly evaluate the lawsuit and keep the Claims Committee informed of key developments that may require its action. If Member Agencies fail to comply with these requirements, the Claims Administrator will promptly alert the Claims Committee and may request intervention.

## **V. Coverage Determinations**

The Claims Administrator will promptly evaluate all reported claims to determine whether coverage is available under the Authority’s MOC.

If this review reveals a potential coverage issue(s), the Claims Administrator will send the affected Member Agency a partial disclaimer of uncovered damages and provide a copy to the Program Administrator. Upon further review of claim details, the Claims Administrator will request Claims Committee approval to issue a reservation of rights letter that clearly states the basis and justification for the finding; a copy of the letter will be provided to the Program Administrator and each Claims Committee Member. The Claims Chair has Authority to approve the issuance of a Reservation of Rights if circumstances dictate that the Claims Committee may not be able to approve. Any Reservations of Rights approved by the Claims Chair will be presented to the Claims Committee for ratification at the next Claims Committee meeting. The Claims Committee, in turn, will apprise the Board of Directors of all reservation of rights letters issued to Member Agencies and will provide regular status updates until matters resolve. All denials of coverage must be approved by the Authority.

Member Agencies can dispute a reservation of rights letter by contacting the Authority’s Board President and requesting that an item be placed on the next available Board of Directors meeting agenda to discuss the matter. In the event of a conflict (i.e., the Board President’s Member Agency is disputing a reservation of rights letter), the Vice President will assume the Board President’s responsibilities.

## **VI. Duty to Disclose a Potential Conflict of Interest**

Members have a duty to disclose a conflict of interest if a conflict of interest or potential conflict exists.

## **VII. Settlement Authority Process**

As stated in the ACCEL Bylaws Article XI Settlement of Claims:

All claims settlement recommendations shall be presented by the Claims Committee to the Board of Directors for its approval prior to final settlement.

ACCEL's Board will review claims covered by ACCEL's Memorandum of Coverage and take the following steps to review and grant authority to resolve claims:

1. The TPA will review claims for exposure to ACCEL's shared risk layer.
2. Claims which are likely to exceed the member retention and require ACCEL funds to resolve will be brought to the Claims Committee for review.
3. For claims in which an ACCEL reserve is being requested, the claim shall be brought to ACCEL's Board for review and action. If a reserve is approved, the reserve will be posted on ACCEL's loss run and indicates ACCEL's level of approval to resolve the claim.
4. If an opportunity to resolve a claim arises, and the amount is less than the approved reserve, the Claims Committee Chairperson has authority to approve the resolution of the claim. If the claim involves the Chairperson's own city, the President will have authority to approve.
5. If a claim resolution exceeds the Board approved reserve, the claim must be brought back to the Board for further discussion and potential action.
6. Any claim involving ACCEL's funds requires a final report to the Board, informing the Board of the claim resolution and financial impact to ACCEL.
7. Claims payments will be processed in accordance with ACCEL's Accounting Guide.

Confirmation of Authority: Prior to attending a settlement conference, the Claims Administrator should provide written notification to the Member Agency and to the Claims Committee of the settlement plan including the details of the mediation or settlement conference, if applicable, the reserves set by ACCEL, confirmation on the potential target settlement value, and where applicable, confirmation that the remainder of the Member Agency SIR may be tendered in the course of finding a resolution.

## VIII. Claims Reimbursement Requests

For claims that fall under the Policy Year 2015-16 and after, the Authority's MOC allows for a Member Agency to seek reimbursement from the Authority.

When seeking reimbursement Member Agencies are required to provide the Authority's Claims Administrator a summary as well as all invoices and documentation to substantiate the exhaustion of the Member SIR and the amount requested in the claim reimbursement.

The statement above does not change any agreement between the Authority and a Member Agency which allows the Member Agency (such as a flat fee agreement) to provide a summary report of the amount requested as part of the claim reimbursement along with a signed affidavit that all bills have been reviewed for accuracy, appropriateness, and reasonableness.

The Authority will reimburse Members or credit their Self-Insured Retentions (SIRs) for reasonable attorney fees and necessary litigation expenses incurred while managing, investigating, defending or litigating covered claims.

ACCEL Members are required to notify the Claims and Program Administrators regarding any claim in which attorney rates are in excess of \$400/hour. The Program Administrators will agendize the claim for the Claims Committee to review rates for reasonableness. The Committee may take action or provide direction.

- 1) Once prior written authorization is given to settle an excess case, or a judgment puts it into the Authority or other excess layers, the Member or its administrator must submit:
  - a) Copies of all settlement documents, including releases, annuity forms (if structured), and properly filed dismissals.
  - b) Copies of all itemized bills from defense attorneys, claims administrators, expert witnesses and any other cost bills. (*see attached sample billing procedures*)
  - c) Copies of valid evidence of payment properly matched to the bills and settlement documents. Valid evidence of payment can take the form of check copies, data processing runs, Member warrant registers, department payment records, TPA claim payment screen printout, identifying the following:
    - a. Check or warrant number
    - b. Issue date
    - c. Payee
    - d. Paid amount
- 2) A cover letter requesting reimbursement of the net amount after deducting the SIR, must be submitted with the above documentation.
- 3) Once the figures are reconciled, a check request will be made to reimburse the Member in the appropriate amount. When issued this check will be mailed to the Member contact person, with a copy to the claims administrator (if applicable).
- 4) If special circumstances arise, which require exceptions or interpretation, the Program Administrators will agendize for Committee or Board consideration.

## **IX. Claims Audits**

All Member Agencies are required to complete an annual claims audit. Such audits will be conducted by a qualified outside audit firm recommended by the Claims Committee and approved by the Authority. The cost of the audits will be shared equally by Member Agencies.

The Claims Auditor will issue a written report summarizing the findings and recommendations for each Member Agency. This report will be presented and approved by the Authority's Board of Directors at a regular Board meeting. The Authority may require a Member Agency to formally respond to an audit finding contained in the report. A Member Agency shall submit its response to the Authority within sixty days of the request.

## **X. Attachments**

- 1) Sample CAR and Budget Form
- 2) Sample Billing Procedures

**APPENDIX 1  
CASE ANALYSIS REPORT**

**Caption of Lawsuit:** \_\_\_\_\_

**Court:** \_\_\_\_\_

**Court Case Number:** \_\_\_\_\_

**Date Suit Filed:** \_\_\_\_\_

**Date of Service:** \_\_\_\_\_

**Fast Track?** \_\_\_\_ Yes \_\_\_\_ No

**Excess TPA Claim Number:** \_\_\_\_\_

**Date of Loss:** \_\_\_\_\_

**Primary TPA Claim Number:** \_\_\_\_\_

**I. PARTIES**

**A. Plaintiffs:**

**B. City and City-Related Defendants:**

**C. Third-Party and Other Defendants:**

**II. TRIAL DATE AND OTHER IMPORTANT DATES**

**III. JURISDICTION AND EVALUATION**

**IV. TRIAL JUDGE AND EVALUATION**

**V. EVALUATION OF COUNSEL**

**A. Plaintiff's Attorney's Name and Evaluation:**

**B. City's Defense Attorney's Name:**

**C. Co-Defendants' Attorneys' Names and Evaluations:**

**VI. STATEMENT OF FACTS**

**VII. INJURIES**

**VIII. SPECIAL DAMAGES**

**A. Medical Expenses:**

**1. Past:**

**2. Future:**

**B. Loss of Earnings:**

**1. Past:**

**2. Future:**

**C. Other (specify);**

**IX. LIABILITY ALLEGATIONS**

- A. Plaintiff's Contentions:**
- B. Defenses:**
  - 1. Legal Defenses:**
  - 2. Factual Defenses:**
- C. Plaintiff's Expert Witnesses and Opinions:**
- D. Defense Expert Witnesses and Opinions:**

**X. VERDICT EXPOSURE**

- A. Chances of Defense Verdict:**  
[Note: a percentage number shall be provided.]
- B. Gross Verdict Range as to all Defendants:**
- C. Potential Offsets and Credits:**
- D. Net Verdict Range to City after Offsets, Credits and Allocation of Fault:**
- E. Plaintiff's Attorney's Fees (if applicable):**
- F. Punitive Damages (if applicable):**

**XI. SETTLEMENT HISTORY**

- A. Last Demand:**
- B. Last Offer:**
- C. History of Settlement Negotiations:**

**XII. RECOMMENDATIONS OF COUNSEL**

- A. Reasonable Settlement Value:**
- B. Proposed Litigation Strategy:**
- C. Other Recommendations:**

**XII. BUDGET**

- A. Fees and Costs Invoiced to Client as of the Date of this Report:**
- B. Fees and Costs from this Date to Trial:**
- C. Fees and Costs of Trial:**
- D. Initial Case Budget:**
- E. Experts' Fees and Costs to Date:**

**F. Experts' Fees and Costs through Trial:**

**G. Litigation Budget Summary Form (see Attachment 1):**

**XIII. MISCELLANEOUS**

**A. Does Complaint Conform to the Tort Claim Filed?**

**(If not, specify differences)**

**B. Is Indemnification, Subrogation, or Contribution Available?**

**(If so, specify by whom, and in what amounts)**

**Attachment**

**1 – Litigation Budget Summary Form**

# ATTACHMENT 1 -- LITIGATION BUDGET SUMMARY FORM

Name of Attorney: \_\_\_\_\_ Case Name: \_\_\_\_\_

**Est Hrs / Cost**

1. **Preliminary Activity**  
(Review File, Interview Witnesses, Case Analysis, Litigation Plan, Budget)
2. **Initial Pleadings**  
(Answer, Cross-Complaint, Demurrer)
3. **Fact Finding – Information Gathering**  
(Document Review, Research, Strategy Development, Sub Rosa, Travel)
4. **Discovery**  
(Interrogatories, Depositions [by individual], Other Requests)
5. **Law & Motion and Pre-Trial Activity**  
(Motions [specify], Arbitrations, Settlement Conferences, Mediations, Court Hearings, Pre-Trial Reports)
6. **Experts**  
(Identify Each Expert [if known] and Area of Expertise)
7. **Documentation – Administrative Support**  
(Correspondence, Copies, Faxes, Other Costs)
8. **Trial Activity**  
(Trial Preparation, Trial Attendance, Briefings, Exhibits, Post-Trial Report)

**TOTAL** \_\_\_\_\_

**BUDGET SUMMARY:**

1. Preliminary Activity	\$
2. Initial Pleadings	\$
3. Fact Finding-Information Gathering	\$
4. Discovery	\$
5. Law & Motion and Pre-Trial Activity	\$
6. Experts	\$
7. Documentation – Administrative Support	\$
8. Trial Activity	\$

**TOTAL**

\$ \_\_\_\_\_

**SUBMITTED BY:**

**Defense Counsel:**

\_\_\_\_\_ Date: \_\_\_\_\_

Signature

\_\_\_\_\_

Printed Name

## **SAMPLE DEFENSE COUNSEL GUIDELINES – Billing Procedures**

### **BILLING PROCEDURES**

All invoices are to be submitted on a [monthly/quarterly] basis and directed to [name of person or position to whom invoices should be sent]. Billings that do not comply with the billing guidelines will not be paid. Payment of any bill by the [entity name and/or the TPA] does not constitute a waiver of the [entity name's] right to question, dispute, obtain reimbursement, compromise, or request repayment or future credit, for any bill or invoice previously paid.

Invoices for counsel fees and expenses should be submitted [monthly/quarterly], within thirty (30) days of the end of the billing period. Final invoices should be submitted within thirty (30) days from receipt of a filed Dismissal. Defense Counsel is responsible for obtaining all outstanding invoices from outside vendors, including experts, before submitting the final bill. Receipts must be submitted for all travel and other expenses.

Firm staffing on all cases should be as limited as possible. Absent prior approval, the [entity name] will not pay for more than one (1) attorney performing the same task. For example, the [entity name] will not pay for two (2) or more attorneys to attend the same deposition. Work should be assigned to those individuals who are most appropriate for the task in terms of their competency and experience.

There should be no more than two (2) attorneys and one (1) paralegal performing work on a case at any given time. Other firm personnel may occasionally have to work on a case due to job departures, vacations, illnesses, schedule conflicts, etc., but this is the exception, not the rule. [Entity name] will not pay for “training” time for new attorneys or “learning” time or “orientation” time as new billers become involved in a matter and are learning the facts and issues. If a firm has summer associates, their time should not be billed to a case without first being approved by the [entity name and/or TPA]

#### **A. Invoices**

Invoices should accurately itemize, in detail, all work performed on a matter. Each invoice must include the following:

- Law firm name and address
- Date of the bill
- Law firm tax identification number
- The TPA and/or entity claim number
- Plaintiff(s) name(s)
- Each billing entry must state the name or initials of the timekeeper who performed the work, the date the work was performed, the hours billed, a detailed description of the services performed, and the total amount billed for that entry
- Attorneys and paralegals should bill actual time spent in increments, no greater than 1/10<sup>th</sup> of an hour for each entry
- Summarize at the end of the bill, the number of hours for each specific biller

- Summarize at the end of the bill the totals for fees, costs, and experts
- Narrative or block/bundled billing is not permitted
- Final bills should be clearly marked
- Invoices must reflect activity for only one (1) case
- Billing entries should be listed chronologically in order of occurrence and not sub-divided by individual or task
- If a number of different tasks are undertaken in one day, each task must be separately identified with a specified time for performing that task, e.g., “telephone conference with John Doe (.30); Attend conference with Jane Doe (1.20), etc.”
- Entries regarding telephone conferences must specify the participants and the subject matter discussed

Vague descriptions such as “work on file,” “telephone call,” “conference,” and “research,” without further explanation, are not acceptable.

Vendor invoices (e.g. experts, mediators, photocopy services, court reporters, and others) in an amount up to [insert amount here] dollars (\$XXXX) per case should be paid by the law firm and included with the monthly attorney billing. Defense Counsel must review and approve all vendor invoices.

## **B. Maximum Allowable Charges and Travel**

The following guidelines are provided regarding maximum allowable charges:

- The [entity name] will only pay the actual cost incurred for reasonable expenses without any markups.
- A firm may conduct necessary and appropriate research up to five (5) hours per case without prior approval by the [entity name and/or its TPA].
- Photocopy costs should not exceed ten cents (\$0.10) per page. Firms are expected to limit the making of photocopies and, wherever cost effective, to use the resources of designated copy services. Billing entries for photocopies must provide the number of copies made, the per page rate, and the total amount billed.
- Mileage should be billed at the applicable Federal rate at the time of travel. The invoice should state the number of miles actually driven.
- Telephone and Fax: Actual long distance charges only. No charges for an incoming fax and no per-page fax charge.
- Air travel is limited to coach or economy rate. Receipts for airfare should allow a reviewer to identify the fare as economy/coach class.
- Rental cars are acceptable only if such vehicles are the most economical means of accomplishing necessary business. Reimbursement is limited to the mid-size class.
- Incidentals, such as movies, alcohol, and entertainment are not allowed.
- Travel time shall be pro-rated if the travel includes time spent on non-[entity name] business.

### **C. Disallowed Charges**

In addition to items listed above in sections A and B, the [entity name] will not reimburse for the following:

- Local telephone calls and all cellular phone charges.
- Routine postage, such as the U.S. Postal Service rates for letters. Any necessary extraordinary postage charges (such as certified mail, overnight service, or oversized packages) must be delineated on the bill with an explanation of the nature and purpose of the charge. Any postage charges that are not explained will not be reimbursed.
- File opening, file organization, or other administrative charges.
- Interoffice conferences between members of the firm, including assigning files or tasks to members of the firm.
- Case administration (e.g. reviewing status of assignments given to associates and paralegals; directing associates, paralegals, or secretaries; preparing or reviewing bills).
- Clerical tasks (e.g. transcription, pulling files, photocopying documents, arranging for copying, labeling documents for production, communication with court clerks, updating master case caption, preparing proofs of service, indexing pleadings, faxing).
- Meals, except in conjunction with out-of-town travel (alcohol will not be reimbursed in conjunction with any travel).
- Routine legal research, including issues considered to be common knowledge among reasonably experienced counsel in the local jurisdiction.
- All work customarily performed by secretaries and other administrative personnel including but not limited to, photocopying, date stamping documents, scanning documents, transcription, retrieving files, indexing pleadings, updating case captions, making travel arrangements, calendaring, and preparing bills/invoices.
- Subscription services (e.g. Westlaw, Lexis-Nexis, or other legal database charge).
- Responding to requests from [entity name and/or TPA] and/or their auditors relating to case file management and/or billing issues.



**Item No. C.1.d**  
**Claims Committee**  
**September 28, 2022**

### **Member Attorney Rates**

**ISSUE:** ACCEL revised the Claims Handling Policy and Procedure to include a Member requirement to notify the Claims Committee when defense fees are in excess of \$400 per hour.

The City of Bakersfield is the first Member to request a Claims Committee review. The first time this was reviewed was at the August 31, 2021 Claims Committee Meeting. As a result of that meeting, ACCEL sent a letter to the City of Bakersfield, signed by the Program Administrators, with the Claims Committee Chair carbon copied stating ACCEL accepts the letter and requests the City to file a letter annually for ACCEL's consideration.

The City provided the attached letter in September 2022 outlining the rates for Marderosian and Cohen, which exceed this hourly rate. The City of Bakersfield also provided its contract with Marderosian and Cohen, which includes the defense of all law enforcement cases (up to 30 annually) for a flat annual fee. The rates for Committee review are \$600 per hour for Mick Marderosian and \$500 per hour for Heather Cohen.

These costs will erode the City's retention with ACCEL, but the City does not intend to recover costs from ACCEL, in essence this caps the defense costs at \$1,000,000 regardless of the expenses associated to the claim.

**RECOMMENDATION:** Staff recommends the Claims Committee review the disclosed defense attorney rates for reasonability and take action or provide direction.

**FISCAL IMPACT:** No financial impact is expected from the recommended action. The policy and procedure asks members to disclose rates in excess of \$400 per hour. Rates at this level or higher will quickly erode a member's self-insured retention, but Bakersfield has agreed not to seek reimbursement from ACCEL for defense costs. If claims penetrate the excess insurance layers, there could be issues with excess carriers regarding appropriate defense fees.

**BACKGROUND:** ACCEL's Claims Reporting and Handling Policy and Procedure, VII. Claims Reimbursement Requests, page 5 of 14 states:

The Authority will reimburse Members or credit their Self-Insured Retentions (SIRs) for reasonable attorney fees and necessary litigation expenses incurred while managing, investigating, defending or litigating covered claims.

# ACCEL

## Authority for California Cities Excess Liability

c/o Alliant Insurance Services, Inc.  
Corporation Insurance License No. 0C36861  
560 Mission Street, 6th Floor, San Francisco, CA 94105



ACCEL Members are required to notify the Claims and Program Administrators regarding any claim in which attorney rates are in excess of \$400/hour. The Program Administrators will agendize the claim for the Claims Committee to review rates for reasonableness. The Committee may take action or provide direction.

**ATTACHMENT:** 2021 ACCEL Claims Committee letter to City of Bakersfield

**SEPARATE:** City of Bakersfield's letter to ACCEL with current outside counsel rates



[www.accelpool.org](http://www.accelpool.org)

### PROGRAM ADMINISTRATORS

September 21, 2021

Daniel J. Howell  
Conor L. Boughey  
Marcus Beverly  
(415) 403-1400

Jena Covey, Risk Manager  
City of Bakersfield, 5th Floor  
1600 Truxtun Avenue  
Bakersfield, CA 93301

### MEMBERS

Anaheim  
Bakersfield  
Burbank  
Modesto  
Monterey  
Mountain View  
Ontario  
Palo Alto  
Salinas  
Santa Barbara  
Santa Cruz  
Santa Monica  
Visalia

Dear Jena,

This letter is in response to the City of Bakersfield letter to ACCEL on July 8, 2021 regarding the disclosure of defense fees to comply with ACCEL's Claims Handling Policy and Procedure.

At the August 31, 2021 Claims Committee Meeting, the Committee reviewed and took action to accept the City's letter for FY 21-22 for the firm Marderosian & Cohen. The Committee requests the City file this request annually for ACCEL's consideration.

If you have any questions or concerns, please contact Conor Boughey at Alliant or ACCEL's Claims Committee Chair Tracey Matthews.

Sincerely,

A handwritten signature in blue ink that reads "Conor Boughey".

Conor Boughey, ARM  
Program Administrator for Authority for California Cities Excess Liability  
[cboughey@alliant.com](mailto:cboughey@alliant.com)

cc: Tracey Matthews, Claims Committee Chair



**Item No. C.1.e  
Claims Committee  
September 28, 2022**

## LITIGATION UPDATE

**ISSUE:** At today's meeting, Ben will provide another update and the Committee will be asked if it wants a quarterly or semiannually update from Ben.

**RECOMMENDATION:** This is an information item, no action is necessary. Direction may be given to the Claims Administrators on the frequency of these updates (quarterly or semiannually.)

**FISCAL IMPACT:** No financial impact is expected.

**BACKGROUND:** The Program Administrators discussed services with ACCEL's Claims Chair, Tracey Matthews. As a result of that discussion, ACCEL requested that George Hills provide a quarterly or semiannual litigation update.

ACCEL has not previously received litigation updates as part of our litigation management services, but has received updates at long range planning meetings.

In January and March 2022, Ben Oram, at George Hills presented a Litigation Update on pertinent case law. It was also disclosed in the Board Meeting's agenda packet as an information item.

The Litigation Update documents are posted on the ACCEL Website in the Members' Only section.

**ATTACHMENT:** Litigation Update from George Hills.

## **POLICE - EXCESSIVE FORCE**

### **Marc Golick v. State of California, et al.**

Docket: A162137(1<sup>st</sup> DCA)

Opinion Date: September 8, 2022

#### ***Summary Rules:***

1. ***Law enforcement has a duty to act with care when using deadly force, but that duty does not encompass an obligation to prevent a third party from engaging in criminal activity.***

#### **Facts:**

Albert Wong, a veteran of the war in Afghanistan, was a former patient of a mental health service provider at the Veterans Home called Pathway; in 2018 he went to the facility armed and dressed for combat and took hostage three female Pathway employees, including Jennifer Gorlick. After exchanging fire with a Napa County Sheriff's deputy, Wong shot and killed his hostages and then killed himself. Family members of the victims filed wrongful death actions naming multiple defendants, including the California Department of Veterans and related state defendants), Napa County, the Sheriff's Office, and Deputy Lombardi.

The trial court dismissed the Napa County defendants from two of the wrongful death actions, finding that the plaintiffs failed to allege facts establishing a duty of care. The court of appeal affirmed. Peace officers owe a duty to act reasonably when using deadly force, but the plaintiffs fail to allege facts showing that this duty encompassed an obligation to prevent Wong from shooting his hostages. The alleged connections between Lombardi's actions and Wong's crimes are little more than speculation. Allegations regarding Lombardi's conduct at the crime scene do not show that he had a special relationship with the hostages.

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### **Javier Vanegas v. City of Pasadena**

Docket: 21-55478 (9<sup>th</sup> Circuit, Court of Appeals, Central District of CA)

Opinion Date: August 31, 2022

#### ***Summary Rules:***

1. ***Where probable causes exists in support of an arrest, based on facts obtained at the scene establishing that a crime had been committed, summary judgment is proper and the court need not decide the issue of qualified immunity.***

**Facts:**

Following an appearing in his divorce proceedings at the Superior Court, Javier Vanegas followed his ex-wife and her attorney out of the courthouse and verbally accosted them both. The attorney called the police and Pasadena PD responded. Vanegas left the scene but was contacted by a Pasadena officer who had been in the courthouse and responded to an alert from dispatch. The officer requested that Vanegas identify himself but he refused. Vanegas was handcuffed and visual confirmation was provided by the attorney. Vanegas was booked and charged criminally. Vanegas then sued alleging violations of his civil rights. The city moved for summary judgment which was granted in its favor.

**Analysis:**

The Ninth Circuit affirmed the district court’s summary judgment in favor of the City of Pasadena and Pasadena police officers in an action brought pursuant to 42 U.S.C. Section 1983 alleging that plaintiff was unlawfully arrested. Plaintiff first argued that, because he was arrested under California Penal Code Section 148(a)(1), that means it was disputed whether probable cause existed under Section 415(2). The panel disagreed, stating first that it was well-established that if the facts support probable cause for one offense, an arrest may be lawful even if the officer invoked, as the basis for the arrest, a different offense that lacked probable cause. Second, by the time of Plaintiff’s arrest, the officers learned enough facts to believe that Plaintiff had violated Section 415(2) and therefore had probable cause to make the arrest.

Having found no violation of the Fourth Amendment, there was no need to proceed to the second question of the qualified immunity analysis—whether the unlawfulness of the officer's conduct was not “clearly established.” Further, the panel held that no “controlling authority” or “robust consensus of cases” prohibited the officer from arresting Plaintiff under the facts confronting him.

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**Gabbi Lemos v. County of Sonoma**

Docket: 19-15222 (9<sup>th</sup> Circuit, Court of Appeals, Northern District of CA)

Opinion Date: July 19, 2022

**Summary Rules:**

1. *The bar to a civil action established by Heck v. Humphrey turns on whether the criminal conviction resulted from the specific conduct which creates the damages in the civil case. If jury does not find guilt on the exact facts, Heck does not bar the claim.*

**Facts:**

Plaintiff was engaged in a verbal altercation with 3 other women, one of whom was in a vehicle parked in the roadway. A Sonoma Deputy arrived on the scene and began to inquire whether one of the women, the one in the passenger side of the vehicle, had been involved in domestic violence. During that investigation, the all the woman argued vehemently that the Deputy must leave the scene. Plaintiff refused multiple orders to back up and continued to argue with and

berate the deputy. The deputy then attempted to restrain and cuff plaintiff, who resisted, and she was taken to the ground. Plaintiff then sued the County and the deputy but proceedings were stayed pending the criminal action. In the criminal case, the jury was instructed that it could find plaintiff guilty based on any one of 4 facts. Instead, the jury issues a general verdict indicating guilt, without any specific finding of one or more of the 4 facts. Following conviction, the civil stay was lifted, and the County filed MSJ, which was granted.

Plaintiff appealed from the district court's dismissal of her claim under 42 U.S.C. Section 1983 alleging that a sheriff's deputy used excessive force in arresting her. The district court held that Plaintiff's claim was barred by Heck v. Humphrey, 512 U.S. 477 (1994), because Plaintiff was convicted of willfully resisting, delaying, or obstructing the deputy during the same interaction in violation of Cal. Penal Code section 148(a)(1).

**Analysis:**

The *en banc* Ninth Circuit court reversed the district court's summary judgment for Defendants. The court held that because the record did not show that Plaintiff's section 1983 action necessarily rested on the same event as her criminal conviction, success in the former would not necessarily imply the invalidity of the latter.

Heck would bar Plaintiff from bringing an excessive force claim under section 1983 if that claim were based on force used during the conduct that was the basis for her section 148(a)(1) conviction. Crucially, the criminal jury was told that it could find Plaintiff guilty based on any one of four acts she committed during the course of her interaction with the Deputy. Because the jury returned a general verdict, it is not known which act it thought constituted an offense. Although any of the four acts could be the basis for the guilty verdict, Plaintiff's section 1983 action was based on an allegation that the Deputy used excessive force during only the last one. The court held that if Plaintiff were to prevail in her civil action, it would not necessarily mean that her conviction was invalid; and the action was therefore not barred by Heck.

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**POLICE – VEHICLE PURSUITS**

**Patricia Flores v. City of San Diego**

Docket: D078501 (4<sup>th</sup> D.C.A.)

Opinion Date: September 15, 2022

***Summary Rules:***

- 1. A law enforcement department is only entitled to immunity under Vehicle Code section 17004.7 if the department complied with the training requirements set forth by POST and 11 C.C.R. 1081.***

**Facts:**

After multiple citizen complaints of a speeding motorcyclist, San Diego PD investigated and observed a motorcyclist run a red light on a motorcycle. SDPD pursued with lights and sirens activated. Flores failed to yield and evaded, merging onto I-805 at accelerating to over 100mph. The officer reported to dispatch, lost sight of the rider, and terminated the pursuit. The officer

then immediately responded to another high priority radio call and did not advise dispatch that he had terminated his pursuit. A second SDPD officer was waiting on the side of I-805, observed a motorcycle operated by decedent Flores, with a female passenger, and initiated pursuit with lights activated. That motorcyclist also evaded, exited I-805, entered a parking lot where it lost control, ejected the passenger, and the driver crashed into a retaining wall which caused fatal injuries.

Appellants Patricia Flores and Angelica Sanchez appealed after the trial court granted summary judgment in favor defendant City of San Diego (the City). Flores and Sanchez sued the City for wrongful death and negligence, respectively, in connection with the death of William Flores, who was operating a motorcycle that was the subject of a police vehicle pursuit when he crashed and was killed.

**Analysis:**

The City moved for summary judgment on the ground that it was immune from liability under the grant of immunity provided for in Vehicle Code section 17004.7. The Court of Appeal concluded that the vehicle pursuit policy training required by section 17004.7 had to meet certain basic standards that were set forth in California Code of Regulations, title 11, section 1081, as adopted by the Commission on Peace Officer Standards and Training (the POST Commission), including an annual one-hour minimum time standard set out in that regulation, before a governmental entity was entitled to immunity under the statute. "Not only did the City fail to present undisputed evidence that the training it provided in the year prior to the incident at issue met the annual one-hour standard, but the City failed to dispute the fact, put forth by appellants, that the training implemented by the City comprised a single video of less than half the required one-hour duration." In the absence of training that met the standards imposed by Regulation 1081, as required by section 17004.7, the City was not entitled to immunity under that statute, as a matter of law. Summary judgment in favor of the City was therefore erroneously granted, and the judgment **had to be reversed.**

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**Preston Seidner v. Jonathan de Vries**

Docket: 20-17403 (9<sup>th</sup> Circuit; District of AZ)

Opinion Date: June 30, 2022

***Summary Rules:***

- 1. Defendant officer was entitled to qualified immunity even if his tactics could have constituted excessive force, since the law as it existed at the time of the incident did not clearly establish that the officer actions violated the 4<sup>th</sup> Amendment.***

**Facts:**

In February 2020, Plaintiff was riding his bicycle near midnight with no front light on the in violation of the law. The officer attempted to stop plaintiff, but he fled. The officer accelerated past plaintiff and pulled his car in front of Plaintiff, causing plaintiff to crash into the patrol car. Plaintiff sued Defendant officer, under 42 U.S.C. Section 1983, alleging that Defendant violated

Plaintiff's Eighth and Fourteenth Amendment rights when the officer used a roadblock to stop Plaintiff, who was suspected of committing a minor traffic violation, from fleeing on a bicycle. The district court construed Plaintiff's allegations as asserting a Fourth Amendment excessive-force claim and found that his claim was plausible.

**Analysis:**

The Ninth Circuit reversed the district court's denial of qualified immunity Defendant. The court held that the question of whether Defendant used excessive force against Plaintiff would be a question for a factfinder. The roadblock was a use of intermediate force that was capable of inflicting significant pain and causing serious injury. Given the circumstances, a jury could conclude that Defendant should have taken additional steps to stop Plaintiff before using an intermediate level of force given Plaintiff's minor offense and the lack of any safety risk to Defendant or anyone else. However, even if Defendant did use excessive force, the law as it existed at the time of the incident did not clearly establish that his actions violated the Fourth Amendment. Therefore, Defendant was entitled to qualified immunity.

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**PUBLIC EMPLOYEE – FREE SPEECH**

**Juan Hernandez v. City of Phoenix**

Docket: 21-16007 (9<sup>th</sup> Circuit; District of AZ)

Opinion Date: August 5, 2022

**Summary Rules:**

- 1. An individual public employee may post on social media commentary on issues of public concern, regardless of whether the public entity employer finds the posts to be a violation of its policy.**

**Facts:**

The City of Phoenix's Police Department concluded that a Sergeant with the Department violated a Department policy by posting content to his personal Facebook profile alleged to denigrate Muslims and Islam. When the Department took steps to discipline the Sergeant, five years after the posts on Facebook had been published, he sued, alleging that the Department was retaliating against him for exercising his First Amendment right to freedom of speech.

**Analysis:**

The Ninth Circuit affirmed in part and reversed in part the district court's dismissal of Plaintiff's action. In analyzing the content, form and context of the Sergeant's posts, the court concluded that the posts qualified as speech on matters of public concern. While it was true that each of the Sergeant's posts expressed hostility toward, and sought to denigrate or mock, major religious faith and its adherents, the Supreme Court has made clear that the inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern.

The court, therefore, reversed the district court's dismissal of Plaintiffs' First Amendment retaliation claim and his related claim under the Arizona Constitution. The court held that the

district court properly rejected Plaintiffs’ facial overbreadth challenge to certain provisions of the Department’s social media policy, except as to the clauses prohibiting social media activity that (1) would cause embarrassment to or discredit the Department, or (2) divulge any information gained while in the performance of official duties, as set forth in section 3.27.9B.(7) of the policy. The court affirmed the district court’s rejection of Plaintiffs’ facial vagueness challenge to the same provisions discussed above and their municipal liability claim.

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## **JAIL CLAIMS – DELIBERATE INDIFFERENCE**

**Kevin Simmons v. G. Arnett**

Docket: 20-55043 (9<sup>th</sup> Circuit; Central Dist. of CA)

Opinion Date: August 31, 2022

### ***Summary Rules:***

- 1. The officer’s use of force was not excessive since he did not have an improper motive and certainly did not act maliciously or sadistically.***
- 2. The nurse did not demonstrate deliberate indifference by cutting short her evaluation of plaintiff in favor of expedited medical treatment outside the prison.***

### **Facts:**

Defendant, a California prison guard, shot Plaintiff with three sponge-tipped plastic rounds during a prison fight involving multiple inmates. Defendant Arnett was alone with no other officers in the vicinity to respond. Arnett had only two options, use force or allow the inmates to severely beat or kill another inmate. Arnett selected the less-lethal weapon, over a mini-14 rifle, and fired several rounds at one of the fighting inmates, breaking Plaintiff’s leg and injuring his butt and thigh. Following the fight, a prison nurse assessed Plaintiff’s injuries and transferred him to an emergency room without fully completing her notes or conducting a full body examination.

### **Analysis:**

The Ninth Circuit affirmed the district court’s summary judgment for Defendants in Plaintiff’s action alleging excessive force and deliberate indifference to medical needs. The panel first held that the district court correctly concluded that there was no constitutional violation. The guard’s decision to shoot Plaintiff with sponge rounds was not excessive use of force. He had a duty to keep prison staff and the prisoners in his care safe and he used the lowest level of force available to him. Even viewing the record in the light most favorable to Plaintiff, there was no evidence showing that Arnett had any improper motive, let alone that he acted “maliciously and sadistically for the very purpose of causing harm.”

As to the nurse, rather than deliberate indifference, her actions seemed to reflect the conduct of a medical professional who quickly and successfully ensured that her patient received the appropriate level of care. The court held that Defendants were therefore entitled to protection under the doctrine of qualified immunity and summary judgment was properly entered in their favor.

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**J.J. V. City of San Diego**

Docket: 20-55622 (9<sup>th</sup> Circuit; Southern Dist. of CA)

Opinion Date: August 2, 2022

**Summary Rules:**

1. *Where video is placed at issue and incorporated in a complaint, the District Court has discretion to review, and does not err by reviewing, the video in connection with a motion to dismiss.*
2. *Officers were not deliberately indifferent when the serious medical need of the plaintiff was not readily apparent, and in fact concealed by, the plaintiff.*

**Facts:**

Plaintiff's mother was arrested at a traffic stop and fell ill in police custody. She began to vomit in the back of the patrol vehicle while the police officers investigated the discovery of narcotics paraphernalia in the car where the woman had been riding. The woman alleged that she was pregnant as the reason for the vomiting. The officers questioned her about possibly detoxing but the woman denied the allegation. Over the course of an hour during transport to the police station, the woman became obviously distressed and screamed for help. By the time of arrival at the police station, the woman was non-responsive. Tragically, she died nine days later. Her minor son, J.K.J., brought constitutional claims against the City of San Diego and two officers who participated in the traffic stop. The District Court dismissed J.K.J.'s amended complaint with prejudice. The district court dismissed J.K.J.'s amended complaint with prejudice.

**Analysis:**

The Ninth Circuit filed (1) an order granting a petition for rehearing, denying as moot a petition for rehearing *en banc*, and amending the prior opinion and dissent; and (2) an amended opinion affirming the district court's dismissal of an action brought pursuant to 42 U.S.C. Section 1983 alleging constitutional violations by police officers in their treatment of Plaintiff's mother.

The court first held that the district court validly exercised its discretion in choosing to review a bodycam video that Plaintiff had incorporated by reference into the amended complaint. Second, the district court did not assign the video too much weight. Lastly, to the extent the district court found that the video contradicted anything in the amended complaint, it rejected Plaintiff's conclusory allegations regarding whether the officers' conduct met the legal standard of a constitutional violation.

The court held that the district court did not err in dismissing the amended complaint. The court further held that the alleged violative nature of the officers' conduct, in failing to recognize and respond to the woman's serious medical need, was not clearly established in the specific context of this case.

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**Lewis Stewart v. Romeo Aranas**

Docket: 20-15586 (9<sup>th</sup> Circuit; District of Nevada)

Opinion Date: May 4, 2022

Judge: Siler

Areas of Law: Civil Rights, Constitutional Law, Government & Administrative Law

**Summary Rules:**

- 1. Prison officials violate a constitutional right to medical treatment when they continued with a course of treatment which had failed and under which the condition worsened, without ever changing the treatment plan.*

**Facts:**

Plaintiff complained of symptoms of related to urinary flow, discomfort in his abdomen and back and requested medical treatment. He was provided with generic medication after a physical examination. The pain continued from 2013 through 2015 with no change in treatment plan which was essentially to “wait and see” what happens. Plaintiff was transferred from Southern Nevada to Norther Nevada in 2015 where treatment continued but the condition had worsened to an enlarged prostate including stage 3 kidney disease

Plaintiff filed an action pursuant to 42 U.S.C. Section 1983 alleging that Defendants, prison officials, were deliberately indifferent to his medical needs, when despite his numerous complaints over a period of years and a visibly deteriorating condition, they ignored his enlarged prostate. After the district court screened Plaintiff’s complaint, he was left with two claims of deliberate indifference to serious medical needs. The remaining officials claimed that they were entitled to qualified immunity and moved for summary judgment. The district court disagreed and denied summary judgment.

**Analysis:**

The Ninth Circuit affirmed the order denying qualified immunity to prison officials. The Ninth Circuit determined that only examination of the second prong of the qualified immunity analysis was necessary—whether the right was clearly established at the time of the violation—because doing so would not hamper the development of precedent and both parties expressly acknowledged that this case turned on the second prong. The court reasoned it was clearly established at the time of Plaintiff’s treatment that prison officials violated the constitution when they choose a medically unacceptable course of treatment for the circumstances and a reasonable jury could find that the prison officials did just that.

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**SEXUAL ABUSE AND MOLESTATION**

**Doe v. Anderson Union High School Dist.**

Docket: C093099 (Third Appellate District; Shasta County Superior Court)

Opinion Date: May 4, 2022

Areas of Law: Civil Procedure, Education Law, Labor & Employment Law, Personal Injury

**Summary Rules:**

1. *Sexual misconduct is not foreseeable as between teacher and student where there are no prior complaints, reports, or rumors of misconduct.*
2. *A school district does not have a duty to constantly monitor teachers and staff for misconduct by reviewing security camera footage and alarm deactivation data. Such a duty is unreasonable.*

**Facts:**

Daniel Schafer, a teacher at a high school in the Anderson Union High School District (District), had a sexual relationship on school premises with one of his students, plaintiff Jane Doe. Doe sued the District, principal Carol Germano, and superintendent Tim Azevedo for negligent hiring and negligent supervision. Plaintiff also contended that the Principal had a duty to review security video footage of Schafer and alarm deactivation data to determine whether Schafer was accessing the school after normal hours for inappropriate purposes. Plaintiff also argued that sexual misconduct between a student and teacher is foreseeable.

The trial court granted the District's motion for summary judgment and entered judgment in favor of the District, finding that there was no evidence the District knew or should have known that Schafer posed a risk of harm to students. On appeal, Doe contended the trial court erred by granting summary judgment because the District had a duty to supervise and monitor Schafer and Doe, and whether the District breached its duty to Doe was a question of fact for the jury to decide.

**Analysis:**

The Court of Appeal affirmed the trial court's grant of summary judgment, finding that on the trial court record, that sexual misconduct between a teacher and student is not foreseeable so the District did not have a duty to review alarm data and video recordings in order to constantly monitor all teachers, students, and campus visitors, nor did it have such a duty specifically with regard to Schafer and Doe.