FEATURED STORY
The Results of California's Police "Reform" Effort

TABLE OF CONTENTS

FEATURED STORY
The Results of California's Police "Reform" Effort 2

LABOR
The "California Rule" After Alameda 5

LEGAL DEFENSE
Abuse of Power 7

LEGAL DEFENSE GROUP VICTORIES 9

INJURY RESOURCE
Are You Adequately Insured? 11

WORK COMP CORNER 13

Q&A 14

VICTORIES, VERDICTS & SETTLEMENTS 16
FEATURED STORY

The Results of California's Police "Reform" Effort

The death of George Floyd while in custody with Minneapolis police officers sparked a nation-wide discussion concerning policing in the United States. California, of course, was ground zero for responsive legislative action. The state’s Legislature was absolutely inundated with so-called “reform” proposals. No less than two dozen bills were presented seeking fundamental changes to law enforcement, ranging from the manner in which officer-involved shootings are investigated, to what legal immunities exist to protect peace officers from civil liability. Needless to say, the Peace Officers Research Association of California (“PORAC”) was in for a busy legislative session.

RLS Principal Timothy K. Talbot was at the forefront of these legislative battles on behalf of all California peace officers. PORAC enlisted Tim as a go-to source for legal advice, strategic guidance, and negotiation leadership with the involved stake-holders throughout the entire legislative session. In the end, Tim’s and PORAC’s hard work paid off. While there was never any doubt that some changes would be made to the law governing policing, PORAC and its partners largely prevailed in ensuring that both bad public policy was avoided and cops on the street simply doing their jobs in good faith remain protected.

A synopsis of some notable legislative outcomes is below.

**AB 1506:**

*Passed by the Legislature and signed into law by the Governor.* Requires the California Attorney General to investigate officer-involved shootings resulting in the death of an unarmed civilian. “Unarmed civilian” is defined to mean a person not in possession of a “deadly weapon.” The bill also requires disclosure of the Attorney General’s investigation report. In addition, the Attorney General must establish a “Police Practices Division” by January 2023, tasked with reviewing local agency use of lethal force policies and making recommendations which must be adopted by the local agency.

**Analysis:**

AB 1506 notably defines “deadly weapon” very specifically, as including “any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, plastic knuckles, or metal knuckles.” Although the bill added “but not limited to” language to the definition, it remains problematic and confusing, as peace officers are trained that a multitude of otherwise common items, not normally thought of as “weapons,” can constitute a lethal threat if used accordingly. In the end, however, this bill does not govern how a peace officer should act in any given circumstance. Peace officers must still conform their conduct to their training and governing law.

**AB 846:**

*Passed by the Legislature and signed into law by the Governor.* Adds to the existing “minimum standards” for becoming a peace officer by requiring that individuals be found free from any physical, emotional, or mental condition, including bias against race or ethnicity, gender, nationality, religion, disability, or sexual orientation, which
The Results of California's Police "Reform" Effort (cont.)

might adversely affect the exercise of the powers of a peace officer. POST is required to develop regulations and screening materials for the evaluation of potential implicit and explicit bias.

**Analysis:**

There was comparatively little discussion or debate about this bill which seeks to disqualify individuals with identifiable bias from becoming peace officers.

**AB 1299:**

Passed by the Legislature and vetoed by the Governor. Would have required law enforcement agencies to complete investigations concerning allegations of serious misconduct against their peace officer employees and report the findings to POST. Law enforcement agencies would have also been required to report to POST whenever a peace officer resigns with misconduct charges pending or resigns in lieu of termination.

**Analysis:**

The primary purpose of this bill was to preclude peace officers who resign with pending charges of serious misconduct or who resign in lieu of termination from concealing the facts of their misconduct when seeking employment with other law enforcement agencies. Even before the recent onslaught of police reform bills, the Legislature was considering action to close a perceived loophole that enabled law enforcement officers accused of serious misconduct to avoid discipline and obtain employment with other agencies.

**AB 1196:**

Passed by the Legislature and signed into law by the Governor. Prohibits law enforcement agencies from authorizing peace officers to use carotid restraints and choke holds.

**Analysis:**

AB 1196 separately defines and bans the use of carotid restraints and choke holds. The bill also prohibits techniques that create a substantial risk of positional asphyxiation. While the bill does not specifically preclude the use of such maneuvers to prevent serious bodily injury or death to a peace officer, the bill does preclude the use of carotid restraints and choke holds as defensive tactics or force options. Whether a peace officer could resort to these techniques when other options are not viable under the circumstances and the force is objectively reasonable for self-defense is unclear.

**SB 1220:**

Passed by the Legislature and vetoed by the Governor. Would have required each prosecuting agency to maintain a Brady list. Also would have required all law enforcement agencies to provide a list of names and badge numbers of peace officers with sustained findings of moral turpitude, group bias, or who are on probation for criminal offenses. The Brady list is confidential except for disclosures to criminal defendants as required to satisfy constitutional obligations. This bill further would have required that prosecuting agencies, prior to placing an officer’s name on a Brady list, notify the officer as soon as practicable and provide the officer an opportunity to present information against placement on the list.

**Analysis:**

The California Supreme Court has held that law enforcement agencies are part of the prosecution team for purposes of satisfying constitutional discovery requirements in criminal cases. The Court ruled that law enforcement agencies are required to provide prosecuting agencies with information about peace officer employees with sustained findings of misconduct that would constitute Brady material. This bill provides uniformity throughout the state as to what is required for law enforcement agencies to satisfy their obligations. This bill also requires that crimes of moral turpitude be as defined in published court of appeal decisions, rather than
The Results of California's Police "Reform" Effort (cont.)

trial court decisions or the subjective views of prosecuting agencies. The concern that peace officers employed in some counties are not told when their names are placed on Brady lists is eliminated because advance notice to the officer is required whenever practical and the officer has the ability to present information as to why their names should not be on a Brady list.

SB 731:

Failed to pass the Legislature. Two primary goals of SB 731 were: (1) greater potential civil liability for peace officers and their employers under state law, and (2) creation of a “certification” requirement for employment as a peace officer, which could be revoked by POST in certain circumstances.

The bill proposed the creation of new state law causing of action against public employees and public agencies for civil rights violations and the elimination of existing statutory immunities from civil liability for peace officers. The bill also proposed the creation of a peace officer “certification” system, whereby POST would issue certifications to individual peace officers that would need to be maintained for employment as a peace officer. A separate board comprised of political appointees would have authority to investigate and recommend revocation of a peace officer’s certification for various reasons.

Analysis:

California is only one of five states that does not have a process for decertifying peace officers. While such a process might help ensure that bad cops are not allowed to remain peace officers, the proposed legislation did not contain sufficient protections against erroneous or politically driven revocations of peace officer certifications. Defeating this bill was a significant victory for PORAC and all peace officers. The “certification” proposal in this bill constituted an attempt to undermine important due process and fairness protections for peace officers. This bill sought to advance a host of bad policy proposals. Both law enforcement and the state’s residents as a whole should be thankful it did not pass the legislature. However, peace officer decertification will almost certainly be proposed again because the issue was already being discussed prior to the recent push for police reform.

SB 776:

Failed to pass the Legislature. Proposed expansion of personnel records disclosure. This bill would have added new categories of documents regarded as public records, including investigations and findings of incidents involving the use of force to make a member of the public comply with an officer, force that is unreasonable, or excessive force against a person, and sustained findings that a peace officer made an unlawful arrest or unlawful search or engaged in conduct involving prejudice or discrimination. Local agencies also would have been required to retain personnel records falling within any of the identified categories for at least 30 years.

Analysis:

SB 1421 amended California Penal Code sections 832.7 and 832.8 to make four types of peace officer personnel records subject to public disclosure on January 1, 2013: (1) incidents involving the discharge of a firearm, (2) uses of force resulting in great bodily injury or death, (3) sustained findings of on duty sexual assault by a peace officer, and (4) sustained findings of dishonesty relating to certain actions by a peace officer. The misguided belief that law enforcement agencies do not investigate or take appropriate disciplinary action against peace officer employees accused of serious misconduct has continued to fuel efforts to eliminate all confidentiality in peace officer investigation and disciplinary records. Initial versions of SB 776 would have allowed the public to receive access to all incidents where any amount
The Results of California’s Police "Reform" Effort (cont.)

of force was used, no matter how slight, and to nearly all complaints against peace officers regardless of whether the allegations were sustained. The final version of SB 776 was more restrained and struck a better balance between public disclosure of personnel records and the confidentiality rights of peace officers. Some version of this bill is expected to be introduced again in the next legislative session.

LABOR

The "California Rule" After Alameda

Where does pension law stand now? Four key takeaways from the Supreme Court’s modification of the California Rule.

Timothy K. Talbot

On July 30, 2020, the California Supreme Court issued its highly-anticipated decision in Alameda County Deputy Sheriffs’ Association, et al. v. Alameda County Employees’ Retirement System, et al. (“Alameda”), in which the Court reviewed a foundational principle of public employee pension law known as the “California Rule.”

Prior to Alameda, the Supreme Court had defined the California Rule as follows:

“With respect to active employees, we have held that any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, must be accompanied by comparable new advantages”

(Allen v. Board of Administration (1983) 34 Cal. 3d 114, 120.)

In practical terms, the California Rule specified that pension benefits promised to an employee at the beginning of their career could not be reduced in the future without providing the employee with an offsetting new advantage. Thus, there were three key components of the California Rule. First, an employee earns a vested right to the pension promised at the commencement of employment. The source of this vested right is the Constitution’s Contracts Clause, which provides generally that the government cannot unlawfully impair an existing contractual right. In the context of public employee pensions, the employee’s commencement of work upon the promise of a specified future pension constituted the contract that could not be impaired. Such a right “vests” – i.e., cannot be taken away – when employment begins. Second, to be constitutionally sufficient, any modification of that existing pension right “must bear a material relation to the theory and successful operation of a pension system.” Third, if the modification was constitutionally sufficient, a comparable off-setting new advantage must be provided.

Alameda keeps the California Rule intact but modifies its application in significant ways, representing the most substantive change to public employee pension law in the past three decades. Below are four key takeaways from the decision.

Takeaway No. 1. Alameda affirms that public employees earn a vested right to receive the pension benefits in place upon commencement of employment when they retire in the future. The Supreme Court rejected arguments by the State of California (represented by the Governor’s Office) urging the Court to hold that employees only acquire a vested right to the pension benefits offered at any given time during their careers. In other words, no matter how long a public employee works
The "California Rule" After Alameda (cont.)

under an existing pension promise, the State of California claimed employees are only ever entitled
to receive the pension in existence at the time of retirement. The Supreme Court rightly recognized
such a concept would destroy not only the California Rule entirely, but the basic premise behind offering a pension to employees in the first place – to induce continued future employment. After all, if a pension can be unilaterally reduced at any time and for any reason prior to retirement, pensions would not incentivize continued future employment because the promise of future compensation would be illusory.

Takeaway No. 2. Alameda revised the existing California Rule analysis as to whether a modification is constitutionally permissible. Now, when analyzing modifications to vested pension rights, a court must first determine whether the modification imposes disadvantages to the existing pension right, and if so, whether the disadvantages are accompanied by comparable new advantages. If the disadvantages are not offset, the court must determine whether the purpose in making the change was sufficient to justify an impairment of pension rights. If a sufficient justification supports the change, a comparable new advantage must be given unless it would undermine or otherwise be inconsistent with the modification’s constitutionally permissible purpose.

On the specific facts of the Alameda case, the Supreme Court found that the Public Employee Pension Reform Act (“PEPRA”) imposed disadvantages to employee pension rights that were not offset by comparable new advantages, but that the disadvantages imposed (prohibiting various practices colloquially referred to as “pension spiking”) were justified because they “bear some material relation to the theory of a pension system and its successful operation.” The Court then held that providing employees with an offsetting new advantage would be inconsistent with the justifiable purpose of excluding “pension spiking.” Consequently, the Court held that the PEPRA provisions at issue did not violate the Contracts Clause.

Takeaway No. 3. Alameda does not afford employers or the Legislature unfettered authority to reduce pensions. The Supreme Court confirmed that reducing promised pension benefits solely for the purpose of saving money is not a sufficient justification for impairing existing pension rights, by citing with approval Abbott v. City of Los Angeles (1958) 50 Cal. 2d 438, and recognizing that pension systems are “essential to attract qualified municipal employees.”

An open question exists as to what other purposes are constitutionally sufficient to justify an impairment of a vested pension right – that is, “bear a material relation to the theory and successful operation of a pension system.” In Alameda, the Court found that closing “pension spiking” loopholes was sufficient, and opined that saving money (as a sole justification) was not. There are many potential justifications other than these two examples, however. Unfortunately, Alameda does not provide clear guidance on how to assess the myriad of potential justifications that may arise in the future. It appears courts will simply exercise discretion, on a case-by-case basis utilizing the specific facts presented, to determine whether a particular justification is constitutionally permissible, and whether offering a comparable new advantage would “undermine” that permissible modification. Such an approach appears to afford the courts wide latitude to make policy judgments in future cases.

"Alameda keeps the California Rule intact but modifies its application in significant ways, representing the most substantive change to public employee pension law in the past three decades."

Continued...
The "California Rule" After Alameda (cont.)

Takeaway No. 4. The doctrine of “equitable estoppel” appears to be of little relevance in the public employee pension context. In Alameda, the employees argued that the retirement associations should be “estopped” – or prevented – from implementing PEPRA's provisions because of the existence of judicially-approved settlement agreements between employees and the retirement associations that contractually entitled the employees to the benefits modified by PEPRA. The employees argued that they relied to their detriment on these agreements, and other express representations made by their employers and the county retirement systems, that the pay items at issue would be included in the calculation of their pension benefits. However, the Court found that the employees did not have a reasonable expectation that the promises made by the county retirement systems meant anything other than those systems would provide benefits commensurate with what is allowable pursuant to state pension law.

"An open question exists as to what other purposes are constitutionally sufficient to justify an impairment of a vested pension right."

The Supreme Court’s decision casts serious doubt on the ability of employees to claim reasonable reliance on promises and actions by employers and retirement systems in the future. After all, if employees cannot reasonably rely on the enforceability of judicially-approved settlement agreements and express promises as to what pension is promised to them, simply because the law subsequently changes, then it is hard to imagine what set of facts would provide the requisite reasonable expectation. Because estoppel is only applicable where reliance exists in conflict with the state of the law, it appears estoppel will no longer be a viable claim in the future. The Alameda decision is comprehensive and detailed. Still, there remains many unanswered questions. For instance, to what extent are employees entitled to recoup contributions made to the retirement systems based on the inclusion of benefits subsequently denied to them? It does not seem fair or just simply to allow the retirement systems to keep this money. RLS has litigation pending in Contra Costa County on this very question. This issue and other questions raised by the Alameda decision will likely be answered only as a result of future litigation.

About the author
Timothy K. Talbot is a principal at RLS and manages the firm’s Sacramento office. Tim is a member of the Collective Bargaining Practice Group and manages the Labor Litigation Group where he oversees the firm’s representation of public and private sector employee associations and individual clients in litigation. He argued before the Supreme Court in the Alameda matter on behalf of several public employee associations.

LEGAL DEFENSE
Abuse of Power

How ill-motivated internal affairs investigations harm both the accused and the department.

Andrew M. Ganz

Peace officers are given a lot of power. The decision to stop a vehicle, make an arrest, use force, and all of the other ways in which a peace officer may significantly impact a person’s life should be approached with care and thoughtfulness. A good officer will respect the weight of these decisions.
Abuse of Power (cont.)

The overwhelming majority of officers I have come to know during my career as both a prosecutor and police defense attorney have that understanding.

However, when the time comes to use that power against their own in the form of an internal affairs (“IA”) investigation and potential imposition of discipline, that respect and restraint often seems to disappear. I have seen this occur in different and repeating patterns in my time so far with RLS.

Some agencies (I won’t name any here) hand out IA notices like candy, so far removed from any sense of self-reflection and fair consideration as to why, that it seemingly has become second-nature and part of the fabric of the agency. The investigators dutifully conduct their investigations, supervisors make decisions based on some vague but ever-present concern about public perception, and the officer is forced to just chalk it up as a cost of doing police business in 2020. While I could go on about the problems with this scenario, there is another scenario that I have been surprised to encounter again and again.

It happens like this: A small to medium-sized department has an officer or civilian employee they want gone from the agency. This could be for a variety and combination of reasons. Like in any other working environment, there is the “in-group” and the outliers. Inter-personal conflicts can turn into formal investigations when one of the two people in conflict rises to a position of power. Or maybe the officer brought negative attention to the agency for something in the past, or did something else that put her on the “you-know-what” list, but was unworthy of discipline. Or, in retrospect, the agency wishes they had addressed the prior issue but the time has passed. Whatever the motivation, the key feature here is that the IA process is being used as an end-run around civil service protections to either retaliate or push someone out.

The officer or employee is served with a notice that they are being investigated for some reason, usually set forth in numerous, vague and often duplicative alleged policy violations. It is not uncommon for an additional notice or notices to be served over the course of time, in an effort to bury the targeted employee under the stress and pressure of multiple allegations, and perhaps ostracize.

The problems with this abuse of the disciplinary system are numerous. Primarily, it is just wrong. When a person receives one of these notices, it is an awful feeling. The notice tells them that they made an error, which possibly could lead to a loss of their livelihood. Most have families and mortgages. Most have either been or wanted to be in law enforcement for their entire lives. This notice threatens them with the loss of not just their income, but their second family and identity.

But there is a silver lining. When an IA is initiated in this manner and for these reasons, the motives soon become transparent. Mistakes are made. Hasty decisions by people who are unfamiliar with or indifferent to the rules of this process are easy to expose.

For example, when an agency truly is concerned with the conduct of an officer and is using the disciplinary process properly to address and fix those problems, there is no reason to hide the nature of the allegations. The rules allegedly violated are clearly identified, along with the specific alleged facts. On the other hand, when an agency is abusing the process for ulterior motives, they often do the opposite, and tend to make the error of applying rules to the subject officer that have never applied to anyone else. This is a tell-tale sign of what kind of “investigation” you’re dealing with.

The attempt to impose any discipline for such conduct violates the requirement that investigations are fair, among other things, and to impose substantial discipline for something minor against an officer with no prior violations conflicts with the requirement that discipline be progressive. And think about it, if the real concern was to enforce the rule and change behavior, the department would handle the matter differently. This is another
Abuse of Power (cont.)

An indication of an ill-motivated IA. While in serious cases of misconduct a given department may be able to justify severe consequences for first time offenses, for the most part, progressive discipline is required. The purpose of the process is supposed to be to correct the “bad” behavior, and so this progressive increase in discipline gives both the employee and the agency the opportunity to see if that can be done with the least amount of penalty and potential expenditure of resources. Talk to your officers. Put out a memo. Let them know in advance that an old policy is going to be dusted off and that there is a new expectation for it to be followed.

Just like the power to stop, arrest and imprison, the power to make an employee the subject of an IA investigation is the power to really mess up a person’s life. While in some instances harsh discipline is warranted, in far too many cases I have come across, it is being done improperly and for the wrong reasons. If an agency’s real concern was to enforce a rule and change behavior, agency heads would communicate expectations, clearly articulate what actions should and should not have been taken, and train for better future outcomes. If no such steps are taken, it becomes clear the intention is not to fix or correct anything, but simply to find a way to punish.

Internal affairs investigators should keep in mind the proper purpose of the process. Ask why an investigation is being conducted and what steps should be taken to address the alleged problem if that is really the goal. Be honest. Consider pushing back (without being insubordinate) against superiors if it is suspected the process is being used for ulterior motives. It should never be forgotten that improper use of the process can cause unintended consequences, including harming the morale of the rank and file. To those who have faced or will face this scenario as the subject of an investigation, know that you are, unfortunately, not alone. Many of you are in the same unfair position, and I and the other members of the Legal Defense team at RLS will be there with you to fight back.

About the author

Andrew M. Ganz is an attorney with the Legal Defense Practice Group. Andrew defends public sector employees in criminal and administrative investigations and proceedings. Prior to coming to RLS, Andrew served as a prosecutor for over 13 years in the district attorney’s offices of Solano and San Francisco counties.

Legal Defense Group Victories

Terminated Police Officer Reinstated with Full Back Pay

Oakland Police Officers’ Association

An officer was charged by the Oakland Police Department with dishonesty and knowingly falsifying a police report. The charges arose as a result of a District Attorney’s Office referral to the County’s Brady Committee, alleging that the officer’s crime report contained “very inconsistent” statements and omissions of significant facts as judged from a review of body worn camera video. The officer was alleged to have misrepresented the reasons for a search of the suspect, misstated that no cover officer was present, and omitted knowledge that the search occurred without proper notification of the suspect’s probationary status.

At arbitration, RLS Attorney Johnathan Murphy argued: (1) a dishonesty charge cannot be upheld by hearsay, which is what occurred in this case. The Department’s dishonesty charge was premised on the perceptions of the deputy district attorney, who
Terminated Police Officer Reinstated with Full Back Pay (cont.)

was never called to testify by the department and thus was never subject to cross-examination; (2) the department violated POBRA by not clearly identifying the nature of the charges against the officer prior to ordering him to a compelled interrogation, not timely providing additional information acquired by investigators prior to the second compelled interrogation, and not completing the investigation within one year; and (3) the evidence did not demonstrate that the officer knowingly filed a false police report.

The arbitrator found that the department failed to establish that the officer knowingly included false statements in the police report, and that the mistakes included were typical of young police officers, as gleaned by the officer’s supervisor. The arbitrator also found that the deputy district attorney’s assertions were not supported by a review of the body worn camera video, and that alternative explanations for some of the report’s inconsistencies were more likely, such as the officer’s relative inexperience and manner of documenting multiple reasons for taking specific actions. Accordingly, the arbitrator found that the department did not have just cause to terminate the officer.

Legal Defense Group Victories

Ten Percent Salary Reduction Overturned by State Personnel Board

CALIFORNIA CORRECTIONAL PEACE OFFICERS’ ASSOCIATION

A correctional officer was charged by the California Department of Corrections and Rehabilitation with failing to properly plan and manage a training scenario – a mock accidental discharge at a firearms training wherein participating correctional staff were not informed they were taking part in a training scenario.

The allegations were as follows: After a “dry fire” order during the firearms training, the “victim” discharged a single round downrange, punctured a packet of fake blood in his pocket on the same leg where a fake wound had been prepared the night prior, and screamed in apparent pain. The training supervisors immediately ordered the officers present to “do as they’ve been trained.” This caused the officers to run to their injured comrade’s aid, place emergency calls to 9-1-1, administer a tourniquet and perform an emergency “Code 3” transport of the “victim” at high rates of speed to a health facility. During the drive, the “victim” never mentioned to his fellow officers it was a training scenario, nor that he had not suffered an injury. After arriving at the health facility, the awaiting medical trauma team belatedly learned the “victim” was not in fact injured – after placing the “victim” on a gurney, rushing him to an emergency room, and administering an intravenous line.

An administrative investigation commenced and a ten-month, ten percent salary reduction was imposed.

Prior to the hearing, RLS Partner Michael Schwartz filed a motion to dismiss, based on the argument that the department’s disciplinary action was time barred by POBRA’s one-year statute of limitations period. The department argued that because the officer’s “hiring authority” – a department deputy chief – was out on vacation
Ten Percent Salary Reduction Overturned by State Personnel Board (cont.)
during the incident, he could not have become aware of a potential basis for discipline at the time of
the incident, thereby starting the one-year clock at the time of his return. Michael argued that the
deputy chief’s fill-in had assumed command responsibilities during the deputy chief’s absence,
which included the authority to initiate investigations. Accordingly, based on the fact that
the deputy chief’s fill-in was informed of the incident the day it occurred, the one-year period
commenced the day of the incident. Because the department’s notice of intent to impose discipline
was served on the officer approximately 14 months after the incident, the Department’s discipline was
time-barred. The State Personnel Board’s administrative law judge agreed and dismissed all
charges against the officer.

INJURY RESOURCE
Are You Adequately Insured?
Protect yourself and your family. Don’t underestimate the importance of Uninsured and
Underinsured Motorist Insurance coverage.
Joseph R. Lucia

The unfortunate reality of operating a motor vehicle (on-duty or off-duty) is that you can’t control
the actions of other motorists. Becoming a victim of an automobile accident is often unavoidable and in
many instances results in significant injuries that can impact or even end your career. For many
public employees, especially first responders, that risk is heightened due to the frequency and duration
you are required to travel in a vehicle.

Victims of automobile accidents are responsible to pay for medical bills, take leave to cover missed
time at work and incur out-of-pocket expenses. One of the biggest misconceptions of suffering an
on-the-job injury is that an injured worker is only entitled to workers’ compensation benefits. That is
simply not true. Not only do you have the ability to bring a claim against the insurance carrier of the
driver who caused the accident, but you may also be able to bring a claim through your own personal
automobile insurance in what is defined as an Uninsured Motorist (“UM”) or Underinsured
Motorist (“UIM”) claim. It is important to understand that these options are also available if
you’re involved in an off-duty accident.

When is the last time you reviewed your automobile insurance coverage limits? Chances are
that unless you have been involved in an accident, you haven’t. Frankly, it would not be a surprise if
you didn’t even know where to look in order to figure out what coverage you currently possess. The
importance of personal automobile insurance, in particular UM/UIM coverage, is commonly
overlooked, which can have devastating impacts on your family. This article will supply you with the
requisite knowledge and understanding of UM/UIM coverage so you can take the necessary steps to
protect you and your family.

What is UM/UIM Coverage?

UM/UIM is a benefit available under your own insurance policy and pays you for past and future
damages (medical bills, lost wages, and pain and suffering) caused by an uninsured or underinsured
motor vehicle driver. In California, the minimum insurance coverage a driver is required to possess is
$15,000 to cover damages resulting from an injury or death.
Are You Adequately Insured? (cont.)

UM coverage applies when the at-fault party has no insurance, or when the vehicle involved in the collision has been stolen or involved in a hit-and-run accident. UIM coverage applies when the injured party’s damages exceed the at-fault party’s liability insurance and the injured party possesses a UIM policy for an amount less than the at-fault party’s liability insurance.

UM/UIM coverage can be used to cover other passengers in the vehicle and family members, such as your spouse and/or children.

Why is UM/UIM coverage so important?

Workers’ compensation benefits are limited and won’t pay for all of your damages. For example, workers’ compensation covers medical bills and base wages, but missed overtime shifts and the “pain and suffering” you’ve experienced as a result of being injured are not. You will almost always need another source of recovery.

Many drivers don’t understand the importance of having good insurance coverage, or don’t have assets that they need protected, so they look to purchase the cheapest available insurance policy. There is also a high percentage of motorists in California with no insurance at all. Should you be involved in an accident where the at-fault driver has no insurance or lacks adequate liability insurance, the only way to ensure that you will recover all your losses is through your own UM/UIM motorist coverage.

Below is an unfortunate hypothetical fact pattern based on actual cases our firm has handled and will help to illustrate the importance of UM/UIM coverage:

You are driving your vehicle and suddenly you are struck by a vehicle traveling at a high rate of speed. You spin out of control and hit the center divider. You are taken to the hospital and informed that you will need surgery to repair a fracture. The doctors also discover an injury to your cervical spine (neck). The combination of these injuries has caused significant and permanent physical impairments, which have rendered you unemployable. You are left with hundreds of thousands of dollars in medical bills and stand to lose wages and benefits equaling over one-million dollars since you planned on continuing your job for another 15 years. The at-fault party only has the minimum insurance coverage of $15,000.

Based on the above hypothetical, here are some potential outcomes:

1. If you have no UIM coverage, or only the statutory UIM minimum, then all you can be paid is $15,000 from the at-fault party.
2. If you have $100,000 of UIM coverage, then you would recover $15,000 from the at-fault party and an additional $85,000 from your UIM coverage, for a total of $100,000.
3. If you have $1,000,000 of UIM coverage, then you would recover $15,000 from the at-fault party and an additional $985,000 from your UIM coverage, for a total of $1,000,000.

Seems rather obvious that Option #3 provides for the most desirable outcome, which is due to the presence of the $1,000,000 UIM coverage.

How do I know if I have UM/UIM coverage?

California mandates that insurance companies include $15,000 of UM coverage, unless the coverage is specifically waived. Thus, it is possible that you have some UM/UIM coverage, but it may only be the $15,000 minimum, which is essentially meaningless because it means you will not recover any additional money (see hypothetical above). This is the big secret insurance companies attempt to avoid when you purchase insurance, so it is incumbent upon you to demand a much larger UM/UIM policy.

In order to determine what coverage you possess, you will first need to locate your automobile insurance policy. Within your policy
Are You Adequately Insured? (cont.)

you will find a document titled “Declarations Page” which is usually the first page of the policy. The declarations page lists different types of information, such as the name of the insurance company, names of persons covered by the policy, vehicles that are covered, and a summary of the different applicable coverage limits, including UM/UIM.

**Steps to ensure you have proper UM/UIM coverage - act now!**

Motor vehicle accidents are unpredictable and can occur at any moment. You should act now and make sure that you have appropriate coverage that is effective on the date of any accident.

1. Obtain your automobile insurance declarations page;
2. Determine whether you have Uninsured and/or Underinsured Motorist Coverage, and if so, the applicable limits of coverage;
3. Contact your broker or agent and ask what the maximum amount of UM and UIM is offered by your automobile insurance company. You will be pleasantly surprised that you can likely purchase $1,000,000 or more of UM/UIM coverage with a very slight increase to your annual insurance premiums.
4. If you have been injured in an automobile accident, contact an attorney from RLS to help navigate the complicated layers of insurance coverage and ensure that you are protecting yourself and your family. Please contact an RLS attorney if you have any questions about how UM/UIM operates, or want some guidance on how to obtain proper insurance coverage.

**About the author**

*Joseph R. Lucia is an attorney in the firm’s Injury Resource and Litigation Group, Legal Defense of Peace Officers Practice Group, and Collective Bargaining Practice Group.*

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**WORKERS’ COMPENSATION**

**Work Comp Corner**

Laura Stornetta

*Work Comp Corner is a regularly occurring column that will provide insight into how workers’ compensation works and address frequently asked questions. It is not meant to be legal advice. Please contact an RLS workers’ compensation attorney should you have specific questions regarding your potential case.*

**Can my personal doctor treat me if I am injured at work or do I have to use my employer’s workers’ compensation doctors?**

One of the benefits provided by workers’ compensation is medical treatment that is “reasonably required to cure or relieve” the effects of an industrial injury. However, there is a system of rules and processes that must be followed in order to utilize this benefit. Some employers may have what is called a Medical Provider Network (MPN) from which you must select a doctor. This is not always as straightforward as it may seem and will be the subject of a future “Work Comp Corner” column. Other employers allow you the freedom to
Workers’ Comp Corner (cont.)

choose any doctor so long as that doctor accepts payment from workers’ compensation.

Alternatively, if you have taken the appropriate steps before you sustain a work-related injury, then your personal doctor can provide treatment (i.e., predesignation):

1. Your personal doctor must be a medical doctor (M.D.) or doctor of osteopathic medicine (D.O.);

2. The doctor must have limited their practice to general medicine or is either a board-certified or board-eligible internist, pediatrician, OBGYN, or family practitioner; and

3. The doctor must have treated you prior to the work injury and retain your medical records.

So, for example, you cannot predesignate a chiropractor, a dermatologist, or someone you’ve never seen before.

There are three general conditions that must be met in order to properly predesignate a personal physician to provide treatment on an industrial basis:

1. You must provide written notice of the predesignation in writing to your employer before the injury occurs. Certain information must be set forth in the written notice or you can utilize a state form (DWC Form 9783);

2. You must have health care coverage for nonindustrial injuries; and

3. Your personal doctor must agree to be predesignated and this agreement must be documented in writing.

However, if your doctor is not familiar with the workers’ compensation system and the various rules and processes which govern the provision of medical treatment (i.e., all of the special forms, utilization review, etc.), it may not be the best choice to have your private doctor serve as your primary treating physician for your industrial injuries. A doctor who is familiar with workers’ compensation may be more effective in helping you obtain the care needed to recover from your work injury.

If you are considering whether predesignation is appropriate for you, we recommend you call our workers’ compensation team for a full discussion that contemplates your specific scenario.

About the author

Laura Stornetta is an attorney with the Injury Resource and Litigation Group, specializing in representing clients in workers’ compensation claims.

Q&A

The Effect of AB 392

Michael L. Rains

California’s law enforcement community has been grappling with the implementation of AB 392 for the better part of a year. As most know, AB 392 amended the standard dictating whether a peace
The Effect of AB 392 (cont.)

835a has not, on its own, led to a rash of new criminal filings against peace officers. I believe that the public narrative surrounding a particular use of force has a greater impact on the likelihood of a criminal filing against a peace officer than the legal standard used by a district attorney to evaluate that use of force. After all, Penal Code section 835a still makes reference to what a “reasonable officer” would believe in light of the “totality of circumstances.” This sounds a lot like the familiar Graham v. Connor standard to me. On the other hand, experience has taught that the public is simply not equipped to rationally and dispassionately evaluate graphic video depictions of force, especially when such video is disseminated without the proper background, context, or explanation of the surrounding circumstances. Therefore, the combination of AB 392 and SB 1421, and the manner in which an employing agency decides to handle the release of video depicting force, is more consequential to the possibility of a criminal filing.

Will AB 392 expose peace officers to more civil liability?

I believe AB 392 will have its greatest impact in the civil liability context. For decades, plaintiff civil rights lawyers have consistently argued two themes: (1) the employing agency failed to properly train its officers on how to deal with particular situations, and (2) the defendant peace officer in question should have used different tactics to avoid using force altogether. As amended by AB 392, Penal Code section 835a’s mandate that officers “shall use other available resources and techniques if reasonably safe and feasible” seems to fit squarely within the plaintiff’s lawyer’s playbook. Civil lawsuits are uniquely situated for lawyers to engage in after-the-fact second guessing of an officer’s tactical decisions, as they have extensive pretrial discovery procedures which do not traditionally exist in criminal cases, and they have a stable of “experts” on the payroll eager to play Monday morning quarterback.

The officer’s use of force is lawful. Debate has ensued as to exactly how, and to what extent, AB 392 implemented practical change. Below, Michael L. Rains discusses his view of how the new law has been implemented.

When is deadly force justified under AB 392?

Penal Code section 835a now states that deadly force is justified only when the officer “reasonably believes,” based on the “totality of circumstances,” that such force is “necessary” to either defend against an “imminent threat of death or serious bodily injury,” or to “apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended.” An “imminent threat” is defined as a person who has the present ability, opportunity, and intent to immediately cause death or serious bodily injury.

The new language also states that peace officers “shall use other available resources and techniques if reasonably safe and feasible,” and that the totality of circumstances includes the officer’s tactical decisions and conduct before using force.

Has AB 392 led to more criminal prosecutions of peace officers?

The amended language of Penal Code section
The Effect of AB 392 (cont.)

How would you rate the response by most law enforcement agencies to the new requirements under Penal Code section 835a?

I believe law enforcement employers could and should provide more high quality scenario-based training regarding real life encounters which have resulted in the use of lethal force by officers.

Since AB 392 became effective, I have attempted to determine what training has been given to peace officers in a variety of jurisdictions concerning the issues presented by the new law, such as more robust “de-escalation” and “tactical repositioning” training, how to determine if a suspect is a danger only to themselves and not to others, how to decide if a suspect has the “apparent intent” to cause death or serious bodily injury, and how to determine if a threat is “imminent” or poses only “future harm.”

Unfortunately, I have not often seen the type of high-quality intensive training necessary for officers to acquire the tools to meet the practical and tactical challenges of this new law. My suspicion is that agencies are waiting for the effective date of SB 230 (January 1, 2021), which requires new policies on force standards. Of course, peace officers are already subject to AB 392 every work day, and must be given the opportunity to ensure their skills conform to the new law. Frankly, collective bargaining organizations should be pressuring their employer agencies much more aggressively to provide this training.

About the author

Mike Rains is a principal and founding member of RLS. He heads the firm’s Criminal Defense and Legal Defense of Peace Officers Practice Groups.

Victories, Verdicts, and Settlements

Construction Worker Loses Leg After Being Struck by City Bus

Plaintiff E.Q. v. City of Santa Monica

Settlement: $4,750,000

RLS Attorneys

Nicole R. Castronovo
Eustace de Saint Phalle
Brendan C. Gannon

On March 22, 2017, E.Q. was working as a laborer removing a metal water crossing on a road. E.Q. was working in a closed lane of traffic kneeling to remove asphalt that was covering the water crossing. As E.Q. worked, an employee of the City of Santa Monica’s Big Blue Bus drove a 60-foot accordion bus next to the closed lane where E.Q. was kneeling. The bus driver was a trainee and had an instructor driver in the bus supervising him.

The trainee driver drove too close to the right side of the road and struck a portion of the water crossing equipment. The equipment became trapped under the moving bus whipping into the area where E.Q. was working. The plate trapped the E.Q.’s right leg, catching and dragging him down.

E.Q. alleged that the Defendants were negligent due to the trainee driver’s inattention and the City of Santa Monica’s failure to properly supervise the trainee.

The City of Santa Monica denied any wrongdoing and denied E.Q.’s assertions that the City was negligent.

E.Q. claimed an injury of the amputation of his right leg below the knee as a result of this accident.

Immediately following the accident, plaintiff had emergency surgery to try and save his leg. He endured muscle grafts, skin grafts, and the placement of plates and screws. The wound never healed properly and E.Q. was hospitalized several times for infection. Due to the severity of his injury E.Q. eventually had a below the knee amputation.
Victories, Verdicts, and Settlements (cont.)

Roofer Falls and Suffers Brain Injury


**Settlement:** $1,651,500

**RLS Attorneys**
- Jack Bollier
- Eustace de Saint Phalle

Plaintiff A.R. sustained a fall from a residential roof during the course of an unpermitted demolition and re-roofing operation in San Mateo, CA, suffering serious injuries. The operation was overseen by unlicensed contractors hired by the property owners. A.R. was hired under several layers of unlicensed subcontractors which was each a link in the chain responsible for providing labor at the worksite.

Despite the presence of several laborers and deliverymen, no one testified to have witnessed A.R.’s fall from the roof.

A.R. asserted that the property owner was his employer since the homeowner hired unlicensed contractors to do the roofing work. Further, A.R. asserted that the homeowner employer was uninsured and therefore liable for all damages from the incident as an uninsured employer.

A.R.’s forensic investigation was able to recreate the fall in a manner that was consistent with the physical evidence documented by law enforcement and which supported a favorable liability argument.

Defendants contested liability and argued that plaintiff was the cause of the incident.

A.R. claimed a lifetime of earnings loss and medical care. Defendants contested the nature and extent of plaintiff’s injuries.

Given the severity of injuries, A.R.’s settlement required and obtained court approval through an application to approve the compromise of a disabled person.

A.R. obtained a gross sum of $1,651,500, which included a policy-limits payment by the property owner of $1,300,000.

CHP Officer: Drivers Speeding, Distracted in Hailstorm


**Settlement:** $1,575,000

**RLS Attorney**
- Andrew S. Miller
  - Eustace de Saint Phalle
  - Joseph R. Lucia

A storm passed through southern Shasta County causing hailstones to accumulate on a several-mile stretch of I-5. Three separate motor vehicle accidents occurred in the same location on southbound I-5 in Cottonwood.

Plaintiff J.D., age 44, was on duty working for the State of California Department of Highway Patrol (CHP) and responded to the scene of the first collision. J.D. was on scene outside of his vehicle investigating the first collision when a vehicle operated by Luis Ramon Cordova, who was traveling southbound on I-5 in the course and scope of his employment with CR Motors Inc., lost control in the hail and slid off the highway. Cordova almost struck J.D. but J.D. was able to jump out of the way and avoid physical injury.

As J.D. was investigating the second collision (Cordova), Jered Shaun Shumaker Barbour was also traveling southbound on I-5 in the course and scope of his employment with J.A. Sutherland, Inc. Barbour lost control of his vehicle in the hail and slid towards the scene of the other collisions. Barbour left the highway and struck and killed a fire captain who was on scene. J.D. who had been speaking with the fire captain seconds earlier, dove down a steep embankment adjacent to the roadway, avoiding the vehicle.

Barbour claimed that he lost control while taking evasive action to avoid a car fishtailing in front of him. He claimed this driver was Brendon Wallers, who was driving in the course and scope of his employment with Frozen Gourmet, Inc.

J.D. sued Cordova, Barbour, J.A. Sutherland,
Victories, Verdicts, and Settlements (cont.)

CHP Officer: Drivers Speeding, Distracted in Hailstorm (cont.)

Inc., Wallers, Frozen Gourmet, Inc., and CR Motors Inc.

Prior to this accident, J.D. had a knee injury that required surgery. J.D. was also involved in a number of prior on-duty incidents where he suffered injuries to his lower back. At the time of the incident, J.D. was getting treatment for his chronic back pain, including epidural injections. Approximately two years before this incident, J.D. was also diagnosed with post-traumatic stress disorder, for which he was receiving monthly treatment.

J.D. claimed he suffered an exacerbation of both his back injury and PTSD. Due to these injuries, J.D. alleged he was unable to return to his employment with the CHP. Economic damages in the case depended on when the plaintiff would have retired from the CHP.

Defendants contended that J.D. was not injured but, rather, all his claimed injuries were pre-existing, and that any physical injuries from the accident resolved. They alleged that he would have retired early, regardless of this incident due to preexisting health issues, and that there was no future wage loss.

J.D. alleged that defendants were operating their vehicles too fast for the road and weather conditions, and failed to take measures to slow their vehicles despite the presence of emergency vehicles on the shoulder.

During trial, J.D. demonstrated a crucial fact to establish culpability on the part of Barbour. Specifically, J.D. and his counsel located a co-worker who was told by Barbour that he was looking at his phone at or around the time of the accident, which caused him to become distracted. The witness initially refused to cooperate, but after finally getting her to appear at trial, she claimed to have no memory of any conversations with Barbour due to amnesia from a head injury. Her audiotaped statement to CHP investigators was admitted into evidence and played to the jury through the "past recollection recorded" hearsay exception. This allowed the jury to learn about Barbour's admissions regarding distracted driving.

Defendants asserted that J.D. should be barred from recovering any damages under the "Firefighter's Rule," which would bar all professional rescuers from collecting on damages that occur in the course of their duties even in cases of clear negligence by other parties.

Defendants asserted that they were not negligent and that the unusual hail storm and icy conditions were the causes of the accident. In support of this argument, defendants noted that three separate motorists all lost control and crashed at the exact location. Defendants also alleged that J.D. negligently managed the scene of the accident.

J.D. defeated Firefighter's Rule arguments on demurrer and summary judgment. Similar arguments were asserted at trial. J.D. showed the jury dash cam video from J.D.'s patrol cruiser. This captured dozens of motorists safely navigating through the accident scene at reduced speeds.

Prior to trial commencing, plaintiff accepted $75,000 from Cordova. In addition, plaintiff served an offer to settle to defendant Babour for and J.A. Sutherland, Inc. for $1,200,000, which was rejected by the defendant.

After approximately six weeks of trial, plaintiff rested.

The defendants were almost finished with their case, and the parties were preparing for closing arguments when, before closing arguments commenced, Barbour raised his settlement offer to $675,000, then $1,200,000, then $1,300,000 and then $1,500,000.

The matter resolved for a total of $1,575,000, with $75,000 from Cordova and $1.5 million from Barbour and J.A. Sutherland.
Our Practice

LABOR REPRESENTATION
The attorneys and labor relations representatives at RLS have negotiated hundreds of collective bargaining agreements on behalf of our association clients. RLS provides collective bargaining and negotiation services for associations ranging in size from eight to several thousand members. We offer advice, training, and litigation services regarding pensions, healthcare, retirement, benefits, meet and confer rights, impasse, association bylaws, unfair labor practices and grievances.

PERSONAL INJURY
RLS offers representation to people who are injured by the negligence or intentional acts of others. We specialize in obtaining successful results in civil litigation for personal injury cases, such as industrial accidents, product liability, and professional malpractice, as well as auto, bicycle and maritime accidents—many of which involve complicated medical issues and disabilities. It is the goal of the civil trial team to vigorously pursue the best results possible for each client, and to work toward full compensation for injuries sustained.

CRIMINAL DEFENSE
RLS enjoys a stellar reputation throughout the state due, in large part, to the substantial victories we have achieved for our law enforcement clients in complex and high-profile cases. Our reputation as successful, thorough, ethical lawyers gives us unparalleled credibility in prosecution offices and, at times, the ability to resolve criminal investigations without any charges being filed. If charges are filed in state or federal court, our criminal trial attorneys have substantial experience in the criminal justice system. Our trial lawyers have the added benefit of working with skilled investigators, impressive technical support, and a host of proven experts.

ADMINISTRATIVE DEFENSE (Internal Affairs)
RLS is the largest legal provider for the PORAC Legal Defense Fund. In addition, we are panel providers for a number of other major labor association defense entities statewide. Administrative defense includes representation during internal interviews, pre-disciplinary hearings, appeal hearings, arbitrations and litigation associated with disciplinary actions. Our team of attorneys, investigators and appellate lawyers has enjoyed unprecedented success.

CIVIL LITIGATION
RLS clients often find themselves in controversies which lead to litigation. The tenacity, thoroughness, and aggressive representation provided by RLS attorneys give our clients a competitive edge in maneuvering through lawsuits.

WORKERS’ COMPENSATION
RLS is proud to offer workers’ compensation and retirement law services to our clients. Our goal is to assist injured workers in all areas of the workers’ compensation claim, and, most importantly, to help them obtain the very best treatment available in a timely fashion. Our services include representation of injured workers with personal injury claims. We are also able to assist our clients who are forced to retire due to the effects of their industrial injuries by guiding them through this difficult process.

Our Emphasis

REPRESENTATION OF PUBLIC SAFETY EMPLOYEES
Rains Lucia Stern St. Phalle & Silver is the premier law firm in California with an emphasis on the representation of peace officers and firefighters. From administrative investigations to federal criminal actions, our highly skilled attorneys have successfully handled almost every conceivable challenge facing men and women whose duty it is to protect and serve. Our hallmark is aggressive, ethical, client-focused representation.

NOTICE: Making a false or fraudulent workers’ compensation claim is a felony subject to up to 5 years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine. NOTE: Sush Merrick is our firm’s primary workers’ compensation attorney.
RLS is excited to announce that its Labor Symposium and Protecting Cops Symposium will be combined into a single two-day event for 2021.

Attendees will have the option to sign up for one or both days. Stay tuned as details will be announced soon at:

RLSlawyers.com/Symposium

SAVE THE DATE!
June 17-18, 2021

LOCATION:
Renaissance Newport Beach Hotel
4500 MacArthur Boulevard
Newport Beach, CA 92660

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