

**POLICE USE OF FORCE IN PROTECTIVE CUSTODY CASES  
UNDER WELFARE AND INST. CODE § 5150**

**AND**

**MONETARY DYNAMICS OF POLICE CIVIL LIABILITY  
LITIGATION**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	POLICE USE OF FORCE – GENERAL STANDARDS .....	1
	A. Burden Of Proof .....	1
	B. Reasonable Force Is The Federal Standard, Not The Least Amount Of Force Needed.	1
	C. Use Of Force To Detain .....	2
	D. Use Of Handcuffs During Detentions And Search Warrants .....	2
	E. Use Of Force To Arrest .....	3
	F. Gun Pointing Can Be An Actionable Use Of Force .....	4
III.	FEDERAL QUALIFIED IMMUNITY AS TO FEDERAL CLAIMS .....	5
	A. General Test For Qualified Immunity .....	5
	B. Qualified Immunity For Use Of Force; No Similar State Law Immunity .....	5
IV.	UNDER <i>HAYES</i> , A “NEGLIGENT TACTICS” CLAIM CAN BE MADE UNDER STATE LAW, BUT NOT FEDERAL LAW, IN SECTION 5150 CASES WHERE DEADLY FORCE IS USED .....	6
	1. A Negligent Tactics Claim Under <i>Hayes</i> Might Not Be Actionable If The Officer Is Making A Lawful Arrest For A Crime .....	8
	2. A Negligent Tactics Claim Under <i>Hayes</i> Might Not Be Actionable In <i>Non-Deadly</i> Force Cases .....	8
V.	SECTION 5150 CASES – <i>SHEEHAN</i> CASE - ACCOMMODATION UNDER THE ADA .....	9
VI.	AVOIDING CLAIMS UNDER <i>HAYES</i> AND <i>SHEEHAN</i> IN SECTION 5150 CASES .....	11
VII.	STATE LAW CIVIL CODE SECTION 52.1 CLAIMS – UNCERTAIN PARAMETERS .....	11
VIII.	STATE LAW CIVIL CODE SECTION 51.7 CLAIMS .....	17
IX.	SETTLEMENT OFFERS UNDER FEDERAL / STATE LAW – EFFECT ON ATTORNEY’S FEES ..	17

## I. INTRODUCTION

This paper provides an overview of police civil liability standards applicable to lawsuits against police officers and their employers for the use of force when taking a person into protective custody for a psychiatric evaluation under California Welfare and Institutions Code section 5150. The salient issues on this topic are as follows:

- The standards for use of force generally and in Section 5150 cases.
- The qualified immunity defense to federal claims.
- The new case of *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 (2013), which creates a new tort for negligent tactics in 5150 cases where the officer ultimately uses deadly force against the mentally ill person.
- Whether a *Hayes* negligent tactics claim might be extended to non-deadly force cases involving 5150 calls and/or force cases involving the detention or arrest of criminal suspects.
- How the ADA may apply to police calls for service in certain 5150 cases.
- The uncertain parameters of Civil Code section 52.1 claims against officers.
- The use of settlement offers to reduce the likelihood of an attorney's fee award.

## II. POLICE USE OF FORCE – General standards

### A. Burden Of Proof

The plaintiff has the burden of proof in a claim under 42 U.S.C. Section 1983 to establish the officer used excessive force.<sup>1</sup> Similarly, under state law, the plaintiff in a civil case has the burden of proving that a police officer used excessive force and thereby committed a battery.<sup>2</sup>

### B. Reasonable Force Is The Federal Standard, Not The Least Amount Of Force Needed

Under federal law, a claim of excessive force pertaining to a person detained in the field or an arrested pretrial detainee is governed exclusively by the reasonable force standard under the Fourth Amendment.<sup>3</sup> However, if the person is not yet seized, the “shocks the conscience” standard under the Fourteenth Amendment’s substantive due process clause applies.<sup>4</sup>

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<sup>1</sup> *Reynolds v. County of San Diego*, 858 F.Supp. 1064, 1069 (S.D. Cal. 1994) *aff'd in part and remanded in part*, 84 F.3d 1162 (9th Cir. 1996).

<sup>2</sup> *Edson v. Anaheim*, 63 Cal.App.4<sup>th</sup> 1269, 1273 (1998) (prima facie battery is not established, unless and until plaintiff proves unreasonable force was used).

<sup>3</sup> *Graham v. Connor*, 490 U.S. 386, 395 (1989).

<sup>4</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998) (during police chase, the person is not yet seized).

The hallmark of the rule of reasonable force is that the force used was reasonable under the circumstances, not as they actually existed, but as they reasonably appeared to the officer.<sup>5</sup> In *Graham*, the Supreme Court held,

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.<sup>6</sup>

The "least amount of needed force" is *not* the legal standard for use of force.<sup>7</sup> Rather, officers "need only act within that range of conduct we identify as reasonable."<sup>8</sup>

### C. Use Of Force To Detain

Grasping a person's arm during a detention is authorized for officer safety and, if the suspect pulls away, the suspect has committed a violation of Penal Code section 148.<sup>9</sup> Even in situations where a detention has not yet been initiated, an officer can be given leeway to grab a person's arm for officer safety. For instance, in *People v. Rosales*, the police officer approached the person he suspected as being involved in narcotics activity, but the officer did not initially intend to detain the suspect; rather, the officer was going to attempt to initiate a consensual encounter to ask the suspect some questions.<sup>10</sup> The officer approached the suspect, but then grasped the suspect's hand and pulled it out of the suspect's pocket because the officer saw a bulge in the suspect's pocket and thought the suspect might be reaching for a weapon. Drugs fell on the ground as the suspect's hand came out of his pocket. The court held that "even without a detention, we believe the officer was entitled to take appropriate precautionary measures to ensure his own safety. Grabbing and extricating defendant's hand in a single defensive maneuver was, under the circumstances shown, a measured and justifiable response to defendant's potentially threatening conduct."<sup>11</sup>

### D. Use Of Handcuffs During Detentions And Search Warrants

Removing a suspect from a vehicle and handcuffing him does not necessarily convert the detention into an arrest requiring probable cause if the circumstances justify such measures.<sup>12</sup>

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<sup>5</sup> *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

<sup>6</sup> *Id.*

<sup>7</sup> *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

<sup>8</sup> *Id.*

<sup>9</sup> *In re Gregory S.*, 112 Cal.App.3d 764, 771, 778 (1980).

<sup>10</sup> *People v. Rosales*, 211 Cal.App.3d 325, 328 (1989).

<sup>11</sup> *Id.* at 331.

<sup>12</sup> *Id.*

Similarly, after a long car chase, “(p)ointing a weapon at a suspect, ordering him to lie on the ground, handcuffing him, and placing him for a brief period in a police vehicle for questioning—whether singly or in combination—does not automatically convert an investigatory detention into an arrest requiring probable cause.”<sup>13</sup>

When police officers execute a search warrant, the “risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.”<sup>14</sup> In *Muehler v. Mena*, the Supreme Court held: “An officer's authority to detain (occupants) incident to a search (warrant) is categorical and it does not depend on the ‘quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.’ ”<sup>15</sup> The Ninth Circuit has also stated that, under *Muehler*, the duration of a detention may last as long as the search and requires no further justification, provided the detention is conducted in a reasonable manner.<sup>16</sup> Further, in *Muehler*, the Court held that handcuffing the occupants for two to three hours while the officers conducted a search of their home was a “marginal intrusion” outweighed by the interests of the officers in effectuating the search.<sup>17</sup>

On the other hand, the Ninth Circuit has held the use of handcuffs during a search warrant to restrain an 11-year old child for 15 to 20 minutes<sup>18</sup>, or a gravely ill person several hours after the premises are secured, raises a question of fact as to whether the manner of detention was reasonable given the totality of the circumstances.<sup>19</sup> Thus, while the use of handcuffs to detain non-disabled adult occupants during a search warrant for several hours is lawful under *Muehler*, leaving children or leaving gravely ill occupants in handcuffs after the premises have been secured may raise a question of fact on the issue of the reasonableness of the manner of the seizure under the Fourth Amendment.

#### E. Use Of Force To Arrest

Under Penal Code section 835a, a police officer may use reasonable force to make an “arrest, prevent escape, or overcome resistance.”<sup>20</sup> A police officer “need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of

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<sup>13</sup> *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995); accord *People v. Johnson*, 231 Cal.App.3d 1, 12-13 (1991); *People v. Bowen*, 195 Cal.App.3d 269, 274 (1987).

<sup>14</sup> *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981).

<sup>15</sup> *Muehler v. Mena*, 544 U.S. 93 (2005).

<sup>16</sup> *Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006).

<sup>17</sup> *Muehler*, 544 U.S. at 98.

<sup>18</sup> *Tekle v. United States*, 511 F.3d 839, 850 (9th Cir. 2007).

<sup>19</sup> *Franklin v. Foxworth*, 31 F.3d 873, 876-77 (9th Cir. 1994) (removing a gravely ill and semi-naked man during a search warrant from his sickbed without providing any clothing or covering, and then by forcing him to remain sitting handcuffed in his living room for two hours, rather than returning him to his bed within a reasonable time after the search of his room, was unreasonable under the Fourth Amendment).

<sup>20</sup> Pen. Code § 835a.

reasonable force to effect the arrest or ... overcome resistance.”<sup>21</sup> Citing Penal Code section 835a, the Supreme Court in *Hernandez v. City of Pomona* held:

... an officer with probable cause to make an arrest “is not bound to put off the arrest until a more favorable time” and is “under no obligation to retire in order to avoid a conflict.” (citations omitted.) Instead, an officer may “press forward and make the arrest, using all the force [reasonably] necessary to accomplish that purpose.” (citations omitted.) Consistent with these principles, Penal Code section 835a provides that a peace officer with reasonable cause to make an arrest “may use reasonable force to effect the arrest” and “need not retreat or desist from his efforts [to make an arrest] by reason of the resistance or threatened resistance of the person being arrested.”<sup>22</sup>

While use of force claims often give rise to a question of fact that cannot be dismissed on summary judgment, in *Jackson v. City of Bremerton*, the plaintiff, who was arrested for interfering with an officer, asserted “(1) she was sprayed with a chemical irritant prior to her arrest; 2) three officers pushed her to the ground to handcuff her and roughly pulled her up to her feet during her arrest; and 3) an officer ‘rolled up the windows and turned up the engine in the July heat in order to ‘adjust her attitude.’ ”<sup>23</sup> Once on the ground, an officer “placed his knee on her back.”<sup>24</sup> Under these facts, the Ninth Circuit held there was no excessive force as a matter of law.<sup>25</sup>

One the other hand, there are many cases holding excessive force claims must typically be resolved by a jury.<sup>26</sup>

#### F. Gun Pointing Can Be An Actionable Use Of Force

In *Robinson v. Solano County*, the Ninth Circuit held “that pointing a gun at the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger.”<sup>27</sup> However, as observed in the unpublished case of *Thompson v. Lake*, “(c)ourts have frequently distinguished *Robinson* on the basis of arrests (versus investigative stops), felonies (versus misdemeanors), potentially armed suspects (versus obviously unarmed suspects), and the presence of dangerous circumstances (versus their absence). [Citations omitted.]”<sup>28</sup> The *Thompson* court

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<sup>21</sup> *Id.*; accord *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>22</sup> 46 Cal.4th 501, 518-19 (2009).

<sup>23</sup> *Jackson v. City of Bremerton*, 268 F.3d 646, 652 (9th Cir. 2001).

<sup>24</sup> *Id.* at 650.

<sup>25</sup> *Id.* at 653.

<sup>26</sup> *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir.2002); *Liston v. Cnty. of Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir. 1997).

<sup>27</sup> *Robinson v. Solano County*, 278 F.3d 1007, 1015 (9th Cir. 2002); see also *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (pointing gun during low-level threat is actionable).

<sup>28</sup> *Thompson v. Lake*, 2013 WL 424436 \*5 (D. Nev. 2013).

reasoned that such factual distinctions are appropriate when approaching a potentially armed person, and therefore, “*Robinson* does not establish a clear standard” for those situations.<sup>29</sup>

### III. FEDERAL QUALIFIED IMMUNITY AS TO FEDERAL CLAIMS

#### A. General Test For Qualified Immunity

The federal rule of qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law”; defendants can have a reasonable, but mistaken, belief about the *facts* or about what the *law* requires in any given situation.<sup>30</sup>

Further, under the qualified immunity doctrine, the constitutional right the officer allegedly violated must have been “clearly established” in a “particularized ... sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>31</sup> “Clearly established” means the “existing precedent must have placed the statutory or constitutional question *beyond debate*.”<sup>32</sup>

#### B. Qualified Immunity For Use Of Force; No Similar State Law Immunity

Qualified immunity applies to a claim of excessive force, unless the amount of force used was “clearly unlawful.”<sup>33</sup> The Supreme Court stated in 2011: “We have repeatedly told courts - and the Ninth Circuit in particular (citations omitted) - not to define clearly established law at a high level of generality.”<sup>34</sup> Rather, the case law establishing a violation must be fairly specific as to the factual scenario at hand, unless the violation is patently “obvious.”<sup>35</sup> The “bar for finding such obviousness is quite high.”<sup>36</sup>

Unlike federal law, there is no common law or statutory immunity pertaining to the use of force under state law.<sup>37</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Saucier v. Katz*, 533 U.S. 194, 202, 206 (2001) quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (emphasis added).

<sup>31</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“the unlawfulness must be apparent”).

<sup>32</sup> *Ashcroft v. al-Kidd*, - U.S. -, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149, 1159 (2011) (emphasis added).

<sup>33</sup> *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

<sup>34</sup> *Ashcroft v. al-Kidd*, - U.S. -, 131 S.Ct. 2074, 2084, 179 L.Ed. 2d 1149 (2011).

<sup>35</sup> *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011).

<sup>36</sup> *Id.*

<sup>37</sup> *Scruggs v. Haynes*, 252 Cal.App.2d 256, 266 (1967); *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002).

IV. UNDER HAYES, A “NEGLIGENT TACTICS” CLAIM CAN BE MADE UNDER STATE LAW, BUT NOT FEDERAL LAW, IN SECTION 5150 CASES WHERE DEADLY FORCE IS USED

Welfare and Institutions Code section 5150 authorizes a police officer to take a person into protective custody for a psychiatric evaluation when, as a result of a mental health disorder, the person is a danger to him or herself, or others. Under federal law, with respect to the use of force to take a person into protective custody under Section 5150, the officers may use considerable force to subdue the person.<sup>38</sup> In *Luchtel*, the Ninth Circuit held the officers pinning a delusional person to the floor, which allegedly resulted in breaking her arm, was reasonable as a matter of law given the level of her resistance.<sup>39</sup>

As state above, a battery claim arises where a claim for unreasonable force under federal law can be made.<sup>40</sup> Until recently, a claim for negligent use of force against a police officer was not thought to add anything to a tort claim for battery. Rather, it was assumed the “reasonable force” standard under federal law applied equally to a battery or negligence claim under state law.<sup>41</sup> However, in 2013, with respect to the use of *deadly* force<sup>42</sup> when taking a person into protective custody for a psychiatric evaluation under Section 5150, the state law standard for a use of force claim was changed by the California Supreme Court in *Hayes v. County of San Diego*.<sup>43</sup> *Hayes* creates a tort called negligent tactics in 5150 cases where the officer uses deadly force.

In *Hayes*, the California Supreme Court held there is a duty of care with respect to an officer’s tactical decisions preceding the use of *deadly* force when the officer is responding to a call for assistance regarding a mentally disordered person who is a danger to himself or others under Section 5150.<sup>44</sup> In *Hayes*, when the officers arrived, Hayes’ girlfriend reported Hayes had attempted suicide earlier that night by inhaling car exhaust fumes, Hayes had attempted suicide on a prior occasion, and she was concerned for his safety. She also stated there were no guns in the house. The officers entered the house to conduct a welfare check on Hayes without first investigating his background or calling for assistance from the psychiatric emergency response team. The officers saw Hayes in the kitchen and ordered him to show his hands. As Hayes

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<sup>38</sup> *Luchtel v. Hagemann*, 623 F.3d 975, 983 (9<sup>th</sup> Cir. 2010).

<sup>39</sup> *Id.*

<sup>40</sup> *Edson v. City of Anaheim* (1998) 63 Cal.App.4<sup>th</sup> 1269, 1272; CACI No. 1305.

<sup>41</sup> *Edson v. City of Anaheim*, 63 Cal.App.4<sup>th</sup> 1269, 1274 (1998); *Johnson v. County of Los Angeles*, 340 F.3d 787, 794 (9<sup>th</sup> Cir. 2003) (reasonable force under federal law precludes a state law claim based on said force).

<sup>42</sup> Deadly force “creates a substantial risk of death or serious bodily injury.” *Smith v. City of Hemet*, 394 F.3d 689, 705 (9<sup>th</sup> Cir. 2005). For instance, a taser is considered “nonlethal” force. *Bryan v. MacPherson*, 630 F.3d 805, 810 (9<sup>th</sup> Cir. 2010). The use of a police dog to apprehend a suspect is not deadly force as a matter of law. *Thompson v. County of Los Angeles*, 142 Cal.App.4<sup>th</sup> 154, 167 (2006).

<sup>43</sup> *Hayes v. County of San Diego*, 57 Cal.4<sup>th</sup> 622, 639 (2013).

<sup>44</sup> *Hayes*, 57 Cal.4<sup>th</sup> 622.



raised his hands “he walked toward the deputies” holding a large knife. The officers shot Hayes when he was “between two to eight feet away.”<sup>45</sup>

The California Supreme Court held “the state and federal standards are not the same” with respect to a claim of negligent use of deadly force in Section 5150 cases.<sup>46</sup> Rather, “state negligence law, which considers the totality of the circumstances surrounding any use of deadly force ..., is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used.”<sup>47</sup> The Court held an officer’s “tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability.”<sup>48</sup>

In the Ninth Circuit, on the other hand, under *Billington v. Smith*, an officer’s pre-force tactics are not actionable, unless the pre-force tactic itself constitutes “an independent Fourth Amendment violation.”<sup>49</sup> Thus, under federal law, “(e)ven if an officer negligently *provokes* a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation.”<sup>50</sup>

Allowing a jury to consider pre-force tactical decisions expands potential civil liability for police officers and their employers because it is relatively easy to second-guess pre-force tactics in an incident that escalates to the use of deadly force. In *Hayes*, the claim of negligent tactics was merely that the officers had approached Hayes, who they had reason to believe was suicidal, and ultimately used deadly force against him when he approached with a knife, without first:

(a) Requesting assistance from the department’s psychiatric emergency response team,

or

(b) Gathering additional available information about Hayes.<sup>51</sup>

After the California Supreme Court returned the case to the Ninth Circuit, the Ninth Circuit did *not* state these omissions were negligent tactics, but rather, remanded the case to the District Court to reconsider the issue in light of the interlocutory ruling by the state Supreme Court that a duty of care arises as to the officers’ pre-contact tactical decisions under these facts.<sup>52</sup>

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<sup>45</sup> *Id.* at 626.

<sup>46</sup> *Id.* at 639.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002).

<sup>50</sup> *Id.* (emphasis in original).

<sup>51</sup> *Hayes v. County of San Diego*, 736 F.3d 1223, 1231 (9th Cir. 2013).

<sup>52</sup> *Id.* at 1232.

1. A Negligent Tactics Claim Under *Hayes* Might Not Be Actionable If The Officer Is Making A Lawful Arrest For A Crime

The California Supreme Court in *Hayes* distinguished its 2009 opinion in *Hernandez v. City of Pomona*.<sup>53</sup> In *Hernandez*, the officers had probable cause to make an arrest, but the suspect fled and posed an immediate danger to the officers. The officers pursued the suspect and unleashed a dog to apprehend him and eventually shot and killed him in self-defense. The Court expressly avoided the threshold issue of whether a duty existed as to alleged negligent tactics because it found as a matter of law the officers' pre-shooting conduct was not negligent.<sup>54</sup> Although the Court skipped over the issue of whether a duty existed as to the pre-force tactics, the Court indicated the officers' *decision* to pursue Hernandez cannot be actionable negligence. This is because the Court held that under Penal Code section 835a, officers have a statutory privilege to *immediately* make a lawful arrest, and use force to do so if necessary; the statute and case law provide that officers have no obligation to wait or retreat.<sup>55</sup>

*Hayes* did not involve an attempt to lawfully arrest a *criminal* suspect. Therefore, it is not clear whether an officer's statutory privilege under Section 835a to *immediately* make a lawful arrest of a criminal suspect, with force if needed, overrides a *Hayes* negligent tactics claim, even if arrest escalates to the use of deadly force. Arguably, Penal Code section 835a and *Hernandez* stand for the proposition that a *Hayes* negligent tactics claim does not apply to a decision to immediately arrest a criminal suspect. Otherwise, the officer could be held liable for negligently provoking a criminal by not waiting longer to arrest him.

2. A Negligent Tactics Claim Under *Hayes* Might Not Be Actionable In *Non-Deadly Force* Cases

The Court in *Hayes* also did not address whether pre-force tactical decisions in *non-deadly* force cases can be the basis of a negligent use of force claim. This is important because if pre-force tactical decisions are made actionable in a negligent use of non-deadly force claim, almost any use of force could give rise to a question of fact as to whether the officer reasonably should have pursued additional non-force tactics before using force. Prior to *Hayes*, the viability of a negligent tactics claim regarding the use of force was questionable due to the ruling in *Munoz v. City of Union City*.<sup>56</sup> *Munoz*, which also involved officers' response to a mental health crisis call, held officers have *no legal duty* with respect to pre-use of force tactical decisions.<sup>57</sup> Whether this holding in *Munoz* survives the *Hayes* case in *non-deadly* force cases is an important issue that has not yet been decided by the appellate courts.

Preliminarily, to state a negligence claim, "a plaintiff must show that defendant had a duty to use due care" and "the question of whether a legal duty exists is analyzed under general

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<sup>53</sup> *Hernandez, supra*, 46 Cal.4th 501 (2009).

<sup>54</sup> *Id.* at 521 n. 18.

<sup>55</sup> *Id.* at 518-19.

<sup>56</sup> 120 Cal.App.4th 1077, 1096 (2004).

<sup>57</sup> *Id.*

principles of tort law” by the court alone.<sup>58</sup> After a lengthy analysis, the *Munoz* court concluded no legal duty of care arises as to pre-force tactics because a mental health crisis:

... is an unstable situation in which the police must be free to make split-second decisions based on the immediacy of the moment. Knowledge that any unsuccessful attempt at intervention will be subjected to second-guessing by experts with the 20/20 vision of hindsight years following the crisis is likely to deter the police from taking decisive action to protect themselves and third parties. These practical concerns compelled us to observe how imposing a duty of care (for pre-force tactics) would actually threaten, and not promote, public safety.<sup>59</sup>

This is because “imposition of a tort duty on public safety officers ... is certainly likely to result in a more tentative police response.” “(E)xposing police officers to tort liability for inadequate or unreasonable assistance ... could inhibit them from providing intervention at all.”<sup>60</sup>

In *Hayes*, the California Supreme Court overruled the “no duty” rule in *Munoz* regarding negligent pre-force tacticals in *deadly* force cases.<sup>61</sup> As stated above, *Hayes* held that in cases involving *deadly* force, “state negligence law, which considers the totality of the circumstances surrounding any use of deadly force (citation omitted), is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used.”<sup>62</sup> However, *Hayes* carefully avoided deciding whether pre-force tactical decisions can be actionable negligence in *non-deadly* force cases by couching every sentence in the opinion in the context of *deadly* force only. This careful use of language suggests the “no duty” rule for pre-force tactical decisions may remain good law in *non-deadly* force cases under *Munoz*.

If a negligent use of force claim can be based on an allegedly negligent tactic preceding a non-deadly use of force, and Penal Code section 835a and *Hernandez* do not provide a defense in a lawful arrest or detention situation, then a pre-trial dismissal in a force case will be made even more difficult by the lack of any common law or statutory immunity (unlike qualified immunity under federal law) pertaining to the use of force under state law.<sup>63</sup>

#### V. SECTION 5150 CASES - REASONABLE ACCOMMODATION UNDER THE ADA

In 2014, the Ninth Circuit, in *Sheehan v. City and County of San Francisco*, addressed the use of force in a Section 5150 case as an issue arising under the Americans With Disabilities Act

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<sup>58</sup> *Id.* at 1093; *Adams v. City of Fremont*, 68 Cal.App.4th 243, 264 (1998).

<sup>59</sup> *Munoz*, 120 Cal.App.4th at 1096.

<sup>60</sup> *Id.*

<sup>61</sup> *Hayes*, 57 Cal.4th at 639.

<sup>62</sup> *Id.*

<sup>63</sup> *Scruggs v. Haynes*, 252 Cal.App.2d 256, 266 (1967); *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002).

(ADA).<sup>64</sup> However, the United State Supreme Court recently granted review in *Sheehan*, and so it is unclear whether its holding on the ADA will remain good law.<sup>65</sup>

In *Sheehan*, the officers responded to a 5150 call by a licensed social worker regarding a resident of a group home for persons with mental illness. The social worker reported Sheehan was mentally disordered, was off her medication, and had threatened to kill him with a knife.<sup>66</sup> The social worker had completed the 5150 form and asked the officers to transport Sheehan to the hospital. The officers went to Sheehan's room with the social worker, announced their presence, and entered Sheehan's locked room with the social worker's pass key.<sup>67</sup> Sheehan charged the officers with a knife, while saying: "get out of here. I'm going to kill you. Get out of my room. I don't need your help."<sup>68</sup> The officers retreated to the hallway and Sheehan closed the door behind them. Shortly thereafter, the officers drew their weapons and forcibly re-entered the room by forcing the door open after several kicks and shoulders rams.<sup>69</sup> Sheehan again charged the officers with the knife, and this time the officers shot her five or six times.<sup>70</sup> Sheehan survived and sued the officers for unlawful entry, excessive force, and other claims.

In *Sheehan*, the Ninth Circuit held that Title II of the ADA "applies to arrests, though ... exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment."<sup>71</sup> The "reasonableness analysis" the court refers to is the "reasonable accommodation" rule for disabled persons under the ADA.<sup>72</sup> In a Title II claim based on a public entity's alleged failure to provide a reasonable accommodation under 28 C.F.R. § 35.130(b)(7), the plaintiff bears the initial burden of producing evidence of *the existence* of a reasonable accommodation.<sup>73</sup>

In *Sheehan*, the court denied the city's motion for summary judgment on the plaintiff's ADA claim because, given Sheehan's mental disability and clear statement she would try to kill the officers if they re-entered her room, a jury should decide whether the officers' re-entry was a

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<sup>64</sup> *Sheehan v. City and County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014) pet. for cert. granted Nov. 14, 2014, 135 S.Ct. 702.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1218.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1219.

<sup>69</sup> *Id.* at 1236 n. 3.

<sup>70</sup> *Id.* at 1220.

<sup>71</sup> *Id.* at 1232.

<sup>72</sup> To state a claim under Title II of the ADA, a plaintiff must allege: "(1) he is an individual with a disability; (2) he is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) he was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of [his] disability." *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007).

<sup>73</sup> See *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

violation of the “reasonable accommodation” rule under the ADA.<sup>74</sup> In *Sheehan*, the plaintiff alleged “there was no *immediate* need to subdue her and take her into custody” and because she had locked herself in her room, the court held a “reasonable jury could find that Sheehan was in a confined area and not a threat to others—so long as they did not invade her home.”<sup>75</sup> The court stated that, under these particular facts, a jury should decide whether the officers should have “used the passage of time to defuse the situation” or “non-threatening communication” as a “reasonable accommodation” for her disability, rather than allegedly precipitating an immediate confrontation, which they arguably should have anticipated would be deadly.<sup>76</sup> However, if there had been additional facts as to a more immediate danger posed by an unsecured person, the court may have dismissed the reasonable accommodation issue without allowing it to go a jury.

#### VI. AVOIDING CLAIMS UNDER HAYES AND SHEEHAN IN SECTION 5150 CASES

As a practical matter, the *Hayes* case places pressure on officers to gather information about a person who may be taken into protective custody under Section 5150 *before* even approaching the person, and to utilize a psychiatric response team, if possible. Additionally, *Sheehan* suggests that to get an ADA claim dismissed in a Section 5150 case, if there is no immediate danger, the officers should proceed slowly with non-threatening communication, and not unreasonably provoke the person, as doing so may be a failure to “reasonably accommodate” a disabled person under the ADA.

To avoid liability under *Hayes* and *Sheehan* in Section 5150 calls that result in the use of force, an officer should therefore attempt, where practical, to:

- Utilize a records check/collect information about the subject before contact, time permitting,
- Call in staff with mental health expertise, if available, and
- If there is no immediate danger, proceed slowly with non-threatening language so as not to “provoke” the person.

Unfortunately, such advice will frequently be impractical due to the need to act quickly when an officer is called in to help with a dangerous person experiencing a severe mental health crisis. However, these factors should be kept in mind given the *Hayes* and *Sheehan* decisions.<sup>77</sup>

#### VII. STATE LAW CIVIL CODE SECTION 52.1 CLAIMS – UNCERTAIN PARAMETERS

The Tom Bane Civil Rights Act, Civil Code section 52.1(a), provides a basis for a state statutory civil rights claim against any person, including a police officer. It states: “If a person ...

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<sup>74</sup> *Sheehan*, 743 F.3d. at 1233.

<sup>75</sup> *Id.* at 1226.

<sup>76</sup> *Id.*

<sup>77</sup> A petition for certiorari was filed on May 22, 2014 in *Sheehan*.

interferes ... or attempts to interfere by *threats, intimidation, or coercion*, with the exercise ... by any individual ... of rights secured by the Constitution or laws of the United States, or the rights secured by the Constitution or laws of this state,” then under Section 52.1(b) the individual can bring “a civil action for damages.” (Emphasis added.)

In interpreting Section 52.1, federal courts “are bound by pronouncements of the California Supreme Court on applicable state law, but in the absence of such pronouncements ... follow decisions of the California Court of Appeal unless there is convincing evidence that the California Supreme Court would hold otherwise.”<sup>78</sup> Accordingly, the analysis of Section 52.1 must start with the state law cases.

The enactment of Section 52.1 was motivated by an increasing incidence of hate crimes in California.<sup>79</sup> Accordingly, the damages available for a violation of Section 52.1 are punitive in that they may include not only actual damages, but treble damages, a \$25,000 penalty, and attorney’s fees.<sup>80</sup>

In *Venegas v. County of Los Angeles*, the California Supreme Court held that unlike Civil Code section 51.7 (discussed in the next Section), Section 52.1 does not require an allegation of “discriminatory animus or intent based upon the plaintiff’s membership in a protected class of persons.”<sup>81</sup> Rather, Section 52.1 “provides remedies for ‘certain misconduct that interferes with’ federal or state laws, if accompanied by threats, intimidation, or coercion, and whether or not state action is involved.”<sup>82</sup> In *Venegas*, the County argued “that if section 52.1 indeed applied to all tort actions, the section would provide plaintiffs in such cases significant civil penalties and attorney fees as well as compensatory damages.”<sup>83</sup> The Court responded that “section 52.1 does not extend to all ordinary tort actions because its provisions are limited to threats, intimidation, or coercion that interferes with a constitutional or statutory right.”<sup>84</sup> The Court also stated that “we need not decide here whether section 52.1 affords protections to every tort claimant, for plaintiffs in this case have alleged unconstitutional search and seizure violations extending far beyond ordinary tort claims.” However, the *Venegas* Court then limited its holding as follows: “All we decide here is that, in pursuing relief for those constitutional violations under section 52.1, plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats, intimidation, or coercion. The Court of Appeal was correct in holding that plaintiffs adequately stated a cause of action under section 52.1.”<sup>85</sup> Since *Venegas* was a case alleging unlawful and coercive search, one reading is that an unlawful, coercive search is sufficient to

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<sup>78</sup> *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010).

<sup>79</sup> *Jones v. Kmart Corp.*, 17 Cal. 4<sup>th</sup> 329, 338 (1998).

<sup>80</sup> Civil Code §§ 52.1(b), 52.1(h), and 52(a).

<sup>81</sup> 32 Cal. 4<sup>th</sup> 820, 843 (2004).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

state a Section 52.1 claim. Another reading is the Court limited its holding solely to whether discriminatory intent is an element of Section 52.1.

In *Austin B. v. Escondido Union School District*, the court apparently read *Venegas* narrowly as only addressing the issue of discrimination, and therefore, cited the Judicial Council's approved California Civil Jury Instruction (CACI) 3025 (now 3066) as correctly stating the elements of a Section 52.1 claim.<sup>86</sup> CACI 3066 requires the plaintiff prove an officer (1) intended to "prevent" the plaintiff from exercising a civil right, or to "retaliate" against the plaintiff for actually having exercised a civil right, and (2) did so by "threatening or committing violent acts." CACI 3066 and CACI Jury Verdict Form VF-3035 both require the plaintiff to prove the officer threatened or committed a violent act "to prevent [him/her] from exercising [his/her] [constitutional] right or retaliate against [the plaintiff] for having exercised [his/her] [constitutional] right."<sup>87</sup> This element of intent to "prevent a person from exercising" or to "retaliate against a person for having exercised" a civil right appears to be based on the phrase in Section 52.1 that prohibits interference "with the exercise" of rights secured by law. Again, in *Austin B.* the court stated CACI 3066 was correct.

The other element in CACI 3066 requiring "threatening or committing violent acts" is of unclear origin, but it is likely based on the statutory text read as a whole and its legislative history. With respect to the text, the phrase in Section 52.1(a) of "intimidation or coercion" must be read in conjunction with Section 52.1(j), which provides: "Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself *threatens violence* against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, *violence* will be committed against them or their property and that the person *threatening violence* had the apparent ability to carry out the threat." (Emphasis added.)

As to the legislative history, when Section 52.1 was amended in 1990 to allow plaintiffs to recover monetary damages (Stats. 1990, Ch. 392 (A.B.2683), § 1), the Legislature also considered, but rejected, a proposal to delete the language requiring interference "by threats, intimidation, or coercion."<sup>88</sup> A bill analysis prepared by the Department of Justice commented:

As a general proposition, statutory or common law remedies are already available to redress interference with rights protected by state or federal constitutions or laws (e.g., tort). Civil Code § 52.1 focuses specifically on the *additional* element present especially in hate violence, viz., putting persons in fear of their safety. It is the element of threat, intimidation, or coercion that is being emphasized in Civil Code § 52.1. The proposed deletion would, in effect, make the civil rights remedy as an alternative cause of action in virtually every tort action: *Any* tort (and, perhaps, some contractual interferences) could be characterized as interference with "rights secured by the Constitution or laws of the United States or of rights secured by the Constitution of laws of this state. Does

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<sup>86</sup> 149 Cal.App.4<sup>th</sup> 860, 882 (2007).

<sup>87</sup> *Id.*

<sup>88</sup> *Shoyoye v. County of Los Angeles*, 203 Cal.App.4<sup>th</sup> 947, 959 (2012).

not the inclusion of the terms [threats, intimidation, or coercion] clearly define the types of interferences that the Act originally intended to curb (i.e. hate violence)?<sup>89</sup>

It appears the authors of jury instruction CACI 3066 may have utilized this legislative history to interpret the meaning of “threats, intimidation, or coercion” as requiring violence or a threat of violence as an element of a Section 52.1 claim.

The court in *Shoyoye v. County of Los Angeles*, side-stepped the issue of whether violence is an element of Section 52.1 and stated it “need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1,” citing *Cabesula v. Browning–Ferris Industries of California*,<sup>90</sup> but then held that “we conclude that the multiple references to violence or threats of violence in the statute serve to establish the unmistakable tenor of the conduct that section 52.1 is meant to address. The apparent purpose of the statute is not to provide relief for an over-detention brought about by human *error* rather than *intentional* conduct.”<sup>91</sup> Thus, the *Shoyoye* court, like *Austin B.*, interpreted “threats, intimidation, or coercion” to require “intentional” wrongful conduct.

The *Shoyoye* case concerned a person who was subject to a valid arrest, but not released in timely fashion due to a clerical error. The court held “where coercion is inherent in the constitutional violation alleged, i.e., an over-detention in County jail, the statutory requirement of ‘threats, intimidation, or coercion’ is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.”<sup>92</sup> Thus, the facts of *Shoyoye* virtually necessitated a finding that no Section 52.1 “coercion” claim could be made.

Yet the *Shoyoye* court also observed (as the County had argued in *Venegas*) that if Section 52.1 did not require *intentional* misconduct, Section 52.1 would be a basis for a state civil rights action with a \$25,000 penalty, attorney’s fees, and treble damages for every allegation of unlawful police conduct, no matter how minor the incident.<sup>93 94</sup> The court notes that in the legislative history, it “is the element of threat, intimidation, or coercion that is being emphasized in Civil Code § 52.1.”<sup>95</sup> “The legislative history thus supports our conclusion that the statute was intended to address only egregious interferences with constitutional rights, not

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<sup>89</sup> *Id.* citing March 1, 1990 Department of Justice Bill Analysis at p. 2; see also Assembly Committee on Judiciary hearing March 7, 1990 at pp. 2–3.

<sup>90</sup> *Cabesuela v. Browning–Ferris Industries of California, Inc.* 68 Cal.App.4th 101, 111 (1998), superseded by statute as stated in *Francis v. State of Cal.*, WL 1792627 (N.D. Cal 2004).

<sup>91</sup> 203 Cal.App.4th at 959 (emphasis added)

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> One unpublished federal district court case disagrees with this reading holding the penalty provisions are not available under Section 52.1(b). *Cuviello v. City of Oakland*, WL 3063199 (N.D. Cal. 2010) aff’d on other grounds, 434 F. App’x 615 (9th Cir. 2011).

<sup>95</sup> *Id.*



just any tort. The act of interference with a constitutional right must itself be deliberate or spiteful.”<sup>96</sup>

The *Shoyoye* court’s evaluation of the facts in *Venegas* harmonizes the two decisions, which is important because, as stated above, the federal courts must follow *Shoyoye* unless there is “convincing evidence” the California Supreme Court would rule otherwise.<sup>97</sup> The *Shoyoye* court observed that in *Venegas*, although it was an unlawful search case, the officers were found to have conducted a “*knowing and blameworthy interference* with the plaintiffs’ constitutional rights.”<sup>98</sup> Thus, although *Venegas* did not involve violence or a threat of violence, there was an allegation of an *intentional* violation of the Fourth Amendment.

In *Bender v. County of Los Angeles*, the plaintiff alleged both an unlawful arrest and an alleged “deliberate spiteful use of excessive force” (beating and pepper spraying of an unresisting plaintiff).<sup>99</sup> With respect to Section 52.1, the court stated, “(c)oercion is, of course, inherent in any arrest, lawful or not. But we *need not weigh in on the question* whether the Bane Act requires ‘threats, intimidation or coercion’ *beyond* the coercion inherent in every arrest, or whether, when an arrest is otherwise lawful, a Bane Act claim based on excessive force also requires violation of some right other than the plaintiff’s Fourth Amendment rights. Where, as here, an arrest is unlawful *and* excessive force is applied in making the arrest, there has been coercion ‘independent from the coercion inherent in the wrongful detention [citation omitted]—a violation of the Bane Act.”<sup>100</sup> Thus, in a case alleging *both* an unlawful arrest and intentional use of excessive force, *Bender* held the elements of Section 52.1 were met, but left open the question as to whether a claim of only unlawful arrest or only inadvertent excessive force states a Section 52.1 claim.

In summary, *Shoyoye* expressly requires an *intentional* violation of person’s rights to state a claim under Section 52.1. Under *Shoyoye*, Section 52.1 strongly appears to require the intent to violate the law, not just the intent to take an action. In other words, a violation of the Fourth Amendment is not enough for a violation of Section 52.1 under *Shoyoye*. Rather, the intent must be “deliberate or spiteful” to be actionable.<sup>101</sup> Since *Venegas*, *Austin B.*, and *Bender* are not inconsistent with this holding in *Shoyoye*, the federal courts are bound to follow *Shoyoye* unless there is convincing evidence the California Supreme Court would rule otherwise, which there is not at this point in time.

Prior to *Shoyoye*, the federal district court published cases yielded opposite results on the elements of Section 52.1. *Shoyoye* evaluated two published federal district court decisions that preceded it. In *Cole v. Doe*, the Northern District federal court held an unlawful detention with

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<sup>96</sup> *Id.*

<sup>97</sup> *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010).

<sup>98</sup> *Shoyoye*, 203 Cal.App.4<sup>th</sup> at 961 (emphasis added).

<sup>99</sup> 217 Cal. App.4<sup>th</sup> 968, 979 (2013).

<sup>100</sup> *Id.* at 978 n. 2 (emphasis added).

<sup>101</sup> *Shoyoye*, 203 Cal.App.4<sup>th</sup> at 959.

use of handcuffs stated a claim under Section 52.1.<sup>102</sup> The *Shoyoye* court disagreed and noted that the court in *Cole* incorrectly based its conclusion on a finding that violence was not necessary under Section 52.1, rather than evaluating whether the element of *intentional* violation of a constitutional right was required.<sup>103</sup> Conversely, in *Gant v. County of Los Angeles*, the Central District federal court held “a wrongful arrest and detention, without more, cannot constitute ‘force, intimidation, or coercion’ for purposes of section 52.1.”<sup>104</sup> This is because “[S]ection 52.1 requires a showing of coercion *independent from* the coercion inherent in a wrongful detention itself.”<sup>105</sup> The court in *Shoyoye*, expressly agreed with *Gant* that there must be an independent showing of coercion beyond the unlawful act itself.<sup>106</sup> Similarly, in *Rodriguez v. City of Fresno*, the Eastern District federal court held a Section 52.1 claim will not arise, unless the coercion results in interference with a separate constitutional or statutory right.<sup>107</sup>

Several unpublished federal district court cases address, often briefly, whether a Section 52.1 claim has been stated, but add little to the above analysis of whether Section 52.1 requires intentional misconduct or deliberate intent to violate the law.<sup>108</sup> This issue will likely be further developed in case law in the near future.

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<sup>102</sup> *Cole v. Doe*, 387 F.Supp.2d 1084 (N.D. Cal. 2005).

<sup>103</sup> The *Shoyoye* court did not evaluate *Knapps v. City of Oakland*, 647 F.Supp.2d 1129, 1168 (N.D. Cal. 2009), which, like *Cole*, held an allegation of excessive force states a Section 52.1 claim.

<sup>104</sup> *Gant v. County of Los Angeles*, 765 F.Supp.2d 1238, 1253-54 (C.D. Cal. 2011)

<sup>105</sup> *Id.* at 1258 (emphasis added).

<sup>106</sup> 203 Cal.App.4<sup>th</sup> at 960.

<sup>107</sup> *Rodriguez v. City of Fresno*, 819 F. Supp. 2d 937, 954 (E.D. Cal. 2011).

<sup>108</sup> The Northern District cases include: *Justin v. City & County of San Francisco*, WL 1990819 (N.D. Cal. 2008) (plaintiff cannot pursue Section 52.1 claim solely on the basis of use of force); *Luong v. City & County of San Francisco*, WL 5869561 (N.D. Cal. 2012); *Hunter v. City & County of San Francisco*, WL 4831634 (N.D. Cal. 2012); *Dorger v. City of Napa*, WL 5804544 (N.D. Cal. 2013); *Bass v. City of Fremont*, WL 891090 (N.D. Cal. 2013); *M.H. v. County of Alameda*, WL 1701591 (N.D. Cal. 2013); *Holland v. City of San Francisco*, WL 968295 (N.D. Cal. 2013); *Skeels v. Pilegaard*, WL 970974 (N.D. Cal. 2013); *Mateos-Sandoval v. County of Sonoma*, WL 3878181 (N.D. Cal. 2013); and *Brown v. City & County of San Francisco*, WL 1364931 (N.D. Cal. 2014).

The Central District cases include *Ervin v. City of Los Angeles*, WL 4758224 (C.D. Cal. 2012) and *Hernandez v. City of Beaumont*, WL 6633076 (C.D. Cal. 2013).

The Eastern District cases include *Dillman v. Tuolumne County*, WL 1907379 (E.D. Cal. 2013); *Rodriguez v. City of Modesto*, WL 6415620 (E.D. Cal. 2013); and *Estate of Crawley v. Kings County*, WL 2174848 (E.D. Cal. 2014).

A Southern District case is *Sialoi v. City of San Diego*, WL 6410987 (S.D. Cal. 2013).

## VIII. STATE LAW CIVIL CODE SECTION 51.7 CLAIMS

A second state statutory civil rights action can arise under California Civil Code section 51.7. It provides that all persons “have the right to be free from any violence, or intimidation by threat of violence, committed against their person or property *because* of their race, color, religion [etc.]”<sup>109</sup> Accordingly, Section 51.7 requires a plaintiff to establish a person is *motivated* by discrimination, e.g. racial discrimination.<sup>110</sup> A plaintiff’s subjective belief that an alleged violation was racially motivated is insufficient.<sup>111</sup>

## IX. SETTLEMENT OFFERS UNDER FEDERAL AND STATE LAW – EFFECT ON ATTORNEY’S FEES

A prevailing plaintiff on a Section 1983 claim in a police civil liability case is entitled to an attorney’s fees award.<sup>112</sup> Attorney’s fees are also available under Civil Code sections 52.1 and 51.7 discussed above. Because police civil liability cases often involve complex motions and a trial, a potential attorney’s fees award creates considerable exposure for the public entity employer, even in a relatively small case. However, in federal court, defense counsel can recommend an offer of judgment under Federal Rule of Civil Procedure 68 to potentially preclude or reduce an attorney’s fees claim if the plaintiff prevails at trial.

To be effective, as explained below, a Rule 68 offer must be made very early in the case. This is often problematic because the defendants often do not want to send the message they are eager to settle, especially early in the case. Nonetheless, a good practice for defense counsel is to discuss the pros and cons of an early Rule 68 offer with their entity client.

### A. FRCP 68 Offer

Rule 68(d) provides: “If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.” In a Section 1983 case, if a defendant makes a written offer of judgment under Rule 68 for a sum certain to a plaintiff, and the plaintiff does not accept the offer within 14 days, if the plaintiff’s judgment at trial is not “more favorable” than a properly worded Rule 68 offer, two things occur. First, the plaintiff cannot recover any post-offer attorney’s fees because those are considered part of the plaintiff’s “costs” under 42. U.S.C. Section 1988.<sup>113</sup> Second, the plaintiff must pay the defendant’s post-offer recoverable costs, but not the defendant’s attorney’s fees.<sup>114</sup>

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<sup>109</sup> *Austin B. v. Escondido Union School District*, 149 Cal.App.4<sup>th</sup> 860, 881 (2007).

<sup>110</sup> *Id.* at 882.

<sup>111</sup> *Gomez v. City of Fremont*, 730 F.Supp.2d 1056, 1069 (N.D. Cal. 2010); *McKenzie v. Milpitas*, 783 F.Supp.1293, 1301-02 (N.D. Cal. 1990) (excessive force case).

<sup>112</sup> 42 U.S.C. § 1988.

<sup>113</sup> *Guerrero. v. Cummings*, 70 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1995).

<sup>114</sup> *Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9<sup>th</sup> Cir. 1993); *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1028 (9<sup>th</sup> Cir. 2003).

A Rule 68 offer is most effective if made early in the case because the offer must exceed the plaintiff's "judgment," meaning the jury's award *plus* recoverable fees and costs through the date of the offer.<sup>115</sup> Otherwise, the offer is not "more favorable" than what plaintiff would have been awarded if the judgment were entered on the date of the offer. If the Rule 68 offer is made late in the case, the plaintiff's attorney's fees alone may exceed the amount of the offer, thereby falling short of the "more favorable" requirement.

The "more favorable" requirement gives rise to an important decision as to how to frame the offer. There are two choices. First, the offer can be for a set number, e.g. \$30,001, *plus* all recoverable reasonable attorney's fees and recoverable costs through the date of the offer. The disadvantage of this offer is the defendants do not know the amount of the plaintiff's attorney's fees on the date of the offer. The advantage, however, is it will be very easy to ascertain whether the offer is "more favorable" than the jury's award. For instance, a jury award of \$30,000 is less favorable than this offer because even though the plaintiff is also entitled to attorney's fees and costs, those items were *included* in this offer.

Second, the offer can be for a set number, e.g. \$30,001, which *includes* all recoverable reasonable attorney's fees and recoverable costs through the date of the offer. The advantage of this offer is, unlike the first offer described above, the defendants know the maximum value of the offer is \$30,001. The disadvantage of this offer is that it will be much more difficult to ascertain whether this offer is "more favorable" than the outcome at trial, e.g. if the jury were to award \$10,000. In that scenario, the issue would be whether the plaintiff's recoverable attorney's fees and costs through the date of the offer exceed \$20,000. Since only the plaintiff's attorney has access to that information, there will be an issue of credibility as to whether the plaintiff's attorney worked a sufficient number of hours at a reasonable billing rate to reach the \$20,000 threshold *by the date of the offer*. To avoid this dispute, the first type of offer is safer and more effective and, if made early in the case, the exposure to an unknown amount of attorney's fees may be tolerable for the client.

With either type of offer, if defense counsel can get plaintiff's counsel to volunteer the accumulated hours or fees in the case through the contemplated date of a Rule 68 offer that is about to be made, such an admission is very helpful. For the first type of offer, such an admission will be helpful when plaintiff's counsel makes a motion for fees after the offer is accepted. For the second type of offer, such an admission will be helpful if plaintiff's counsel claims a higher amount of fees through the date of the offer in order to cover the gap between the jury's award and the offer.

B. A Rule 68 Offer Made Jointly But Without Entry Of Judgment Against The Officer Personally

A Rule 68 offer is an offer of judgment, and that poses a potential problem for the individual officer who is a defendant that may not want such judgment entered against him or her even

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<sup>115</sup> *Corder v. Gates*, 947 F.2d 374, 380-81 (9<sup>th</sup> Cir. 1991).

though the entity will pay it. Rule 68(a) provides, “a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” The exact wording of a Rule 68 offer is crucial and technical. For instance, the offer must include the payment of plaintiff’s costs (and fees, if applicable) in a clear manner.<sup>116</sup> A good resource to consult for the wording of the offer is Rutter Group *California Practice Guide, Federal Civil Procedure Before Trial*, Section 15(D).

In *Stanczyk v. City of New York*, the Second Circuit recently held a public entity employer and a police officer can make a joint offer to a plaintiff for a sum certain without allocating the amount each defendant is offering and without allowing entry of judgment against the officer.<sup>117</sup> The court reasoned: “Nothing in this (Rule 68) language appears to require that the defending party's (or parties') offer must permit taking judgment against every defending party. To the contrary, the Rule provides the defending party with discretion to ‘allow judgment on specified terms,’ terms which we believe need not include taking judgment against each defendant.”<sup>118</sup> Since “the Offer was clearly made on behalf of all Defendants and there is no dispute that the amount Stanczyk ultimately obtained was less than that provided by the Offer,” the offer complied with the requirements of Rule 68.<sup>119</sup> In fact, “in multi-defendant cases in which a single payer will likely pay the entire judgment, a full settlement that does not apportion damages will often be the most workable and logical ... and ... a nominal allocation of damages makes little sense when a package offer does not permit individual defendants to independently settle the claims against them.”<sup>120</sup>

The First and Third Circuits are in accord with the Second Circuit in *Stanczyk*, but rulings in the Fifth and Seventh Circuits (that can be distinguished from the offer in *Stanczyk*) provide an unpersuasive basis to argue such a joint offer does not comply with Rule 68.<sup>121</sup> The Ninth Circuit has not yet ruled on this issue. Therefore, defense counsel should explain to the entity defendant that (a) a joint Rule 68 offer is probably valid even if it precludes entry of judgment against the officer personally, but this issue has still not be decided in the Ninth Circuit, and (b) it would likely be improper to require an officer defendant to make an offer of judgment against him or her, even if the entity will pay for the judgment.

The exact terms of the defendants’ Rule 68 offer in *Stanczyk* were as follows:

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant City of New York hereby offers to allow plaintiff Anna Stanczyk [*sic*] to take a judgment against it in this action for the total sum of One Hundred Fifty Thousand and One (\$150,001.00) Dollars,

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<sup>116</sup> *Cruz v. Pacific American Ins. Co.*, 337 F.2d 746, 750 (9<sup>th</sup> Cir. 1964); *Thompson v. Southern Farm Bureau Cas. Ins. Co.*, 520 F.3d 902, 904 (9<sup>th</sup> Cir. 2008).

<sup>117</sup> 2014 WL 2459696 (2d Cir. 2014).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *King v. Rivas*, 555 F.3d 14, 18 (1st Cir. 2009) (distinguishing the Fifth and Seven Circuit cases on joint Rule 68 offers and noting the First Circuit case that supports joint offers).

plus reasonable attorneys' fees, expenses and costs to the date of this offer for plaintiff's federal claims.

This judgment shall be in full satisfaction of all federal and state law claims or rights that plaintiff may have to damages, or any other form of relief, arising out of the alleged acts or omissions of defendants City of New York, Richard DeMartino, Shaun Grossweil[ ]er, or any official, employee, or agent, either past or present, of the City of New York, or any agency thereof, in connection with the facts and circumstances that are the subject of this action....

This offer of judgment is made for the purposes specified in Rule 68 of the Federal Rules of Civil Procedure and is not to be construed as an admission of liability by any defendants, or any official, employee or agent of the City of New York, or any agency thereof; nor is it an admission that plaintiff has suffered any damages.

Acceptance of this offer of judgment will act to release and discharge defendants the City of New York, Richard DeMartino and Shaun Grossweil[ ]er; their successors or assigns; and all past and present officials, employees, representatives and agents of the City of New York, or any agency thereof, from any and all claims that were or could have been alleged by plaintiff in the above-referenced action.<sup>122</sup>

It is interesting the above offer is for all *federal* claims on the condition the state claims be dismissed. This wording is presumably intended to avoid an *Eerie* doctrine problem as to whether state civil procedure must apply to a pendant state claim in a federal case, which seems doubtful.

#### C. Rule 68 Offers In Multiple Plaintiff Cases

A Rule 68 offer to two plaintiffs can condition the offer on acceptance by both plaintiffs.<sup>123</sup> However, such a conditional offer cannot be “collusive,” such as when the offer is designed to ensure it is rejected, e.g. the offer to one plaintiff is reasonable and the offer to the other is very low.<sup>124</sup> Such an offer will not trigger the cost shifting penalty of Rule 68.<sup>125</sup>

#### D. Section 998 Offers In State Court

If the case is in state court, Code of Civil Procedure section 998 governs an offer to compromise. Like with a Rule 68 offers, a Section 998 offer is technical and counsel should consult a practice guide for the wording, such as *The Rutter Group's California Practice Guide*,

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<sup>122</sup> *Id.*

<sup>123</sup> *Lang v. Gates*, 36 F.3d 73, 75 (9<sup>th</sup> Cir. 1994).

<sup>124</sup> *Amati v. City of Woodstock*, 176 F.3d 952, 958 (7<sup>th</sup> Cir. 1999).

<sup>125</sup> *Id.*

*Civil Procedure Before Trial*, Section 12(C). For instance, to effectuate the cost-shifting penalty of Section 998, the offer must provide a place for the offeree to sign a statement of acceptance.<sup>126</sup>

A Section 998 offer is similar to a Rule 68 offer in that the “more favorable” clause is applied in a similar fashion.<sup>127</sup> It also appears that a joint offer by a public entity and an officer in a police civil liability case meets the criteria of Section 998.<sup>128</sup> A Section 998 offer can be conditioned on a dismissal of the lawsuit, rather than requiring entry of judgment.<sup>129</sup> Thus, it appears a public entity defendant can make a Section 998 offer on behalf of itself and the officer defendant conditional on a dismissal of the entire lawsuit without the need for a formal judgment. This is an advantage over Rule 68. However, in a multiple plaintiff case, unlike a Rule 68 offer, a Section 998 offer usually *cannot be* conditioned on *all* the plaintiffs accepting the offer.<sup>130</sup>

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<sup>126</sup> Code Civ. Proc. § 998(b)(2).

<sup>127</sup> *Heritage Engineering Construction, Inc. v. City of Industry*, 65 Cal.App.4<sup>th</sup> 1435, 1441-42 (1998); *Wilson v. Safeway Stores, Inc.*, 52 Cal.App.4<sup>th</sup> 267, 271-72 (1997).

<sup>128</sup> *Santantonio v. Westinghouse Broad. Co.*, 25 Cal.App.4<sup>th</sup> 102, 115 (1994).

<sup>129</sup> *On-Line Power, Inc. v. Mazur*, 149 Cal.App.4<sup>th</sup> 1079, 1085 (2007).

<sup>130</sup> *Menees v. Andrews*, 122 Cal.App.4<sup>th</sup> 1540, 1544 (2004).