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A Retrospective Look at 2008 POBRA Decisions

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At this season, we recap the year's major court decisions interpreting the California Public Safety Officers' Procedural Bill of Rights Act ["POBRA"], along with other key rulings affecting law enforcement. This past year brought fewer than usual decisions interpreting POBRA, perhaps a sign that this body of legislation is gradually attaining a more settled state where both labor and management increasingly understand its boundaries and act accordingly.

For the second consecutive year, management won most of the POBRA battles that reached the appellate courts. Early in the year, the California Supreme Court in *Mays v. City of Los Angeles* (2008) 43 Cal. 3d 313, overruled a Court of Appeal precedent holding that POBRA's one-year statute of limitations for completing internal investigations requires the employing agency to notify the employee of the specific proposed penalty within the year following discovery of the facts. Two later decisions, *Perez v. City of Los Angeles* (2008) 167 Cal. App. 4th 118, and *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal. App. 4th 1625, rejected union counsel's expansive interpretations of officers' POBRA protections in disciplinary interrogations.

***Mays v. City of Los Angeles*: POBRA statute of limitations does not require employer to notify employee of the specific proposed penalty.**

The POBRA statute of limitations, *Government Code*, section 3304(d), requires the employer to "complete its investigation and notify the public safety officer of its proposed disciplinary action within" one year of the time of the discovery of the misconduct. The Second District Court of Appeal in *Sanchez v. City of Los Angeles* (2006) 140 Cal. App. 4th 1069, construed this language to mean that within the one year period, the Department must tell the officer exactly what disciplinary penalty it proposes to take. But the California Supreme Court in *Mays v. City of Los Angeles* (2008) 43 Cal. 4th 313, overruled *Sanchez* and held that the statute means only that within the one year, the Department must notify the officer of the *fact* that it proposes to take some type of disciplinary action.

Petitioner John Mays was a LAPD Sergeant who suffered a burglary of his personal car, in which confidential police

documents were taken. Within the year following discovery of this incident, the Department served Sergeant Mays with a form entitled "Notice of Proposed Disciplinary Action" containing misconduct charges for failure to adequately secure confidential department materials, failure to promptly report the loss, making false statements in the investigation, and various other charges.

Under the form's heading for proposed penalties, the box was checked to indicate that the matter would be adjudicated by a Board of Rights, the LAPD's internal disciplinary tribunal. If an officer is found guilty of misconduct by a Board of Rights, the Board can recommend penalties ranging from reprimand to termination. 43 Cal. 3d at 319, citing Los Angeles City Charter section 1070(n).

Under the LAPD Manual, adjudication by a Board of Rights is itself treated as a disciplinary penalty that a supervisor may recommend. Under the City Charter, the Department must *offer* the accused officer an opportunity for a Board of Rights hearing if it seeks to impose a penalty of termination or suspension for more than 22 days, but the officer is also entitled to *request* a Board of Rights hearing to appeal any level of disciplinary penalty.

The only penalty of which Sergeant Mays was informed within the section 3304(d) statute of limitations was adjudication by a Board of Rights. Without holding a Board of Rights hearing, Chief William Bratton issued an official written reprimand based on the two charges of failure to secure confidential materials and failure to promptly report the loss. At a Board of Rights hearing on the other charges including making false statements, Mays was found not guilty.

Mays then filed a petition for writ of mandate seeking to rescind the written reprimand, on the ground that he was not given notice of the possibility of that penalty within the section 3304(d) statute of limitations. The Supreme Court framed the issue in terms of whether section 3304(d) requires the employer to give "notice of the specific punishment or discipline that is contemplated for the charged misconduct." *Id.* at 321.

The Court began its analysis by articulating the interplay between the most applicable rules of statutory construction for this issue, observing that "our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. We give the language its usual and ordinary meaning, and if there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." *Id.* This analytical process is known as the "plain language" rule.

Although courts usually begin their analysis by examining whether the statutory language is ambiguous, and applying the plain language if not, this examination remains subservient to the fundamental task of effectuating the legislative intent. The Court recognized that the ultimate goal is to promote rather than defeat the statute's general purpose. *Id.*

The Court found that the statute's "fundamental purpose" is to place a time limit on investigations of misconduct, and consequently, "it seems most reasonable to interpret the language 'proposed disciplinary action' as referring to the agency's determination that 'discipline may be taken.'" *Id.*, quoting from the statute. That interpretation would serve the "apparent purpose" that "an officer will not be faced with the uncertainty of a lingering investigation, but will know within one year" that it may be necessary to respond to the

charge and "defend against possible discipline." *Id.* at 322.

The Court could have reasonably found the statute unambiguous. To "notify" the officer "of its proposed disciplinary action" means more than telling the officer that some punishment may be imposed, it means telling the officer what punishment is contemplated. The statute could have been phrased in terms of notifying the officer that the employer plans to take disciplinary action, if that were all the legislature intended to require of the employer. The Court could have left it at that, and said that if the legislature did not intend to require the employer to notify the officer of a specific disciplinary action, it should amend the statute.

In stretching the plain meaning to find this statutory language ambiguous, the Court engaged in pro-government judicial activism, making law rather than interpreting it. This is not a highly egregious example of that tendency, because the individual right that is taken away in this case is more technical than substantive. But the tendency bears mention because "judicial activism" is a favorite complaint by conservatives when courts find novel individual rights implied by a constitutional or statutory text.

While the *Mays* decision only benefits employers, there is sound logic in the Court's reasoning. It is not until the employee is notified of an employer's decision to take disciplinary action on a misconduct charge that the employee becomes entitled to Skelly rights (*Skelly v. State Personnel Bd.* (1975) 15 Cal. 3d 194), and eventually to an administrative appeal. Given that procedural context, the Court recognized that "It would be anomalous to require the public agency to reach a conclusion regarding potential discipline prior to any pre-disciplinary proceedings or response on the part of the officer." 43 Cal. 4th at 322.

A requirement to notify the officer of a specific proposed penalty before considering the officer's initial response "also could have the practical effect of always leading the public agency to proposed the maximum punishment in order to ensure it retained the full range of options in the subsequent disciplinary proceedings." *Id.* Indeed, the opinion stops short of recognizing an even greater drawback for employees contained in this situation, that Department administrators and counsel may feel boxed in by bureaucratic inertia into vigorously defending the maximum punishment once they have made a record of giving notice of it.

The Court also perceived a structural anomaly between the deadline of section 3304(d) and the provision of section 3304(f) that "If, after investigation and any pre-disciplinary response or procedure," the employer "decides to impose discipline," it "shall notify the public safety officer in writing of its decision to impose discipline" within 30 days of the decision. Section 3304(f) appears to assume that the employer is not required to decide on a specific penalty before receiving the officer's Skelly response, and can even wait until the section 3304(b) administrative appeal hearing to decide on the specific penalty to be imposed. *Id.* at 323. Since section 3304(f) sets the deadline for notifying the officer of the specific proposed penalty at a later stage in proceedings than the section 3304(d) deadline for notifying the officer of the intention to impose discipline, it would be a strained interpretation to find a similar deadline in section 3304(d).

The Court also reasoned that a statute of limitations such as section 3304(d) ordinarily establishes a "period in which an action must be initiated...." Therefore, "It would be inconsistent with the general

function of limitations statutes to treat ... section 3304(d) as requiring the public agency to reach a firm conclusion with respect to the discipline or punishment actually intended to be imposed at a point ordinarily viewed as the commencement of an action." *Id.*

Finding no legislative history supporting a requirement to notify the officer of the specific punishment within the one-year period established by section 3304(d), the Court concluded that "the notice it contemplates is intended only to inform the officer that the agency has found the allegations to be sufficiently serious that they may subject the officer to discipline." *Id.* at 324.

The method of statutory construction followed in *Mays*, where the Court first stretched the plain meaning to find an arguable ambiguity, then harmonized the language of the one-year limitation period with other provisions of the same statute, illustrates a statutory construction technique known as "structural interpretation," in which the meaning of a particular provision may be determined in reference to its function within the whole statute, so to give the statute the most coherent total meaning that can be derived from its parts.

Mays' attorney Diane Marchant, as a staunch labor advocate, made a heroic attempt to capitalize on careless legislative drafting to give her client a technical defense that would also place a probably unintended burden on law enforcement employers. This kind of tactic was often successful in a bygone era, but as noted above, the current California Supreme Court's judicial activism has now been redirected toward favoring institutional interests over individual rights.

***Perez v. City of Los Angeles*: Where an interrogation violates POBRA rights, the officer's statements may be excluded but nonverbal conduct remains admissible.**

In *Perez v. City of Los Angeles* (2008) 167 Cal. App. 4th 118, the Second District Court of Appeal affirmed the termination of a Los Angeles police officer despite the Department's admitted violation of interrogation rules established by *Government Code*, section 3303. The court held that while violation of POBRA interrogation rules calls for exclusion of the officer's statements and evidence derived therefrom, the officer's nonverbal conduct during the unlawful interrogation was properly admitted into evidence.

The *Perez* case examined several POBRA interrogation issues, as both parties appealed from a trial court ruling on a petition for writ of mandate that vacated and remanded a termination imposed by the LAPD Board of Rights. The Board had found Officer Cindy Perez guilty of five counts of misconduct, and recommended termination. First, while training a recent academy graduate, believing her trainee had allowed a suspect to get too close to her, Officer Perez suddenly pulled out a loaded gun and pointed it at the trainee's head, to demonstrate how fast a suspect can pull a gun. *Id.* at 121. Afterwards at the station, a lieutenant and sergeant questioned Perez about the incident. When the lieutenant asked Perez how she had pointed the gun at the trainee, Perez said, "I did this," and demonstrated by pulling out her loaded gun and pointing it at the sergeant, who was three or four feet away from her. The lieutenant emphatically told Perez to re-holster her gun, and charged her with another count of misconduct. *Id.* The Board found Perez guilty of two counts of misconduct for the two gun-pointing incidents.

During the same interrogation session, Perez voluntarily disclosed another recent incident in which she and her partner

had searched an intoxicated arrestee at the station. In that incident, Perez found a knife on the suspect during the search. Perez admitted that she then surreptitiously returned the knife to the suspect's pocket and directed her partner to search the suspect, to determine whether the partner would be able to find the knife. The partner found the knife, and did not realize that Perez had previously found it. *Id.* at 121-122. This knife incident gave rise to another misconduct charge. Perez and her partner testified about this incident at the Board, and Perez was found guilty. *Id.*

Perez filed a petition for writ of mandate, which was heard by Superior Court Judge Dzintra Janavs. Perez argued that the interview with the lieutenant and sergeant at the station violated the POBRA rules governing interrogations established by *Government Code*, section 3303, and that consequently; the evidence that Perez pointed the gun at the sergeant should have been excluded. Perez also argued that all the evidence of the knife incident should have been excluded. *Id.* The City conceded that the interview had not complied with the POBRA interrogation rules, but argued that all the Board's findings could nevertheless be upheld, because the exclusionary remedy should not apply to Perez' physical act of pointing a gun at the sergeant, and that the finding of guilt on the knife incident could be upheld on the basis of the partner's corroborating testimony.

Judge Janavs held admissible the evidence that Perez had pointed a gun at the sergeant during the interrogation, because that evidence constituted physical conduct, not a verbal statement. But Judge Janavs ruled that all evidence of the knife incident should have been excluded, because the Department's only knowledge of the knife incident came from Perez' voluntary disclosure during an unlawful interrogation. Thus, but for the interrogation, the knife incident would never have come to the Department's attention. *Id.* The exclusion of the evidence of the knife incident required the case to be remanded for reconsideration of the penalty.

Both sides appealed. Perez argued on appeal that the gun-pointing incident at the station should have been excluded. The City argued that the evidence of the knife incident should was properly admitted. The Court of Appeal affirmed the rulings of Judge Janavs on both issues.

At the Board of Rights and in the superior court, the City conceded that the interview with the Lieutenant and the Sergeant did not comply with POBRA. It is not clear from the opinion just what provisions of POBRA were violated. It appears that Perez was not given an opportunity to have a representative present as required by section 3303(I), nor was she informed in advance of the nature of the interrogation as required by section 3303(c). In the appeal, the City attempted to retract its concession and argue that POBRA did not apply. Under section 3303(I), the POBRA interrogation rules do not apply to interrogations "in the normal course of duty, counseling, instruction, or informal verbal admonishment" nor to "routine or unplanned contact" with a supervisor. The appellate court, however, bound the City to its concession below, and refused to permit it to change its position on appeal to make this argument. *Id.* at 122 and fn. 3. This might have been an interesting argument, since the interrogation was held before a formal investigation had been commenced, but it certainly focused on matters that could result in discipline, and perhaps even a criminal assault charge.

In ruling that the evidence of the knife incident was properly excluded, the appellate court held that the exclusionary

remedy for violation of POBRA includes not only statements elicited in violation of POBRA, but also their derivative fruits, which in this case meant Perez' Board testimony and the partner's corroborating testimony. This ruling extended to POBRA the constitutional doctrine known as "fruit of the poisonous tree," which means that when the government obtains evidence through a constitutional violation, the exclusionary rule bars not only the evidence directly obtained through the violation, but also evidence that is indirectly derived from the violation, unless the government can show it would have inevitably obtained the evidence by other lawful means.

In this case, the court recognized that the Department would never have obtained evidence of the knife incident if Perez had not volunteered it during an interrogation that violated POBRA rules. *Id.* at 124. Since the partner had not realized at the time of the incident that Perez had previously retrieved the knife and placed it back in the suspect's pocket, *id.* at 121-122, the partner had no way to report the incident as misconduct. *Id.* at 124. The opinion approves of the trial court's finding that "'there is no evidence in the record that Respondents received the information which supports this count from anyone other than [appellant] during her interrogation.'" *Id.* Accordingly, "The deterrent effect of excluding her statements would have been defeated if the Department had been permitted to prove" the charge through the Board testimony of Perez and her partner. *Id.*

There is no reason why the fruit of the poisonous tree doctrine should not be applicable to the POBRA exclusionary remedy. But the *Perez* case gave the court probably the clearest factual record seen in POBRA history to explicitly apply the doctrine.

In ruling admissible the evidence of Perez pointing a gun at the sergeant, the appellate court held that while *statements* made in an interrogation that violated POBRA would be inadmissible, a violation of POBRA interrogation rules would not render inadmissible evidence of *conduct* during an interrogation. The Court stated, "We see no appropriate deterrent value in precluding use of evidence of appellant's physical misconduct, as that ban could not provide any additional incentive to police departments to comply with POBRA." *Id.* at 123, internal punctuation and citation omitted. As the court observed, Perez "was asked a question which called for a verbal response. She was not asked to demonstrate with the use of a loaded firearm." Doing so "was an independent act of physical misconduct. No police officer should be shielded from discipline for such life-threatening misconduct." *Id.* This holding confirms that the applicability of the exclusionary rule to POBRA violations has limits, and that one such limit is a distinction between statements and physical conduct.

In making and applying this distinction, the appellate court was mindful of the flexibility of its remedial powers under *Government Code*, section 3309.5, and appeared to be influenced by the dangerous nature of the conduct, in pointing a loaded gun at a person solely to illustrate having done the same thing to another person. Manifestly, the failure to observe POBRA safeguards did not play a major role in causing this conduct.

For Officer Perez, the appellate decision means that the Board of Rights will be required to redetermine the penalty, considering the two gun-pointing incidents but not the knife incident. Whatever the outcome, it is difficult to imagine why an officer would engage in conduct so dangerous

and contrary to the cardinal rules of firearm safety. See *id.* at 124.

For the profession, the Perez case furnishes two important precedents guiding the operation of the exclusionary rule under POBRA. Employee interests benefit from the precedent that the fruit of the poisonous tree doctrine is applicable. Management interests benefit from the precedent that physical conduct may remain admissible even if statements must be excluded. Viewing the opinion as a whole, these precedents offer helpful clarification of the proper remedies for violation of POBRA interrogation rules.

***Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*: Department may prohibit joint consultation with attorneys in the wake of a shooting**

Do law enforcement officers involved in a shooting incident have a right to jointly consult with their attorneys and representatives before speaking to investigators? The Association of Los Angeles Deputy Sheriffs ["ALADS"] is asking California courts to guarantee that right. The courts' initial inclination is to refuse.

The California Court of Appeal's Second Appellate District in *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal. App. 4th 1625 affirmed the superior court's denial of a preliminary injunction that would have prohibited the Department from isolating the officers and witnesses from each other in conducting a shooting investigation. The superior court will conduct a full trial of the issue, but the appellate decision indicates that the Department might ultimately prevail in this dispute. But, there are strong arguments on both sides of this issue.

The Department argues that the integrity of a shooting investigation can easily be compromised by permitting the involved officers to consult jointly with their attorneys and representatives "to get their stories straight" before speaking to investigators. Not only can they conspire to concoct a false explanation that absolves them of culpability, but even when the officers act in good faith, the purity of their perceptions can be polluted with information that they did not truly have when they made their tactical decisions, according to the Department. They can lose sight of what information they actually had, and what they learned afterward from others.

On the other hand, a Department cannot isolate the officers from each other without interfering to some extent in their right to counsel and to union representation. This erosion of rights could lead to a slippery slope threatening other procedural rights for which unions have fought long and hard. And the enforcement of a policy of isolating the officers may create conflicts of interest among counsel, which will often force unions to hire more separate counsel for individual officers than they would otherwise need, thereby increasing the unions' cost of defending these investigations.

The case arose when the Sheriff's Department revised its policy manual to prohibit deputies who participate in or witness a shooting incident from consulting "collectively or in groups" with counsel or union representatives before being interviewed by Department investigators. The revised policy does not jeopardize the officers' basic right to individually consult with counsel before speaking to investigators, but sought to prevent what was described by the court as "huddling" to share perceptions and coordinate explanations. ALADS sought temporary and permanent injunctive relief to prohibit the enforcement of this policy.

ALADS contended that the policy violated the constitutional right to counsel, as well as violating provisions of the Public

Safety Officers' Procedural Bill of Rights Act ("POBRA") and the Meyer-Milias-Brown Act ("MMBA"). The MMBA claim was procedural in nature--a failure to properly meet and confer on a change in terms of employment before implementing the policy.

In affirming the superior court's denial of relief, the appellate opinion first clarified that the policy does not prohibit one lawyer from representing multiple individuals; it only prohibits "a group of deputies from meeting with the same lawyer at the same time." 166 Cal. App. 4th at 1632. The court acknowledged that its opinion is not the final adjudication of the case but only considers whether "pending a trial on the merits, the defendant should ... be restrained from exercising the right" being claimed. *Id.* at 1634. Because the trial court's ruling is discretionary and not final, the appellate court would only reverse the ruling if it "exceeded the bounds of reason." *Id.*

Generally, the test for a preliminary injunction entails two steps: a prediction of the probable outcome on the merits, and a balancing of the competing interests affected by granting or denying the injunction. A strong showing of immediate harm from denying the injunction can sometimes overcome a relatively weaker showing of probability of ultimate success on the merits.

Here, the trial and appellate courts examined ALADS' arguments under POBRA, the Constitution, and the MMBA, and found a low probability that ALADS would prevail on the merits. Given that low probability, the court found that ALADS had not shown a sufficient degree of immediate harm to its members from the implementation of the policy to overcome the low probability of ultimate success. The ruling essentially means the Department will be permitted to enforce the "anti-huddling policy" while the case remains pending for trial.

POBRA CLAIM

ALADS' argument under POBRA is based on *Government Code*, section 3303(I), which provides that "whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation...." In *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal. App. 4th 1294, the Upland Police Department refused to postpone a scheduled interrogation of an officer whose chosen attorney first obtained a five-day postponement, then gave one hour's advance notice of being unavailable for the rescheduled appointment. The superior court found that the statute unambiguously prohibited the Department from proceeding with an interrogation in the absence of the officer's chosen representative. *Id.* at 1304-1305. Reversing the ruling, the Court of Appeal held that the statute does not mean, "that the time chosen for the interrogation is subject to the schedule of the chosen representative...." *Id.* at 1305.

The appellate court explained that this "infusion of a reasonableness requirement avoids the absurd result" that the officer could "prevent any interrogation by simply choosing a representative who would never be available." *Id.* The court recognized that a department "needs to conduct interrogations in a reasonably prompt manner, so that subjects can be interviewed and evidence gathered while memories are still fresh." Accordingly, the court held that an officer "must choose a representative who is reasonably available ...

and ... physically able" to appear at a "reasonably scheduled interrogation." *Id.* at 1306. It would be the officer's responsibility to secure the representative's attendance, or to select another available representative. *Id.* The court also observed that the record indicated that one of the chosen attorney's partners would have been available for the interrogation. *Id.*, fn. 7.

Applying the *Upland* case as precedent for imposing reasonable restrictions on the section 3303(I) right to counsel, the court in ALADS proceeded to examine whether the anti-huddling restriction was reasonable. ALADS argued it was unreasonable because it "interferes with how a client can interact with counsel before providing very crucial and potentially criminally and administratively harmful statements." *Id.* at 1637. But the court found the restriction was reasonable, as the Department's policies "expressly protect a deputy's right to meet with counsel individually" and had the objective "to assure the collection of accurate witness accounts before the recollection of witnesses can be influenced by the observation of other witnesses." *Id.*, internal quotation marks omitted.

CONSTITUTIONAL CLAIMS

ALADS also challenged the constitutionality of the "anti-huddling policy" under the First, Fifth, and Sixth Amendments of the United States Constitution, relying principally on *Long Beach Police Officers Assn. v. City of Long Beach* (1984) 156 Cal. App. 3d 996, which invalidated a policy prohibiting officers involved in a shooting from consulting with an attorney or representative before making a written or oral report of the incident. *Long Beach* did not actually address the constitutional issue because it was decided under MMBA as a failure to meet and confer. See *ALADS*, 160 Cal. App. 4th at 1639.

Although *Long Beach* did not confront the constitutional issue head on, one of our own federal district court cases, *Watson v. County of Riverside* (C.D.Cal. 1997) 976 F.Supp. 951, recognized a constitutional right of a deputy sheriff to consult with counsel before, during, and after preparing a report on a use of force incident. *Id.* at 957. Regardless which of these authorities may most persuasively be cited for the constitutional argument, however, it nevertheless requires a vast stretch to bridge the factual gap between the "anti-huddling policy" at issue in *ALADS,* and the total denial of the right to consult with counsel before making a statement, as found in the *Long Beach* and *Watson* cases.

ALADS also argued that the "anti-huddling policy" violated the freedom of association under the First Amendment. The court agreed that the constitutional right of association "includes a right to hire and consult with an attorney," 160 Cal. App. 4th at 1640, but rejected the argument that this right was unduly burdened by the "anti-huddling policy." *Id.*

MEYERS-MILIAS-BROWN ACT

The court also rejected ALADS' argument that the Department's unilateral implementation of the "anti-huddling policy" violated the Meyers-Milias Brown Act, which protects California public employee collective bargaining rights. *Government Code*, section 3505 requires the employer to meet and confer before unilaterally implementing changes in wages, hours, and other "terms and conditions" of public employment. See *ALADS*, 160 Cal. App. 4th at 1641. In *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal. 4th 623, 638, the California Supreme Court held that the

employer's duty to meet and confer over changes in "terms and conditions" of employment did not extend to the "'implementation of a fundamental managerial or policy decision.'" *ALADS*, 160 Cal. App. 4th at 1642.

ALADS portrayed the "anti-huddling policy" as a change in terms and conditions of employment, asserting that it affected working conditions because the Department had "tolerated huddling" for over 25 years. *Id.* at 1643. The Department argued, however, that it's "express objective in implementing its policy revision was to collect accurate information regarding deputy-involved shootings." *Id.* at 1644. Accepting the Department's argument, the court found that "the purpose of the policy revision was to foster greater public trust in the investigatory process." *Id.* Accordingly, the policy revision "arose from the implementation of a fundamental managerial or policy decision" and the Department had no duty to meet and confer over it. *Id.*

BALANCING OF INTERESTS

In its effort to show harm from the implementation of the "anti-huddling policy," ALADS pointed out that deputies would be deprived of their chosen counsel, that unitary representation was more economical, that very few local law firms engage in this work, and that it would be logistically difficult for multiple law firms to respond to incidents in a timely manner since most shootings occur outside business hours and far from law offices. But the court noted that the policy does not force ALADS to retain a different attorney for every involved officer. It only requires the attorney to consult with one officer at a time rather than collectively or in groups. Nor did the policy preclude different attorneys from the same firm from representing different officers. *Id.* at 1645-1646.

In closing, the court recognized that deputies' constitutional right under the Fifth and Sixth Amendments to consult with counsel before being interviewed does not outweigh the public's interest in prompt and accurate collection of information about a shooting incident, and that "the Department's anti-huddling policy revision protects the right of every individual deputy to meet with counsel." *Id.* at 1647. Accordingly, the court found the denial of preliminary relief was not "beyond the bounds of reason," but noted that its decision did not preclude a future action by an individual deputy who may be able to show actual harm from the policy. *Id.*

HOW THIS RULING AFFECTS YOU.

From the initial rulings on preliminary injunctive relief, it appears that the California courts thus far find that preserving the integrity of a shooting investigation outweighs the erosion of the right to counsel and representation that results from isolating the officers. We cannot say the courts are wrong about this, but we applaud ALADS and its attorneys Dick Shinee, Helen Schwab, and Elizabeth Gibbons of Green & Shinee, for bringing and brilliantly arguing a court case raising this issue. It is a laudable public service to seek a court ruling on an important public safety issue where reasonable minds can disagree in good conscience, and particularly to raise the issue in the abstract, rather than waiting to make the argument in the context of a particular shooting, where the litigation might arouse public passions in a way that would distract from the solemn judicial task of balancing the competing rights and interests.

Investigative techniques such as timely on-scene interviews with isolation of participants and witnesses should not

necessarily be reflexively perceived solely as a threat to individual rights. The *ALADS* opinion acknowledges an argument by the union that the "anti-huddling policy" treats deputies like criminal suspects. *Id.* at 1646. But an equally important point is that prompt and effective investigation not only serves to hold wrongdoers accountable, but also to clear away any issues of misconduct.

We will continue to follow this case as it moves to trial, and look forward to seeing the issue more definitively resolved after a complete presentation of the relevant facts.

Our firm's attorneys "roll out" to officer-involved shootings and other critical incidents on an on-call schedule for a number of Southern California agencies. Based on hundreds of such events over nearly 30 years, we do not permit involved officers and deputies to "commingle" their statements, even if the agencies permit them an opportunity to do so.

There are good reasons for this prohibition in the interests of the officers themselves. In any major use of force, it is inevitable to confront differences of perception, recollection and sequencing among the involved officers. It is often said that in a dynamic, rapidly-evolving and violent confrontation, each involved officer has his or her own "tunnel," and that tunnel is not shared with any other participant.[1] Necessarily then, multiple officers in a dynamic event come away with anywhere from slightly different to downright conflicting perceptions. This is to be expected. But when multiple officers share their differing perspectives *before* their individual accounts are developed, there is a tendency for their recollections to be confused or influenced by others' accounts. A purely innocent effort to reconcile different perceptions can lead to serious consequences if one participant, for example, adopts the view of another when that officer was in no position to have the same perspective. It is far better to keep individual recollections pure, and it is necessary that the officers be held accountable *only for what they saw or perceived*.

STAY SAFE
Michael P. Stone
and
Marc J. Berger

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 30 years, following 13 years as a police officer, supervisor and police attorney.

Marc J. Berger is the firm's senior writs and appeals specialist. He has been associated with Michael P. Stone since 1986.

[1] "Tunnel vision" occurs in the vast majority of these dynamic events. It is on the one hand helpful, because the phenomenon permits the officer to respond to vulnerability, harm or risk, by intense focus on the threat. But it also reduces the officer's perception and awareness of things happening "outside the tunnel."