# LEGAL DEFENSE TRUST
# Training Bulletin


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## A PENDING CALIFORNIA SUPREME COURT CASE EXAMINES WHETHER THE APPLICATION OF THE "*LYBARGER* RULE" OF ADMINISTRATIVE COMPULSION IS LIMITED TO PEACE OFFICERS

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Earlier this year, these authors discussed the pending California Supreme Court case of *Spielbauer v. County of Santa Clara,* reviewing a decision where the Sixth District Court of Appeal reversed the termination of a deputy public defender for refusal to give administratively compelled answers about suspected misconduct. The *Spielbauer* decision sharply criticized the rule established in *Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 822, governing administratively compelled statements of public employees. Deviating from the "*Lybarger* rule," which enables governmental employers to obtain compelled statements for administrative purposes by advising the employee the compelled statement cannot be used in a criminal prosecution, *Spielbauer* held that the employee has a right to remain silent unless and until granted formal use and derivative use immunity from all potential prosecuting authorities.

The prior article concluded that requiring the employer to obtain immunity from prosecutors before compelling statements for administrative use would cripple the internal investigation process. The benefit of increasing the employees' constitutional protection would be

outweighed by the employer's inability to deter and punish misconduct. And, where multiple employees are accused of misconduct, the employer's inability to obtain compelled statements would make it more difficult for innocent employees to be cleared of suspicion and defend against sustained charges.

This article looks at different aspect of *Spielbauer,* examining the appellate procedure by which the case reached the Supreme Court. In our view, the Sixth District deliberately misinterpreted the scope of the "*Lybarger* rule" in a contrived effort to induce the Supreme Court to reexamine *Lybarger.* In a transparent effort to use the *Spielbauer* case to force the Supreme Court to re-examine *Lybarger*, the Sixth District declared *Lybarger* limited to peace officers. The Sixth District's attempt to limit *Lybarger* offers insight into the way appellate courts can create test cases. But the idea that peace officers should be governed by different rules than other public employees in these matters would introduce a legal distinction that has no basis in reason.

The Sixth District opinion could have registered displeasure with *Lybarger* but still have recognized that the Court of Appeal was bound to follow Supreme Court precedent and find the warnings given to Spielbauer sufficient to uphold the termination. Then it would be Spielbauer bringing the petition for review. The Supreme Court could have granted review and examined the main issue as to the extent of the employee's constitutional protection. But if the Sixth District had properly followed *Lybarger*, the Supreme Court would not have been required to examine the nonsensical proposition that peace officers should be governed by a rule of administrative compulsion different from the rule that governs other positions of public employment, for example, government lawyers.

## 1. The Sixth District gave no reason why different rules should apply to administrative compulsion in different positions of public employment.

The Sixth District declared the "*Lybarger* rule" limited to peace officers by noting that it was the Public Safety Officers' Procedural Bill of Rights Act ["POBRA"] (*Cal. Govt. Code,* section 3303), that entitled Lybarger to be *advised of his constitutional rights* before being administratively compelled to answer potentially incriminating questions. The Sixth District declared that the only binding precedent in *Lybarger* is that under *Government Code*, section 3303, the advice Officer Lybarger was given about his constitutional rights was insufficient to compel an answer or to treat Lybarger's silence as insubordination.

The *Spielbauer* court elaborated that the aspect of *Lybarger,* that the employee must be advised that the administratively compelled answers cannot be used in a criminal prosecution, was unnecessary to the decision, and therefore, not binding precedent. Thus the Sixth Circuit was able to characterize *Lybarger* as a mere interpretation of a POBRA provision, which only applies to peace officers protected by POBRA.

The Sixth District did not explain why administrative compulsion of statements from peace officers should be governed by a different rule than for other public employees. Certainly, there is a need for a high degree of public accountability from peace officers, but that same need is hardly less forceful for other sensitive fields of public employment such as government attorneys. The need to hold public employees accountable for their job performance does not vary between different fields of public employment in any way that is meaningful to the balance between administrative compulsion and criminal exclusion.

**2. <u>The Supreme Court in *Lybarger* was required to decide the actual extent of the constitutional rights of a public employee under administrative compulsion</u>.**

The Sixth District's attempt to limit the holding of *Lybarger* to peace officers is a transparent attempt to justify refusing to follow it. A public employee's right to be advised that compelled answers to incriminating questions cannot be used in criminal prosecutions arises directly from the Fifth Amendment of the United States Constitution, independently of POBRA. The reason that right is confirmed in POBRA is to eliminate any uncertainty about when the officer is entitled to "*Miranda*" warnings. The *Spielbauer* case did not raise a contested issue as to whether the employee was entitled to *Miranda* warnings, so the fact that Lybarger's entitlement to be advised of his constitutional rights derived from POBRA was immaterial to the resolution of that case.

Since POBRA required the employer to advise Lybarger of his constitutional rights, and the Supreme Court had to decide whether the advice given was sufficient, the Supreme Court needed to examine what Lybarger's constitutional rights were in determining whether the advice was adequate. The *Spielbauer* opinion assumes the *Lybarger* court could have ended its analysis by saying the advice was inadequate, but a decision about what made the advice inadequate flows almost from the same breath.

The *Lybarger* Court defined the constitutional right that "any statement made under the

compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding." 40 Cal. 3d at 829. If the Court had understood formal immunity to be prerequisite to administrative compulsion, or if the Court believed that without immunity the statements might be admissible, then Lybarger's constitutional right would have been to remain silent unless and until formal immunity was granted, and the Court could not have approved of an assurance that the compelled statement would be inadmissible in criminal proceedings. The fact that the Court did not mention formal immunity at this point meant it was necessarily deciding that (1) formal immunity was not required, and (2) the exclusionary rule made the statements criminally inadmissible; and (3) the exclusionary rule gave Lybarger sufficient constitutional protection.

When the Supreme Court reviews *Spielbauer*, it will not need to adopt the Sixth District's justification for deviating from *Lybarger*. If the Court is persuaded by the Sixth District's resolution of *Spielbauer*, it can overrule *Lybarger* and apply the *Spielbauer* rule to all public employees. This is probably what the Sixth District was hoping to accomplish, but as stated in the previous article about this case, this effort should be rejected. In any event, whichever outcome the Supreme Court decrees, it can and probably should hold that the same rules of administrative compulsion apply across the board to all public employees.

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