PARMA 2015

THINGS THAT GO BUMP IN THE NIGHT: on Streets, Storm Drains and Other Dark and Scary Places - Rick Buys, Greg Fox and Rich Osman

I. Who owns/maintains that tree? Who owns/maintains those tree roots? Who owns/maintains those sewers? Who owns/maintains what and who takes the hit if a claim and then a lawsuit is filed because of personal injuries and property damages caused by trees and tree roots causing defective sidewalk or sewer lines or other related causes of action?

Diagram showing typical private lot, sewers, sidewalk and street.

II. Issues of Concern:

The Exposure for Entities. Historical duties and trends and new developments in the law.

Sewers: who owns/maintains and repairs the main and lateral sewer lines?

Street Trees: who owns/maintains and repairs the trees and roots?

The fact that coverage for the exposure is mixed among the pools.

Public entities have a history of being suckered by developers into accepting land that is prone to slides, and why this should be avoided.

III. Red Flag Incident/Critical Incidents - Pre Tort Claim

A. What is a Red Flag Incident?

Significant Personal Injury and/or Property Damages.

Examples: Landslide, sewer collapse and/or backup, bicycle accidents, auto – pedestrian accidents, etc.

B. Early Investigation and Strategy Key to Building a Defense.

Documentation by photos, witness statements, press reports, TV reports, police and fire radio/CAD and related first responder reports. Google and other on line searches.

City records and past claims/incidents.

Meeting with police, relevant public employees to get facts straight and advise city representatives including council or board members of situation and appropriate comments to press and public especially at public meetings.

Meet with your maintenance employees and discuss current practices and how said practices comply with existing ordinances, rules and regulations.

Examples

C. ***Pre-Tort Claim or Pre-Lawsuit resolution issues.***

IV. Strategies for Handling the Tort Claim

A. Late Claim Issues. Need to Respond. Dutro v Antioch.

B. Insufficient Claims.

C. Denial by Written Letter of Denial by Operation of Law.

D. Claim analysis before lawsuit.

E. *Meeting with your public entity to discuss history, records, missing records,* ***involvement of other entities and utilities*** *and related lawsuits involving same slide or slides in same area/traffic intersection/etc. Strategy and tactical considerations.*

F. To be or not to be – claims for indemnity and cross complaints for indemnity

G. Investigation, site visit, talking with involved parties.

H. Pros and cons of temp fixes, remedial measures, soils and slides investigations. The problem of the slippery slope i.e., once you agree to fund anything tough to later say no.

I. Political considerations. Working with entity folks, controlling the message and public comments.

J. Early mediation, pros and cons. Private insurance companies may refuse to pay until formal litigation.

K. Importance of selecting the right mediator. Practical Considerations.

L. Modify those indemnity agreements to include claims for lost profits and other business losses.

M. Did they file the claim with the right person?

The California Supreme Court case *DiCampli-Mitnz v. County of Santa Clara*, 55 Cal.4th 983 (2012), which mandates strict compliance with the Tort Claims Act which plaintiff failed to do and case was dismissed.

V. Timing/Building the defense team. Attorneys, geotechnical experts, other experts. Issues relevant to retention of attorneys and experts.

VI. Defending the Lawsuit.

A. To Demurrer or not To demurrer – Reasons for and reasons not to.

Under the California Tort Claims Act, the City's liability must be based on statute and cannot rest on common law theories of liability, including common law negligence. Gov. Code §815; *Forbes v. County of San Bernardino*, 101 Cal.App. 4th 48, 53 (2002). Therefore, the City may not be sued for "negligent hiring" or "negligent supervision" which is a direct negligence claim.

B. Removal to federal court – Considerations and options.

Examples: Dutro v Antioch

C. Tendering the defense – fees and costs under CCP 1021.6.

D. What to do with another public entity? Options including joint defense; agreement to arbitrate disputes; cross complaints, etc.

E. How to get an early dismissal for a frivolous case.

1. CCP 1038 re MSJ.

Code of Civil Procedure section 1038 is a potent fee-shifting statute allowing public entities a way to recover the costs of defending against unmeritorious and frivolous litigation. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center*, 19 Cal.4th 851, 857 (1998).) In relevant part, the statute provides that in any civil proceeding under the California Tort Claims Act, the trial court shall, upon motion of the defendant public entity, determine at the time of granting a summary judgment whether or not the plaintiff brought the proceeding with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint. If not, then the lower court decides the reasonable defense costs (in additional to routine costs) that should be awarded to the prevailing public entity. The next unpublished decision affirmed a fairly good-sized award under section 1038.

Dannemeyer Family Partnership v. City of Fullerton, Case No. G043376 (4th Dist., Div. 3 Dec. 8, 2010) (unpublished) involved a plaintiff family partnership seeking to compel the City of Fullerton to pave a 700-foot unimproved portion of an alley abutting the general partner's property and to remove various obstructions. The problem was that plaintiff could cite no statutory authority that compelled such action, further complicated by the facts that (1) the germane portions of the alley had been completely unimproved for the 45 years that general partner had lived there, and (2) general partner wanted the City to bear the cost of improving and paving the alley for better access so he had a parking/storage area for his RV/boat (an improvement that would cost between $300,000-$800,000). Summary judgment was granted to the City, with the lower court later awarding its requested defense costs of $67,644.30 under section 1038. Appeal followed.

Plaintiff lost both the merits and fees challenges.

Because the California Torts Claims Act does encompass all suits for money or damages, plaintiff's suit was within the ambit of section 1038. The good faith element is a factual, subjective determination subject to the substantial evidence review test, whereas the reasonable cause element is objective and subject to de novo review on appeal. (*Clark v Optical Coating Laboratory, Inc.*, 165 Cal.App.4th 150, 183 (2008).) Lack of reasonable cause was shown by the failure to show any statute or other duty-producing law with respect to paving the unimproved alley section. Subjective good faith was in doubt based on the ulterior motive apparently driving the suit in the first place, a factual determination for the lower court to make and one supported by the record.

Dannemeyer was a 3-0 decision authored by Acting Presiding Justice O'Leary on behalf of the Fourth District, Division 3. This summary credited to California Attorneys Fees Blog.

2. CCP 128.7 procedures to set the table for fees and costs but there is a catch!

There is the 21 day grace period, per subsection (c)(1):

For the defense, there's a strategic feature about the §128.7 motion and it has to do with the interplay between §128.7 and our summary judgment statute, CCP §437c. The summary judgment statute requires an extraordinary 75 days notice before the hearing. So when a case is truly meritless or frivolous, the ideal scenario goes like this:

- Defendant files motion for summary judgment, setting the hearing 75 days hence;
- Defendant serves §128.7 motion, contending that by "later advocating" the allegations in his complaint, the plaintiff is violating this section;
- If Plaintiff doesn't dismiss the case in 21 days, Defendant files the 128.7 motion with the court, setting it for hearing on the same date as the summary judgment motion.

  Problem: You must incur the fees for making either motion and if the plaintiff dismisses the fees motion probably becomes moot. But the lawsuit is over.

VII. **Two Important Immunities:**

1. **Trail Immunity.**

Government Code § 831.4. **Unpaved road providing access to fishing, hunting, or recreational areas; Trails**

A public entity, public employee, or a grantor of a public easement to a public entity for any of the following purposes, is not liable for an injury caused by a condition of:

(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational **or <u>scenic areas</u>** and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.

(b) **<u>Any trail used for the above purposes.</u>**

(c) Any paved trail, walkway, path, or sidewalk <u>on an easement of way</u> which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads.

2. **Reasonable Inspection Program.**

<u>Public Entity Immunity Under Government Code § 835.4</u>

Government Code §835.4 provides that a public entity is not liable for a dangerous condition of public property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was <u>reasonable</u>:

(a) <u>A public entity is not liable under subdivision (a) of Section 835</u> for injury caused by a condition of its property <u>if the public entity establishes that the act or omission creating the condition was reasonable</u>. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(b) <u>A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable</u>. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against such injury.

VIII. **Statement of a Major Problem. TREES!**

Public Entities for years have assumed maintenance responsibility for street trees, sidewalks and lateral sewers that run from private residence to the main sewer located in the middle of the Street. Examples.

Entities have paid claims for personal injuries and property damages caused by dangerous conditions of public property and other causes of action. Liablity claims increasing and costs going up including exposure for attorneys fees. Carriers increasingly filing suit for reimbursement of monies paid to insured under inverse theories.

City of Pasadena v Superior Court August 14, 2014 228 Cal.App.4th 1228

Carrier paid homeowner $293,000 after tree fell on house and then sued City contending City liable under inverse and nuisance theories. City MSJ denied by trial court and city appealed. The Court of Appeal held the City's motion for summary judgment was properly denied because there *were issues of fact regarding whether the tree which caused damage was part of a public improvement project.* The City offered testimony that City had an urban forestry program that strives to enhance quality of life in City, a tree data base and had maintained the tree in question. The Court found these facts indicated the tree might be part of a City public program. Issues of fact remained whether this Tree was part of a forestry program that constituted a public improvement, and thus, would be a proper basis for an inverse claim.

Court also found City had not preserved for appeal its argument that a tree is not "deliberately designed and constructed" (see *Albers* case: 62 Cal.2d 250, 263 holding "any actual physical injury to real property *proximately* caused by the improvement *as* deliberately designed and constructed is compensable [by inverse claim] whether foreseeable or not"). But, court finds issue not preserved on appeal as city did not challenge trial court's ruling w/respect to "causation." only whether tree can be public improvement.

Note.

Research indicates City's petition for review and de-publication was denied by the Supreme Court. Therefore, the case is good law, and clarifies that trees may be seen as part of a public improvement project and therefore subject to an inverse claim when they cause damage.

IX. <u>Abutting Owners May Have an Existing Duty to Maintain Sidewalks</u>

An owner of land holds legal title to the right-of-way between the sidewalk and the curb abutting his or her land.

Civil Code § 831 provides*: "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."*

Civil Code § 833 provides. Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another.

Streets & Highways Code § 5610 provides in pertinent part that the owners of such land must maintain the sidewalk in a non-dangerous condition:

> *The owners of lots or portions of lots fronting on any portion of a public street or place when that street or place is improved or if and when the area between the property line of the adjacent property and the street line is maintained as a park or parking strip, shall maintain any sidewalk in such condition that the sidewalk will not endanger persons or property....*
>
> CHECK THOSE MAPS! CHECK THOSE PROPERTY LINES!

X. Duty to Maintain Sidewalks Does Not Create a Duty of Care to Third Parties

Although the statute appears to place a primary duty of maintenance on the private landowner, it has not been so interpreted since the statute goes on to provide that cities may give notice of necessary repairs to the property owner and bill the property owner for repairs if the City is required to make them because the owner does not do so. (Sts. & High. Code §§ 5625 & 5890.) Thus, the statute has been interpreted only to provide a means for municipalities to obtain reimbursement for the cost of repairs to sidewalks, not to transfer the primary duty of repair to private landowners or to impose liability on abutting landowners for injuries caused by defective sidewalks. (*Schaefer v. Lenahan* (1944) 63 Cal.App.2d 324, 327-28.) In *Williams v. Foster* (1989) 216 Cal.App.3d 510, 522-23, the court held that neither § 5610 nor a virtually identical municipal ordinance created any duty on part of private landowner to a pedestrian injured by a fall on a sidewalk made defective by tree roots in the parking strip of abutting property.

Consequently, an ordinance that mirrored Streets & Highways Code § 5610 may suffice to make homeowners financially responsible for repairs of sidewalks adjacent to their property but it would probably not make them liable to third parties for injuries resulting from the homeowners' failure to repair defects.

See Fairfield Ordinance – But City states it owns Trees and maintains them.

See **Alameda Ordinance** – City states property owner has duty to maintain sidewalks, if City tree causes defect City will fix but will not fix any other sidewalk defects and property owner shall indemnify City if failure to maintain.

See **Fremont Ordinance** – States property owner has duty to maintain sidewalks and trees and duty to protect third parties.

As discussed in the following section, however, homeowners still could be liable to third parties if the defect were attributable to some act of the homeowner.

XI. Abutting Owners May Be Liable to Third Parties if the Defect Is Attributable to the Owner Even Absent an Ordinance

In *San Francisco v. Ho Sing* (1958) 51 Cal.2d 127, 138, the court held that where the sidewalk is altered in some way for the exclusive benefit of the abutting landowner, the city has the right to bring an indemnity action against the landowner to recover damages paid to a third party injured by the alteration.

In *Moeller v. Fleming* (1982) 136 Cal.App.3d 241, the court held an abutting property owner could be liable to a third party who fell on a break in the sidewalk if it could be shown that the owner allowed the roots of a tree on his property to cause a dangerous condition on the sidewalk. (*Id.* at p. 245.) In *Jones v. Deeter* (1984) 152 Cal.App.3d 798, however, the adjacent landowner was not liable under similar circumstances because the tree roots that caused a break in the sidewalk extended from a tree located in the parking strip rather than the property owner's yard. (*Id.* at p. 804.)

Under those circumstances, the court held liability depended on whether the City or the landowner traditionally maintained the trees. If adjoining landowners historically did so, the landowner may be concurrently liable with the public entity for injuries to third parties. Where the city habitually maintained the trees, the city alone would bear the duty of maintaining the trees so that the area is safe for pedestrians. (*Id.* at p. 805.) *See also Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 830.) The *Jones* court held that simply watering the trees and mowing the parking strip did not give rise to a duty on the part of the adjoining landowner to undertake major repairs such as digging up the roots and repairing the sidewalks. **The court noted, however, that the City had the power to transfer maintenance responsibilities to the landowner:**

> This result need have no great fiscal impact on the City of Long Beach. Should it tire of its responsibility to care for the magnolias at issue here, this task may be passed on to abutting owners under the procedure established by Streets and Highways Code, section 5600 *et seq.* Until this is done, however, it would be fundamentally unfair to hold an abutting owner liable to pedestrians injured by defects in the sidewalk and parkway, when past practice has given that owner every reason to believe that the City has undertaken the responsibility to repair these defects. (*Id.* at p. 806.)

This breezy dismissal of the fiscal impacts suggests that simply transferring maintenance responsibilities is sufficient to create joint liability, but that conclusion runs contrary to other cases. The courts in *Schaefer v. Lenahan, supra*, 63 Cal.App.2d 324, 332, *Williams v. Foster, supra*, 216 Cal.App.3d 510, 522, and *Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1590-1592, **all indicated that to impose a duty on adjacent property owners towards users of sidewalks, an ordinance must include express language to that effect.** *Gonzales v. City of San Jose* (2004) 125 Cal.App.4th 1127, 1136-1139, discussed *infra*, reached the same conclusion.

XII. Changing the Rules of the Game – Amend Ordinances to Shift Duty to Maintain to Private and Commercial Property Owners.

Amend Sidewalk/Landscaping Liability Ordinances – Shifting the Duty of Maintenance and Repair to the Private and Commercial Property Owner. Reduce liability exposure to cities by at least 50%.

A General Law or Charter City may want to adopt an ordinance that would make private and property owners responsible for the maintenance and repair of sidewalks and trees abutting the homeowners' property. The City also wants to make homeowners liable to third parties who are injured due to the failure to maintain the sidewalks and trees in a non dangerous condition. May a City adopt such an ordinance?

Summary of Analysis

Existing law already provides a mechanism for cities to recoup the costs of repair of sidewalks from abutting property owners. In order to impose a duty to third parties, however, an ordinance must include explicit language to that effect. While the powers of general law cities are more limited than those of charter cities, and all reasonable doubt about the exercise of power will be resolved against a general law city, we recommend that an ordinance similar to that enacted by the City of San Jose, as discussed in the *Gonzales* case below, probably would survive a constitutional challenge.

The City Has the Power to Enact Financial Responsibility Ordinances

The Government Code classifies cities as either 'general law cities' (cities organized under the general law of California) or 'chartered cities' (cities organized under a charter). (Gov. Code §§ 34100-34102.) The powers of a general law city include "only those powers expressly conferred upon it by statute the Legislature, together with powers as are necessarily incident to those expressly granted" or essential to the declared object and purposes of the municipal corporation. (*Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 20; *City of Orange v. San Diego County Employees Retirement Assn.* (2002) 103 Cal.App.4th 45, 52.)

The general authority of cities to adopt regulations and ordinances is set forth in Article XI, § 7 of the California Constitution: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." The Legislature implemented this section in Government Code § 37100 which provides that the legislative bodies of cities and counties "may pass ordinances not in conflict with the Constitution and laws of the State or the United States." Although a city's police power extends only within its territorial limits and can be displaced by general state law, it is otherwise "as broad as the police power exercisable by the Legislature itself." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140.) "[T]he enactment of financial responsibility laws would come within the general scope of the constitutional police powers authorization." (63 Ops.Cal.Atty.Gen. 874, *2 (1980).)

Gonzales v. City of San Jose

In *Gonzales*, the plaintiff sued the City of San Jose and adjacent property owners for injuries incurred when she tripped and fell over a break in a sidewalk next to a tree. (*Id*. at p. 1132.) A City ordinance explicitly provided that property owners owed (1) a duty to third parties to maintain sidewalks abutting their property in a nondangerous condition and (2) that the property owner would be liable to the any person who suffered injury as a result of the owner's failure to maintain the property in a nondangerous condition. (See Appendix A for text of ordinance. The text of other city ordinances on the same subject is also included in App. A.) The trial court granted summary judgment in favor of the private property owner and held the ordinance was unconstitutional because the Government Tort Claims Act fully occupied the field of governmental liability for torts on public property. The appellate court reversed. (*Id*.)

The Court of Appeal held that the State neither explicitly nor implicitly occupied the field because the Government Claims Act addressed only public entity and public employee liability, not private party liability. Nor did the act purport to cover sidewalk maintenance and repair. (*Id.* at p. 1136.) Similarly, neither Streets & Highways § 5610 nor Civil Code § 1714[1] showed a Legislative intent to preempt the field of abutting landowner liability. (*Id.* at p. 1137.)

Significantly, the Court found the City ordinance did not alter the City's liability under the Government Tort Claims Act. "Under the two laws, both San Jose as well as the abutting property owner could be held liable to a plaintiff injured as a result of a dangerous condition on a city-owned sidewalk. Concurrent liability of San Jose and an abutting landowner is not tantamount to immunizing San Jose for dangerous conditions on public sidewalks." (*Id.* at pp. 1138-1139.)[2]

Powers of General Law Cities More Limited than Charter Cities

The powers of a general law city are strictly construed, so that "any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation." (*Irwin v. City of Manhattan Beach, supra,* 65 Cal.2d at pp. 20-21.) In contrast, ordinances enacted by charter cities are presumed valid if enacted pursuant to competent

[1] Civil Code section 1714, subdivision (a) provides, in relevant part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."

[2] Thus, the ordinance did not run afoul of the general rule prohibiting public entities from shifting liability for basic duties inherent in property ownership. For example, in *Ellis v. Board of Education* (1945) 27 Cal.2d 322, the Supreme Court considered whether a school district could require those using its facilities for public meetings to obtain liability insurance covering the district. Distinguishing between insurance that would protect the district from liability arising from the conduct of those attending the meeting and insurance that would protect the district from liability for the duties inherent in the ownership and management of property, the Court held the district must bear the cost of insuring against normal management and maintenance costs. (*Id.* at pp. 327-329. See also, 63 Ops.Cal.Atty.Gen. 874, *6 (1980): City that leased a lagoon could not require boat owners using the lagoon to maintain insurance naming the City as an additional insured.

authority: "Where ordinances or bylaws have been enacted pursuant to competent authority they will be supported by every reasonable intendment, and reasonable doubts as to their validity will be resolved in their favor. Courts are bound to uphold municipal ordinances and bylaws unless they manifestly transcend the powers of the enacting body." (*Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 231 [internal citations omitted].) When a city adopts a charter, state statutes are generally displaced as to "municipal affairs" covered by the charter. (*First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 660; Cal. Const., art. XI, § 5.)

The Ordinance Would likely withstand Constitutional Challenge

While the Gonzales case would control absolutely were a City a charter city, some further discussion is necessary before concluding it would also control where a general law city enacted such an ordinance. We found no cases citing *Gonzales* that considered a similar ordinance passed by a general law city; therefore, it is to *Gonzales* itself that we look for further edification.

There are two holdings in *Gonzales* that lead us to conclude that if a General Law City passed a similar ordinance, it would survive a constitutional challenge notwithstanding the strict scrutiny with which the courts review the exercise of general law powers. First, the *Gonzales* court declined to even look at whether the ordinance implicated municipal affairs or conversely qualified as a matter of statewide concern. Because it found no procedural or substantive conflict between the ordinance and state law, it determined it need not inquire further. (*Id.* at p. 1138, citing *Johnson v. Bradley* (1992) 4 Cal.4th 389, 399.)

As noted above, general law cities have the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Constitution, Article XI, § 7 [emphasis supplied]; Gov. Code § 37100.) Thus, we find it significant that the *Gonzales* court was able to resolve the case before it on the relatively simple ground that the ordinance did not conflict with state law.

The second holding in *Gonzales* that leads us to conclude that a general laws city may pass a similar ordinance, is the court's observation that the ordinance "serves an important public policy of providing incentives to abutting landowners to maintain the sidewalks adjacent to their property in a safe condition." (*Gonzales, supra*, at p. 1139.) The court noted that adjacent property owners are often in the best position to identify and resolved dangerous conditions, and by providing an additional level of responsibility for maintenance, unrestricted by the notice provisions of Government Code § 835, the ordinance enhanced the protection of and recourses for the public. (*Ibid,* referencing *Selger v. Steven Bros., Inc.* (1990) 222 Cal.App.3d 1585, 1591-1592, which observed that to fully protect its citizens, a city would have to have inspectors circulating throughout the city, day and night.) Thus, not only was the ordinance not in conflict with state law, but it also furthered the public interest.

XIII. Public Records Act Requests and Responses

A. Public Right to Know is Constitutional Right.

B. Exemptions Are Waived by Selective Disclosure. (Govt Code 6253.5)

C. An Exempt Part Does Not Justify Withholding the Whole. (Govt. Code 6253 (a).)

D. Preliminary Drafts Are Not Always Exempt.

E. The Problems with Emails! Why not pick up the phone!

F. Litigation Documents May Be Withheld While the Case is Pending.

G. Law Enforcement Records May Be Withheld But Not The Basic Facts.

H. The Deliberative Process Privilege May Apply to Pre-Decisional Documents.

XIII. **"DISCOVERY"**

A. Prior accident statistics, reports and summaries.

B. Prior inspection and maintenance schedules and records.

C. Design drawings and specifications.

D. Warnings and safety instructions. Names of involved public employees.

E. Notes, diaries and journals maintained by employees.

F. All applicable standards, manuals and guidelines.

G. Minutes from the Entity's Traffic Committee or other applicable supervising agency.

H. Records of prior complaints from both citizens and the Entity employees regarding the property.

I. Emails and other problems.

XIV. PRACTICE TIPS

A. BEFORE AND AFTER A LAWSUIT IS FILED

1. Be aware of which manuals are "mandatory" as opposed to "advisory" in nature. Plaintiffs will attack you with your own internal manuals, guidelines and policies. When deviations from mandatory guidelines are

necessary, the Entity employees should clearly document the reasons for taking such actions. Plaintiffs will also attack you with all other state and federal manuals, guidelines and polices which apply or relate to the work which the Entity employees perform. Any deviations from the "mandatory" standards must be approached with caution. The reasons for such deviations should be documented and approved.

2. Inspection manuals used by the Entity should explain that significant discretion is vested in the inspector. Avoid "boxing yourselves in" regarding the nature of any requirements. The circumstances of each case vary. Any manual or guidebook created by the Entity for the use of its employees should have a disclaimer at the beginning which states that such guidelines or "goals" are not intended to be a legal standard but are merely intended to serve as a reference source for the employees.

3. Establish design immunity when undertaking improvements and modifications. When a new project is constructed, make certain that each and every document is created and maintained by the Entity employees to establish the "design immunity." Any deviation from the plans made at the construction site or elsewhere should be documented and approved in writing before construction. Entities often lose their design immunity defense as a result of improper or poorly documented compliance with its requirements.

4. Create and maintain an adequate record-keeping system. Records should be stored in a manner, which insures easy and reliable access. Entities frequently misplace or are unable to access documents which would assist in their defense. Cross-referencing systems are often helpful. Lost records are a constant and crippling defense problem.

5. Obtain Hold-Harmless Agreements and Insurance: Hold-harmless agreements should be obtained from each and every possible source for any work or project the Entity undertakes. The Entity should make certain that it is named as an additional insured on any related insurance policy.

6. Monitor Problem Areas: Areas that have been brought to the attention of the Entity as "trouble spots" should be inspected on a timely basis and each inspection should be documented. It is difficult to defend the Entity where an injury occurs in an area that has been brought to the Entity's attention. If a condition is repaired, it should be checked at a later date to make sure it has not deteriorated. For example, if it is known that streetlights are vandalized at a particular location, the Entity must be able to document that it has taken reasonable actions to ensure that the lights remain functioning.

7. Inspect for proper visibility of signs and warnings. Visibility problems are a constant source of alleged liability. Red zones for parked cars, overgrown shrubbery etc., should be closely monitored. Limit lines should be painted with consideration of legal consequences.

8. Inspect left-turn lanes/pockets. These generate an inordinate amount of litigation claims. They should be scrutinized for proper counts, signalization, markings, etc.

9. Immediately investigate and film all serious and fatal accidents scenes. Preserve any and all evidence that could be used in the Entity's defense. Photograph all relevant approaches to the accident scene from sufficient distance to address visibility and related considerations. Critical evidence is often lost as a result of photographs limited to the accident scene itself.

10. Retain digital investigative photographs. These should be held for at least two years in all cases with potential exposure to the Entity. Keep the original digital images! Important details lost in poor copies of photographs may jeopardize the ability to perform "photogrametry" or various other accident reconstruction techniques.

11. Maintain accident history request forms. These form should be printed and utilized, so that the Entity and its defense counsel know who requested what information when, and especially what information and documents were given out in response to the request. Placement of the form in the relevant intersection or other appropriate file facilitates this purpose.

12. Do not allow documents to be released without your approval which are the subject of litigation. Plaintiff attorneys and their investigators frequently contact the Entity employees directly and request information that is the subject of a lawsuit. Implement a reliable procedure whereby you are notified of such requests. Instruct the Entity to attempt to obtain the investigator's name, business card and the names of the case under investigation. Even if documents are "public record", you may argue that they may only be obtained through appropriate discovery. Such a position is supported by California Rule of Professional Responsibility #2-100; American Bar Association Code DR 7-104(a)(1) and Rule 4.2; Mitton v. State Bar (1969) 71 Cal.2d 525, 534; Mills and Land Water Co. v. Golden West Refining Co. (1986) 186 Cal.App.3d 116, 129-130.