



LEGISLATIVE UPDATE 2022

CITY ATTORNEY'S OFFICE

JANUARY 6, 2022





2022 Laws

(Taking effect January 1, 2022, unless otherwise noted)

AB 333 (KAMLAGER)

Criminal Street Gang Participation: Enhanced Sentence



AB 333 - EFFECTIVE JANUARY 1, 2023 AMENDS PC 186.22 AND ADDS 1109

Redefines the terms "pattern of criminal gang activity" and "criminal street gang" for the purposes of the gang offense, enhancement, and alternate penalty under the STEP Act and requires bifurcation of gang-related prosecutions from prosecutions that are not gang-related.



AB 333 (KAMLAGER) PARTICIPATION IN CRIMINAL STREET GANGS

New patterns of gang activity (PC 186.22 (e)(1)):

Last of the offenses have occurred within three years of prior offense and within 3 years of current offense.

Offenses were committed by two or more members.

AB 333 (KAMLAGER) PARTICIPATION IN CRIMINAL STREET GANGS

Offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational.

- “Common benefits that are more than reputational” examples:
 - ✓ Financial gain or motivation
 - ✓ Retaliation
 - ✓ Targeting a perceived or actual gang rival
 - ✓ Intimating or silencing of a potential current or previous witness or informant.

AB 333 (KAMLAGER) PARTICIPATION IN CRIMINAL STREET GANGS

Crimes removed from patterns of gang activity:

- **Felony vandalism**
- **Looting**
- **Unlawful theft (PC 484e), attempted use or use (PC 484f) of an access card**
- **Unlawful use of personal identifying information (530.5)**

AB 333 (KAMLAGER) PARTICIPATION IN CRIMINAL STREET GANGS

- Currently charged offense shall not be used to establish pattern of criminal gang activity.
- Requires that engagement in a pattern of criminal activity must be done by members collectively, not individually.
- Extends until January 1, 2023, (from Jan 1, 2022) a requirement that a court, when applying enhancement, to select sentence that best serves interest of justice (rather than middle term).

AB 333 (KAMLAGER) PARTICIPATION IN CRIMINAL STREET GANGS

PC 186.22 (f) definition of “Criminal Street Gang:”

An ongoing, organized association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity.



AB 333 (KAMLAGER)- PARTICIPATION IN CRIMINAL STREET GANGS: ENHANCED SENTENCE

WHAT THIS BILL MEANS TO LAW ENFORCEMENT

Removal of these from the existing law, but more specifically (i.e., identity fraud) would only serve to empower gangs and gang members, while furthering the negative impact of the victim.

If Gangs/ and their members have the ability to earn more money through fraud/ ID Theft it gives them more buying power, which in turn can lead to the purchase of more weapons and a larger stake in the drug trade. This in turn can lead to more violent crime in the neighborhoods already impacted, as well as continued drug access and use among teens/ young adults.

AB 89 (JONES-SAWYER)

PEACE OFFICERS: MINIMUM QUALIFICATIONS

Government Code section 1031.4

Any other peace officer employed by an agency that participates in the Peace Officer Standards and Training (POST) program shall be at least 21 years of age at the time of appointment.

This section shall not apply to any person who, as of December 31, 2021, is currently enrolled in a basic academy or is employed as a peace officer by a public entity in California.

AB 89 (JONES-SAWYER)

PEACE OFFICERS: MINIMUM QUALIFICATIONS

“Modern policing degree program” to be recommended to the Legislature by January 1, 2023, by the Chancellor of CA Community Colleges, with POST, CSU, and community organizations to serve as advisors.

Recommendations shall:

- Focus on courses pertinent to psychology, comms, history, ethnic studies, emotional intelligence.**
- Include allowances for appropriate work experience, postsecondary education or military experience to satisfy a portion of eligibility.**

AB 89 (JONES-SAWYER)

PEACE OFFICERS: MINIMUM QUALIFICATIONS

- Prior military experience intended to be those with specializations pertinent to, and including community relations, de-escalation, foreign language translators, and those which require necessary critical thinking and emotional intelligence skills.
- Prior “experience” be granted to good moral character (i.e., no prior sustained disciplinary actions), except that POST may grant partial allowance.

AB 89 (JONES-SAWYER)

PEACE OFFICERS: MINIMUM QUALIFICATIONS

- Include both policing degree program and BA (in discipline of their choosing) as minimum education requirements for employment as a peace officer.
- Within two years of the Chancellor's report, POST to adopt.

AB 89 (JONES-SAWYER)

PEACE OFFICERS: MINIMUM QUALIFICATIONS

WHAT THIS BILL MEANS TO LAW ENFORCEMENT

POST- Fiscal impact of \$1.3 million General Fund in 2021-22 to develop the required list of basic certificate courses and establish a media campaign, and \$550,000 General Fund ongoing for additional staffing to process compliance checks for basic certificates and implement the higher education financial support program.

LOCAL AGENCIES- You may have to update your recruitment and retention policies/practices to adhere to the 21-age minimum.

SB 2 (BRADFORD)

PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS

DISQUALIFYING PROVISIONS (GC 1029 (AMENDED))

- Specifies that any person who, after January 1, 2004, has been convicted of a crime based upon a verdict or finding of guilt of a felony by the trier of fact, or upon the entry of a plea of guilty or nolo contendere to a felony, is disqualified from being a peace officer, even if the court sets aside, vacates, withdraws, expunges or otherwise dismisses or reverses the conviction, unless the court finds the person to be factually innocent of the crime for which they were convicted at the time of entry of the order.
- Provides that any person who has been issued peace officer certification and has had that certification revoked by POST, or who has voluntarily surrendered that certification permanently, or having met the minimum requirement for issuance of certification, has been denied issuance of certification, is disqualified from being a peace officer.

SB 2 (BRADFORD)

PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS

DISQUALIFYING PROVISIONS (GC 1029 (AMENDED))

- Requires the Department of Justice (DOJ) to supply POST with necessary disqualifying felony and misdemeanor conviction data for all persons known to be current/former peace officers.
- Provides that POST shall be permitted use of the information from DOJ for de-certification purposes and that the data, once received by POST, will become information releasable under the California Public Records Act (CPRA), including documentation of the person's appointment, promotion, and demotion dates, as well as certification/licensing status and reason/disposition for leaving service.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

POST

- Grants POST the power to investigate and determine the fitness of any person to serve as a peace officer within the POST training program, as specified, in the State of California
- Grants POST the power to audit any law enforcement agency that employs peace officers, as specified, without cause and at any time.
- Creates a Peace Officer Standards Accountability Division within POST.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

- to review investigations conducted by law enforcement agencies or any other investigative authority and to conduct additional investigations, as necessary, into serious misconduct that may provide grounds for decertification, present findings and recommendations to the advisory board created by this bill and to POST and bring proceedings seeking the revocation of certification of peace officers as directed by the board and POST.
- Requires POST to establish procedures for accepting complaints from members of the public regarding peace officers or law enforcement agencies that may be investigated by the accountability division or referred to the peace officers' employing agency or the Department of Justice (DOJ).

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

Peace Officer Standards Accountability Division

Creates a 9-member Advisory Board for the purpose of making recommendations on the decertification of peace officers to POST.

Members:

- **One peace officer (or former) appointed by the Governor.**
- **One peace officer (or former) with substantial experience at a management rank in IA or disciplinary proceedings, appointed by the Governor.**
- **Two members of the public, working in nonprofit or academic institutions on issues related to police misconduct (one by Governor, other by Speaker of the Assembly).**

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

- Two members of the public working at community-based organizations on issues related to police misconduct (one by Governor and one by Senate Rules Committee).
- Two members shall be members of the public, who shall not be former peace officers, with strong consideration given to individuals who have been subject to wrongful use of force likely to cause death or serious bodily injury by a peace officer, or who are surviving family members of a person killed by the wrongful use of deadly force by a peace officer, appointed by the Governor.
- One attorney with substantial professional experience involving oversight of peace officers, as appointed by the Governor.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

Grounds for Decertification, Investigation, Appeal

- Requires that a certified peace officer have their certification revoked, and an applicant have their application for certification denied, upon a determination that the peace officer or applicant has done any of the following:
 - a) The person is or has become ineligible to hold office as a peace officer, as specified;
 - b) The person has been terminated for cause from employment as a peace officer for, or has, while employed as a peace officer, otherwise engaged in, any “serious misconduct,” as defined.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

- Requires definitions of “serious misconduct,” without limitation.
- Requires, beginning no later than January 1, 2023, that each law enforcement agency be responsible for the completion of investigations of allegations of serious misconduct by a peace officer, regardless of their employment status.
- POST may consider the officer’s prior conduct and service record in determining whether revocation is appropriate for serious misconduct.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

Serious Misconduct

(b) By January 1, 2023, the commission shall adopt by regulation a definition of “serious misconduct” that shall serve as the criteria to be considered for ineligibility for, or revocation of, certification.

This definition shall include all of the following:

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

- (1) Dishonesty relating to the reporting, investigation, or prosecution of a crime, or relating to the reporting of, or investigation of misconduct by, a peace officer or custodial officer, including, but not limited to, false statements, intentionally filing false reports, tampering with, falsifying, destroying, or concealing evidence, perjury, and tampering with data recorded by a body-worn camera or other recording device for purposes of concealing misconduct.**

- (2) Abuse of power, including, but not limited to, intimidating witnesses, knowingly obtaining a false confession, and knowingly making a false arrest.**

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

Serious Misconduct

(3) Physical abuse, including, but not limited to, the excessive or unreasonable use of force.

(4) Sexual assault, as described in subdivision (b) of Section 832.7.

(5) Demonstrating bias on the basis of race, national origin, religion, gender identity or expression, housing status, sexual orientation, mental or physical disability, or other protected status in violation of law or department policy or inconsistent with a peace officer's obligation to carry out their duties in a fair and unbiased manner. This paragraph does not limit an employee's rights under the First Amendment to the United States Constitution.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

Serious Misconduct

(6) Acts that violate the law and are sufficiently egregious or repeated as to be inconsistent with a peace officer's obligation to uphold the law or respect the rights of members of the public, as determined by the commission. Whether a particular factual or legal determination in a prior appeal proceeding shall have preclusive effect in proceedings under this chapter shall be governed by the existing law of collateral estoppel.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

(7) Participation in a law enforcement gang. For the purpose of this paragraph, a “law enforcement gang” means a group of peace officers within a law enforcement agency who may identify themselves by a name and may be associated with an identifying symbol, including, but not limited to, matching tattoos, and who engage in a pattern of on-duty behavior that intentionally violates the law or fundamental principles of professional policing, including, but not limited to, excluding, harassing, or discriminating against any individual based on a protected category under federal or state antidiscrimination laws, engaging in or promoting conduct that violates the rights of other employees or members of the public, violating agency policy, the persistent practice of unlawful detention or use of excessive force in circumstances where it is known to be unjustified, falsifying police reports, fabricating or destroying evidence, targeting persons for enforcement based solely on protected characteristics of those persons, theft, unauthorized use of alcohol or drugs on duty, unlawful or unauthorized protection of other members from disciplinary actions, and retaliation against other officers who threaten or interfere with the activities of the group.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

Serious Misconduct

(8) Failure to cooperate with an investigation into potential police misconduct, including an investigation conducted pursuant to this chapter. For purposes of this paragraph, the lawful exercise of rights granted under the United States Constitution, the California Constitution, or any other law shall not be considered a failure to cooperate.

(9) Failure to intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject.

SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

QUALIFIED IMMUNITY

What is it?

Judicially created doctrine that shields government officials from being held personally liable for constitutional violations (i.e., the right to be free from excessive force) for money damages under federal law so long as the officials did not violate “clearly established” law.

What is it not?

Defense to claims for injunctive relief



SB 2 (BRADFORD)- PEACE OFFICERS: CERTIFICATION - CIVIL RIGHTS (CONT'D)

WHAT ABOUT QUALIFIED IMMUNITY?

SB 2 does nothing to alter qualified immunity in federal civil rights litigation.

In state litigation matters, SB 2 makes largely superficial technical changes within Civil Code section 52.1.

However, it leaves untouched Civil Code section 825, et seq., which is the statutory basis upon which peace officers frequently secure indemnity and defense by their employers against lawsuits for matters within the scope of their employment.

AB 481 (CHIU)

MILITARY EQUIPMENT: ACQUISITION AND USE



AB 481

Is this law just talking about equipment acquired from the military?



It's referring to any equipment used by an agency that now falls under the "military equipment" definition?



AB 481 (CHIU D)- MILITARY EQUIPMENT: ACQUISITION & USE

GC 7071 (a) (to be added)

STAGE 1 – January 1, 2022- Approval of new equipment

- A law enforcement agency will have to obtain approval of their governing body (as defined) by ordinance, prior to requesting, seeking, or using new ‘military equipment’ either permanently or temporarily.
 - In the case of a law enforcement agency of a county, including a sheriff’s department or a district attorney’s office, “governing body” means the board of supervisors of the county.

AB 481 (CHIU D)- MILITARY EQUIPMENT: ACQUISITION & USE

STAGE 2- Approval of existing equipment

- **No later than May 1, 2022, a law enforcement agency seeking to continue the use of any military equipment that was acquired prior to January 1, 2022, shall commence a governing body approval process in accordance with this section.**
 - **If the governing body does not approve the continuing use of the equipment, including by adoption of a military equipment use policy within 180 days of submission of the proposed military equipment use policy to the governing body, the law enforcement agency shall cease its use of the military equipment until it receives the approval of the governing body.**

AB 481 (CHIU D)- MILITARY EQUIPMENT: ACQUISITION & USE

GETTING APPROVAL:

- In seeking the approval, a law enforcement agency shall submit a proposed military equipment use policy to the governing body and make those documents available on the law enforcement agency's internet website at least 30 days prior to any public hearing (i.e., agendaized mtg w/ public comment) concerning the equipment at issue.

AB 481 (CHIU D)- MILITARY EQUIPMENT: ACQUISITION & USE

WHAT'S IN A "MILITARY EQUIPMENT USE POLICY?"

➤ “Military equipment use policy” means a publicly released, written document governing the use of military equipment by a law enforcement agency or a state agency that addresses, at a minimum, all of the following:

- A description of each type (i.e., same manufacturer model #) of military equipment.
- The purposes and authorized uses for each type of military equipment.
- The fiscal impact of each type of military equipment.
- The legal and procedural rules that govern each authorized use.
- The training that must be completed before agency is allowed to use.
- Mechanisms to ensure compliance, including legally enforceable violations.
- Public complaint procedures.

AB 481 (CHIU D)- MILITARY EQUIPMENT: ACQUISITION & USE

WHAT IS “MILITARY EQUIPMENT?”

- Collaboration with another LEA in deployment of equipment within governing body’s jurisdiction.
- Unmanned, remotely piloted, powered aerial or ground vehicles.
- MRAPs or armored personnel carriers (Police versions of standard consumer vehicles excluded).
- Humvees, or wheeled vehicles with breaching or entry apparatus attached.
- Tracked armored vehicles providing ballistic protection.
- Command and control vehicles built or modified to facilitate the operational control and direction of public safety units.
- Weaponized aircraft, vessels, or vehicles of any kind.

AB 481 (CHIU D)- MILITARY EQUIPMENT: ACQUISITION & USE

WHAT IS “MILITARY EQUIPMENT?”

- Battering rams, slugs, and breaching apparatuses that are explosive in nature.
- Firearms and ammunition of .50 caliber or greater (standard issue shotguns specifically excluded).
- Specialized firearms and ammunition of less than .50 caliber, including assault weapons as defined in Sections 30510 and 30515 of the Penal Code, (with the exception of standard issue service weapons and ammunition of less than .50 caliber that are issued to officers, agents, or employees of a law enforcement agency or a state agency).
- Any firearm or firearm accessory that is designed to launch explosive projectiles.
- “Flashbang” grenades, explosive breaching tools, “tear gas,” and “pepper balls”.
- Taser Shockwave, microwave weapons, water cannons, and LRAD.
- The following projectile launch platforms and their associated munitions: 40mm, projectile launchers, “bean bag,” rubber bullet, and SIM weapons.

AB 481 (CHIU D)- MILITARY EQUIPMENT:

ACQUISITION & USE

ONGOING USE (ONCE APPROVED)

A law enforcement agency shall submit to the governing body an annual military equipment report for each type of military equipment approved by the governing body within one year of approval, and annually thereafter for as long as the military equipment is available for use and make each annual report publicly available on its internet website for as long as the military equipment is available for use.

The annual military equipment report shall, at a minimum, include the following information for the immediately preceding calendar year for each type of military equipment:

- (1) A summary of how the military equipment was used and the purpose of its use.
- (2) A summary of any complaints or concerns received concerning the military equipment.
- (3) The results of any internal audits, any information about violations of the military equipment use policy, and any actions taken in response.



AB 481 (CHIU D)- MILITARY EQUIPMENT:

ACQUISITION & USE

ONGOING USE (ONCE APPROVED)

(4) The total annual cost for each type of military equipment, including acquisition, personnel, training, transportation, maintenance, storage, upgrade, and other ongoing costs, and from what source funds will be provided for the military equipment in the calendar year following submission of the annual military equipment report.

(5) The quantity possessed for each type of military equipment.

(6) If the law enforcement agency intends to acquire additional military equipment in the next year, the quantity sought for each type of military equipment.

(b) Within 30 days of submitting and publicly releasing an annual military equipment report pursuant to this section, the law enforcement agency shall hold at least one well-publicized and conveniently located community engagement meeting, at which the general public may discuss and ask questions regarding the annual military equipment report and the law enforcement agency's funding, acquisition, or use of military equipment.

AB 481

WHAT THIS BILL MEANS TO LAW ENFORCEMENT

Could result in significant additional workload and related costs for law enforcement agencies to implement the provisions of this bill. However, the requirements of the bill only apply to law enforcement agencies that opt to use or acquire military equipment, which could be viewed as a voluntary activity and therefore not a reimbursable mandate.



AB 490 (GIPSON)

AGENCY POLICIES: POSITIONAL ASPHYXIA

GC 7286.5 (a)- (amended)

- (1) A law enforcement agency shall not authorize the use of a carotid restraint or choke hold by any peace officer employed by that agency.
- (2) *A law enforcement agency shall not authorize techniques or transport methods that involve a substantial risk of positional asphyxia.*

“Positional asphyxia” means situating a person in a manner that compresses their airway and reduces the *ability to sustain adequate breathing*. This includes, without limitation, the use of any physical restraint that causes a person’s respiratory airway to be compressed or impairs the person’s breathing or respiratory capacity, including any *action* in which pressure or body weight is unreasonably applied against a restrained person’s neck, torso, or back, or positioning a restrained person without *reasonable* monitoring for signs of asphyxia.

AB 490 (GIPSON)

AGENCY POLICIES: POSITIONAL ASPHYXIA

GC 7286.5 (a)- (amended)

There are a lot of ambiguities built into this language that will have to be further defined through evolving case law if this bill is enacted into law.

In sum, monitor suspects closely if you have applied a hobble, tarp or other restraint device, or have used body weight for any significant period of time to control a suspect.

Also ensure that the suspect is placed in a proper recovery position, or other appropriate steps are taken, to ensure the ability to breath if there are complaints or signs of the inability to breath (turning blue for example).

SB 98 (MCGUIRE)

PUBLIC PEACE: MEDIA ACCESS



SB 98 (MCGUIRE)

PUBLIC PEACE: MEDIA ACCESS

PC 409.7. (to be added)

(a) If peace officers close the immediate area surrounding any emergency field command post or establish *any other command post, or establish a police line, or rolling closure* at a demonstration, march, protest, or rally where individuals are engaged in activity that is protected pursuant to the First Amendment to the United States Constitution or Article I of the California Constitution, the following requirements shall apply:

(1) A duly authorized representative of any news service, online news service, newspaper, or radio or television station or network may enter the closed areas described in this section.

SB 98 (MCGUIRE)

PUBLIC PEACE: MEDIA ACCESS

2) A peace officer or other law enforcement officer shall not intentionally assault, interfere with, or obstruct the duly authorized representative of any news service, online news service, newspaper, or radio or television station or network who is gathering, receiving, or processing information for communication to the public.

(3) A duly authorized representative of any news service, online news service, newspaper, or radio or television station or network that is in a closed area described in this section shall not be cited for the failure to disperse, a violation of a curfew or violation of paragraph (1) of subdivision (a) of Section 148. If the duly authorized representative is detained by a peace officer or other law enforcement officer, that representative shall be permitted to contact a supervisory officer immediately for the purpose of challenging the detention, unless circumstances make it impossible to do so.

SB 296—CODE ENFORCEMENT OFFICERS: SAFETY STANDARDS

- Each local jurisdiction that employs code enforcement officers shall develop code enforcement safety standards appropriate for the code enforcement officers employees in their jurisdiction. (PC 829.7 is added).
- There is no immediate impact.

SB 16 (SKINNER)

PEACE OFFICERS: RELEASE OF RECORDS

PC 832.5 (b) (to be amended)

- Complaints and any reports or findings relating to these complaints shall be *retained for a period of no less than 5 years (not sustained) and no less than 15 years for sustained findings of misconduct.*

PC 832.7 (to be amended)

- 832.7(b)(ii): Requires disclosure of an incident involving use of force that resulted in death or GBI
 - (iii) A *sustained finding* involving a complaint that alleges unreasonable or excessive force.
 - (iv) A sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive.

Provides a phased-in implementation of this bill so that records relating to incidents (that relate to the new categories of offenses added by this bill) which occurred before January 1, 2022, shall not be subject to the time limitations of the bill until January 1, 2023. However, records of incidents that occur after January 1, 2022, shall be subject to the time limitations of the bill.



SB 16 (SKINNER)

PEACE OFFICERS: RELEASE OF RECORDS

REDACTION ALLOWANCES

- To preservice anonymity of *whistleblowers, complainants, victims, and witnesses.*
- If invasion of personal privacy clearly outweighs strong public interest in records about *possible misconduct and serious use of force....*

COSTS & RETENTION

- *The cost of copies of records subject to disclosure pursuant to this subdivision that are made available upon the payment of fees covering direct costs of duplication pursuant to subdivision (b) of Section 6253 of the Government Code shall not include the costs of searching for, editing or redacting the records.*



SB 16 (SKINNER)

PEACE OFFICERS: RELEASE OF RECORDS

(12) (A) For purposes of releasing records pursuant to this subdivision, lawyer-client privilege does not prohibit the disclosure of either of the following:

- (i) Factual information provided by the public entity to its attorney or factual information discovered in any investigation conducted by, or on behalf of, the public entity's attorney.*
- (ii) Billing records related to the work done by the attorney so long as the records do not relate to active and ongoing litigation and do not disclose information for the purpose of legal consultation between the public entity and its attorney.*

(B) This paragraph does not prohibit the public entity from asserting that a record or information within the record is exempted or prohibited from disclosure pursuant to any other federal or state law.

AB 26 (HOLDEN)

USE OF FORCE: DUTY TO INTERCEDE

- GC 7286(a)

Law enforcement agency policies must include:

- *(a)(9)- A requirement that an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject.*
- *A requirement that an officer that has received all required training on the requirement to intercede and fails to act pursuant to paragraph (9) be disciplined up to and including in the same manner as the officer that committed the excessive force.*

AB 26 (HOLDEN)

USE OF FORCE: DUTY TO INTERCEDE

- Federal law on the issue:

- “Police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen.” (*United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 81, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996)).

- Importantly, however, officers can be held liable for failing to intercede only if they had an opportunity to intercede. (See *Bruner v. Dunaway*, 684 F.2d 422, 426-27 (6th Cir. 1982) (holding that officers who were not present at the time of the alleged assault could not be held liable in a section 1983 action); *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n.3 (1st Cir. 1990) (granting arresting officers' motion for summary judgment because the officers had no "realistic opportunity" to prevent an attack committed by another officer).

- GC 7286(a) does not take prior law into account. However, federal law on the duty to intervene, while not binding on state law issues, should be persuasive in interpreting this law. In addition, it just makes sense....



AB 48 (GONZALEZ)

KINETIC ENERGY PROJECTILES AND CHEMICAL AGENTS

PC 13652 (to be added)

- Kinetic energy projectiles and chemical agents shall not be used by any law enforcement agency to disperse any assembly, protest, or demonstration.

Exceptions:

- Deployed by a peace officer who has received training (from POST) on their proper use for crowd control is the use if objectively reasonable to defend against life or SBI and in accordance with several requirements
- *To bring an objectively dangerous and lawful situation safely and effectively under control.*
- Not aimed at the head, neck, or any other vital organs
- If the chemical agent is tear gas, only a commanding officer at the scene (of assembly, protest, etc.) may authorize the use of tear gas.

AB 48 (GONZALEZ)

KINETIC ENERGY PROJECTILES AND CHEMICAL AGENTS

PC 13652

- Kinetic energy projectiles and chemical agents can be only be used if all of the following are met:
 - De-escalation techniques are attempted and have failed
 - Repeated, audible announcements are made (and attempted in various languages, if necessary) noting intent to use
 - Persons are given objectively reasonable (OR) opportunity to disperse
 - OR effort made to identify persons engaged in violent acts and projectiles and agents are used only towards those individuals
 - Used only with frequency, intensity and in a manner proportional to the threat
 - OR effort made to extract individuals in distress
 - Medical assistance is promptly procured or provided for injured persons

AB 48 (GONZALEZ)

KINETIC ENERGY PROJECTILES AND CHEMICAL AGENTS

PC 13652

- Kinetic energy projectiles and chemical agents cannot be used:
 - Due to violation of curfew
 - In response to verbal threat
 - *Noncompliance with a law enforcement directive*

AB 48 (GONZALEZ)

KINETIC ENERGY PROJECTILES AND CHEMICAL AGENTS

“Kinetic energy projectiles” means any type of device designed as less lethal, to be launched from any device as a projectile that may cause bodily injury through the transfer of kinetic energy and blunt force trauma. For purposes of this section, the term includes, but is not limited to, items commonly referred to as rubber bullets, plastic bullets, beanbag rounds, and foam tipped plastic rounds.

“Chemical agents” means any chemical that can rapidly produce sensory irritation or disabling physical effects in humans, which disappear within a short time following termination of exposure. For purposes of this section, the term includes, but is not limited to, chloroacetophenone tear gas, commonly known as CN tear gas; 2-chlorobenzalmalononitrile gas, commonly known as CS gas; and items commonly referred to as pepper balls, pepper spray, or oleoresin capsicum.

AB 48 (GONZALEZ)

KINETIC ENERGY PROJECTILES AND CHEMICAL AGENTS

WHAT DOES THIS MEAN FOR LAW ENFORCEMENT?

A very difficult area of the law for LEOs to navigate.

Some case law on the issue:

Don't Shoot Portland v. City of Portland, 503 F. Supp. 3d 1022, 2020 U.S. Dist. LEXIS 223729, 2020 WL 7049089 – Civil contempt case involving the violation of a court's prior restraining order concerning use of crowd control devices.

AB 48 (GONZALEZ)

KINETIC ENERGY PROJECTILES AND CHEMICAL AGENTS

The court's order – FN303s and 40mm less-lethal launchers must be used "as outlined in PPB Use of Force Directive 1010" and "shall not be used where people engaged in passive resistance are likely to be subjected to the use of force." TRO at 2. FN303s and 40mm less-lethal launchers are impact munitions governed by ¶ 6.4.2 of Use of Force Directive 1010. Paragraph 6.4.2.1 provides, in relevant part, that officers are authorized to use impact munitions: (1) "[i]n response to active aggression" and (2) "[t]o avoid the use [**22] of a higher level of force."

The Court finds that three of the eight incidents involving the use of impact munitions violated the Order. These three incidents include: (1) two deployments of fifteen rounds from an FN303 against individuals carrying a banner (Incidents 2 and 3) and (2) the deployment of a few rounds from an FN303 against an individual picking up an unknown object between the protest line and the police line (Incident 9).

AB 48 (Gonzalez)

Kinetic energy projectiles and chemical agents

- PC 13652

- Turning first to Incident 2, the Court finds that Officer Taylor did not use his FN303 in response to active aggression. Officer Taylor testified that he deployed his FN303 against an individual holding onto a banner because he believed the banner would later be used as a weapon. Specifically, he cited the following circumstances in support [**23] of his belief that the banner may be dangerous: (1) the atmosphere of the protest that day; (2) the movement of protestors behind the sign as though it was a shield; (3) the slow pace of the protestors holding the banner, causing interference with the police formation; (4) the protestor's refusal to let go of the banner; and (5) the use of PVC pipe as the banner's frame, which he testified can be reinforced with cement or nails. But none of the circumstances cited by Officer Taylor suggested that this banner was a weapon or would be imminently used by protestors as a weapon.
- In sum, make sure that you can satisfy the requirements of the statute regarding use and procedural steps taken prior thereto.
- No private right of action taken, but can be used to support a Bane Act claim under state law, particularly where First Amendment rights are implicated.

QUESTIONS

