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Defending Against Motions for Attorney Fees:

Perils and Pointers

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INTRODUCTION

Under the so-called "American Rule," parties to litigation must pay their own attorney fees despite prevailing in the litigation.[1] California courts have long followed the Rule, and it has been codified in California Code of Civil Procedure section 1021, which provides that, in the absence of a statute or contract, prevailing litigants are entitled to an award of their costs *but not their attorney fees*.[2] However, there are numerous statutes in California shifting fees to the prevailing party in litigation. Many of these statutes apply in litigation involving cities and can lead to costly fee awards against cities that may far exceed the cost of losing the underlying case.

This paper is intended to assist cities in defending against motions for attorney fees under these fee-shifting statutes. It does not attempt to provide a comprehensive survey of the law. Rather, it provides a few tips for avoiding some traps plus a few general tips. That is, this paper identifies several perils posed by fee motions and provides six basic pointers (and more sub-pointers) for cities to dodge these perils and to limit--or even defeat--fee awards against them in California courts.[3]

POINTER #1: DON'T LIGHTLY ASSUME LIABILITY FOR ATTORNEY FEES.

a. *There must be an explicit statutory or recognized equitable basis for a fee award.*

Despite the codification of the American Rule in Code of Civil Procedure section 1021, several equitable exceptions to the Rule are recognized in California. Unlike federal courts, California courts have inherent equitable authority under the "private attorney general" doctrine to award attorney fees to litigants who successfully pursue public interest litigation vindicating important rights. (*See, Serrano v. Priest* (1977) 20 Cal.3d 25 ["*Serrano III*"]; *see also*, *Alyeska Pipeline Service Co. v. Wilderness Society* (1975) 421 U.S. 240, rejecting the equitable private attorney general doctrine in federal courts.) California also recognizes the equitable "common fund" and "substantial benefit" theories, authorizing fee awards in cases that, respectively, create or preserve a fund for the benefit of non-litigants or confer a substantial benefit on members of an ascertainable class. (*See, Serrano III,* discussing both the "well-established 'common fund' principle," and the "more recent . . . so-called 'substantial benefit' rule.")

Nevertheless, because the American Rule is a codified California rule, absent a contract, a court cannot award attorney fees to a prevailing litigant unless there is an explicit statute or recognized equitable doctrine authorizing the award. Hence, the first step in defending against a motion for attorney fees is to determine whether there is any

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[1] *See, Buckhannon Bd & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources* (2001) 532 U.S. 598, 602, stating the American Rule generally applies in the United States, in both federal and state courts.

[2] *See, Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565, citing §1021.

[3] Although cities may face motions for attorney fees in federal courts under the various federal fee shifting statutes, this paper is limited to fee motions in California state courts.

basis for a fee award and, if so, the second step is to determine whether all the criteria for an award on this basis have been met. These steps may seem obvious, but often cities neglect them and concede liability for fees when there should be no liability.

For example, Code of Civil Procedure section 1021.5 is the codification of the private attorney general doctrine recognized in *Serrano III*.[4] Under its express language, attorney fees may be awarded to successful parties in public interest litigation only if four requirements are all satisfied, including that the case: 1) "resulted in the enforcement of an important right affecting the public interest"; *and*, 2) conferred "a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons." Because judgments correcting violations of CEQA are generally viewed as vindicating important rights and conferring significant benefits, attorney fees are usually awarded to prevailing petitioners in CEQA cases under §1021.5, and many cities seem to believe they must pay attorney fees whenever they lose a CEQA case. But there are cases holding no important right was enforced and no significant benefit was conferred despite the petitioners' victory in a CEQA case (or in a case involving other environmental and land use laws).[5]

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[4] Hereafter, this important statute will be referred to solely as "§1021.5."

[5] *See, e.g., Concerned Citizens of La Habra v. City of La Habra* (2005) 113 Cal.App.4th 329, holding enforcement of minor, technical CEQA requirements did not justify a fee award because the benefit conferred was neither "significant" nor "widespread"; *Christward Ministry v. County of San Diego* (1993) 13 Cal.App.4th 31, holding a judgment requiring certain revisions to an EIR and mitigation report conferred no significant benefit warranting a fee award; *Angelheart v. Burbank* (1991) 232 Cal.App.3d 460, reasoning that, absent evidence showing how many were affected by a successfully challenged zoning restriction, it could not be held that the challenge conferred a significant benefit; *Grimsley v. Board of Supervisors* (1985) 166 Cal. App.3d 960, holding no important right was vindicated by a successful challenge to a general plan because the petitioner only prevailed on a technicality; *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, similarly holding where the petitioner only prevailed on a technicality in a challenge to a housing element.

Helpful cases in other contexts which deny fees under §1021.5 because there was no important right vindicated or significant benefit conferred include: *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc.* (2005) 127 Cal.App.4th 387 (successful objection to class action settlement in toxics case did not really benefit class); *Baxter v. Salutary Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941 (case only a "bounty hunt" for "niggling statutory violations" that did not harm anyone); *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629 (no significant benefit from discrimination case even if judgment sent a "cautionary message"); *Family Planning Specialists Medical Group, Inc. v. Powers* (1995) 39 Cal.App.4th 1561 (equivocal free speech victory did not warrant fees); *California School Employees Ass'n v. Del Norte County Unified School Dist. Bd. of Trustees* (1992) 2 Cal.App.4th 1396 (case only benefitted the union plaintiff); and *Balch Enterprises v. New Haven School Dist.* (1990) 219 Cal.App.3d 783 (successful challenge to development fees on technical ground conferred no significant benefit).

Based on such cases, a city may defeat a motion for attorney fees under §1021.5 even in a CEQA or other land use case.[6]

And, based on another line of cases and a third explicit statutory requirement in §1021.5, a city may defeat a fee motion in a CEQA or land use case even if the case unquestionably enforced an important right and conferred a significant benefit. The statute expressly provides that attorney fees may be awarded only where the "financial burden of private enforcement . . . [is] such as to make the award appropriate." In other words, because the purpose of the private attorney general doctrine codified in §1021.5 is to encourage private enforcement of public rights that would not otherwise be enforced, attorney fees may be awarded under §1021.5 only if the cost of pursuing litigation "transcended" the fee claimants' "personal interest" and placed a burden on them "out of proportion to [their] individual stake in the matter." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 941.) CEQA and other environmental and land use cases have denied fees on this ground--even where the fee claimants' personal interest was not financial.[7]

In sum, a city should not concede liability for attorney fees under §1021.5 just because it has lost an environmental, land use or any other "public interest" case.

Similarly, a city should not just concede that another fee-shifting statute applies to a case just because a successful litigant claims fees under the statute. It is worth doing a little research on the criteria for an award under the statute before assuming that it provides a basis for a fee award.

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[6] *But see, Protect Our Water v. County of Merced* (2005) 130 Cal.App.4th 488, holding a successful challenge to an EIR vindicated an important right and conferred a significant benefit even though the petitioners succeeded only on the ground that the administrative record was inadequate, and even if the litigation had "no more effect than to prompt the County to alter for the better its methods of creating and managing its CEQA records." *See also, Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, holding a significant benefit was conferred by a due process challenge to a project approval although the project was re-approved after a hearing comporting with due process.

[7] *See, e.g., Pacific Legal Foundation v. California Coastal Com'n.* (1982) 33 Cal.3d 158; *Williams v. San Francisco Bd. Of Permit Appeals* (1999) 74 Cal.App.4th 961; *California Licensed Foresters Ass'n v. State Bd. of Forestry* (1994) 30 Cal.App.4th 562; *Beach Colony II, Ltd. v. California Coastal Com'n* (1985) 166 Cal.App.3d 106; and *Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547. *But see, Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, and *State v. County of Santa Clara* (1983) 142 Cal .App.3d 608, both reducing fee awards because of the litigants' personal interest.

Again, there are helpful cases in other contexts denying fees under §1021.5 on this ground, including: *Arnold v. California Exposition and State Fair* (2004) 125 Cal.App.4th 498; and *Punsly v. Ho* (2003) 105 Cal.App.4th 102. *But see, City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, holding an ideological interest in an initiative is not the kind of personal interest that makes a fee award inappropriate.

b. *Even if all the criteria for a fee award are met, a court may have discretion to deny fees.*

When there is a statutory or equitable basis for an award of attorney fees and all of the criteria for a fee award on this basis have been met, a city may still be able to defeat a motion for attorney fees if an award of fees is discretionary and if the circumstances are such as to make a denial of fees appropriate. Hence, a crucial step in defending against a fee motion is determining if an applicable fee-shifting statute says fees "may" or "shall" be awarded to prevailing litigants. However, if a statute says "may," the discretion to deny fees may have been sharply limited by the cases, and if a statute says "shall," there may still be some discretion to decide whether statutory criteria have been satisfied.

For example, the Public Records Act provides that courts *"shall* award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation" under the Act. (Gov. Code §6259, subd.(d).) Although fee awards to prevailing plaintiffs are clearly mandatory under this section, it has been held that courts have discretion to decide "what it means to 'prevail in litigation'." (*Belth v. Garamendi* (1991) 232 Cal App 3d 896, 901; *see also, Rogers v. Superior Court* (1993) 19 Cal App.4th 469, and *Motorola Communication & Electronics, Inc v. Department of General Services* (1997) 55 Cal App.4th 1340, both holding plaintiffs did not "prevail" within the meaning of §6259, subd.(d).) Most important, a plaintiff could obtain documents "that are so minimal or insignificant as to justify a finding that the plaintiff did not prevail." (*Los Angeles Times v. Alameda Corridor Transp. Auth.* (2001) 88 Cal.App.4th 1381, 1391-1392.) In other words, a court has some discretion to deny fees in Public Records Act cases despite the mandatory language in the statute.

By way of contrast, the Brown Act provides a "court *may* award court costs and reasonable attorney fees to the plaintiff . . . where it is found that a legislative body of the local agency has violated [the Act]." (Gov. Code §54960.5.) Although fee awards are clearly discretionary under this section, it has been held that a fee award may be denied *only if* "the defendant shows that special circumstances exist that would make such an award unjust." (*Los Angeles Times Communications LLC v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal App 4th 1313, 1327; *see also, Common Cause v. Stirling* (1981) 119 Cal.App.3d 658, establishing this rule.) In other words, a court has limited discretion to deny fees in Brown Act cases despite the discretionary language in the statute.

In sum, despite the "shall" in the fee-shifting statute, cities have some chance (albeit slim) of defeating a Public Records Act fee motion, and cities have only a little bit better chance of defeating a Brown Act fee motion despite the "may" in the statute. Nevertheless, cities should not automatically concede liability under either statute--or any other fee-shifting statute. Even if there is a statutory or equitable basis for fees, and even though all criteria for a fee award on this basis are satisfied, a court may have discretion to deny a fee award under the particular circumstances of a case.

c. *Plaintiffs who win partial or even complete victories are not necessarily "prevailing parties," entitled to all or any of the attorney fees they seek.*

Although fee-shifting statutes generally provide that fees may or shall be awarded to the "prevailing" or "successful" party, the statutes generally do not define these terms. By way of contrast, Code of Civil Procedure section 1032, spells out that *costs* are recoverable as "a matter of right" when a party to litigation falls in one of four defined categories of "prevailing party."[8] Section 1032 further provides that, if any party recovers "other than monetary relief" or if no party falls within one of these four categories, the prevailing party "shall be determined by the court," and "the court, in its discretion, may allow costs or not."

As can be seen from section 1032, it is not always easy to determine who should be considered the prevailing party in litigation. And, given the provisions of section 1032, the prevailing party for costs is not necessarily the successful party for attorney fees (and *vice versa*). (*See, Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, and *Stevens v. City of Glendale, supra,* 125 Cal.App.3d 986, both considering whether fees were appropriate under §1021.5 separately from whether costs were appropriate under §1032.)

More important, a party may be the prevailing party under section 1032 or an applicable fee-shifting statute, but may not have fully succeeded. A "reduced fee award is appropriate when a claimant achieves only limited success." (*Sokolow, supra,* 213 Cal.App.3d at p. 249; *see also, Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1471, quoting from *Hensley v. Eckerhart* (1983) 461 U.S. 424, 440, that "where the plaintiff achieved only limited success, the . . . court should award only that amount of fees that is reasonable in relation to the results achieved.")

Further, where a plaintiff succeeds, not only on claims that warrant a fee award under an applicable fee-shifting statute, but also on claims that do not warrant a fee award under any fee-shifting statute, any award should be limited to the former claims. (*See, e.g., Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, holding a fee award should be limited to the plaintiff's work on a successful Brown Act cause of action because no fee-shifting statute applied to the other successful causes of action.)

In sum, just because a plaintiff has ostensibly won a case against a city and has filled a motion for attorney fees under an applicable fee-shifting statute (and also a memorandum of costs), cities should assume neither that the plaintiff is the prevailing party for the purpose of attorney fees (or costs) nor that an unquestionably prevailing

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[8] These four categories of "prevailing party" are: "[1] the party with a net monetary recovery, [2] a defendant in whose favor a dismissal is entered, [3] a defendant where neither plaintiff nor defendant obtains any relief, and [4] a defendant as against those plaintiffs who do not recover any relief against that defendant."

plaintiff is entitled to all of the attorney fees requested. Even a full victory may not warrant a full fee award, and a partial victory should only warrant a partial award.[9]

To assist cities in following Pointer #1 (and its various sub-pointers), attached to this paper as "Appendix A" is a list of the most significant fee-shifting statutes for cities in California along with an indication of the basic criteria for a fee award under each statute and whether an award is discretionary or mandatory.

POINTER #2: <u>BEWARE OF STEALTH CONSTITUTIONAL CLAIMS.</u>

Where California courts have concurrent jurisdiction with federal courts in actions brought under federal statutes to secure federal civil rights, California courts may award attorney fees under the federal statutes, using the federal standards. (*Serrano v. Unruh* (1982) 32 Cal.3d 621 ["*Serrano IV*"].) The most important federal fee-shifting statute which may be applied in California courts in cases involving cities is the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988), which provides for fee-shifting in actions to secure federal constitutional or statutory rights brought under 42 United States Code section 1983 and other federal civil rights statutes.

Generally, cities will know if there is a federal civil rights claim being tried in a case and, thus, if there is potential liability for attorney fees under §1988. However, sometimes a constitutional claim is not expressly pled, but a constitutional argument is made. And sometimes there may be an explicit federal constitutional claim pled along with state claims, but only the state claims are litigated and decided in the plaintiff's favor. In either case, cities may be surprised by a motion for attorney fees under §1988 in addition to or instead of under §1021.5 (or another California fee-shifting statute). Cities may be further surprised when they discover that California courts have awarded attorney fees under §1988 in such cases.[10]

Defending against a motion for attorney fees under both §1021.5 and §1988 or under §1988 instead of §1021.5 can be perilous for cities because the standards for a fee award under the sections are different and because it is generally easier to obtain

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[9] Two simple strategies could prevent plaintiffs' partial victories from turning into full--or any--fee awards. First, a city should try to keep any language indicating the plaintiff is the prevailing party out of the judgment and any statement of decision. Second, a city should try to limit the specific relief given to the plaintiff by the judgment.

[10] *See, e.g., Filipino Accountants' Ass'n v. State Bd. of Accountancy* (1984) 155 Cal. App.3d 1023; *Best v. California Apprenticeship Council, supra,* 193 Cal.App.3d at p. 1464; *Green v. Obledo* (1984) 161 Cal.App.3d 678; *see also, Choudhry v. Free* (1976)17 Cal.3d 660 awarding fees under the federal Voting Rights of 1965 [42 U.S.C. §1973(e)] in a constitutional challenge to a state statute restricting those who could vote in a public irrigation district election although §1973(e) was never mentioned in the opinion. *But see, Board of Admin v. Wilson* (1997) 57 Cal.App.4th 967, affirming a denial of §1988 fees when the constitutional claim was neither pled nor tried, and the fee request unfairly surprised and prejudiced the defendant.

attorney fees under §1988 than under §1021.5. In particular, there is no requirement under §1988 that a case enforce an important right and confer a significant benefit or that the financial burden of pursuing the case outweighs the plaintiff's personal stake.

Hence, cities should consider strategies to guard against a fee motion under §1988. First, because such a motion may be successful if a constitutional claim is not tried but should not be successful if a constitutional claim is tried and lost by the plaintiff (*McFadden v. Villa* (2001) 93 Cal.App.4th 235), a city could insist on trying all stealth constitutional claims. This strategy is very risky, but the risk could be worth it. Second, a similarly risky but less costly strategy would be to seek an explicit ruling early in a case, through a demurrer or motion, that no federal civil rights statute could be the basis for a decision in favor of the plaintiff.[11] Third, a less risky but also less effective strategy would be to wait until there is a decision in favor of the plaintiff and then ask the court to explicitly state in any statement of decision or in the judgment that no federal statutory or constitutional claim was the basis for this decision. Last, the least effective but also least risky strategy would be to simply ask for an explicit statement that no federal claim was litigated.

Whether or not a city chooses to risk any of these pre-emptive strikes, a city must act swiftly and decisively if attorney fees are sought for stealth constitutional claims. Waiting too long can be perilous, as the following scenario shows.

A city employee filed an action alleging a city had improperly calculated his pension under the MOU. No federal or constitutional claims were pled, and the only dispute was over the interpretation of the MOU. But, in the briefs, the employee argued that he had a "vested right" to his pension under the contract clause of the federal constitution, and, thus, the judge should use her "independent judgment" to interpret the MOU. Without saying whether she used her independent judgment, the judge ruled from the bench that she was deciding for the employee. His attorney then handed her a proposed judgment, which provided for an award of attorney fees under §1988 "in an amount to be determined." The judge immediately signed the judgment, and the city's attorney only realized that an unwarranted fee award had been slipped into it after leaving court. The

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[11] *See, e.g., Union Oil Co. v. City of Los Angeles* (2000) 79 Cal.App.4th 383, 395, holding that taxpayers who successfully challenged a city's business license tax scheme were "not entitled to any relief or attorney fees under the federal civil rights law" because they could not have maintained a federal civil rights action given the adequate state remedy of seeking a tax refund; *Bouvia v. County of Los Angeles* (1987) 195 Cal.App.3d 1075, 1086-1088, holding that, although a fee award under §1021.5 was appropriate when the plaintiff successfully challenged a hospital's refusal to terminate her life support, and although a federal civil rights claim was explicitly pled based on the "fortuitous fact that the hospital personnel and doctors involved were employed by the County of Los Angeles and the hospital itself was maintained by the county," an award under §1988 was not appropriate because there was no showing necessary to prevail on the federal civil rights claim that "the actions of the physicians . . .[and] various county health officials involved, were motivated by some governmental policy or custom that sought to deprive Bouvia of her civil rights."

city swiftly moved for reconsideration of the fee provision in the judgment. Although the judge granted reconsideration, and although she had signed the proposed judgment without any argument or briefing on entitlement to fees under §1988, she made it clear at the hearing on reconsideration that she was reluctant to modify a final judgment and then expressly ruled a fee award was warranted under §1988. The city chose not to appeal and ended up paying substantial attorney fees in a case where no fee award was warranted.[12]

In sum, cities should be aware of the peril posed by stealth constitutional claims and should carefully weigh the risks and benefits of trying to prevent a fee motion under §1988 before they are faced with the motion. And cities should be prepared to argue vigorously against any such motion. Although motions for attorney fees under §1988 based on stealth constitutional claims are perilous, they can be defeated.

POINTER #3: DON'T GET CAUGHT UNAWARES BY THE CATALYST THEORY.

Unlike in the federal courts, in California courts, plaintiffs may be entitled to a fee award even when they do not obtain judgments in their favor if their lawsuits are the "catalyst" for actions by the defendants that provide sought-after relief, that is, there is a "causal connection" between the litigation and the defendants' voluntary actions. Indeed, in two cases decided in late 2004, the California Supreme Court, not only expressly approved the catalyst theory, but also expressly disagreed with the United States Supreme Court's disapproval of the theory and its rule for federal courts that a "judicial imprimatur" on a defendant's action is required to make the action the basis of an award of attorney fees. (*Graham v. DaimlerChrysler Corp., supra,* 34 Cal.4th 553; *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, both rejecting *Buckhannon, etc. v. West Va. Dep't etc., supra,* 532 U.S. 598; *see also, Godinez v. Schwarzenegger* (Aug. 24, 2005) __ Cal. App.4th __, applying *Graham* and *Tipton* retroactively.)

The California Supreme Court's approval of the catalyst theory means that, even though cities may be willing and able to cure problems pointed out in litigation or may be anxious to resolve the litigation before they incur substantial costs and attorney fees, cities must be cautious before they take voluntary curative actions or settle litigation. Cities can and should try to get a plaintiff to waive or settle attorney fees as a condition of their taking voluntary curative action or entering into a settlement of the merits. But, absent a waiver or settlement of the fee issue, the plaintiff may claim and be awarded attorney fees under the catalyst theory even where litigation is dismissed as moot based on the curing of all problems or is dismissed based on a settlement without any judgment for the plaintiff.

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[12] Fees were not sought and would not be warranted under §1021.5 because the petitioner had a substantial personal stake in the litigation and because there was no significant benefit to a large class of persons in that only a few employees would get larger pensions and some would get smaller pensions.

Cities should not assume it would be impossible to obtain a waiver or early settlement of attorney fees. In one case where a city was facing multiple lawsuits challenging various aspects of its towing operations, the city attorney recognized there were some problems with the "Tow Services Agreement" which could easily be fixed. She approached the plaintiffs' attorney and he readily agreed (for unknown reasons) to enter into a written agreement and stipulation with the city providing that, if the city amended the Tow Service Agreement, its actions in amending it "shall not be considered a basis for any claim for attorney's fees and shall not be admissible in this lawsuit to support any claim by Plaintiffs for attorney's fees."

Such an agreement can be sought in all cases which cities wish to settle or resolve through voluntary corrective actions. However, because fee awards generally can and may be paid directly to the attorney (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 575; *Folsom v. Butte County Ass'n of Governments* (1982) 32 Cal.3d 668, 682, fn. 26), there may be a conflict of interest between the attorneys and their clients whenever an attempt is made to resolve the question of attorney fees at the same time as or before the merits. This conflict may preclude early settlements of the fee question as a practical if not a legal matter.

Except for seeking a waiver or settlement of attorney fees, there may be nothing cities can do to prevent getting caught by the catalyst theory. Nevertheless, cities may still wish to cut short costly litigation. Indeed, it may be far cheaper to resolve litigation that a city is likely to lose before the winner incurs substantial attorney fees. Cities simply should not take action to resolve litigation without being aware of the risk and should never be surprised by or unprepared for a fee motion after a case is dismissed.

POINTER #4: <u>WATCH OUT FOR THE JOINT AND SEVERAL LIABILITY TRAP.</u>

Liability for the prevailing parties' attorney fees generally may be imposed on all of the losing parties, including real parties in interest. (*See, San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino*, so holding for §1021.5.) Liability may be apportioned among the losing parties based on their relative culpability, the extent of the relief obtained against them or other factors. (*See, e.g., Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961; *Sokolow v. County of San Mateo, supra,* 213 Cal.App.3d at p. 250.) But, if the court does not explicitly apportion fees, *liability is presumed to be joint and several* even if no relief is obtained against one of the liable parties. (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810; *see also,* Cal.Civ.Code §1431, providing "a joint obligation imposed against several persons . . . is presumed to be joint and several" absent "express words to the contrary.")

Because cities not only may be the deep pockets in a case but also will not disappear after the case is over, joint and several liability for a fee award can mean the city pays the whole award even if it did not play an active—or any—role in the litigation.

To illustrate how perilous the joint and several liability trap can be for a city, consider the following scenario. A city's approval of a residential project is challenged

as violating CEQA. Two newly elected city council members do not like the project and want the council to reconsider the approval rather than defending it. However, the developer (real party in the case) asks the council not to reconsider and offers to defend the case at no cost to the city. An agreement is signed so providing (and giving the city veto power over the developer's choice of a lawyer); the developer hires a good lawyer; and the council agrees to be defended by her rather than reconsidering its approval of the project. No one from the city attorney's office ever appears in or does any work on the case, but all pleadings and briefs by the developer's lawyer also have the city attorney's name on them and are said to be for both the city and real party. The court decides for the petitioner, and she moves for attorney fees under §1021.5. The developer's lawyer argues against any fees on the ground the petitioner was a "NIMBY" motivated by her own self-interest rather than concern for the environment, but the court awards $300,000 in fees. No request was made to apportion fees, and no apportionment of fees is set forth in the fee order so liability is presumed to be joint and several. The city asks the developer to pay the whole award under their agreement, but he says "I only agreed to defend you, not pay any fees." The developer then drops his appeal of the judgment and also his application for approval of the subdivision. And, because he only had an option on the property and is not local, he no longer has any ties to the city, and also refuses to pay any share of the award. The city is stuck paying the whole award and vainly seeks to obtain indemnification or contribution from the developer, incurring more litigation costs.

Except in Brown Act and Public Records Act cases, such a distressing scenario can easily be avoided through a few simple measures.[13]

First, before allowing any party to assume the defense of litigation against a city, a city should enter into a hold-harmless or indemnification agreement which expressly provides for payment of all fee awards. Indeed, cities should consider including such provisions in all development agreements or make payment of all legal costs, including fee awards, a condition of development approval.

Second, even if another party has assumed the defense of a city or does the bulk of the work in a case, the city must appear and defend itself if there is a motion for attorney fees. Any lawyer for another party has a conflict of interest when it comes to apportionment of a fee award and should not represent both the city and the other party.

Third, a city must expressly address the question of an apportionment, not just defend against any award. That is, the city must make a pitch for no award against the city, for an appropriate apportionment of fees—or just for a 50/50 split rather than joint and several liability. As stated in *Feminist Women's Health Center v. Blythe* (1993) 17 Cal.App.4th 1641, 1672, fn. 7, if the "trial court was not asked to apportion the attorney

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[13] The fee-shifting statutes in the Brown Act and the Public Records Act (Gov. Code §§54960.5 & 6259, subd.(d)) both specify that *the losing public entity defendant must pay all fees awarded to the prevailing plaintiff.*

fee award . . . , it cannot be said the trial court abused its discretion by failing to order an apportionment."

Last, if the order awarding fees is silent about any apportionment and, thus, is presumed to impose joint and several liability, a city must immediately go back to the trial judge to try to get the order fixed. A trial court may be willing to fix its own order, especially if no one requested an apportionment and this presumption was unintended. But an appellate court won't guess at the trial court's intent and won't fix a trial court's order unless reversible error is shown. In the absence of a request for apportionment, there can be no such error. (*Feminist Women's Health Center v. Blythe, supra; see also, Friends of the Trails v. Blasius, supra,* 78 Cal.App.4th 810, noting no California appellate case has ever reversed a refusal to apportion fees.)

POINTER #5: CAREFULLY SCRUTINIZE FEE CLAIMS FOR OVERREACHING.

Fee-shifting statutes generally provide for an award of "reasonable" attorney fees. To fix this amount, California courts ordinarily use the "lodestar" method, under which a lodestar figure is calculated by multiplying the number of hours the prevailing party's attorney reasonably spent on the case by the reasonable hourly rate; this lodestar figure may then be enhanced or reduced by a "multiplier" based on a number of factors. (*Serrano III, supra,* 20 Cal.3d 25; *see also, Press v. Lucky Stores* (1983) 34 Cal.3d 311.)

California courts do not require fee claimants to provide contemporaneous time records to fix the lodestar amount, and may accept reconstructed records or even an estimate of the reasonable number of hours spent on a case. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084.)[14] Nevertheless, a fee claimant has the burden of establishing the time spent and should do so by presenting complete and accurate time records. (*Kern River Pub. Access Comm. v. City of Bakersfield* (1985) 170 Cal.App.3d 1205.) Inadequate records should be challenged.

Moreover, a "fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (*Serrano IV, supra,* 32 Cal.3d at p. 635.) Cities would be amazed by the kind of inconsistencies, mistakes and overreaching found in time records submitted in support of fee motions, particularly reconstructed records of attorneys who don't ordinarily bill and who don't keep contemporaneous records (like attorneys for legal services programs, in-house counsel and attorneys who ordinarily work for contingency fees). Time records should be carefully scrutinized, and inflated records should be challenged.

Experts can be hired for this work, but it is best to have someone familiar with the case--or at least with the particular type of case--scrutinize the records. To illustrate, an

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[14] *But see, Bell v. Vista Unified School Dist., supra,* 82 Cal.App.4th at p. 689, holding reconstructed block billing records were insufficient to properly apportion work attributable to a Brown Act claim and requiring further documentation on remand.

expert may be able to say that it appears duplicative and unnecessary to have multiple conferences of multiple attorneys or to have multiple attorneys attend a hearing. But only someone familiar with a case can make the more persuasive argument that three attorneys were not required for a particular insignificant hearing or that there was no need for a lengthy conference before preparing a particular simple pleading.

Even if an attorney submits detailed, contemporaneous time records or copies of the bills actually sent to the client, the documentation should be carefully scrutinized. The best time records submitted by the most honest attorneys may include time spent for non-compensable work, such as time spent on:

1) unsuccessful causes of action or claims for relief (*see, e.g., Sokolow v. County of San Mateo, supra,* 213 Cal.App.3d 231; *Californians for Responsible Toxics Management v. Kizer, supra,* 211 Cal.App.3d at p. 975);[15]

2) causes of action and claims to which no fee-shifting statute applies, whether successful or unsuccessful (*see, e.g., Superior Gunite v. Ralph Mitzel, Inc.* (2004) 117 Cal.App.4th 301; *Bell v. Vista Unified School Dist., supra,* 82 Cal.App.4th at p. 686);

3) administrative proceedings before a lawsuit (*see, e.g., Kizer* at p. 972; *Beach Colony II, Ltd. v. California Coastal Com'n, supra,* 166 Cal.App.3d at p. 116);[16]

4) dealing with the media or doing political work (*Kizer* at p. 973; *Crawford v. Board of Education* (1988) 200 Cal.App.3d 1397, 1408 [stating §1021.5 "simply does not, nor should it, encompass successful lobbying efforts by those who seek to influence the Legislature or the electorate on any particular issue"); and

5) duplicative or unnecessary work (*Serrano III* at p. 635, fn. 21; *Hadley v. Krepel* (1985) 167 Cal.App.3d 677.)

Cities should ask courts not to compensate attorneys for time spent on such matters either by not including the time in calculating the lodestar or by applying a negative multiplier to the lodestar.

In addition to carefully scrutinizing time records and making appropriate objections to them, cities should carefully examine the documentation submitted in support of the hourly rate claimed. Fee claimants also have the burden of showing that the hourly rate they seek is reasonable. Whether or not claimants' attorneys are in private practice and bill for their services, the reasonable hourly rate is set at the prevailing market rate in the community for attorneys of similar experience in similar kinds of cases. (*See, PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1094; *Rich v. City of Benicia* (1980) 98 Cal.App.3d 428.) This market rate must also be documented and

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[15] *But see, Best v. California Apprenticeship Council, supra,* 193 Cal.App.3d at pp. 1471-1472, holding a plaintiff could recover for work on alternative theories or on unsuccessful claims for the same relief that was obtained.

[16] *But see, Best* at p. 1459, distinguishing *Beach Colony II*, and holding there may be recovery under §1021.5 for administrative work that was "useful and of a type ordinarily necessary to the vindication of the public interest litigated by the private party."

may be documented through attorneys' declarations setting forth such matters as the hourly rates of the other attorneys, the generally prevailing rates known to the attorneys and the hourly rates determined in other cases.

Fee claimants' attorneys often fail to document the market rate and just submit declarations asking for their usual hourly rate (or what they declare is their usual hourly rate). Cities should not allow fee claimants to get away with this or with simply submitting declarations of friendly attorneys, who will inflate the rates for their friends.[17]

Cities should further question high claimed rates and submit their own declarations to establish the true market rate. Cities should also keep in mind that, whether they are scrutinizing supporting declarations or attempting to obtain their own declarations, they need not and should not accept that the high rates charged by large firm, big city lawyers are the market rates in every kind of practice in every city. Cities should establish through declarations the market rate in the community for the kind of case being litigated by the kind of attorneys usually litigating such cases. But a local judge may reduce inflated hourly rates even without counter declarations because judges know the prevailing rates in the locality and the trial judge is the “best judge” of the value “of professional services rendered in his court." (*Serrano III, supra,* 20 Cal.3d at p. 49.)

It is possible for cities to conduct discovery to delve deeper into the documentation submitted and to establish inaccuracies and inflation. There is a right to conduct discovery relating both to the calculation of the lodestar and to the basis for a fee award as part of defending against a motion for attorney fees.[18] However, cities should carefully consider before conducting discovery in fee litigation.

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[17] As the California Supreme Court stated long ago and as is still true today: "Attorneys are inclined to place a very high estimate upon the value of their services when rendered in important litigation; and, also, inclined to look with kindly eyes and sympathetic feelings upon the efforts of brother attorneys when engaged in establishing before the court the value of services performed . . . [W]hen upon the witness-stand as experts, they entertain most liberal views as to what should be the amount of a brother attorney's allowance and hold large ideas as to the importance of the litigation in which he has been engaged. It is well, and it is the law, that the court should temper this kind of evidence with its own calm judgment, based upon the amount and kind of labor performed, and to thereupon make its decree." (*Freese v. Pennie* (1895) 110 C. 467, 469.)

[18] *See, e.g., Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal. App.4th 235, allowing discovery on outside funding of litigation to establish if the financial burden test of §1021.5 was met; *but see, PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1098, quoting *Serrano IV* for the proposition that discovery amounting to a “meticulous analysis of every detailed facet of the professional representation” is not appropriate; *see also, Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, holding the denial of a generalized request for discovery was not an abuse of discretion.

All of the time spent by a fee claimant's attorney seeking attorney fees is recoverable as part of any fee award. (*Serrano IV, supra,* 32 Cal.3d 621.) Hence, the time spent responding to discovery will be included in any fee award. A city might just be driving up the award by conducting discovery. Moreover, discovery may actually hurt the city's defense. For example, where an attorney's time records are apparently inflated or inadequate, a deposition of the attorney might give her a chance to explain gaps and inconsistencies or otherwise fill in the blanks. The city would be better off just objecting to the inflated and inadequate records.[19]

In sum, whether or not a city decides to conduct discovery on the amount (or basis) of a fee award, the city should not just accept the amount claimed in a motion for attorney fees. All documentation of the amount claimed should be carefully scrutinized, and appropriate objections should be made. Moreover, cities facing claims for inflated hourly rates should be prepared to establish the appropriate rate themselves, with declarations and other evidence (such as the amount awarded in similar cases).

POINTER #6: <u>LOOK OUT FOR APPELLATE PITFALLS.</u>

Attorney fees claimed under a fee-shifting statute (or a contract) should be sought through a noticed motion. (Cal. Rules of Court, Rule 870.2; *see also,* §1021.5, providing a court may award attorney fees to the successful party "[u]pon motion.") A motion for attorney fees for trial work ordinarily is filed after judgment (because the prevailing party is not known until the judgment) and must be filed within the time to appeal from the judgment. (Rule 870.2(b)(1).) The parties may, however, stipulate to postpone the filing of any motion for attorney fees for either 60 days after the time to file a notice of appeal or 40 days after final resolution of an appeal through the issuance of a remittitur. (Rules 870.2(b)(2) & 27(d).)

Cities should obtain such a stipulation whenever an appeal is contemplated. There is no reason to spend time and money litigating over entitlement to fees and the amount of fees when the ultimate results of the litigation are in doubt. Further, if an appeal does not succeed, and the prevailing party in the trial court remains the prevailing party and is still entitled to a fee award, that party will also be seeking fees for work on the appeal (as allowed by *Serrano III*). The motion for fees on appeal will also be made in the trial court under Rule 870.2(c). There is no reason to go through two motions for fees in the trial court when you can have only one.

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[19] Cities should be particularly careful before conducting discovery on a fee claimant's self-interest in a case in an attempt to show that the financial burden test of §1021.5 is not met. If it looks like there is self-interest, a city may be better off going with what seems apparent instead of probing into the fee claimant's motivation. For example, deposing a NIMBY plaintiff trying to stop a project because of traffic problems could allow her to come up with a poignant story about a tragic traffic accident, and deposing a businessman petitioner in a CEQA case who seems to be motivated by a desire to stop a rival business from opening might allow him to tell about his long-time support of environmental causes.

Cities should make sure to get a stipulation extending time to file a motion for attorney fees before the time to appeal has passed. Rule 870.2(b)(2) allows for an extension of time but only "by stipulation filed before the expiration of the time allowed" to file the motion, that is, the time to appeal. If a city is not sure whether there will be an appeal, it could first obtain a 60-day extension to file the motion.

If a motion for attorney fees is filed before an appeal is filed, a city should seek a stipulation to extend the time to consider the motion. Because an award of attorney fees is an ancillary order, consideration of a fee motion is not stayed by the filing of an appeal. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365.) And, because Rule 870.2(b)(2) pertains to stipulations extending time for *filing* fee motions, stipulations extending time to *consider* fee motions are timely even after the time to appeal has passed.

If there is no stipulation to extend time for a motion for attorney fees and fees are awarded, whether the order was made before or after the judgment or before or after the notice of appeal from the judgment, *a city must expressly appeal from the order awarding attorney fees.* Even if the judgment provides for an award of attorney fees, unless it also awards a specific amount of fees (which would be unusual), any award of attorney fees is an ancillary order which is separately appealable. (*See, Lakin v. Watkins Associated Industries* (1994) 6 Cal.4th 644)[20] This means that an appeal of the judgment does not encompass the fee award and that, absent an express appeal from the order awarding fees, *a city may still have to pay the attorney fees awarded even if the judgment is reversed on appeal and the city ultimately prevails in the litigation*.

A footnote in the city's opening brief in *Neecke v. City of Mill Valley* (1995) 39 Cal. App.4th 946, saved the city from this trap. But, because cities cannot count on such a rescue, it is informative to review what happened in *Neecke*,

Neecke was a class action challenge to a city tax. The superior court ruled that the tax was a "special tax" which had not been approved by two-thirds of the voters and, thus, was invalid under Proposition 13 and also ruled that, before the tax ordinance was amended, the purported parcel tax was actually an invalid property tax. However, the court refused to order any refund of the tax to the class, ruling that the applicable statute precluded class refunds. Neecke's attorney immediately moved for attorney fees under §1021.5; no stipulation was entered into extending time for consideration of the motion until after any appeal; and the court awarded all of the fees requested for the successful work on the merits, but no fees for the unsuccessful work on class issues. The city decided not to appeal but, on the last possible day, Neecke appealed, expressly stating the appeal was from the judgment insofar as it denied a class refund and from the order for attorney fees insofar as it denied recovery for time spent litigating class claims. The city cross-appealed, stating the appeal was from the judgment only insofar as it ruled the tax

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[20] *See also, Los Angeles Times v. Alameda Corridor Transp. Auth., supra,* 88 Cal App 4th 1381, holding orders on attorney fees in Public Records Act cases are appealable although the judgments in these cases can only be reviewed through writ petitions.

was an invalid special tax. The city had decided not to appeal from the judgment insofar as it related to the pre-amendment parcel tax issue, but it simply neglected to expressly state the appeal was also from the order awarding attorney fees. However, in its opening brief, in the portion of the brief addressing Neecke's appeal from the fee award, as the Court of Appeal stated in the opinion, the "City argue[d] in a footnote that, if we rule in its favor on the special tax issue, then Neecke is not entitled to any attorney fees." (*Id.* at pp. 965-966.) The Court did rule in the city's favor on the special tax issue and on the class issue and, fortunately for the city decided that it could reverse the award of attorney fees in the exercise its equitable discretion.[21]

Mill Valley was lucky, but cities should not count on being so lucky and must always remember to appeal from orders awarding attorney fees if they are appealing from the merits.[22]

CONCLUSION

The six pointers (and multiple sub-pointers) discussed in this paper may seem either obvious or obscure. However, because awards of attorney fees can be very costly for cities, it is worth remembering them. Indeed, cities should keep all of these pointers in mind, not only when they are faced with a motion for attorney fees, but also whenever they are faced with litigation which could result in a fee award. Motions for attorney fees are full of traps for the unaware, but cities can avoid getting snared by the traps or, at the least, can lessen the pain by following these pointers..

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[21] However, the Court of Appeal remanded the case to the trial court to determine if Neecke was entitled to attorney fees for his success on the pre-amendment parcel tax issue "and, if so, in what amount." (*Id.* at p. 966.)

[22] If a separate appeal from a fee award is required (because the award is made after the appeal from the judgment), cities can ask to consolidate the two appeals or to stay briefing on the fee appeal until after the resolution of the appeal from the judgment.

APPENDIX A

SIGNIFICANT CALIFORNIA FEE-SHIFTING STATUTES FOR CITIES

(listed in alphabetical and numerical order rather than by significance)

- ***Civil Code §55*: disabled persons**

The "prevailing party" in actions seeking to enjoin violations of certain specified sections protecting disabled persons "***shall*** be entitled to recover reasonable attorney's fees."

- ***Civil Code §1717:* actions on contracts providing for attorney's fees**

Attorney's fees ***shall*** be awarded to the "prevailing party" in any action on a contract "specifically providing" for attorney's fees to any party.

- ***Code of Civil Procedure §425.16, subd. (c)*: SLAPP suits**

Attorney's fees ***shall*** be awarded to the "prevailing defendant on a special motion to strike" any "strategic lawsuit against public participation," that is, any action or cause of action brought against a person "arising from any act . . . in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."

Note 1: Fees are "mandatory" if the defendant has prevailed on an anti-SLAPP motion. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122.)

Note 2: A court "***shall*** award costs and reasonable attorney's fees to a plaintiff prevailing on the motion" *but only if* it finds the defendant's motion was "frivolous" or was "solely intended to cause unnecessary delay."

- ***Code of Civil Procedure §1021.5*: public interest litigation**

Attorney's fees ***may*** be awarded to "successful" parties in litigation ***if*** four statutory conditions are met:

1) the litigation "resulted in enforcement of an important right affecting the public interest"; ***and***

2) the litigation conferred "a significant benefit, whether pecuniary or non-pecuniary, on the general public or a large class of persons"; ***and***

3) the "necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity are such as to make the award appropriate"; ***and***

4) "such fees should not in the interest of justice be paid out of [any] recovery."

Note 1: A city may claim attorney's fees under section 1021.5 but only in an action against another public entity, and it may be hard for a city to meet the "necessity and financial burden" test given that cities generally do not bring cases unless they or their residents have substantial interest in the litigation. (*See, City of Hawaiian Gardens v. City of Long Beach* (1998) 61 Cal.App.4th 1100.)

§1021.5, cont'd.

Note 2: The cases are split on the extent of a court's discretion to deny fees if all of the statutory criteria are met. (*Compare, City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, indicating a court has no discretion to deny fees where the criteria are met, and *Bartling v. Glendale Adventist Med. Ctr.* (1986) 184 Cal.App.3d 97, holding, even if the criteria are met, fees may be denied if "special circumstances render an award unjust.")

- ***Code of Civil Procedure §1036:*** **inverse condemnation**

Attorney's fees "actually incurred" ***shall*** be awarded as part of any judgment for the plaintiff (and must be included in any settlement effected "by the attorney representing the public entity" defendant).

- ***Code of Civil Procedure §§ 1250.410, subd. (b) and 1268.610:*** **eminent domain actions**

Attorney's fees ***shall*** be awarded after a judgment ***if*** the defendant's final demand was reasonable and the plaintiff's final offer was unreasonable, and ***shall*** be awarded when eminent domain actions are defeated or are abandoned, whether before or after judgment.

- ***Government Code §800:*** **arbitrary and capricious administrative action**

The prevailing complainant in litigation to review administrative decisions or actions "***may*** collect reasonable attorney's fees" (but only up to "seven thousand five hundred dollars" and only when the complainant is "personally obligated to pay the fees") if it is "shown" that the decision or action was "the result of arbitrary or capricious action or conduct" of a public entity or official.

Note 1: Attorney fees should not be awarded under this section even if a public agency's action was "clearly erroneous"; to warrant a fee award, the agency's conduct must not be "supported by a fair or substantial reason," must be characterized by a "stubborn insistence on following an unauthorized course of action," or must be taken in "bad faith." (*Gilliland v. Medical Board* (2001) 89 Cal App 4th 208, 220-221.)

- ***Government Code §6259, subd. (d):*** **Public Records Act**

Attorney's fees ***shall*** be awarded "should the plaintiff prevail in litigation" under the Act.

Note 1: The court ***shall*** award attorney's fees to a prevailing public entity defendant ***if*** "the court finds that the plaintiff's case is clearly frivolous."

Note 2: Any fee award "***shall*** be paid by the public agency" employing the public official who unlawfully withheld the records "and shall not become a personal liability of the public official."

- ***Government Code §12653, subd.(c)*: whistle blowing employees**

A defendant-employer, including a public agency employer, who "violates" section 12653 by taking adverse actions against a whistle blowing employee "***shall*** be required to pay litigation costs and reasonable attorneys' fees" to the employee.

- ***Government Code §12965, subd. (b)*: FEHA**

A court, "in its discretion, ***may*** award . . . reasonable attorney's fees and costs, including expert witness fees," to the prevailing party "except where the action is filed by a public agency or a public official, acting in an official capacity."

Note 1: Although the court explicitly has discretion to award attorney fees to a prevailing plaintiff, this discretion is "narrow"' and fees should ordinarily be awarded "unless special circumstances would render such an award unjust." (*Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 332.)

Note 2: Although the court explicitly has discretion to award attorney fees to a prevailing defendant under this section, the defendant should only be awarded fees where the action was clearly "frivolous, unreasonable, or groundless" or "the plaintiff continued to litigate after it clearly became so." (*Cummings v. Benco Building Services* (1992) 11 Cal App 4th 1383, 1388, quoting *Christianburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421-422.)

- ***Government Code §54960.5*: Brown Act**

Attorney's fees ***may*** be awarded to the plaintiff where the court has "found" that a legislative body of the local agency violated the Act.

Note 1: The court ***may*** award attorney's fees to a prevailing public entity defendant ***if*** "the court finds that the action was clearly frivolous and totally lacking in merit."

Note 2: Any fee award "***shall*** be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency."