Qualified Immunity

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City Attorneys Spring Conference
The Broad Outline

What claims are covered?
Who is protected?
What is the rationale?
What is the standard?
What claims are covered?

- All claims for money damages
- Allegation of violation of federal statutory or constitutional right
- Declaratory Relief
- Injunctive Relief
Who is protected?

- Any federal, state or local public official
- **Not** contractors
- All pay levels
- Discretionary functions
- Municipalities **Not** Covered
- But, Combine with **Monell** motion
What is the rationale?

“The central purpose of affording public officials qualified immunity is to protect them ‘from undue interference with their duties and from potentially disabling threats of liability.’”

_Elder v. Holloway_

What does this mean?

Applies when the officer has violated a citizen’s constitutional right
What does this mean?

“This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued.”

*Hunter v. Bryant*,
What does this mean?

Vigorous enforcement of the law more important than recovery of damages.
More than a defense to liability

“An entitlement not to stand trial or face the other burdens of litigation”

Mitchell v. Forsyth,
472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)
Early resolution

“The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”

Mitchell v. Forsyth
What is the standard?

Defined by when immunity is lost:

“if an official ‘knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff].’”

*Harlow*

457 U.S. at 815, 102 S. Ct. at 2737

League of California Cities

May 5, 2004
Objective Reasonableness

“Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

*Harlow* at 818
Purpose of the Standard

- Does not rely on Subjective good faith of defendant
- Encourages Summary Judgment
When are actions objectively reasonable?

- When lawful
- When the legal standard changes or is unclear
What happens when the legal standard is clear?

“The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed [defendant's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.”

*Anderson v. Creighton*

Unreasonable Actions

Can an officer be objectively reasonable while acting unreasonably?

“the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . after the fact.”

Hunter at 228
State of Mind

What happens when the defendants’ state of mind is an element of the constitutional violation, e.g., retaliation?

*Crawford-El v. Britton*


*Jeffers v. Gomez*

267 F.3d 895, 911 (9th Cir. 2001)
What is the Test?

Two steps

Saucier v. Katz

533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)
Step One

“[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [official’s] conduct violated a constitutional right?”

*Id.* at 201, 121 S.Ct. at 2156.
Step Two

If the answer to step one is “yes,” determine “whether the right was clearly established" at the time it was allegedly infringed.

*Id.* at 201, 121 S.Ct. at 2156.
Confusion in the Ninth Circuit on Step Two

One view: Very limited scope limited to “an inquiry into the reasonableness of the officer's belief in the legality of his actions.”

*Wilkins v. City of Oakland*

350 F.3d 949, 955 (9th Cir. 2003)
Confusion in the Ninth Circuit on Step Two

Another view with two subparts:

(1) “Was the law governing the state official’s conduct clearly established?
(2) Under that law could a reasonable state official have believed his conduct was lawful?”

Marquez v. Gutierrez
322 F.3d 689, 692 (9th Cir. 2003); Schneider v. California Dept. of Corrections, 345 F.3d 716, 721 (9th Cir. 2003).
Procedural issues

Attack on Pleading
Summary Judgment
Trial
Interlocutory Appeal
Pleading Stage

- Must be plead
- Can stay discovery
More Confusion: What if reasonableness of defendant’s actions are disputed?

*Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993):*

Error to deny an officer’s claim of qualified immunity because of a dispute as to the reasonableness of the defendant’s actions.
But…

_Santos v. Gates_, 287 F.3d 846, 855 n.12 (9th Cir. 2002):

Premature to decide the qualified immunity issue “because whether the officers may be said to have made a ‘reasonable mistake’ of fact or law may depend on the jury's resolution of disputed facts and the inferences it draws therefrom.”
If the case goes to trial, is qualified immunity a question for the judge or jury?

Even more confusion…
Appeal

Pretrial orders denying qualified immunity immediately appealable...

*Mitchell v. Forsyth*

472 U.S. 511, 530, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)
Appeal

But not on issues of “evidence sufficiency.”

*Behrens v. Pelletier*

Effect of Appeal

Appeal stays trial court proceedings unless claim to qualified immunity is “frivolous or has been waived.”

*Chuman v. Wright*

960 F.2d 104 (9th Cir. 1992).
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I. Introduction.

Qualified immunity is a doctrine that offers as much frustration as it does promise for attorneys who represent governmental officials. Over the years, the Supreme Court has steadily strengthened the defense with the explicit purpose of encouraging governmental officials in the effective exercise of their discretion authority by sparing them the rigors of litigation even when they have violated a plaintiff’s constitutional rights. The Supreme Court’s “objective reasonableness” standard permits defendants to obtain judgment early in the litigation, at the pleading stage or on summary judgment. Furthermore, the Court has empowered governmental defendants to bring an immediate appeal from adverse pretrial rulings on qualified immunity.

Of course, nothing in the law is ever that simple. Courts have struggled to maintain a balance between contradictory values resulting in a complex web of rules. The defense avoids the evil of punishing officials for vigorously enforcing the law, but it potentially bars the victims from any recovery where officials have abused their power. Furthermore, the immunity is typically applied in the pre-trial phase of a case, implicating a plaintiff’s right to a jury trial on contested issues of fact. It is not surprising that courts frequently have reached inconsistent positions. Unfortunately, the Supreme Court has only been partially successful in resolving those differences. Particularly in the Ninth Circuit, the courts have failed to apply the defense in a uniform manner.

What follows is a brief summary of the most important issues in the field of qualified immunity as they impact a litigator.

II. Overview.

A. What is qualified immunity?

1. Qualified immunity is an affirmative defense that, when established, requires the dismissal of a lawsuit against a federal, state or local public official who is accused of violating the plaintiff’s federal statutory or constitutional rights while the official was exercising discretionary functions within the course and scope of his or her employment.


b) Compare: “discretionary act” immunity under California state law. Cal. Govt. Code § 820.2 (“Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the
exercise of the discretion vested in him, whether or not such discretion be abused.”). In the absence of a statute, a public entity cannot be held liable for an employee’s act or omission where the employee himself would be immune. Govt. Code § 815.2(b).

2. Qualified immunity is an affirmative defense that must be pleaded and proven by a defendant official. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

   a) However, once a defendant raises the issue of qualified immunity by establishing that the conduct complained of was within his or her discretionary authority, the burden shifts to the plaintiff to prove that the right allegedly violated was “clearly established” at the time of the occurrence at issue. *Davis v. Scherer*, 468 U.S. 183, 197, 104 S.Ct. 3012, 3020, 82 L.Ed.2d 139 (1984); *see also Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir.1991) *rev’d on other grounds* 510 U.S. 510, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (outlining extent of the plaintiff’s “burden” to demonstrate the law was “clearly established”).

   b) But see *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (“The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court.”) It would appear illogical to assign a “burden of proof” on a purely legal issue.

B. What claims are covered?

1. All claims for money damages arising out of the violation of a federal statutory or constitutional right.


C. Who may assert the defense?


2. The immunity applies “across the board,” both to high government

3. A municipality, however, may not assert the qualified immunity of its officers or agents as a defense to liability. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980).

4. Employees of government contractors doing government work cannot (yet) assert the defense. *Bibeau v. Pacific Northwest Research Foundation Inc.*, 188 F.3d 1105, 1111-1112 (9th Cir. 1999).

D. What is the rationale for the defense?

1. The defense is designed to promote the effective exercise of reasonable discretion by public officials, which would be chilled if these officials were too easily required to defend themselves against baseless or insubstantial lawsuits. Thus, the defense is an *immunity from suit*, and it “reflect[s] an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, . . . but also ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’” *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed. 2d 90 (1974)); see also *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 70 F.3d 1095, 1098 -1099 (9th Cir. 1995). “This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued.” *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 73 L.Ed.2d 396 (1991) (per curium) (citation and internal quotation marks omitted).

2. The Supreme Court stated that “[t]he central purpose of affording public officials qualified immunity is to protect them ‘from undue interference with their duties and from potentially disabling threats of liability.’” *Elder v. Holloway*, 510 U.S. 510, 514, 114 S.Ct. 1019, 1022, 127 L.Ed.2d 344 (1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982)); see also *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 70 F.3d 1095, 1098 -1099 (9th Cir. 1995). “This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued.” *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 73 L.Ed.2d 396 (1991) (per curium) (citation and internal quotation marks omitted).

3. “As a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [I]f [officials] of reasonable competence could disagree on th[e] issue [i.e., whether a chosen course of action is or is not constitutional], immunity should be recognized.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

III. What is the legal standard for establishing qualified immunity?
A. A government official performing discretionary functions is entitled to immunity from damages when a reasonable official could have believed his or her actions to be lawful, in light of clearly established law and the information the official possessed. *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987).

B. Older two-part test:

1. In step one, the court asks whether the law governing the official’s conduct was “clearly established.”

2. In step two, the court asks whether, given this clearly established standard, a reasonable official could believe that his or her conduct was lawful. See *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994 (9th Cir. 1999) (citing *Ortega v. O’Connor*, 146 F.3d 1149, 1154 (9th Cir. 1998).


1. This decision added a threshold question: before the court can determine whether an official is entitled to qualified immunity, it must first ask whether “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [official’s] conduct violated a constitutional right?” *Id.* at 201, 121 S.Ct. at 2156. This appears to be a pleading-type inquiry as opposed to a summary judgment standard.

2. If the answer to this question is no, then the inquiry is over because the case should be dismissed. However, if the answer is “yes,” the court must then proceed to determine “whether the right was clearly established” at the time it was allegedly infringed. *Id.* at 201, 121 S.Ct. at 2156.

D. What is a “clearly established” right?

1. “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156, 150 L.Ed.2d at 282.

2. “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); see also *Patrick v. Miller*, 953 F.2d 1240, 1249 (10th Cir.1992) (“We consider the law to be ‘clearly established’ when it is *well-developed enough* to inform [a] reasonable official that his conduct violates the law”) (emphasis added)).
E. The Ninth Circuit has not consistently applied *Saucier*.

1. Some cases graft the old two-part test onto the *Saucier* test. As a result, some courts hold that qualified immunity involves three distinct steps: (1) “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [official’s] conduct violated a constitutional right?” *Saucier* at 201; (2) “Was the law governing the state official’s conduct clearly established?” *Marquez v. Gutierrez*, 322 F.3d 689, 692 (9th Cir. 2003), quoting *Jeffers*, 267 F.3d at 910; accord, *Schneider v. California Dept. of Corrections*, 345 F.3d 716, 721 (9th Cir. 2003).

a) In *Marquez*, the defendant prison guard allegedly shot the plaintiff as the plaintiff stood near a fight between inmates. The court found that law was clear that “to shoot a passive, unarmed inmate standing near a fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm” stated a violation of the plaintiff’s Eighth Amendment rights. *Id.*, 322 F. 3d at 692. However, the court found that an officer could misperceive that plaintiff was kicking another inmate, therefore threatening the other inmate with death or serious harm. Therefore, the officers were entitled to qualified immunity.

2. However, in *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003), the court (B. Fletcher, J.) dispensed with the second step of the *Saucier* test because it is limited to “an inquiry into the reasonableness of the officer’s belief in the legality of his actions.”

a) In *Wilkins*, the defendants shot an undercover officer believing that he was about to shoot an unarmed man. The court reasoned that, had the officers known the undercover officer’s true identity, they would have understood that shooting him was a violation of the constitution. Since the officers’ entitlement to qualified immunity turned on the reasonableness of their belief that he was a civilian, there was no need to reach the second *Saucier* step.

b) *See also Lee v. Gregory*, 04 C.D.O.S. 2951 (9th Cir., April 8 2004), where the court denied qualified immunity based on the existence of a factual dispute over whether the defendant, an FBI agent, passed an arrest warrant on to the local sheriff’s office while knowing that the person named in the warrant was not the suspect to be arrested. The court declined to analyze whether the agent could have reasonably believed the person named in the warrant was the suspect, and instead held that the mere existence of a factual dispute on this issue destroyed qualified immunity.
immunity.

3. In sum, the Ninth Circuit seems intent on applying what is in effect a more stringent test. The court will uphold the denial of qualified immunity on summary judgment whenever a disputed issue of fact exists over whether, under the circumstances presented, the defendant’s belief in the legality of his or her conduct was or was not reasonable – in contrast with the more widely accepted formulation of whether, on the undisputed facts (and viewing all genuinely controverted facts in the plaintiff’s favor), a reasonable officer could have believed that his or her conduct was lawful.

F. Can an Official Rely on Legal Advice? While not conclusive, reliance on an attorney’s advice is some evidence of the reasonableness of an official’s belief that his or her actions are lawful. Stevens v. Rose, 298 F.3d 880, 884 (9th Cir. 2002) (dictum) (quoting Lucero v. Hart, 915 F. 2d 1367, 1371 (9th Cir. 1990)). The reasoning in these cases is illogical because the qualified immunity standard is an objective one, so what the official actually believed ought to be completely irrelevant to the court’s qualified immunity analysis. Cf. Carl v. Angelone, 833 F. Supp. 1433 (D. Nev. 1995).

IV. When can the defense be raised?

A. Earliest juncture in the litigation.

1. The qualified immunity defense is:

   an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.


B. The defense is structured to encourage early resolution.

1. The Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 819, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982), adopted a criterion of “objective legal reasonableness,” rather than good faith, precisely in order to “permit the defeat of insubstantial claims without resort to trial.”

2. In Saucier v. Katz, 533 U.S. 194 (2001), the Court refused to adopt the
Ninth Circuit’s definition of qualified immunity in part because it discouraged resolution of claims on summary judgment:

The approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.

Id. at 202 [internal quotation and citation omitted].

C. How does the defense impact pleading?

1. Since qualified immunity is a defense, the burden of pleading it rests with the defendant. It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d. 572 (1980).

   a) But see Elder v. Holloway, 975 F.2d 1388, 1392 (9th Cir.1991) rev’d on other grounds 510 U.S. 510, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (outlining extent of the plaintiff’s “burden” to demonstrate the law was “clearly established”), and discussion of burden of proof supra.


3. To determine immunity, the court must accept the allegations of the complaint as true. The official seeking immunity bears the burden of demonstrating that immunity attaches to a particular function. A dismissal for failure to state a claim is appropriate only where it appears, beyond doubt, that the plaintiff can prove no set of facts that would entitle him or her to relief. Morley v. Walker, 175 F.3d 756, 759 (9th Cir.1999) [citations omitted].

D. Summary judgment.

1. What constitutes a triable issue of fact?

   a) “Even if the plaintiff’s complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to
uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.” *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L.Ed.2d 411, 105 S.Ct. 2806.

2. The fact that reasonable minds could differ as to the legality of the defendants’ actions should not prevent summary judgment for the defendant.

a) In *Hunter v. Bryant*, 502 U.S. 224, 116 L.Ed.2d 589, 112 S.Ct. 534 (1991), the Supreme Court reversed a decision of the Ninth Circuit denying secret service agents qualified immunity for the arrest of a man they believed had delivered a letter threatening the president. The Ninth Circuit denied summary judgment on the ground that a more reasonable interpretation of the plaintiff’s letter was that he was warning of threat by other persons. The Ninth Circuit held that summary judgment was improper because there was a question of fact as to the reasonableness of the agents’ conclusion. The Supreme Court reversed, holding that the Ninth Circuit’s reasoning improperly placed the issue in the hands of the jury and not the court. “Immunity ordinarily should be decided by the court long before trial. *Id.* at 228. The question the court should have asked is “whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.” Reviewing the facts known to the agents, the Court concluded that, “Even if we assumed, *arguendo*, that they . . . erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken.” *Id.* at 228-9.

b) Following *Hunter*, the Ninth Circuit in *Act Up! / Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993) held that it was error for a court to fail to consider an officer’s claim of qualified immunity because of a dispute as to the reasonableness of the defendant’s actions. In that case, the trial court denied defendants’ motion for summary judgment based on qualified immunity on the grounds that the reasonableness of defendants’ decision to conduct a strip search was one for the jury. This court reversed:

Absent a genuine dispute of material fact, however, this issue may go to the jury only if the court has determined that the officer is not entitled to qualified immunity. If a reasonable officer could have believed that Appellants were justified under *Giles* in strip
searching the Appellees, Appellants are entitled to qualified immunity. This is so notwithstanding that reasonable officers could disagree on this issue, because even officers who mistakenly conclude that reasonable suspicion is present are entitled to immunity so long as that conclusion is objectively reasonable.

_Id._ at 872; _see also, Hemphill v. Kincheloe_ 987 F.2d 589, 594 (9th Cir. 1993).

c) Other decisions of the Ninth Circuit suggest an unwillingness to grant summary judgment where the reasonableness of a defendant’s actions is disputed. _Wilkins v. City of Oakland_, 350 F.3d 949, 955 (9th Cir. 2003) [Reasonableness of defendant’s actions “a question of fact best resolved by a jury.”]; _Santos v. Gates_, 287 F.3d 846, 855 n. 12 (9th Cir. 2002) [finding it premature to decide the qualified immunity issue “because whether the officers may be said to have made a ‘reasonable mistake’ of fact or law may depend on the jury’s resolution of disputed facts and the inferences it draws therefrom.”].

3. How does a court evaluate a defendants’ state of mind on a motion for summary judgment?

a) Normally, a defendant’s subjective intent is not relevant to the qualified-immunity defense. _Harlow v. Fitzgerald_, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982).

b) In some cases, however, the defendant’s mental state is relevant where it is an element of the alleged constitutional violation. For instance in _Crawford-El v. Britton_, 523 U.S. 574, 140 L.Ed.2d 759, 118 S.Ct. 1584 (1998), a prisoner alleged that officials had lost his property in retaliation for his frequent use of the courts to challenge the conditions of his confinement. Plaintiff’s First Amendment rights were violated only if the defendants acted with the motive to retaliate. Therefore, the court recognized that “although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff’s affirmative case.” _Id._ at 589.

c) Where motive is an element of a claim, the plaintiff must “put forward specific, nonconclusory factual allegations’ that establish improper motive causing cognizable injury.” _Crawford-El, supra; Jeffers v. Gomez_, 267 F.3d 895, 911 (9th Cir. 2001) [In Eighth
Amendment claim, “Jeffers must allege facts in this case that demonstrate that Appellants shot at Jeffers, or permitted Jeffers to be shot, because of an unconstitutional motive or state of mind.”].

E. If the case goes to trial, is qualified immunity a question for the judge or jury?

1. There is a disagreement among the Circuits as to whether a judge or jury should make the ultimate determination of immunity. See Curley v. Klem, 298 F.3d 271, 278, n. 3 (3rd Cir. 2002) [listing cases].

2. The Ninth Circuit has carefully avoided answering this question. Resnick v. Adams, 348 F.3d 763, 771 n. 9 (9th Cir. 2003) (O'Scannlain, J.); Sloman v. Tadlock, 21 F.3d 1462, 1467-68 (9th Cir. 1994) (B. Fletcher, J.); but see, Ortega v. O'Connor, 146 F.3d 1149, 1154 (9th Cir. 1998) (Reinhardt, J.) [“Courts should decide issues of qualified immunity as early in the proceedings as possible, but when the answer depends on genuinely disputed issues of material fact, the court must submit the fact-related issues to the jury.”].

V. Interlocutory appeals.

A. What pretrial orders are appealable?

1. Pretrial orders denying motions asserting claims of qualified immunity are appealable under the “collateral order doctrine.” While 28 U.S.C. section 1291 grants appellate courts jurisdiction to hear appeals only from “final decisions” of district courts, certain pretrial “collateral orders” are immediately appealable. Collateral orders are those that “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949). In circumstances such that the order determines rights that require immediate appellate consideration, the order is effectively a “final decision” for the purposes of section 1291 and therefore appealable.

2. Because the defense of qualified immunity “is an immunity from suit rather than a mere defense to liability,” the Supreme Court in Mitchell v. Forsyth, 472 U.S. 511, 530, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985), held that pretrial orders denying qualified immunity are appealable under the collateral order doctrine. As the Court in Johnson v. Jones, 515 U.S. 304, 312, 132 L.Ed.2d 238, 115 S.Ct. 2151 (1995), observed an order denying a motion for summary judgment based on qualified immunity is “effectively unreviewable,” for review after trial would come too late to vindicate one important purpose of “qualified immunity” – namely, protecting public officials, not simply from liability, but also from trial.
B. Appellate courts may hear an interlocutory appeal from a denial of a motion to dismiss, *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir.1998), or a motion for summary judgment. *Billington v. Smith*, 292 F.3d 1177, 1183-4 (9th Cir. 2002).

C. Defendants may file more than one interlocutory appeal. For example, defendants may file an appeal from a denial of a motion to dismiss and, if unsuccessful, a subsequent appeal following denial of a motion for summary judgment. *Behrens v. Pelletier*, 516 U.S. 299, 133 L.Ed.2d 773, 116 S. 834, 838 (1996).

D. What is the scope of appellate review?

1. Right of immediate appeal does not extend to orders or portions of orders that determine only a question of “evidence sufficiency.”

   a) In *Johnson v. Jones*, 515 U.S. 304, 312, 132 L.Ed.2d 238, 115 S. Ct. 2151 (1995), the appellants were police officers who denied they had been present when plaintiff alleged other officers had beaten him. The defendant officers filed a motion for summary judgment based on qualified immunity. The district court denied the motion, finding sufficient evidence to raise a triable issue of fact whether defendants were present and whether either participated in, or failed to prevent, the alleged beating. The officers appealed, contending that the record evidence was insufficient to support this finding. The Supreme Court found that the collateral order doctrine did not extend to that “portion of a district court’s summary judgment order that, though entered in a ‘qualified immunity’ case, determines only a question of ‘evidence sufficiency,’ i.e., which facts a party may, or may not, be able to prove at trial.” 515 U.S. at 313.

   b) The Supreme Court reasoned that the issue of “evidence sufficiency” is not truly “collateral” to the merits. The issue of whether the evidence is sufficient to support a finding that the defendant violated the plaintiff’s constitutional rights is not essentially different than the issue the trial court faces on the merits. An interlocutory appeal may delay resolution of the case and appellate judges are no better situated to decide factual issues than trial court judges. On the other hand, the issue of qualified immunity is different than the issue raised on the merits; indeed, the defendant is entitled to qualified immunity even if he or she violated the plaintiff’s constitutional rights. Therefore, “considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of qualified immunity matters to
cases presenting more abstract issues of law.” *Johnson*, at 317 [internal quotations omitted].

2. However, defendants are entitled to interlocutory appeals of orders denying summary judgment even when the ground for denial is that a triable issue of fact exists.

   a) In *Behrens v. Pelletier*, 516 U.S. 299, 133 L.Ed.2d 773, 116 S.Ct. 834, 838 (1996), the Court explained that its holding in *Johnson* did not deny the right of appeal from an order denying summary judgment merely because the court found material facts in dispute.

      (1) “Denial of summary judgment often includes a determination that there are controverted issues of material fact, and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable. 516 U.S. at 312.

3. Interlocutory appeals are available on “issues of law.”

   a) Defendants are entitled to raise on appeal whether the federal right allegedly infringed was ‘clearly established.’” *Behrens v. Pelletier*, 516 U.S. 299, 313, 133 L.Ed.2d 773, 116 S.Ct. 834, 838 (1996).

   b) Defendants may bring an interlocutory appeal that essentially asks “so what?” *Jeffers v. Gomez*, 267 F.3d 895, 905-6 (9th Cir. 2001) [“From *Behrens* and its progeny we conclude that we may consider the legal question whether, taking all facts and inferences therefrom in favor of the plaintiff, the defendant nevertheless is entitled to qualified immunity as a matter of law”]. *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997) [“Even if disputed facts exist about what actually occurred, a defendant may still file an interlocutory appeal if the defendant’s alleged conduct in any event met the standard of objective legal reasonableness under clearly established law regarding the right allegedly infringed.”].

   c) *Colston v. Barnhart*, 146 F.3d 282, 284 (5th Cir. 1998) utilized the following example to distinguish appealable and non appealable issues.

      (1) Assume that plaintiff alleges that the defendant police officer shot him and the defendant alleges that he merely beat the plaintiff with his baton. The district court denies the defendant’s motion for summary judgment on the
ground that a genuine issue of material fact exists as to what type of weapon was involved.

(2) If the defendant argues on appeal that plaintiff presented insufficient evidence from which a reasonable juror could conclude that the defendant shot him rather than merely hit him with a baton, then he is not entitled to an interlocutory appeal under the Supreme Court’s decision in *Johnson*.

(3) If defendant argues that, regardless of whether he shot the plaintiff or hit him with a baton, his actions did not constitute excessive force, then he is entitled to an interlocutory appeal under *Behrens*.

d) An appellate court still has jurisdiction to consider defendants’ argument that the dispute of fact is not material. *Cunningham v. Gates*, 229 F.3d 1271, 1286 (9th Cir. 2000); *Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1997).

4. However, under the doctrine of pendent appellate jurisdiction, once the appellate court takes the case, it may exercise jurisdiction over any issues that are “inextricably intertwined” with the qualified immunity issue. *Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001).

5. Difficulty may arise if the trial court fails to specify the grounds for its decision. *Johnson v. Jones*, 515 U.S. 304, 319, 132 L.Ed.2d 238, 115 S.Ct. 2151 (1995). In such a case, it may be difficult to “separate an appealed order’s reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is ‘genuine’).” *Id.*

a) If the court does not state the facts upon which it relied to conclude that defendants were not entitled to qualified immunity, then the court “may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.” *Id.* [internal citations omitted].

b) This review encompasses “the materials submitted to the district court to determine what the record, viewed in the light most favorable to the nonmoving party, discloses in order to have a factual basis upon which to base its legal conclusion.” *Winfield v. Bass*, 106 F.3d 525, 533 (4th Cir. 1996).

E. Effect of interlocutory appeal.

1. If the claim is one that is immediately appealable, the filing of the notice
of appeal divests the district court of jurisdiction over the case. \textit{United States v. Claiborne}, 727 F.2d 842, 850 (9th Cir. 1987).

2. Exception for frivolous appeals.

a) In \textit{Behrens v. Pelletier}, 516 U.S. 299, 313, 133 L.Ed.2d 773, 116 S.Ct. 834, 838 (1996), the Supreme Court recognized the potential for abuse in permitting interlocutory appeals on the issue of qualified immunity. The Court sanctioned the practice of the Ninth Circuit which enables District Courts to retain jurisdiction of a case even while the appeal is pending where the claim of qualified immunity is “frivolous or has been waived.” \textit{Chuman v. Wright}, 960 F.2d 104 (9th Cir. 1992).

b) If the district court finds that the defendant’s claim of qualified immunity is frivolous or has been waived, “the district court may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may proceed with trial.” \textit{Chuman v. Wright}, \textit{supra}. The defendant may contest the district court certification by applying to the appellate court for a stay of the district court proceedings. \textit{Id.}, n. 1.

c) The plaintiff bears the burden to demonstrate that the appeal is frivolous. \textit{Apostal v. Gallion}, 870 F.2d 1335, 1339 (7th Cir. 1989), [“it should not be necessary for the defendants to come to this court, hat in hand, seeking relief that is theirs by virtue of Forsyth, which authorizes pre-trial appeals.”].

d) The power of a district court to retain jurisdiction “must be used with restraint.” \textit{Goshtasby v. Board of Trustees of the University of Illinois}, 123 F.3d 427, 428 (7th Cir. 1997).

VI. Conclusion.

Qualified immunity remains a powerful weapon for attorneys representing governmental officials, and defense counsel must take steps to preserve and assert the immunity as early as possible in the litigation. The Supreme Court has steadily expanded and strengthened the defense to encourage the effective exercise of discretionary authority by allowing the early and favorable termination of litigation against public officials. However, a litigator practicing in the Ninth Circuit cannot depend on the court applying the defense as vigorously as the Supreme Court intended. Therefore, a thorough understanding of the principles underlying the immunity is essential to mounting the strongest defense. The principles that give rise to the substantive doctrine dictate the procedural rules that govern how the immunity is applied. Likewise, the procedural rules help to explain how a court should give a broad reading to the substantive scope of the immunity.
The inconsistency with which the Ninth Circuit has applied the immunity make it likely that the Supreme Court will eventually revisit some of the issues described in this outline. Stay tuned.
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