CALIFORNIA SUPREME COURT

Gerken, et al., v. Fair Political Practices Commission, et al. (State of California, Intervenor),

6 Cal. 4th 707, 93 D.A.R. 16121, No. S025815 (Dec. 20, 1993).

Divided Court Declines to Revive Proposition 68 After Upholding Viability of Partially Invalidated Proposition 73

Propositions 73 and 68, both designed to implement campaign contribution reform, were each approved by the voters at the June 1988 primary election; Proposition 73 garnered more affirmative votes than did Proposition 68. Proposition 73 proposed to impose limits on campaign contributions for all elective offices; prohibit the use of public funds for campaign expenditures; and prohibit elected officials from spending public funds on newsletters and mass mailings. Proposition 68 proposed to impose contribution limitations on state legislative candidates, and further proposed to impose expenditure limitations on qualified candidates who elect to receive partially state-funded matching funds. According to the court, the two schemes were presented to the voters as alternative, competing measures.

In *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*, 51 Cal. 3d 744, 274 Cal. Rptr. 787 (1990) (hereafter *Taxpayers*), the California Supreme Court held that under the California Constitution, when two or more measures at the same election are competing initiatives and both pass, only the provisions of the measure receiving the highest number of affirmative votes can be enforced. Accordingly, the Supreme Court declined to "merge" the two measures, and instead held that Proposition 73 was effective and that Proposition 68 was inoperative. *[11:1 CRLR 153–54]* At the conclusion of its *Taxpayers* opinion, the court observed in a footnote that in *Service Employees Int'l Union v. Fair Political Practices Commission*, 747 F. Supp. 580 (E.D. Cal. 1990) (*Service Employees*), the U.S. District Court had recently invalidated as unconstitutional Proposition 73's restrictions on campaign contributions and transfers thereof *[10:4 CRLR 189–90]*; however, the Supreme Court noted that the district court's decision was not final and did not invalidate the remainder of Proposition 73. Accordingly, the Supreme Court did not decide in *Taxpayers* whether an initiative measure that has no effect at the time it is adopted because it is superseded by another measure adopted by a larger vote at the same election becomes effective if the latter is subsequently invalidated.

In this original mandamus proceeding, petitioners raised the issue reserved in *Taxpayers*; noting that the Ninth Circuit Court of Appeals affirmed the district court's decision in *Service Employees [12:2&3 CRLR 273–74]*, and that the U.S. Supreme Court denied *certiorari* review of that judgment, petitioners asserted that Proposition 73 had been invalidated and Proposition 68 should be revived by operation of law. *[12:4 CRLR 241]* In a 4–3 decision, the Supreme Court disagreed, thus leaving California bereft of contribution limitations for statewide and legislative campaigns despite the passage of two initiatives indicating the electorate's intent to impose them.

First, the majority noted that the *Service Employees* plaintiffs primarily challenged Proposition 73's contribution limitations, arguing that because they are measured on a fiscal year instead of an "election cycle" basis, they unconstitutionally discriminate in favor of incumbents and their supporters and against challengers and their supporters; plaintiffs did not challenge the various other parts of Proposition 73, which include rules regarding solicitation and use of funds, a prohibition on the use of public funding for campaigns, rules for special elections, the regulation of honoraria, and a prohibition on publicly funded newsletters and mass mailings. The district court found that the fiscal year provisions of Proposition 73 are unconstitutional under the first amendment; the district court then addressed the state law issue of whether those provisions might be severed from the contribution limitation provisions, and concluded that the latter provisions could not be saved. Accordingly, it struck the contribution limitations and permanently enjoined their enforcement.

In this proceeding, petitioners asserted that because Proposition 73's contribution limitations (insofar as they apply to primary and general elections) were invalidated and their enforcement enjoined, the remaining parts of Proposition 73 (which are not subject to the injunction) are likewise unenforceable because they are nonseverable from the invalidated portions of the measure. In other words, petitioners claimed that Proposition 73 was invalidated in its entirety as a result of the federal injunction.

In considering this argument, the majority noted that Proposition 73 contains a severability clause which provides that "[i]f any provision of this act, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this act to the extent it can be given effect, or the application of those provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this act are severable." The court noted that, although not conclusive, a severability clause normally calls for sustaining the valid part of an enactment, especially when the invalid part is mechanically severable. However, the court held that the final determination depends on whether the remaining portion of the act is complete in itself and would have been adopted by the legislative body had it foreseen the partial invalidity of the statute, or constitutes a completely operative expression of legislative intent and is not so connected with the rest of the statute as to be inseparable.

As a predicate to petitioners' claim that all or part of Proposition 68 should be revived, the majority held that they must establish that Proposition 73 has been completely invalidated, and that no "substantial part" of the measure remains effective; according to the majority, "[i]f any substantial part of Proposition 73 remains effective despite the federal injunction, petitioners' claim of revival of Proposition 68, in whole or in part, must fail." Therefore, the majority stated that it need not decide the viability of each remaining section of Proposition 73 in order to resolve petitioners' writ application, and decided that "we can resolve this litigation by finding that at least one substantial part of Proposition 73 is severable and operative." According to the majority, "the section that most clearly and easily meets this requirement is section 89001, the ban on publicly funded mass mailings."

Therefore, the majority considered whether section 89001 is severable from the invalidated provisions, noting that petitioners had conceded that section 89001's ban on public funding of mass mailings is grammatically and functionally separate from the contribution limits enjoined by the federal courts; however, "the question is whether the ban is also volitionally separate from the enjoined provisions." In concluding that it is, the majority reviewed the official statements made to the voters about Proposition 73 in the ballot pamphlet, and found that the ban on publicly funded mass mailings was separately highlighted for the voters as one of the goals that would be met by passage of Proposition 73; the Legislative Analyst specifically listed the ban on pub-

licly funded mass mailings as one of the three main goals of the initiative; the Legislative Analyst emphasized the anticipated savings that would result from the ban on publicly funded mass mailings; and nothing in the text of the measure suggested that the ban on publicly funded mass mailings is dependent on the existence of the enjoined contribution limitations, or any other provision of the measure. The majority conceded that the ballot arguments which followed the text of the measure did not expressly address the proposed public funding ban on mass mailings. However, viewing the ballot materials as a whole, the majority concluded that the ban on publicly funded mass mailings was sufficiently highlighted to identify it as worthy of independent consideration. Further, the majority held that the electorate's attention was sufficiently focused upon the ban on public funding of mass mailings so that it would have separately considered and adopted that ban in the absence of the enjoined portions. The majority thus concluded that "section 89001 remains effective despite (and regardless of) the federal injunction against enforcement of Proposition 73's campaign contribution provisions" and that, "although the ban on public funding of mass mailings was not the 'heart' or 'dominant purpose' of the measure, it was a substantial feature of the initiative." Accordingly, the majority held that petitioners cannot show that, by reason of the federal injunction, Proposition 73 has been invalidated.

Petitioners also argued that the factual premise underlying the *Taxpayers* decision—namely, that Propositions 73 and 68 were competing, alternative statutory schemes—was undermined by the federal injunction; petitioners contended that even if Proposition 73's remaining provisions are all severable, the measure has been so diluted that it would no longer constitute a competing, alternative statutory scheme, as compared with Proposition 68, and hence the state Constitution should be read to require the courts to merge the nonconflicting parts of the two measures. The majority rejected petitioners' assertion that the factual premise of *Taxpayers* has been undermined by events occurring after the June 1988 election, stating that the rule articulated in *Taxpayers* looks to the nature of the measures as they were presented to the voters. Accordingly, the majority rejected the suggestion that the federal injunction has transformed Propositions 73 and 68 from alternative, competing measures that cannot be merged, into complementary, supplementary measures that must be merged.

Justice Arabian was joined by Justices Mosk and Kennard in a stinging dissent. The dissent noted that "[a]n attachment to the principle of popular sovereignty" has characterized a long line of California Supreme Court decisions. "Yet it is that very principle that the majority breach in declaring that the clear desire of the voters to impose real controls on the stream of money corroding our political life—a desire expressed not once, but *twice in the same election*—has produced what? Little more than a ban on officeholders' use of their mailing privileges" (emphasis original). Quoting from the court's own opinion in *Taxpayers*, the dissent argued that "the dominant, indeed, the inducing purpose of Proposition 73, was to enact a 'comprehensive regulatory scheme' that would limit political contributions to candidates for public office," and contended that the federal courts' invalidation of Proposition 73's campaign contribution limits "completely thwarts its overriding purpose." Thus, the dissent concluded that no provision of Proposition 73 is severable from the contribution limitation provisions invalidated by the federal courts; Proposition 73 is completely nullified; and Proposition 68, "the rival campaign finance reform measure approved by the voters at the June 1988 election," prevails.

Freedom Newspapers, Inc., v. Orange County Employees Retirement System Board of Directors,

6 Cal. 4th 821, 93 D.A.R. 16426, No. S029178 (Dec. 23, 1993).

Operations Committee of Retirement Board Is Not 'Legislative Body' Subject to Statutory Open Meeting Requirements

In this proceeding, the California Supreme Court interpreted the Ralph M. Brown Act, Government Code section 54950 *et seq.*, which provides that all meetings of the "legislative body" of a local agency shall be open and public, except as otherwise provided in the Act. *[12:4 CRLR 242]* Government Code section 54952.3 specifically addresses advisory bodies of local agencies, and provides that the term "legislative body" includes "any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency." However, section 54952.3 also provides that the term "legislative body," as it is used in that section, does not include "a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body."

The parties to this proceeding—the nine-member board governing the Orange County Employees Retirement System and Freedom Newspapers, which sought access to meetings of the four-member advisory Operations Committee of the Board—disagreed over the meaning of the less-than-a-quorum exception contained in section 54952.3. The Board and its *amici curiae*, including the Attorney General, argued that an advisory committee that is excluded from the definition of "legislative body" under section 54952.3 is completely exempt from the open meeting requirements of the Act; Freedom Newspapers and its *amici curiae* contended that the less-than-a-quorum exception in section 54952.3 merely exempts less-than-a-quorum committees from the special, relaxed procedural requirements also contained section 54952.3, but that such committee remain subject to the stricter open meeting requirements that are generally applicable to "legislative bodies" under Government Code section 54952. The Fourth District Court of Appeal held that even the Board's four-member advisory committee is subject to the Brown Act, because it meets the definition of "legislative body" in section 54952 ("any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation"). *[12:4 CRLR 242]*

The Supreme Court reversed. According to the majority, "the legislature's action in two respects since the 1968 enactment of section 54952.3 indicate [sic] its continuing understanding that advisory committees comprised solely of less than a quorum of the governing body are exempt from the opening meeting requirements of the [Brown] Act." Although acknowledging that legislative acquiescence is a weak indication of legislative intent, the court noted that the legislature has not attempted to legislatively supersede the appellate court decision in *Henderson v. Board of Education*, 78 Cal. App. 3d 875 (1978); in *Henderson*, the court held that ad hoc advisory committees created for the purpose of advising the Board of Education, and which were composed solely of members of the governing body of each school district numbering less than a quorum of the governing body, were not subject to the Brown Act.

Second, the court noted that in 1992 the legislature attempted to extend the coverage of the Brown Act by limiting the coverage

of the express less-than-a-quorum exception in section 54952.3 to "ad hoc" advisory committees (thus subjecting "standing" committees—regardless of their membership—to the Act). According to the court, "[t]his legislation is the strongest indication that the current version of section 54952.3 excludes less-than-a-quorum advisory committees from the Act's open meeting requirements, rather than merely from the less-stringent procedural requirements in section 54952.3." Although Governor Wilson vetoed the legislation, the court held that the legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the legislature's understanding of the unamended, existing statute.

The court concluded that it is more consistent with legislative intent to construe the less-than-a-quorum exception contained in section 54952.3 as an exception to the definition of "legislative body," and thus one of several exceptions to the Brown Act's opening meeting requirements, rather than merely as an exception to the special procedural requirements of section 54952.3.

Justice Kennard dissented from the majority opinion, arguing that it conflicts with legislative intent as clearly revealed in the preamble to the Brown Act, Government Code section 54950. Justice Mosk concurred and dissented, observing that SB 1140 (Calderon) (Chapter 1138, Statutes of 1993) becomes effective on April 1, 1994, and substantially amends section 54952.3 to distinguish between "ad hoc" and "standing" advisory committees, subjecting the latter—to the extent they "have a continuing subject matter jurisdiction"—to the Brown Act's open meeting requirements. *[13:4 CRLR 232]* Justice Mosk found the matter to have been mooted by the enactment of SB 1140, and would have dismissed the Court's review as "improvidently granted."

CALIFORNIA COURTS OF APPEAL

Tirapelle v. Davis (California State Employees Association, et. al., Intervenors and Appellants),

20 Cal. App. 4th 1317, 93 D.A.R. 15535, No. C012772 (Dec. 8, 1993).

State Controller May Not Refuse to Implement Salary Reductions for Exempt Civil Service Employees

In this appeal, the Third District Court of Appeal considered the authority of the State Controller to refuse to implement salary reductions established in 1991 by the Department of Personnel Administration (DPA) for certain administrative and supervisorial employees of the state who are not entitled to engage in collective bargaining under the Ralph C. Dills Act.

By way of background information, the court noted that at the outset of its 1991–92 fiscal year, the state of California faced an unprecedented budgetary crisis; the crisis was precipitated by a significant projected revenue-to-expenditure shortfall. In the Budget Act of 1991, the legislature and the Governor attempted to deal with the shortfall in a number of ways; one of those ways is found in section 3.90 of the Act, which instructed the Director of Finance to allocate reductions to general fund employee compensation line items by $351 million. *[11:4 CRLR 51–52, 54]*

The court explained the roles of the various "players" in this matter. Although the Department of Finance (DOF) has general powers of supervision over all matters concerning the financial and business policies of the state, the power of appropriation resides exclusively in the legislature. Under the Budget Act of 1991, the legislature required the Director of Finance to allocate reductions in the appropriations for employee compensation in each item of the budget in order to provide for an overall reduction in employee compensation in the amount of $351 million; DOF was not delegated the responsibility for achieving the reduced spending necessitated by the budget reductions. The task of determining how to achieve budget reductions in employee compensation items fell largely to DPA, which manages the nonmerit aspects of the state's personnel system; in general, DPA has jurisdiction over the state's financial relationship with its employees, including matters of salary, layoffs and nondisciplinary demotions. The Controller is a state constitutional officer who is elected at the same time and for the same term as the Governor. The state Constitution provides that money may be drawn from the state treasury only through an appropriation made by law and upon a Controller's duly drawn warrant.

The court also noted that there are limited means by which employee compensation can be reduced so as to stay within employee compensation budget allotments; the available means fall into the broad categories of reducing the size of the workforce, reducing the compensation payable on a per employee basis, or some combination thereof. DPA asserted that the employee compensation allotment reductions of the Budget Act of 1991 raised the specter of significant employee layoffs; it therefore determined to attempt to reduce salaries in order to minimize the need for layoffs. The salary reduction target chosen by the DPA was 5% per employee.

The Third District has already considered—and rejected—one aspect of DPA's effort to reduce employee compensation items during the 1991–92 fiscal year. *Department of Personnel Administration v. Superior Court*, 5 Cal. App. 4th 155 (1992), involved rank and file employees who were represented for purposes of collective bargaining under the Dills Act. DPA, as the Governor's designated representative, and various employee unions had negotiated and participated in mediation but had reached an impasse; DPA then purported to impose its "last, best offer" upon the employees, which included 5% salary reductions. The employee unions successfully petitioned the superior court for extraordinary relief precluding implementation of the DPA directive. DPA then petitioned the Third District for a writ of mandate compelling the superior court to set aside its judgment. In considering the issues presented in that proceeding, the Third District noted that the Dills Act is a "suppression statute"; that is, the parties are permitted to override otherwise applicable statutory provisions in a memorandum of understanding (MOU), but in the absence of an existing MOU, those statutory provisions apply. DPA's salary setting function, set forth in Government Code section 19826, is one of the statutory provisions which may be overridden in a MOU. However, with respect to represented employees under the Dills Act, section 19826(b) specifically provides that the DPA "shall not establish, adjust, or recommend a salary range." Since the parties' MOU had expired and they were at an impasse, section 19826 was applicable, but that section prohibited the DPA from imposing salary reductions. Accordingly, the court found that DPA had no authority to impose salary reductions upon represented employees at impasse during collective bargaining. *[12:2&3 CRLR 55]*

The current proceeding involves a different aspect of DPA's efforts to reduce employee compensation, as it is concerned with managerial and supervisory employees in civil service and certain exempt employees; managerial and supervisory employees and civil service exempt positions are excluded from the provisions of the Dills Act. On July 1, 1991, DPA announced an immediate general salary decrease for classes designated managerial and "E99." With a few exceptions to which lesser decreases applied, salaries

were reduced by 5%. In August 1991, DPA announced 5% salary decreases for supervisorial employees effective with the September 1991 paychecks. The Controller initially implemented the managerial employee compensation reductions. However, in September 1991, he announced that he would not implement the supervisory employee compensation reductions, would cease implementing the managerial compensation reductions, and would repay managerial employees for sums which had previously been withheld. DPA petitioned for a writ of mandate compelling the Controller to implement its salary reduction decisions. A number of employee organizations intervened; the trial court granted the relief sought by the DPA. *[12:1 CRLR 37]*

The Third District found that, with respect to the Controller's duties and authority, the Constitution follows a "minimalist approach." That is, it provides for the office but primarily leaves it to the legislature to define the duties and functions of the Controller; the legislature has wide discretion in defining the duties and functions of the office. After reviewing many of the Controller's duties, the court found that although in some circumstances the Controller may have discretionary duties, the greater part of the duties devolved upon him by the law are of a ministerial character, and concluded that he has no discretion as to the issuance of warrants for appropriations for the public service. While the Controller disagreed with DPA's decision to reduce salary levels, he did not point to any provision of law which would authorize payment of salaries at the prior higher levels pending resolution of disputes over the reductions. The court stated that the Controller "may not draw a warrant upon the Treasury except as directed by law. With respect to the compensation of state employees the legislature has not seen fit to delegate to the Controller any supervisory or review powers over the decisions of the DPA. The Controller has the power to audit salary claims, but this is far from being authorized to fix compensation. Although disputes over salary levels inevitably arise the legislature has not provided that the decisions of the DPA should be held in abeyance nor has it authorized the Controller to fix salary levels pending resolution of such disputes."

The Controller and the intervenors also argued that DPA failed to give appropriate consideration to prevailing pay rates, as it is required by law to do when it is establishing or changing salary ranges. Although DPA submitted declarations asserting that consideration had been given to prevailing rates, the Controller and intervenors responded that DPA failed to satisfy its burden of showing that it gave appropriate consideration to prevailing rates because it relied upon data that were considered in connection with January 1, 1991, salary increases and which were thus stale; the data concerned rank and file pay rates rather than supervisor and manager salaries; the data were in raw form without statistical analysis; and the consideration given to the data was perfunctory. In response, the court reiterated that the Controller had no authority to call DPA before him to justify its exercise of the authority delegated to it by the legislature, and that, accordingly, DPA had no burden to carry.

The Controller further asserted that even if DPA had authority over civil service employees, it had no authority to reduce the salaries of exempt employees. The court noted that although exempt positions are not subject to civil service laws, they are nevertheless governed by laws otherwise applicable to state employment. DPA's approval authority over the salaries of civil service exempt employees is set forth in Government Code section 19825(a), which provides that such salaries are subject only to the approval of DPA before they become effective and payable. Although noting that the power of approval over expenditures generally implies an exercise of some degree of discretion and thus confers greater authority than the ministerial power of audit, the court agreed that the mere power of approval over compensation, standing alone, is not itself sufficient authorization to reduce salaries when the power to fix those salaries is exclusively conferred upon a different agency. According to the court, the power of approval must be coupled with some other supervisory control over the salaries or employees in question in order to authorize a reduction or change in salary by the approving agency. In this case, the court found that because both the power of approval and the authority over the administration of salaries of exempt employees resides in DPA, DPA is vested with discretion over the salaries of civil service exempt employees which the Controller is not free to disregard.

Elizabeth D. v. Director of Motor Vehicles, Department of Motor Vehicles,

21 Cal. App. 4th 347, 93 D.A.R. 16408, No. B064904 (Dec. 23, 1993).

Without Sufficient Portion of Administrative Record, Trial Court Cannot Independently Review Administrative Proceedings

In May 1991, appellant Elizabeth D. suffered a seizure while at work, lost consciousness, and was taken to the hospital; in July 1991, based on information received from her physician, the Department of Motor Vehicles (DMV) notified appellant that her driver's license was suspended. Following an administrative hearing conducted at the request of appellant, the DMV subsequently sustained the suspension. In October 1991, appellant filed a petition for writ of mandate under Code of Civil Procedure section 1094.5, seeking to compel the DMV to restore her driver's license; she contended that DMV abused its discretion because the evidence at the administrative hearing did not support DMV's findings that she suffered from a condition characterized by lapses of consciousness or control which precluded her safe operation of a motor vehicle. However, appellant did not provide a transcript of the administrative hearing, instead submitting various documents, some of which were not introduced during the course of the administrative review. In its opposition, DMV cited in part to the administrative hearing transcript, but did not attach it or any of the exhibits to its papers. The trial court, after noting that it did not have a copy of the administrative hearing transcript and must look at the entire evidentiary record de novo, informed DMV's counsel that it was his responsibility to bring the administrative record before the court, and granted appellant's petition after an independent evaluation of the evidence presented to it. DMV appealed, contending that the trial court abused its discretion in rendering a decision without reviewing the entire administrative record.

On appeal, the Second District Court of Appeal noted that section 1094.5 provides that "[a]ll or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court." The court noted that although section 1094.5 allows both parties in a mandamus proceeding to file either "all or part" of the record of the administrative proceeding for review by the court, "this does not mean respondent is *required* to file the administrative record or that petition is *relieved* from the burden of providing a sufficient enough record to establish error" (emphasis original). The court held that in a section 1094.5 proceeding, it is the responsibility of the petitioner to produce a sufficient record of the administrative proceedings, noting that the "DMV is not required to show it was right. It was up to Elizabeth D. to supply a sufficient record to show the DMV was wrong."

Further, the court held that section 1094.5 imposes limitations on the trial court's authority to admit and consider new evidence; specifically, the section provides that where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the administrative hearing, it may either remand the case to be reconsidered in light of the new evidence or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, admit the evidence at the hearing on the writ without remanding the case. The court found that certain evidence submitted by appellant to the trial court did not constitute new evidence for purposes of section 1094.5; because that evidence could have been produced at the administrative hearing but was not, the court found that for purposes of the petition it is inadmissible. The Second District then reversed the trial court's decision and remanded the matter to DMV with instructions to conduct a supplemented hearing on the new evidence regarding petitioner's present medical condition.

Mogilefsky v. Superior Court of Los Angeles (Silver Pictures, et al., Real Parties in Interest),

20 Cal. App. 4th 1409, 93 D.A.R. 15679, No. B072438 (Dec. 10, 1993).

Same-Gender Sexual Harassment Can Be Basis for Cause of Action Under Fair Employment Act

In this writ proceeding, the Second District Court of Appeal considered whether same-gender sexual harassment may be the basis of a cause of action for sexual harassment in violation of the Fair Employment and Housing Act (FEHA), specifically Government Code section 12940(h).

Petitioner Wayne Mogilefsky alleged that he was subjected to sexual harassment and sexual discrimination by his supervisor, Michael Levy, during the course of his employment as creative editor for real parties in interest Silver Pictures, Warner Brothers, and Joel Silver. Specifically, petitioner alleged that, on two occasions, Levy—the president of Silver Pictures—demanded that petitioner stay overnight in Levy's hotel suite. On the first occasion, Levy allegedly informed petitioner that he would receive more money if he cooperated, ordered petitioner to play a pornographic film on the VCR, made lewd and lascivious comments about the film, and asked petitioner how much he would charge to perform acts similar to those depicted in the film. The next morning, Levy allegedly falsely implied to others that petitioner engaged in sex with him. On the second occasion, Levy allegedly referred to petitioner in a profane and degrading manner and inquired repeatedly into petitioner's private life, including questions regarding his prior relationships. Very early the next morning, Levy called petitioner, told him he wanted to sleep next to him, and instructed him to come to his hotel suite. Petitioner alleged that he went to Levy's suite the second time only after being informed by others that he had no choice in the matter, that attendance at the suite was mandatory, that another male employee had been fired for not going to Levy's suite when ordered to do so, and that petitioner should consider the consequences before refusing. Petitioner alleged that these acts were violations of the duties imposed upon real parties in interest by Government Code section 12940, including its prohibitions against discrimination on the basis of gender, asking for sexual favors in return for favorable treatment in the workplace, and making sexual requests with an explicit or implicit quid pro quo consequence in the workplace.

Real parties in interest Silver Pictures, Warner Brothers, and Joel Silver generally demurred to the first cause of action, contending that sexually suggestive remarks by one male to another with no physical touching did not constitute an unfair employment practice under Government Code section 12940. Real party in interest Michael Levy filed a separate demurrer to the first cause of action in which he asserted facts contradictory to those alleged in petitioner's complaint and argued that "[e]ven assuming the truth of plaintiff's allegations, plaintiff only alleges incidents of 'sexually explicit jokes, comments and innuendoes [sic],' and the use of 'profane and sexually explicit language.'" These allegations, Levy argued, could not state a cause of action for sexual harassment as a matter of law. The trial court sustained the demurrers without leave to amend.

On appeal, the Second District explained that Government Code section 12940 defines eleven unlawful employment practices prohibited by FEHA, including sexual discrimination and sexual harassment; the court noted that there is some overlapping of prohibited practices in these two sections, as recognized by cases holding that sexual harassment is a form of discrimination. The court explained that the primary distinction between the two is that an employee alleging discrimination must allege facts demonstrating that he/she was discriminated against "in compensation or in terms, conditions or privileges of employment," whereas an employee alleging sexual harassment need not allege loss of tangible job benefits.

Petitioner's cause of action was for sexual harassment; California caselaw recognizes two theories upon which sexual harassment may be alleged. The first is quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances; the second is hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. Petitioner's first amended complaint invoked both theories by alleging that Levy and one of Levy's employees informed petitioner that he would "receive more money on his writing deal if he came to the hotel suite" (quid pro quo), and by alleging that a hostile, sexually harassing environment existed which disrupted petitioner's "emotional tranquility in the workplace and otherwise interfered with and undermined his personal sense of well being" (hostile environment).

A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put. To state a cause of action on this theory, is it sufficient to allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances. By contrast, a cause of action for sexual harassment on a hostile environment theory need not allege any sexual advances whatsoever. A cause of action on this theory is stated where it is alleged that an employer created a hostile environment for an employee because of that employee's gender. The court noted that, as might be expected, cases sometimes involve a hybrid of these two theories; for example, a hostile work environment may result from inappropriate sexual conduct in the workplace. Under such circumstances, the plaintiff may allege that the unwelcome sexual advances were sufficiently pervasive so as to also alter the conditions of employment and create an abusive work environment.

According to the court, there is "no basis of support in the statutory language for the contention that the legislature intended to limit protection from sexual harassment to male-female harassment. Al-

though the statute does not specify whether it prohibits 'same gender' harassment or 'other gender' harassment, no ambiguity is created by this omission. Common usage indicates that in the absence of a modifying adjective, the legislature intended to prohibit sexual harassment in all cases."

In an effort to avoid the conclusion that the statute applies in this case, real parties in interest urged that the legislature did not intend to "protect members of the empowered majority [men] from one another." In rejecting this contention, the court held that a person subjected to such behavior in California is entitled to the protection provided by Government Code section 12940 regardless of whether he/she is otherwise "empowered." The court was similarly unpersuaded by the policy arguments advanced by real parties in interest. Real parties' expressed fear that freeing "everyone from sexual remarks and conduct" would "put the First Amendment right of free speech on the endangered species list"; according to the court, this argument reveals real parties' superficial understanding of the First Amendment's protections. Nor did the court share real parties' concern that allowing a cause of action for same-gender sexual harassment will "make an inquiry into the sexual orientation of the male supervisor an absolute necessity." The focus of a cause of action brought pursuant to Government Code section 12940 is whether the victim has been subjected to sexual harassment, not what motivated the harasser.

The court therefore concluded that a cause of action for sexual harassment in violation of Government Code section 12940(h) may be stated by a member of the same sex as the harasser, whether based on the quid pro quo theory, the hostile environment theory, or a hybrid of both theories.

CALIFORNIA ATTORNEY GENERAL OPINION

Opinion No. 93-212 (Dec. 30, 1993).

City May Not Make It a Misdemeanor to Disclose Substance of Discussion In Closed City Council Meeting

Senator Robert Presley requested the California Attorney General to issue an opinion on whether a city may adopt an ordinance making it a misdemeanor for any person present during a duly conducted closed session of a city council meeting to publicly disclose the substance of any discussion properly held during the session unless so authorized by the council. Initially, the Attorney General noted that the Brown Act, Government Code section 54950 *et seq.*, requires the legislative bodies of local agencies to hold their meetings in public unless expressly excepted by the Act or impliedly excepted by another provision of law pertaining to confidential communications. The Act contains numerous provisions authorizing the holding of closed sessions; according to the Attorney General, "[t]he public policy reasons for authorizing closed sessions for public body deliberations appear almost as numerous as the individual exemptions contained in the Act itself."

The Attorney General noted that its office routinely observes that it would be "improper" for information received during a closed session to be publicly disclosed without authorization of the governing body as a whole; however, the issue in question pertains solely to the authority of a city to make a crime of disclosing information under such circumstances. In considering this question, the Attorney General noted that a city possesses and may exercise only such powers as are granted it by the Constitution or by statutes, together with those powers that arise by necessary implication from those expressly granted; if an ordinance of a general law city conflicts with state law, it is void under the limited grant of constitutional authority. Under California caselaw, a conflict exists if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Further, when the state has occupied a particular field, not even complementary or supplementary local legislation is permitted.

The Attorney General noted that the Brown Act already contains specific and general criminal sanctions for certain activities, and concluded that "a local misdemeanor ordinance to further enforce the Act's provisions would be in conflict with state legislation either by duplicating it or being supplemental thereto in an area fully occupied by the legislature." Therefore, the Attorney General concluded that a city may not adopt an ordinance making it a misdemeanor for any person present during a duly conducted closed session of a city council meeting to publicly disclose the substance of any discussion properly held during the session unless so authorized by the council.