

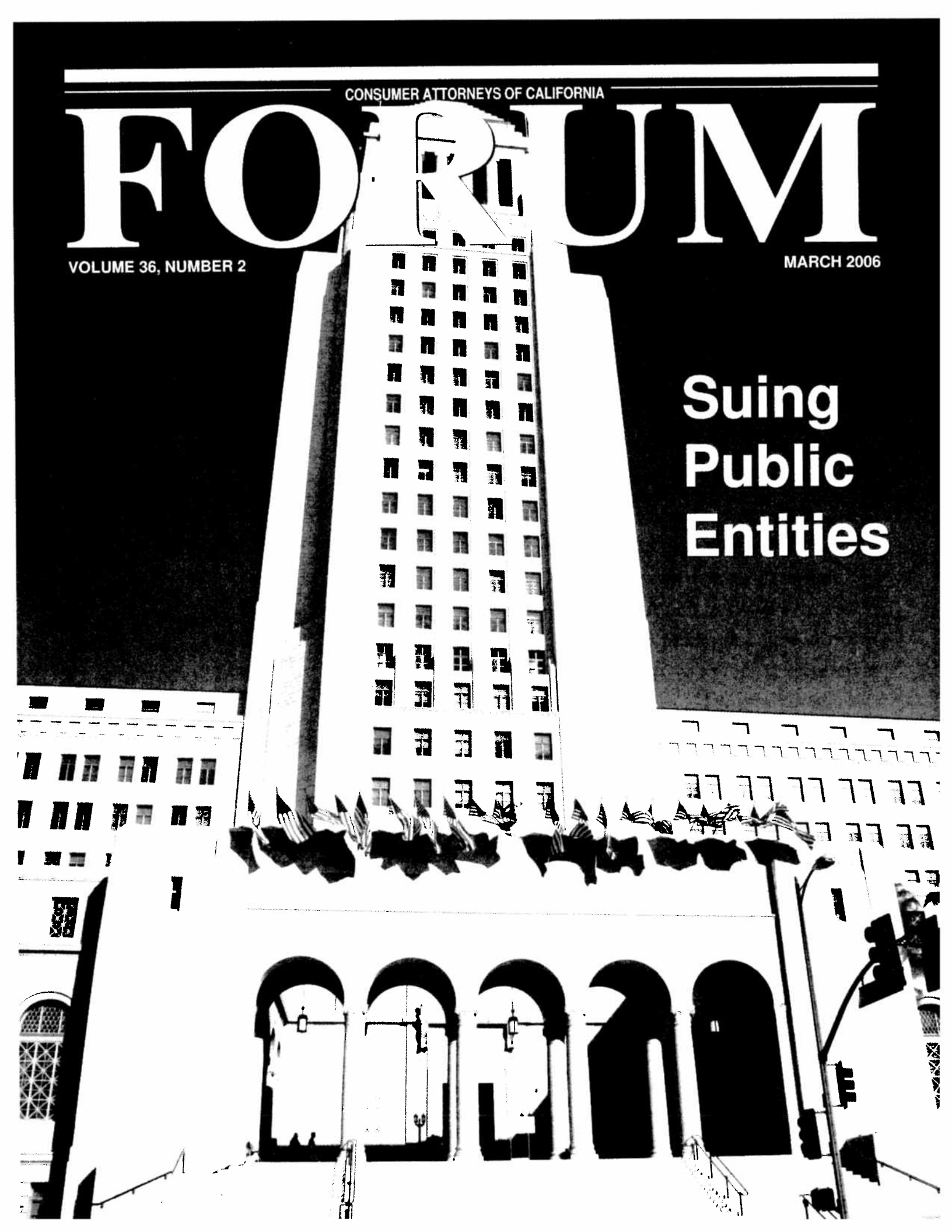
CONSUMER ATTORNEYS OF CALIFORNIA

FORUM

VOLUME 36, NUMBER 2

MARCH 2006

**Suing
Public
Entities**



Commencing Actions Against State and Federal Public Entities: Procedural and Statutory Considerations

By Shaana A. Rahman



Shaana Rahman is with The Dolan Law Firm in San Francisco. She is a member of the Forum Editorial Board.

Evaluating a potential action against a state or federal public entity requires a thorough review of applicable claims filing procedures. Any evaluation also requires an understanding of the statutory basis on which a claimant may pursue an action against a public entity as claims against such entities are more limited in scope than those against an individual actor. This article will address issues of claims filing procedures and potential causes of action in both state and federal forums.

FINDING LIABILITY

Before commencing an action against a state or federal government entity, it is important to evaluate the potential liability of the government entity using the statutory schemes which outline the sometimes restrictive theories of liability that may be alleged against a public entity.

1. Potential Liability of California Public Entities

In California, Government Code sections 810 through 895.8 outline the types of actions that can be commenced against a public entity as well as the limitations. It is important to note that a public entity is not generally liable for an injury unless liability is established via statute. In addition, once you establish that a public entity might be liable for its actions under the Government Code, you must then address the issue of governmental immunity.¹

For instance, the Government Code provides that state and local public entities (and their employees) may be held liable

for injuries in the following limited circumstances: 1) public entities may be held liable for injuries caused by the acts or omissions of their employees acting within the scope of their employment (Gov. Code § 815.2); 2) public entities and their employees may be held liable for injuries caused by a dangerous condition on public property (Gov. Code §§ 835, 840-840.6); and 3) an employee of a public entity may be held liable for acts or omissions that cause injury if the acts or omissions are within the scope of the employee's employment (Gov. Code § 820). However, a public entity is not liable for exemplary damages awarded pursuant to Civil Code section 3294. (Gov. Code § 818.)

The Government Code also addresses specific issues of potential liability relating to incidents involving police and correctional officers, fire fighters, and medical facilities and personnel. (Gov. Code §§ 840-856.6.)

Ultimately, you cannot sue a public entity under the same theories you would use against a private actor. Unless a duty is identified within the Government Code, no action can be pursued against a public entity. Thus, it is important to ascertain whether or not your proposed theory of liability is supported by the Government Code prior to commencing any action.

2. Potential Actions Pursuant to the Federal Tort Claims Act

28 U.S.C.A. § 1346(b) of the Federal Tort Claims Act ("FTCA") provides the authority for actions against a federal government entity. In relevant part § 1346(b)(1) provides:

[T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (28 U.S.C.A. § 1346(b)(1).)

Thus, the FTCA requires that a claimant establish the following: (1) negligent or wrongful conduct, and (2) the scope of employment of the federal employee. While the FTCA provides that the United States, for liability purposes, can be sued as if it was a private person, liability is not the same as that with a private person as there are numerous types of claims that are expressly excluded from coverage as set forth in 28 U.S.C.A. § 2680, titled "Exceptions to the Federal Tort Claims Act."

28 U.S.C.A. § 2680 provides that the following claims cannot be brought against the United States:

(a) Any claim based upon an act or omission of an employee of the

Government, exercising due care, in the execution of a statute or regulation ... or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty ... whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer...

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) repealed

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: provided that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, or after the date of the enactment of this provision, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution...

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combative activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal Intermediate credit bank, or a bank for cooperatives.

Although § 2680 outlines many exceptions to the FTCA, it is not exhaustive. Other claims may be excluded by other statutory provisions and interpretation by courts of the parameters of § 2680.

FILING AND PRESENTING A CLAIM

Before filing a lawsuit for money or damages a potential plaintiff must first submit a timely written claim to the appropriate public entity. (See, Gov. Code § 945.4; 28 U.S.C.A. § 2401.) The failure to submit a proper claim within the required time limitations will bar a claimant from recovery.



SHARON J. ARKIN

ARKIN & GLOVSKY

Phone: 949.455.9300

Fax: 866.294.2501

E-mail: sarkin@arkinglovsky.com

- ▶ AV rated
- ▶ Certified Specialist in Appellate Law*
- ▶ Immediate Past President of Consumer Attorneys of California
- ▶ Los Angeles Magazine "SuperLawyer" in Appellate Practice

GET EXPERT HELP WITH YOUR APPEALS AND WRITS

* By State Bar Board of Legal Specialization

1. California's Government Tort Claims Act Filing Procedures²

A claim against a public entity for personal injury or death or for damage to personal property or crops must be presented to the governmental entity within six months of accrual of the cause of action.³ All other claims must be presented to the governmental entity within one year. (Gov. Code § 911.2.) The date of accrual of a cause of action in personal injury actions is identified as the date of injury. (Code Civ. Proc. § 335.1.) However, some actions, such as medical malpractice actions, accrue only when the injury is discovered. (See Code Civ. Proc. § 340.5.)

A claim must be in writing and must be signed by the claimant or someone on his behalf. Government Code § 910 outlines the required contents of a claim which includes the name and address of the claimant, the date, place and other circumstances of the incident giving rise to the claim, a general description of the injury and/or damage incurred, the names of public employees causing the claimed injury and/or damage and the amount claimed, if less than ten thousand dollars. If the potential liability of the public entity and its employees is the same, a separate claim for damages does not need to be presented as to the employees. However, if an issue arises as to an independent contractor working for a public entity, an independent contractor can be sued without filing a formal claim against the hiring entity as independent contractors are specifically excluded from the Act. (Gov. Code § 810.2.) Any such claims must be completed on the public entities' designated forms. (Gov. Code § 910.4.)

While technical defects in the content of a claim will not invalidate the claim if it "substantially complies" with the statutory requirements, it is a good practice to identify all theories for recovery you intend to assert in the complaint in the claim itself, including all allegations regarding employees of the public entity. (*Phillips v. Desert Hosp. Dist* (1989) 49 Cal.3d 699, 706-707.) If the original claim is defective in some way, a claimant may file an amendment to cure a defect in the claim to include additional or corrected information at any time prior to the expiration of the period for presentation of claims or

before the entity acts on the claim, whichever is later. However, the amended claim must relate to the same transaction or occurrence that gave rise to the original claim. (Gov. Code § 910.6.)

It is important to note that some actions have special requirements. Examples include medical malpractice actions which require that a potential defendant must be given at least 90 days' notice of intent to commence suit pursuant to Code of Civil Procedure § 364. Thus, the action cannot be filed until the 90-day notice period has expired. However, if the health care provider is a public entity or an employee of a public entity, the claimant must comply with the Tort Claims Act and the § 364 "notice of intent to sue" requirement. However, a claimant may file a Tort Claims Act claim and a § 364 notice contemporaneously in the same or separate documents. (*Wurts v. County of Fresno* (1996) 44 Cal.App.4th 380, 386-387.)

If the § 364 notice is properly served during the last 90 days of the applicable limitations period, the statute of limitations is tolled for 90 days. (*Russell v. Stanford Hosp.* (1997) 15 Cal.4th 783, 788-791.) This 90-day tolling period applies to the § 945.6 six-month filing period.

Another example of special filing requirements arises in employment cases which require a claimant to comply with state law administrative filing requirements, which may include a mandatory filing with the Department of Fair Employment and Housing within a year of the bad act, such as a termination. This does not extend the time to file on common-law claims as a claimant still must comply with the Tort Claims Act.⁴

Once completed, a claim form must also be mailed or presented to the proper entity. If the proper entity is not served, a claim may not be in "substantial compliance" with the statutory requirements. (*Johnson v. San Diego Unified School Dist.* (1990) 217 Cal.App.3d 692.) As some agencies will direct claimants to lodge claims with a specific office, it is best to either call the agency you are filing against or look on their website for information regarding claims filing.

After a claim is properly presented, the public entity has 45 days in which to accept or reject the claim, unless this time is extended by the claimant through a

CALIFORNIA'S BEST RECORD RESEARCH

With Specialists
Covering
All of California



Research You Can Trust!

- Civil court research
- Criminal court research
- Tax liens/judgments
- FBN's/DBA's
- Court Case Retrievals
- Real Estate Records

Our expert staff will index, retrieve and review the court and recorder's office records needed to solve your criminal or civil case anywhere in California.

DCW & Associates
7400 Center Ave. Ste. 209
Huntington Beach, CA 92647
www.dcwpi.com

Office: 714.892.0442
Toll Free: 800.899.0442
Fax: 714.892.3543
info@dcwpi.com
Former Federal Agents
PI#12300

stipulation.⁵ The public entity also may notify the claimant within twenty days that the claim fails to substantially comply with the claim filing requirements. If the public entity takes no action, the claim is deemed rejected and the public entity effectively waives any defense based on untimeliness. (Gov. Code §§ 913; 911.3(b).) If the public entity sends a written notice of its rejection or inaction, the notice must warn the claimant of the 6-month statute of limitations for filing suit after rejection. (Gov. Code § 913(b).)

As with any filing requirement, timeliness is important. However, if a claimant misses the statutory deadline for filing a claim, the claimant may apply in writing to the public entity for permission to file a late claim up to one year after accrual of the cause of action. Any such application must state the reason for the delay and include a copy of the proposed claim. (Gov. Code § 911.4.)

If a claim is filed late, without a request for permission filed by the claimant, the public entity must send a notice to the claimant indicating that the claim is late within 45 days of the presentation of the claim. If no such notice is given, the public entity waives the untimely defense. (Gov. Code §§ 911.3(a), 911.3(b).)

The public entity must grant a timely application for leave to file a late claim if there is a showing of mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced by the delay; claimant was a minor during the time for filing; claimant was physically or mentally incapacitated during the claims-filing period and as a result could not present a timely claim; or claimant died during the claims-filing period. (Gov.

Code § 911.6.) If the public entity denies the application to file a late claim, the claimant may petition the court for relief within six months after the application was denied. (Gov. Code § 946.6(b).) If the court then grants the petition for relief, claimant must file suit on the claim within 30 days after the order granting the petition. (Gov. Code § 946.6(f).)

Once the public entity provides proper notice to the claimant of its rejection, a claimant must file suit within six months after delivery or mailing of the notice of rejection. (Gov. Code § 945.6(a)(2).)⁶ The section 945.6 six-month period has been interpreted to allow claimant six calendar months or 182 days, whichever is longer, within which to sue. (*Gonzales v. County of Los Angeles* (1988) 199 Cal.App.3d 601, 605-606.) If the public entity does not give proper notice or gives improper notice, the time is extended to two years from the accrual of the cause of action. (Gov. Code § 945.6(a)(1).)

The six month filing period generally supersedes other applicable statutes of limitation which means that if a claimant does not file within the six month period, the claim is barred even if the statute of limitation on the claim has not yet run.⁷ However, in a personal injury action, not involving the negligence of a health care provider, compliance with the provisions of the Act exempt a claimant from the provisions of the statute of limitations. (*Schmidt v. Southern Calif. Rapid Transit Dis.* (1993) 14 Cal.App.4th 23, 30.)

2. Federal Claims Filing Procedures

28 U.S.C.A. § 2401 provides that claims accruing on and after January 18, 1967 are barred unless submitted in writing to the appropriate federal agency within two years after their accrual⁸ or unless the action is initiated within six months after the date of mailing of the notice of final denial of the claim by the agency to which it was presented. For persons under a legal disability or "beyond the seas" at the time the claim accrues, commencement of their actions must be within three years after the disability accrues. (28 U.S.C.A. § 2401(a).)

If the agency does not formally deny the claim within six months after the claim is filed, a claimant may wait indefinitely

before filing suit. (*Reo v. U.S. Postal Service* (1996) 98 F.3d 73.) However, claimants should be mindful of 28 U.S.C.A. § 2401(a) which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." (28 U.S.C.A. § 2401(a).)

Procedurally, the claims process is fairly straightforward. Claims should be submitted using Government Standard Form 95 "Claim for Damage or Injury" and must be mailed to the agency by certified or registered mail. (28 U.S.C.A. § 2401(b).)

CONCLUSION

Due to the statutory complexity of public entity law, before embarking on such litigation it is worthwhile to clearly outline your theories of liability, and the statutory support for such theories, as well as the filing time line. ■

¹ A thorough discussion of the subject of governmental immunity is found in this edition. (See "Design Immunity," by Emile A. Davis.)

² The title "Tort Claims Act" is somewhat misleading as in California, the Act applies to all claims for money or damages against government entities, including claims arising out of contract. (*Hart v. Alameda County* (1999) 76 Cal.App.4th 766, 774.)

³ Some claims are excluded from the claims filing requirement. Thus, a careful review of such exclusions contained within Government Code § 905 et seq. is required.

⁴ Further information regarding these issues is contained in Jeremy Pasternak's article in this edition.

⁵ If the claim is presented by mail, Gov. Code § 915.2 provides the public entity 5 additional days if mailed within California, 10 days if from another state, and 20 days if from another country.

⁶ The time for filing is not extended if the rejection is sent by mail as CCP section 1013 does not apply to notices of rejection of claims. (*Cole v. Los Angeles Unified School Dist.* (1986) 177 Cal.App.3d 1.) The six month statute of limitations is also not extended for minors.

⁷ The six month deadline applies only to claims based on state law, not claims based on federal law.

⁸ It has been held that a claim "accrues" for limitations purposes when the claimant knows or reasonably should know of both the existence and the cause of injury. (*Slaaten v. U.S.* (1993) 990 F.2d 1038.)

**LEGAL MALPRACTICE
EXPERT WITNESS**

Phillip Feldman, B.S., M.B.A., J.D., A.V.

State Bar Defense (former prosecutor)
Bd. Cert. Legal & Medical Malpractice CA & ABA

Any "case within a case"
Fee Arbitrator 30 Years
Former Judge Pro Tem

www.legalmalpracticeexperts.com
(310) LEG MALP (534-6257)

Email:
LegMalpExpert@aol.com
StateBarDefense@aol.com