

50th Anniversary
 PARMA Annual Conference
 February 20-23, 2024
 Indian Wells, CA

MED-LEGAL PROCESS AND STRATEGY

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OVERVIEW

- Med-Legal Fee Schedule
- Settlement based on PTP reporting (Unrep & Rep)
- Number of panels employee can obtain
- Agreed Medical Evaluators
- ADR Agreements
- PQME Specialty strategy/Disputes over Specialty
- Process to properly obtain a panel
- Grounds for Replacing PQME (but not specialty)
- Process to provide information/documentation to med/legal doctor

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MED/LEGAL FEE SCHEDULE 8 CCR §9795 EFFECTIVE 4/1/2021

- ML-201: \$2,015.00 for a Comprehensive Medical-Legal Evaluation. Records over 200 pages shall be reimbursed at \$3.00 per page. The physician must include a verification of number of pages reviewed.
- ML-203: \$650 for a Supplemental Report request. Review of records in excess of 50 pages that were received as part of the request for the supplemental report shall be reimbursed at the rate of \$3.00 per page. The physician must include a verification of number of pages reviewed.
- ML-204: \$455/hr for Depositions. The physician shall be entitled to fees for all itemized reasonable and necessary time spent related to the testimony, including reasonable preparation and travel time. The physician shall be paid a minimum of two hours for a deposition. §35.5(f) the doctor has to be available for a deposition within 120 days of the notice of deposition. The location should be where the exam was performed or not more than 20 miles from the exam location.
- ML-205: \$325/hr for Review of Sub Rosa Recordings. Real time, billing in ¼ hr intervals. If the sub rosa recordings are received by a physician prior to the issuance of a pending report related to a medical-legal evaluation, the physician may not also bill a supplemental report fee in connection with the review of the sub rosa material.

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MED/LEGAL FEE SCHEDULE 8 CCR §9795 EFFECTIVE 4/1/2021 CONTINUED

- In any formal medical evaluation, the AME or QME must identify:
 - o all information received from the parties;
 - o all information reviewed in preparation of the report; and
 - o all information relied on in the formulation of a medical opinion (LC 4062.3(d)).
- Evaluation of All Body Systems
- More Comprehensive than a PTP evaluation
- Evaluate each claim for risk of additional body parts and/or referral to PQME in new specialty before initiating med-legal process. Check pharmacy records.

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SETTLEMENT BASED ON PTP REPORT

PRO PER EMPLOYEE

- Settlement based on PTP Report should include Fully Executed QME Waiver. If the applicant does not understand English, then the waiver needs to be in the language the employee understands or be translated and signed by an interpreter.
- Include in Stipulations or C&R that employee was advised of his or her right to be evaluated by PQME and Notice of Right to Confer with the Information and Assistance Officer.
- No AME with in Pro Per. LC 4062.1(a).

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SETTLEMENT BASED ON PTP REPORT CONTINUED

- Unrepresented applicant picks doctor from 3-panel list.
- The employee shall NOT be entitled to an additional evaluation should the applicant later become represented after evaluation. LC 4062.1(e). However, either party can request new panel if panel has issued, but the evaluation didn't occur before evaluation. *Romero v. Costco Wholesale* (2007) 72 CCC 824 (significant panel decision)
- Applicant signs form to become legally represented, but withholds it from the Appeals Board. AA advises Court he commonly advises the applicant who to select from panel before filing NOR. Panel is invalid *Johnson v. California Department of Social Services*, 2015 Cal. Wrk. Comp. P.D. LEXIS 224.

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SETTLEMENT BASED ON PTP REPORT CONTINUED

REPRESENTED EMPLOYEE

- LC 4061(i) No issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a Declaration of Readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator.
- LC 4061(i) doesn't preclude parties from settling claims based on a treating physician's opinion. Parties still may settle claims based on a treating physician's reporting, and may walk-through any settlement based on a treating physician's report.

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SETTLEMENT BASED ON PTP REPORTING CONTINUED

REPRESENTED EMPLOYEE

- LC 4061(i) precludes the filing of a DOR only over an issue relating to "the existence or extent of permanent impairment and limitations resulting from the injury without a med-legal evaluation ..."
- The parties still may file DORs on issues of injury arising out of and in the course of employment, statutes of limitation, discovery or any other issues not covered by LC 4061(i).

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SETTLEMENT BASED ON PTP REPORTING CONTINUED

- Alternative Strategy #1: File DOR for Status Conference on issue of response to settlement offer to get attention of AA if no substantive response.
- Alternative Strategy #2: If a significant time has elapsed since PTP MMI report and no objection to DOR based on issues on of permanent disability argue waiver. *Orellana v. Pro Wash, Inc.*, 2016 Cal. Wrk. Comp. P.D. LEXIS 401.

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HOW MANY PQME'S IN AN APPLICANT ENTITLED TO

LC 4062.3 (j) The medical evaluation shall address all contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's initial appointment with the medical evaluator.

CCR tit. 8, § 35.5(e) In the event a new injury or illness is claimed involving the same type of body part or body system and the parties are the same, or in the event either party objects to any new medical issue within the evaluator's scope of practice and clinical competence, the parties shall utilize to the extent possible the same evaluator who reported previously.

Navarro v. City of Montebello (en banc), 79 CCC 418.

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EXAMPLE #1

- DOI July 1, 2017 settles on QME report by stipulation on January 5, 2019. The QME is now retired or otherwise unavailable. On January 15, 2020, represented Applicant re-opens claim for new and further.
- On January 15, 2020, Applicant files new claim for a specific injury of the same date.
- On January 15, 2020, Applicant files new claim for a cumulative trauma.
- On February 2, 2020, AA requests a panel on the CT ending in January 15, 2020.

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EXAMPLE #1, CONTINUED

- Parties make strikes and initial evaluation with PQME is set for April 15, 2020 that moves forward.
- Is Applicant is entitled to additional panel on the other claims after the evaluation? No. The other claims were in existence at the time of the initial evaluation.
- If AA goes online and requests a panel on the other claims, send on objection letter. Make a panel strike to preserve the rights of the client.
- Remedy: File a DOR for an Expediting Hearing or MSC.
- Basis: LC 5502 (b)(3) A medical treatment appointment or medical-legal examination.

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EXAMPLE #2

- Represented Applicant files orthopedic claim with DOI 03/27/2023. PQME Evaluation set for 05/27/2023.
- PQME issues report on June 27, 2023 finding a cumulative trauma to the same body part.
- AA files CT ortho claim ending May 27, 2023 (See LC 5412). Is either party entitled to an additional panel on this claim? Yes.
- While these two claims are still litigated and after evaluation with new PQME on second claim, the Applicant files a third claim for a new ortho injury to the same body part alleging DOI 10/01/2023. Is either party entitled to a third ortho panel? Yes.

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AGREED MEDICAL EVALUATORS

- Prior fact scenario is a good example of where Defendants should consider the use of an AME to address all of Applicant's open claims to reduce the cost of the med-legal process
- Note -94 modifier. AME's bill higher than PQME's.
- Presumption in favor of the opinion of the AME. *Isaeff v. WCAB* (1997) 62 CCC 813 (writ denied).
- When an AME makes a determination that an employee is entitled to benefits, the defendant has the obligation to object to it by seeking further clarification from the doctor. *Jones v. Tulare District Hospital*, 2014 Cal. Wrk. Comp. P.D. LEXIS 593

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AGREED MEDICAL EVALUATORS CONTINUED

- No such presumption in favor of the opinion of the PQME over the PTP.
- Defendants unlikely to prevail in alleging the opinion of the AME is not substantial medical evidence unless opinions are egregious.
- Consider language in AME agreement with opposing party that all claims filed by the applicant within the next 12-24 months go back to the same AME.

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ADR AGREEMENTS (INDEPENDENT MEDICAL EVALUATORS)

- Typical language binding parties by determination of the IME, can not dispute findings at the WCAB for not being substantial medical evidence.
- IMR process vs IME to litigate UR disputes.
- Employees need to be represented by bargaining unit to enter into ADR. Only large entities are allowed to make these agreements.
- AME fee schedule and expedited resolution (in theory?)

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ADR AGREEMENTS (INDEPENDENT MEDICAL EVALUATORS) CONTINUED

- The intent of ADR is to create a separate system for adjudication of industrial injuries rather than going to the Workers' Compensation Appeals Board.
- Under certain circumstances, as authorized by law, eligible employees and employers may, through a collective bargaining agreement, opt to be part of an ADR process for exclusive "initial" jurisdiction to adjudicate workers' compensation injuries.
- Jurisdiction transfers to the appeals board if there is an appeal of an ADR arbitrator's final decision.

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ADR AGREEMENTS (INDEPENDENT MEDICAL EVALUATORS) CONTINUED

Ombudsman

- An ombudsman is defined as a person who acts as a trusted intermediary between an organization and some internal or external constituency while representing the broad scope of constituent interests.
- An ombudsman is also "one that investigates, reports on, and helps settle complaints."
- The ombudsman "stands between, and represents, the citizen before the government."

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ADR AGREEMENTS (INDEPENDENT MEDICAL EVALUATORS) CONTINUED

- ADR has no jurisdiction over death claims because dependents were not party to the agreement. *Shilts, Guest v. Brunton Enterprises, Inc* 2010 Cal. Wrk. Comp. P.D. LEXIS 20
- Inter vivos case, the ADR would have initial jurisdiction over industrial injury and standard workers' compensation benefits, including TD, PD and medical.
- But as soon as the employee dies from the industrial injury, jurisdiction over death benefits would be vested in the WCAB.
- This scenario would lead to the possibility of two cases arising from the same work injury to the same employee being argued simultaneously, in different forums or by different doctors.

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PQME SPECIALTIES

- To evaluate orthopedic injuries: Orthopedic Surgery is preferred over Podiatry, Chiro Medicine, Pain Medicine, Physical Medicine and Rehab., and Occupational Medicine
- Specialists over generalists. Cardiology subspecialty to evaluate heart claim. Neurologists to evaluate a stroke. Oncologist to evaluate cancer.
- Risk of additional panel or consult when choosing a narrow specialty.

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DISPUTES OVER PANEL SPECIALTY

- Party objecting to the specialty must first file dispute with the Medical Director before going to Court. CCR 31.1 (b).
- Make panel strike on disputed specialty, attach letter disputing use of specialty. Dispute must be filed with the Medical Director within a reasonable amount of time. Cancel PQME appointment or this will be considered waiver.
- If the Medical Director doesn't respond to the dispute over panel specialty within a reasonable amount of time (usually 30-60 days), the aggrieved party can file a DOR to present the issue to a WCJ. *Gonzalez v. GG Hospitality*, 2019 Cal. Wrk. Comp. P.D. LEXIS 439

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DISPUTES OVER PANEL SPECIALTY CONTINUED

- Recent panel decisions have denied requests for panel replacements over specialty disputes.
- Applicant allowed panel in Chiropractic despite the claim involving surgery and the use of prescription medication because the Chiropractic QME can still request outside referrals or evaluations for areas outside of his scope of competence. There can still be a second panel in Orthopedic Surgery. *Ramirez v. Jaguar Farm Labor Contracting, Inc.* (2018) 84 CCC 56 (panel decision).

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DISPUTES OVER PANEL SPECIALTY, CONTINUED

- Look for procedural defects in AA's Panel Request. Did AA provide all the relevant information in CCR 30(b)(1)(A) and make a panel request within the appropriate time frames under LC 4060/4061/4062?
- Remedy is to seek panel in specialty of your own choice if AA's panel request is defective. *Espinosa v. Smith Gardens, Inc.*, 2021 Cal. Wrk. Comp. P.D. LEXIS 258; *Godinez v. ABM Building and Energy Solutions*, 2020 Cal. Wrk. Comp. P.D. LEXIS 350.
- Can not rely on defective LC 4061/4062 objection letter of opposing counsel.

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VALID OBJECTION LETTER AND PANEL APPLICATION

- date of injury;
- claim number;
- requesting party;
- reason QME panel is being requested;
- dispute type (that is, LC 4060, LC 4061 or LC 4062);
- name of primary treating physician;
- date of report being objected to;
- date of objection communication;
- specialty of treating physician;
- QME specialty requested; and;
- opposing party's QME specialty preferred (if known);
- File and serve Panel Application including supporting documents within one business day.

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DEFECTS CAN INVALIDATE PANEL!

- Panel invalid when Defendant requested under 4060 instead of 4062. Applicant's Petition for Removal granted. *Campos v. Mt. Diablo Country Club* (2020) 85 CCC 91
- Defendant's failure to specifically identify issue what issue was in dispute made Defendant's 4061 objection letter invalid. *Hazen v. Porterville Unified School District* (2022) 87 CCC 932 (panel decision).
- Panel invalid when Defendant used the prior treaters' report as the basis for an objection. *Godinez v. ABM Building and Energy Solutions*, 2020 Cal. Wrk. Comp. P.D. LEXIS 350
- Panel invalid when specialty of PTP not referenced in Panel Application. *Mariscal v. St. Francis Assisted Care*, 2015 Cal. Wrk. Comp. P.D. LEXIS 22

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LC 4060 DISPUTE

- Only applies if the entire claim is denied, not specific body parts.
- PTP Report is not needed to request Panel in a LC 4060 dispute over compensability.
- A panel request can be made after a claim form is filed.
- A panel request can be made by either party during the 90 day investigatory period after a claim form has been filed. Claim delay or deny letter is sufficient.
- No timeline for requesting a panel under LC 4060, however unreasonable delay can expose the employer to penalties under LC 5814. *Mendoza v. Huntington Hospital* (2010) 75 CCC 634, 646-48 (appeals board en banc).

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LC 4061 DISPUTE

- Dispute over Permanent Disability and Future Medical.
- No specific deadline for objecting to the PTP's MMI Report, but should be reasonable.
- Consider PQME when prior industrial injuries or potential significant non-industrial apportionment because of preexisting conditions or significant non-industrial medical treatment to the same body parts.

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LC 4062 DISPUTE

- Catch-all for disputes over medical determinations not covered under LC 4060 or LC 4061.
- Most commonly used for disputes over industrial causation of specific body parts, work restrictions, and TD status.
- Objection must be made within 20 days of receipt of PTP report if Applicant is represented, 30 days if Applicant is unrepresented.
- Untimely objection to TD status will lead to waiver of right to seek credit for potential TD overpayment. *J.C. Penney Co. v. WCAB (Edwards)* (2009) 74 CCC 826.

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**GROUND FOR REPLACING PQME 8 CCR §31.5(a)
(BUT NOT CHANGE OF SPECIALTY)**

- There are 16 reasons to obtain a replacement PQME list.
- QME on the panel does not practice in the specialty requested by the party holding the legal right to request the panel.
- Failure to schedule within 90-120 days.
- Failure to schedule at location on PQME panel .
- Failure to send out appointment notice within 5 days.
- Failure to issue report within 30 days (subject to extension).
- Two or more doctors in the same practice group.

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**GROUND FOR REPLACING PQME 8 CCR §31.5(a)
(BUT NOT CHANGE OF SPECIALTY)
WHO IS THE PARTY HOLDING THE LEGAL RIGHT TO REQUEST THE PANEL?**

- LC gives the employee the **first opportunity** to schedule the appointment.
- During the **first 10 days following the issuance of a panel**, an **unrepresented employee** has the legal right to schedule the examination, and ;
- Under CCR 31.3(d), **within the first 10 business days after the selection of a QME**, a **represented employee** has the legal right to schedule it;
- Only after those periods does the **employer** have the legal right to schedule the examination.

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**GROUND FOR REPLACING PQME 8 CCR §31.5(a)
(BUT NOT CHANGE OF SPECIALTY) CONTINUED**

- **31.5(a)(2)**: QME on the panel cannot schedule the exam within 90 of the initial request, or if 90 days scheduling limit is waived, then the QME cannot schedule the exam within 120 days of the initial request.
- This is again about the **party holding the legal right to request the panel**.
- The **party holding the strike** is the only party that has the legal right to waive the scheduling limit if the QME is scheduling after the 90th day but before the 120 days of the initial request to schedule the initial evaluation. An applicant also may waive the right to schedule the appointment during the first 10 days.

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**GROUND FOR REPLACING PQME 8 CCR §31.5(a)
(BUT NOT CHANGE OF SPECIALTY) CONTINUED**

- **31.5(a)(12)**: QME on the panel fails to adhere to the timing deadlines in LC 4062.5 and 8 CCR §38.
- 8 CCR §38 says "The time frame for an initial or a follow-up comprehensive medical-legal evaluation report to be prepared and submitted shall not exceed thirty (30) days after the QME, Agreed Panel QME or AME has seen the employee or otherwise commenced the comprehensive medical-legal evaluation procedure.
 - o The "Mailbox Rule" applies: 5 days for mailing.

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LC 4050 REPORTS

- Alternative ground for obtaining medical reports.
- Not admissible as evidence and can not be provided to be med-legal evaluator.
- Applicant can be compelled to appear for an evaluation.
- Potentially used to help Defendant prepare for cross-examination of QME or AME.
- Can be used to assess work restrictions and to provide evidence for the adjuster to accept or deny the claim.
- Applicant can request an attorney or another physician be present.

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LC 4062.3 INFORMATION

LC 4062.3(a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:

- Records prepared or maintained by the employee's treating physician or physicians.
- Medical and nonmedical records relevant to determination of the medical issue.

b. Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.

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LC 4062.3 INFORMATION CONTINUED

c. If an agreed medical evaluator is selected, as part of their agreement on an evaluator, the parties shall agree on what information is to be provided to the agreed medical evaluator.

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LC 4062.3 COMMUNICATION

A. All communications with a qualified medical evaluator selected from a panel before a medical evaluation shall be in writing and shall be served on the opposing party 20 days in advance of the evaluation. Any subsequent communication with the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator.

B. Communications with an agreed medical evaluator shall be in writing, and shall be served on the opposing party when sent to the agreed medical evaluator. Oral or written communications with physician staff or, as applicable, with the agreed medical evaluator, relative to non-substantial matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, do not constitute ex parte communication in violation of this section unless the appeals board has made a specific finding of an impermissible ex parte communication.

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LC 4062.3 COMMUNICATION CONTINUED

C. Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (c), the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.

D. The party making the communication prohibited by this section shall be subject to being charged with contempt before the appeals board and shall be liable for the costs incurred by the aggrieved party as a result of the prohibited communication, including the cost of the medical evaluation, additional discovery costs, and attorney's fees for related discovery.

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**MAXHAM V. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
(2017) 82 CCC 136**

The WCAB focused on the difference between Information and Communication.

"[T]he Code requires the parties' agreement before any "information" is provided to an AME." (Lab. Code, § 4062.3(c))

In contrast, when a party wishes to send a "communication" to an AME, it is necessary only to serve the opposing party with that communication. Obtaining the opposing party's consent regarding a "communication" with an AME is not necessary. (Lab. Code, § 4062.3(f)).

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**MAXHAM V. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
(2017) 82 CCC 136**

b. We thus conclude that a "communication" under section 4062.3 can become "information" if that correspondence or letter contains, references, or encloses (1) records prepared or maintained by the employee's treating physician or physicians, or (2) medical and nonmedical records relevant to determination of the medical issue.

Information can include:

1. Treating reports
2. Vocational Reports
3. Sub Rosa
4. Any other piece of evidence that could be considered by the evaluator.

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MAXHAM: INFORMATION VS. COMMUNICATION

Ordinarily, however, advocacy letters discussing legal positions or decisions would not constitute "information" as defined by section 4062.3(a)."

Correspondence engaging in "advocacy" or asserting a "legal or factual position" can, however, cross the line into "information" if it has the effect of disclosing impermissible "information" to the AME without explicitly containing, referencing, or enclosing it. Misrepresentation of case law or legal holdings, engaging in sophistry regarding factual or legal issues, or misrepresentation of actual "information in a case are three ways in which a party might attempt to convey purported "information" to a medical examiner to which the opposing party has not agreed."

The WCJ retains wide discretion in determining these matters.

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QUESTIONS?

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