



Litigation Practice Tip - July 2023

Article I, Section 7 of the California Constitution: it's not your con law professor's Due Process Clause

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Many of our clients live with the constant threat of arbitrary government action: a mistaken denial of rental assistance needed to stave off eviction; a miscalculation of subsistence benefits; a wrongful denial of needed health care coverage. When these actions are taken without adequate advance notice or a reasonable opportunity to be heard, one remedy is a lawsuit claiming violation of the Due Process Clause.

But which Due Process Clause, and does it matter? Article I, Section 7 of the California Constitution, exactly like its more famous Fourteenth Amendment counterpart, prohibits a state or local government from depriving any person of "life, liberty, or property, without due process of law" The identical words, however, mask fundamental differences.

No need for property interest

Under the federal case law taught in national law schools, "[t]o have a property interest in a [statutory] benefit [triggering due process protections], a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The federal courts have imposed similar restrictions on when deprivation of a liberty interest can invoke due process protections.

That changed in California with *People v. Ramirez*, 25 Cal. 3d 260 (1979). The California Supreme Court in *Ramirez* criticized the rigid federal approach as inconsistent with the fundamental values underlying due process and undervaluing "the important due process interest in recognizing the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society." *Id.* at 267.

The state high court instead substituted a more flexible approach in which "the issue of critical concern" is "what procedural protections are warranted in light of governmental and private interests." *Id.* at 268. That means litigants challenging a denial of a statutory benefit on due process grounds no longer need to identify a property or liberty interest that has been infringed. Rather, a litigant must "identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution" *Gresher v. Anderson*, 127 Cal. App. 4th 88, 105 (2005).

The statutory benefit need **not** be an entitlement. Due process protections might apply even if the decision to grant the benefit is completely discretionary. *Ramirez*, 25 Cal. 3d at 267; *see, e.g., Saleeby v. State Bar*, 39 Cal. 3d 547, 557 (1985) (holding that applicants for payments from a State Bar-administered fund were entitled to due process protections despite a State Bar rule providing that "[a]ll payments from the fund shall be a matter of grace and not of right and shall be in the sole discretion of the State Bar of California.").

Navigating the four-part Ramirez test

Of course, that due process applies does not dictate the result of a case. The question then becomes how much process is due.

On this question, *Ramirez*, 25 Cal. 3d at 269, partially borrowing from federal case law, requires trial courts to weigh four factors. The first is the “private interest” involved. This factor should almost always favor legal services clients, especially when deprivation of a statutory benefit threatens loss of a roof over their heads, food on their tables, or their very health.

The second *Ramirez* factor is often the most difficult due process question. Courts must consider the extent to which the procedures currently used run “the risk of an erroneous deprivation” and “the probable value, if any, of additional or substitute procedural safeguards.” *Id.* Showing that a challenged practice contains a high percentage of erroneous denials would be ideal, but unless the government is unusually cooperative in auditing its own processes and timely sharing that information in discovery, that might not be possible. But since the test is the “risk” of erroneous deprivation, plaintiffs have often prevailed in due process cases by pointing to all the points in the decision-making process where factual errors could be made, especially when they couple that with anecdotal evidence of actual errors. Plaintiffs must also convince the court that “substitute procedural safeguards,” i.e., the procedures plaintiffs seek, would likely result in fewer erroneous denials, or at least a fairer process.

Often, the due process issue is whether claimants must be afforded a hearing to challenge a government action. Generally, legal services clients should seek due process procedures that allow them to testify orally to a decision-maker, in a formal hearing or otherwise.^[1] The seminal opinion that best extols the virtue of providing such an opportunity to be heard is *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Court explained that “[w]ritten submissions are an unrealistic option for most [welfare] recipients” in part because “they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important.” *Id.* at 269. *Cf. Elkins v. Superior Ct.*, 41 Cal. 4th 1337, 1367–68 (2007) (invalidating on statutory grounds a local rule and order prohibiting direct oral testimony in family law cases, stating “[w]e are most disturbed by the possible effect the rule and order have had in diminishing litigants’ respect for and trust in the legal system.”).

The third *Ramirez* factor diverges from federal law in that it requires courts to consider “the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official.” 25 Cal. 3d at 269. Legal services counsel should emphasize this interest, bolstering the point with quotes from *Ramirez* itself and perhaps declarations from plaintiffs stating how they felt when they were deprived of an important benefit without being told exactly why or given a meaningful opportunity to tell their side of the story.

Finally, a court evaluating a due process claim must consider “the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 269. Counsel should carefully scrutinize claimed estimates of the cost of providing fair procedures, as government agencies have a well-earned reputation for creative accounting of such costs. See, e.g., *Conlan v. Shewry*, 131 Cal. App. 4th 1354, 1376 (2005) (“[t]he assertion that complying with this court’s order will cost the Department between \$3.35 million and \$8.04 billion . . . is, to put it mildly, preposterous.”).

What about federal due process claims?

Given the advantages of state due process law over its federal counterpart, should counsel still assert Fourteenth Amendment violations in a state court complaint? This is a case-by-case decision.

The main reason for foregoing any claim under the Fourteenth Amendment is that the defendant can remove the case to federal court under 28 U.S.C. § 1441. If that is an undesirable result, the plaintiff can amend the complaint to remove the federal claims, which will ultimately result in a remand back to state court. But that can be time-

consuming.

On the other hand, there are at least two advantages to including a federal due process claim. First, federal civil rights actions seeking monetary relief are exempt from the Government Claims Act, which imposes procedural and substantive limits on government liability. *Williams v. Horvath*, 16 Cal. 3d 834 (1976).

And second, in cases where applicable state law does not contain a fee-shifting provision, a plaintiff prevailing under the federal Due Process Clause is likely eligible for an attorneys' fees award under 42 U.S.C. § 1988, which authorizes fee awards to plaintiffs who prevail under 42 U.S.C. § 1983. See *Green v. Obledo*, 161 Cal. App. 4th 678 (1984) (a suit alleging violations of federal welfare law was in essence a § 1983 action, entitling the prevailing plaintiffs to fees under § 1988).

Please feel free to [contact me](#) if you have any questions.

[1] I said “generally” because every case is different. As the *Ramirez* Court itself observed, “due process is flexible” and sometimes more limited protections are warranted. 25 Cal. 3d at 268-69.



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