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Pre-Disciplinary Process: Basics for Skelly

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Introduction

- Skelly Basics
- Nuts & Bolts
- The Skelly Meeting
- Skelly Officer Role, Mindsets & Cautions
- Best Practices
- Union Tactics
- After the Skelly Meeting
- Writing the Skelly Decision
- Final Action After the Skelly Decision
- What If There's a Skelly Violation?
- Q's & A's

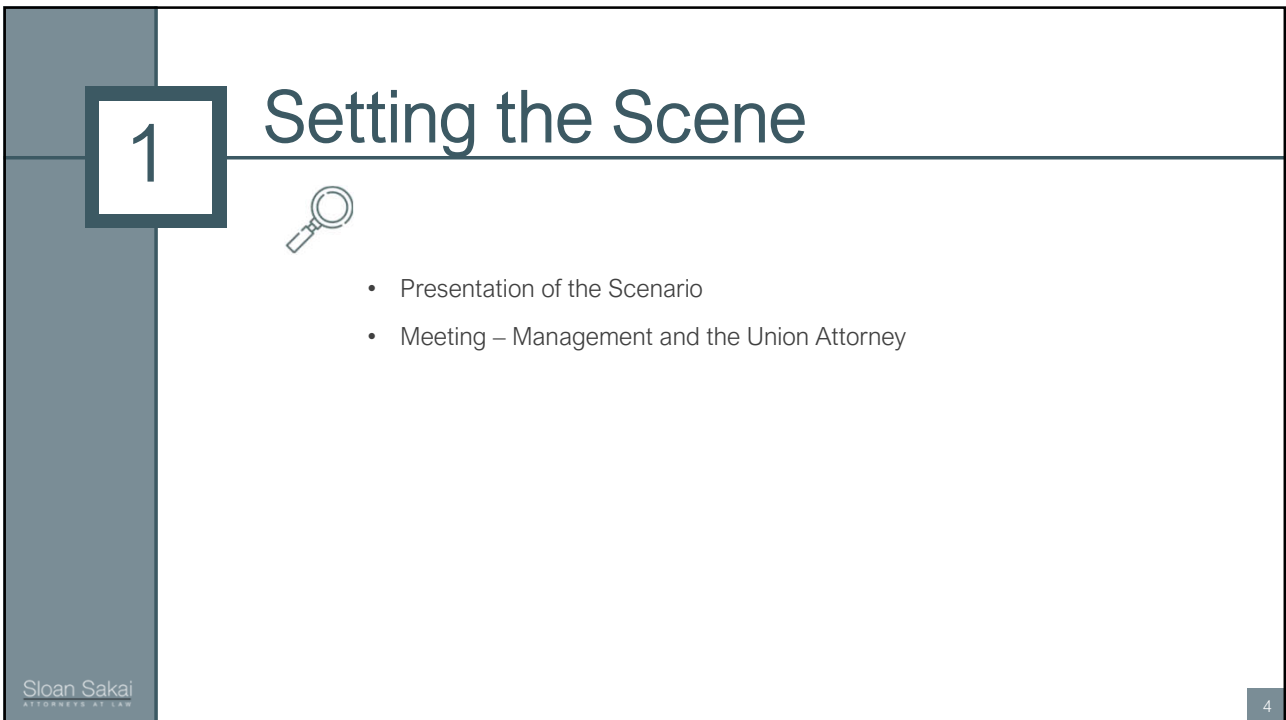
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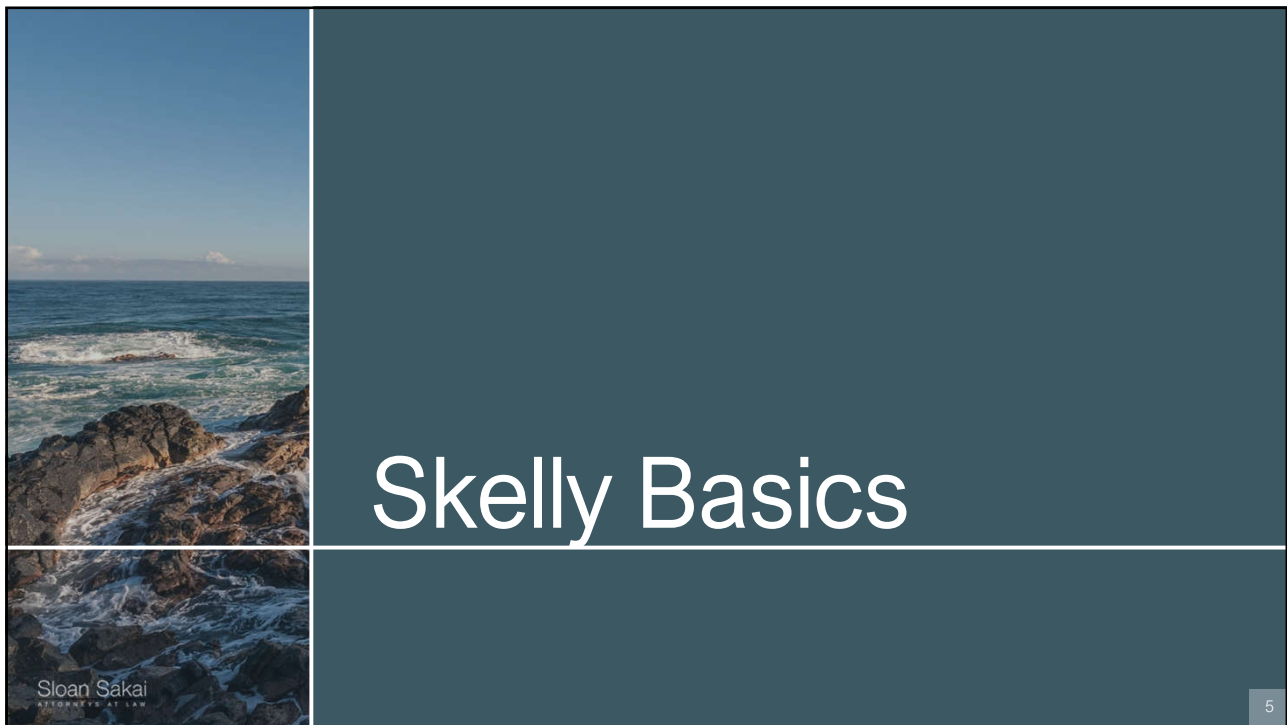
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A presentation slide with a white background and a dark teal header. On the left, there is a dark teal vertical bar containing a white square with the number "1". The title "What Is Skelly?" is written in a large, dark teal, sans-serif font. Below the title, there is a magnifying glass icon followed by the text "Process by which permanent employees have a right to receive a review of proposed serious discipline before it is implemented". Below this, there is a bulleted list of points. In the bottom left corner, it says "Sloan Sakai ATTORNEYS AT LAW". In the bottom right corner, there is a small grey box with the number "6".

1 What Is Skelly?

 *Process by which permanent employees have a right to receive a review of proposed serious discipline before it is implemented*

- This is a Due Process requirement for employees with a “property interest” in their employment
- *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194
 - At a minimum, pre-disciplinary safeguards “must include”:
 - Notice of the proposed action,
 - The reasons therefore,
 - A copy of the charges and materials upon which the action is based,
 - and the right to respond, either orally or in writing, to the authority initially imposing discipline.

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1 What Is Skelly?

- The process applies when the department issues a notice of proposed discipline and before it precedes implementation of discipline
- The focus is whether the proposed discipline should be sustained, modified, or rejected
- A relatively disinterested person – not ordinarily the person who proposed the discipline – serves as the Skelly officer

Union Viewpoint:

- Purpose/goals of the Skelly process
- Why the process is important from the union perspectives

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Nuts and Bolts

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Nuts and Bolts



WHEN DOES SKELLY APPLY:

- Suspensions (typically five days or more)
- Demotions
- Reductions in pay
- Terminations
- AWOL/automatic resignation cases (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3th 1102)
- Layoffs in certain circumstances
 - *Levine v. City of Alameda* (9th Cir. 2008) 525 F.3d 903
 - *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166
- Before placement on administrative leave *without pay* (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95)
- Terminations due to disability – medical separations
- Forced disability retirements

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Nuts and Bolts



WHEN DOES SKELLY NOT APPLY?

- At-will employment
- Probationary employment
- Written Reprimands
- Transfers and Reassignments
- Negative Evaluations
- Short suspensions (typically less than 5 days) or lesser forms of discipline (trigger often depends on local rule)
- Layoffs in certain circumstances per prior slide

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Nuts and Bolts



BEGINNING THE PROCESS

- Employer has investigated allegations of wrongdoing
- Employer has prepared a “Skelly” Notice containing:
 - ✓ Statement of facts constituting wrongdoing
 - ✓ Reference to rules the conduct violated
 - ✓ Reference to aggravating and mitigating factors
 - ✓ Reference to personnel file contents and/or disciplinary history
 - ✓ The proposed penalty
- Employer has compiled:
 - ✓ A copy of the materials upon which the action is based (*Skelly v. State Personnel Board* (1995) 15 Cal. 3d 194, 215)
 - ✓ At a minimum, the employer must provide “materials amounting to the substance of the relevant supporting evidence” evaluated before proposing discipline (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264).
- Employer has selected a Skelly Officer

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Nuts and Bolts



Serve the Skelly Notice on the employee

- Notice of right to Skelly review should include a reasonable deadline for the employee to respond.
- Discussion of Dos and Don'ts:
 - ✓ Methods of Service
 - ✓ Timing of Service
 - ✓ What is a reasonable deadline for the employee to respond?
 - ✓ Should the Notice include a date on which discipline will be imposed if no response by the employee is provided?
 - ✓ Should the Notice advise the employee s/he has a right to a representative at the Skelly Meeting?
 - ✓ Should all the materials be provided with the Notice or should the employee simply be notified he/she can request the materials?



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A presentation slide with a white background and a dark teal vertical bar on the left. A large number "3" is inside a white square with a teal border on the teal bar. The title "The Skelly Meeting" is in a large, dark teal font. Below the title, the question "Who should be present?" is written in a smaller, dark teal font. There are two sections: "Management" and "Employee". The "Management" section has an icon of a person with three lines below them representing subordinates, and a list of bullet points: "Manager most knowledgeable?", "Investigator?", "Employer's legal counsel?", "Notetaker?", and "Representative(s)?". The "Employee" section has an icon of a person with a dollar sign in a circle behind their head, and a list of bullet points: "Representative(s)?", "Shop stewards?", "Witnesses?", and "Support person? Spouse/partner?". The logo "Sloan Sakai ATTORNEYS AT LAW" is in the bottom left, and the number "14" is in a small white box in the bottom right.

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Representational Rights



- Employee has right to be represented by union representative or attorney
- Employer is not required to advise employee of right to representation unless required by MOU/CBA or local rule
- Representative must be available within a reasonable time
- Representative's role
- What are the parameters of a permissible response by a representative?
 - *Is the employee required to speak or answer questions?*
 - *Can the employer control the length, tone, content, or manner of the response provided?*

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The Skelly Meeting

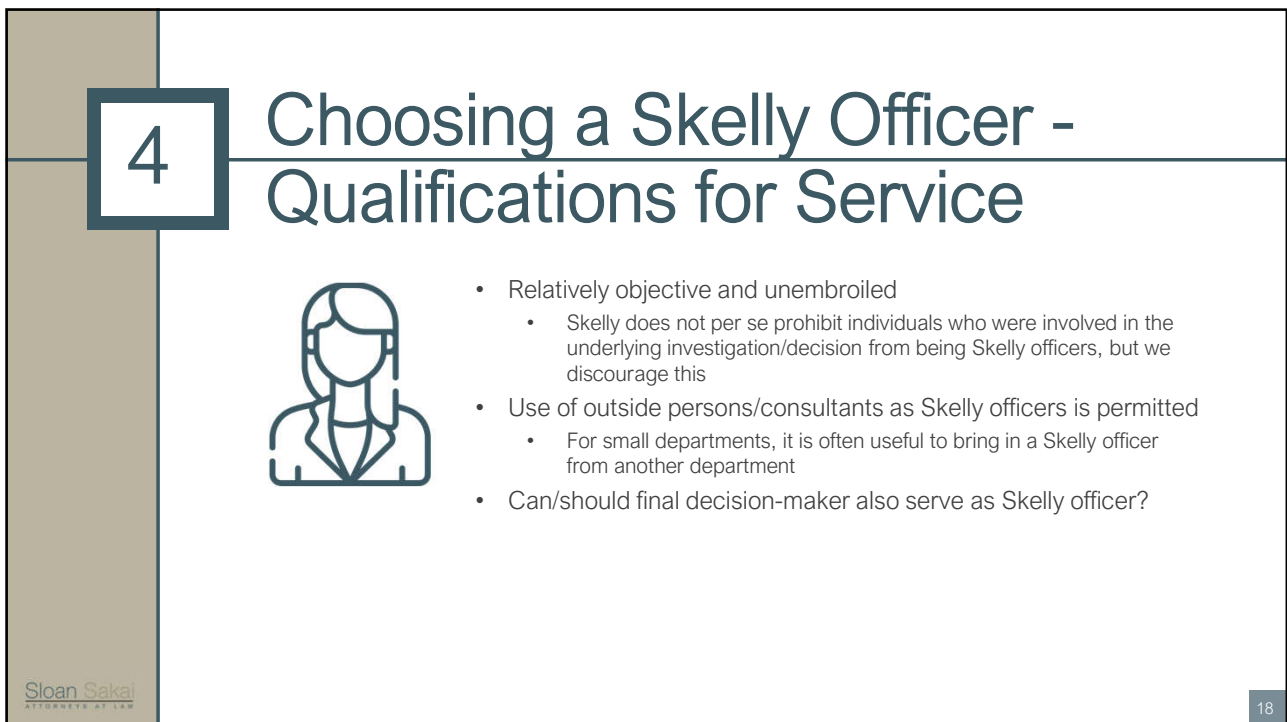


Scenario



A slide with a dark teal background. On the left, there is a vertical strip of a photograph showing waves crashing against dark rocks. The text 'Skelly Officer Role, Mindsets And Cautions' is written in large white font on the right side. In the bottom left corner of the photo strip, the text 'Sloan Sakai ATTORNEYS AT LAW' is visible. In the bottom right corner of the slide, the number '17' is displayed in a small white box.

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A slide with a white background and a dark teal border. On the left, a dark teal square contains the number '4'. To the right of this square, the title 'Choosing a Skelly Officer - Qualifications for Service' is written in dark teal. Below the title, there is a line-art icon of a person's head and shoulders. To the right of the icon, there is a bulleted list of three points. In the bottom left corner, the text 'Sloan Sakai ATTORNEYS AT LAW' is visible. In the bottom right corner, the number '18' is displayed in a small white box.

4 Choosing a Skelly Officer - Qualifications for Service

- Relatively objective and unembroiled
 - Skelly does not per se prohibit individuals who were involved in the underlying investigation/decision from being Skelly officers, but we discourage this
- Use of outside persons/consultants as Skelly officers is permitted
 - For small departments, it is often useful to bring in a Skelly officer from another department
- Can/should final decision-maker also serve as Skelly officer?

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4 Role of Skelly Officer



Do:

- Review materials
- Listen to the presentation made by the employee and the employee's representative
- Take good notes or record the meeting
- Determine whether the employee has presented sufficient information to persuade that the recommended discipline is somehow wrong in the facts or penalty
- Endeavor to conduct an objective review – be open minded



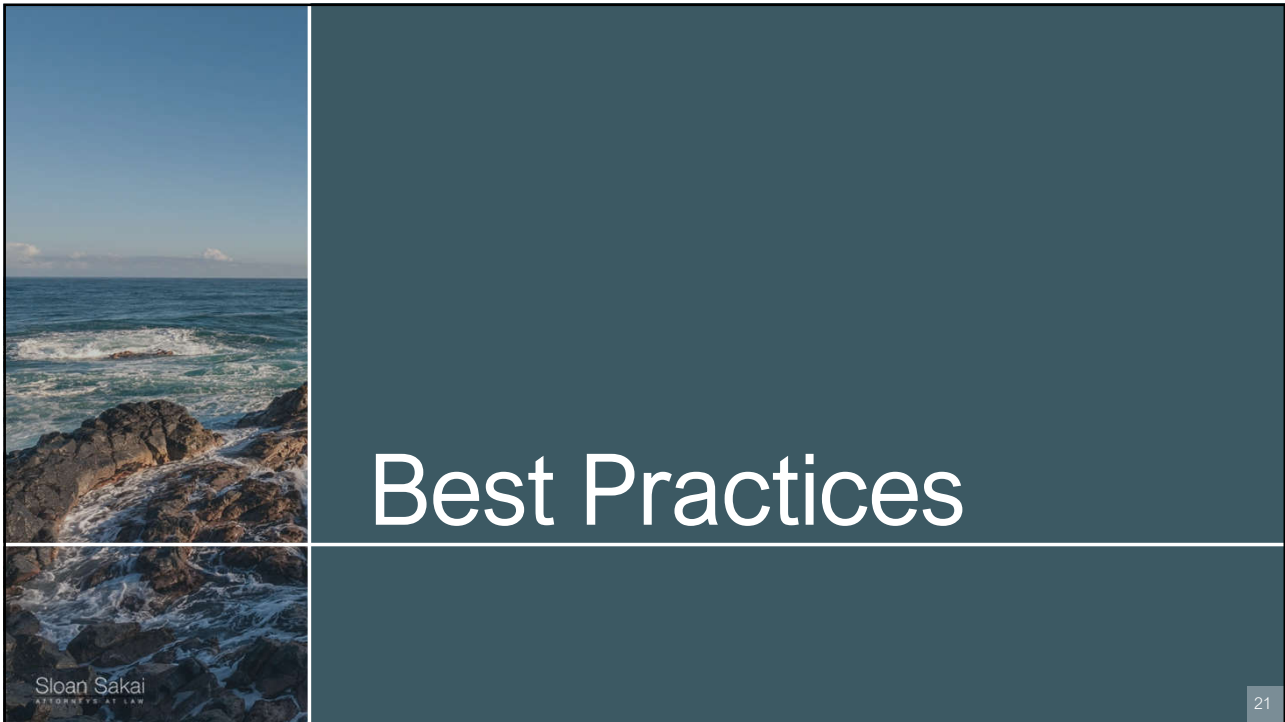
Don't:

- Conduct a detailed or independent investigation
- Add new charges during the Skelly Process

4 Key Skelly Officer Cautions






- Remember:
 - Everything is discoverable (except attorney/client privileged matters)
 - The Skelly officer may be called as a witness in an ensuing appeal of disciplinary action
- Decision-making time frame



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5 Best Practices for Management

-  If the employee objects to tape-recording, consider whether to proceed without taping rather than cancelling the meeting
 - don't cancel the meeting
 - use a good note-taker and have a witness
-  Remember that communications between the management representative and the Skelly officer are not ordinarily privileged – be careful about “briefing” the Skelly officer
-  Remember that settlement discussions during a Skelly hearing are not necessarily privileged and can come back to management as an allegation of “constructive termination”

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A presentation slide with a dark teal background. On the left, a white square with a gold border contains the number "6". To the right of this square, the title "Union Tactics" is written in a large, white, sans-serif font. Below the title, there is a line-art icon of two chess pieces: a king and a pawn. To the right of the icon is a bulleted list of union tactics. In the bottom left corner, the logo "Sloan Sakai ATTORNEYS AT LAW" is visible. In the bottom right corner, the number "24" is displayed in a small white box.

- Requests for continuance of the Skelly meeting
- Claims of Skelly officer bias or partiality
- Claims of inadequacy/incompleteness of the Skelly packet
- Demands for information
- Demanding that witnesses be allowed to testify
- Demanding cross-examination of management representatives
- Disrupting the meeting
- “The Rapoport Gambit”
- “Let’s Make a Deal”
 - Holding discipline in abeyance
 - Seeking forfeiture of leave rather than unpaid suspension
 - Last Chance Agreements

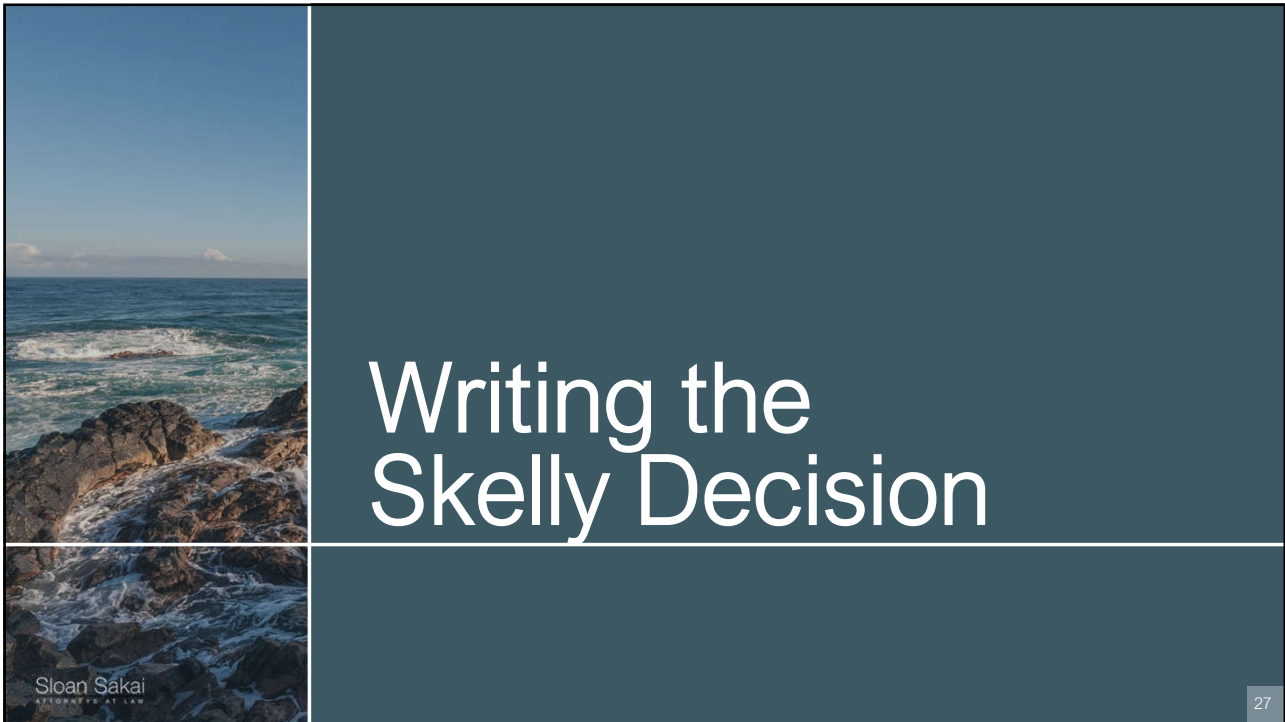
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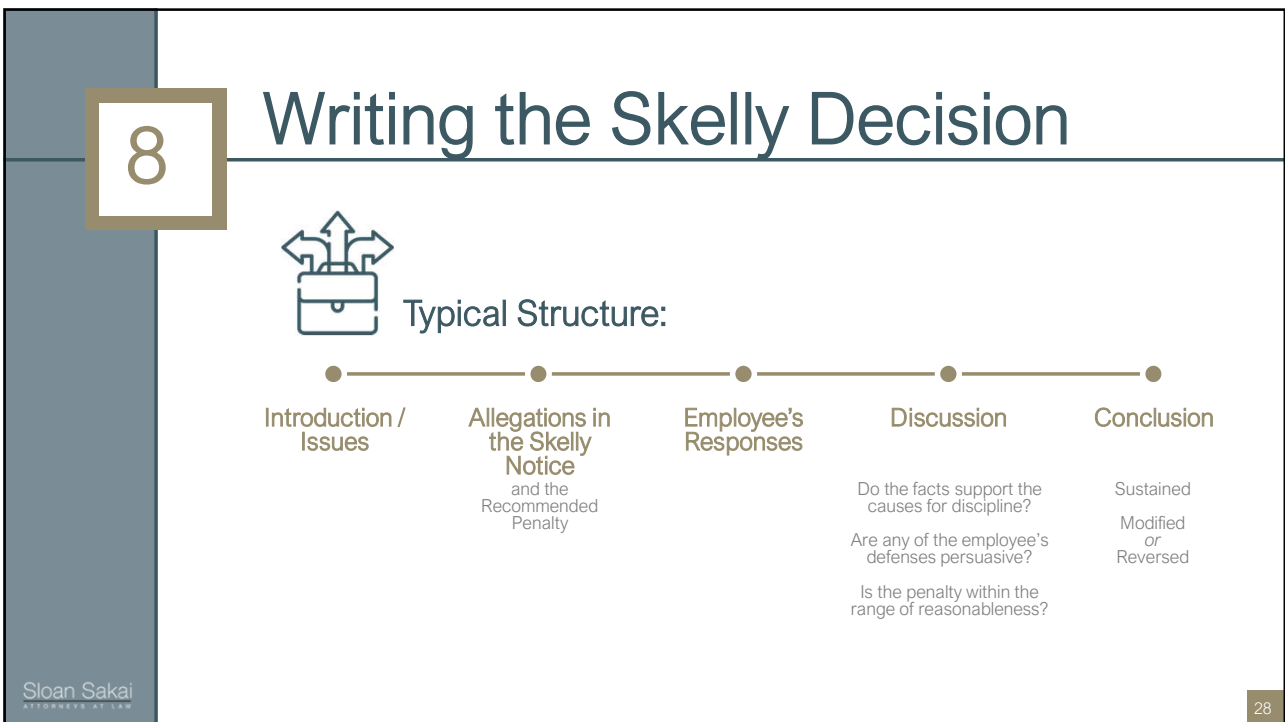
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A presentation slide with a light beige background. On the left, there is a vertical bar with a dark beige square containing the number "7". To the right of the bar, the title "After the Skelly Hearing" is written in a large, dark brown, serif font. Below the title, there are two icons: a clipboard with a checklist and a pencil, and a circle with a diagonal slash through it. To the right of these icons are two bulleted lists. The first list is titled "Key points for the Skelly officer to assess:" and contains four items. The second list is titled "The Skelly officer should NOT:" and contains four items. In the bottom left corner, the logo "Sloan Sakai ATTORNEYS AT LAW" is visible. In the bottom right corner, the number "26" is displayed in a small dark beige box.

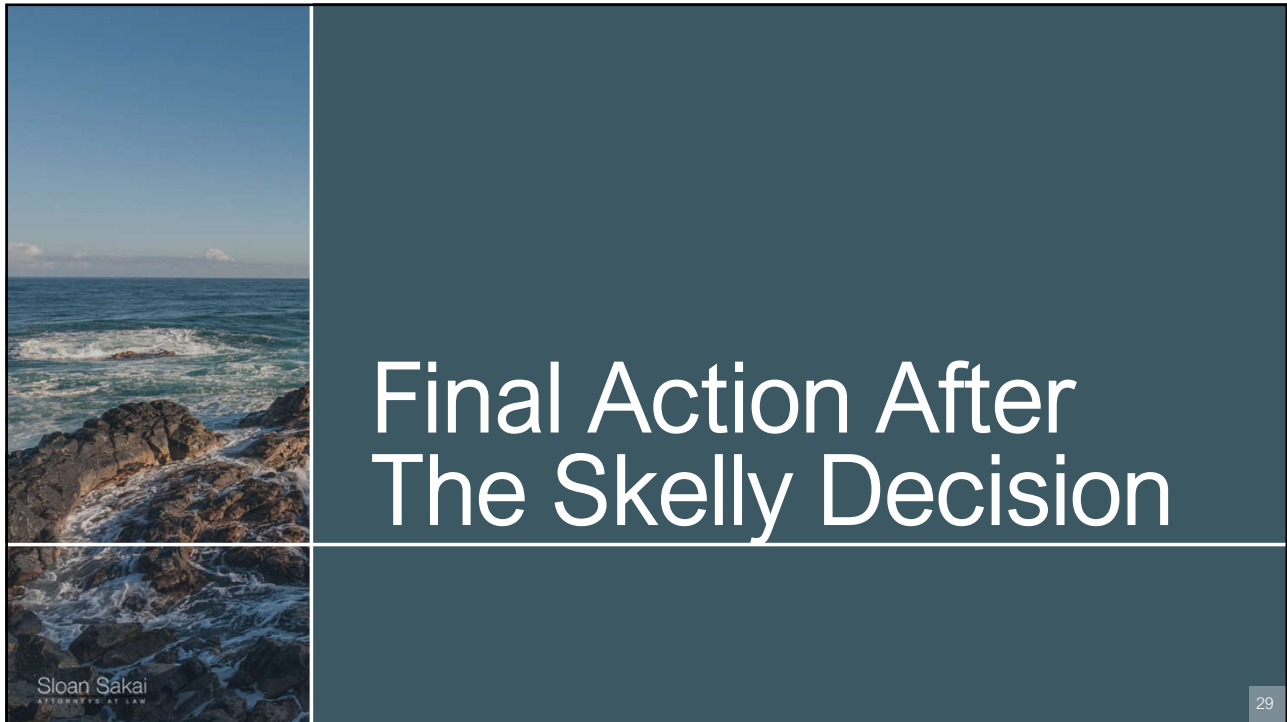
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A presentation slide with a dark teal background. On the left, there is a vertical strip with a white square containing the number "9". The main title "Final Action After the Skelly Decision" is written in a large, dark teal, sans-serif font. Below the title, there is a dark teal box containing a white icon of a hand holding a document and the text "After the Skelly Report, a Final Notice of Discipline is Prepared". Below this box is a bulleted list of five points. In the bottom left corner of the slide, the logo "Sloan Sakai ATTORNEYS AT LAW" is visible. In the bottom right corner of the slide, the number "30" is displayed in a small white box.

9 Final Action After the Skelly Decision

 After the Skelly Report, a Final Notice of Discipline is Prepared

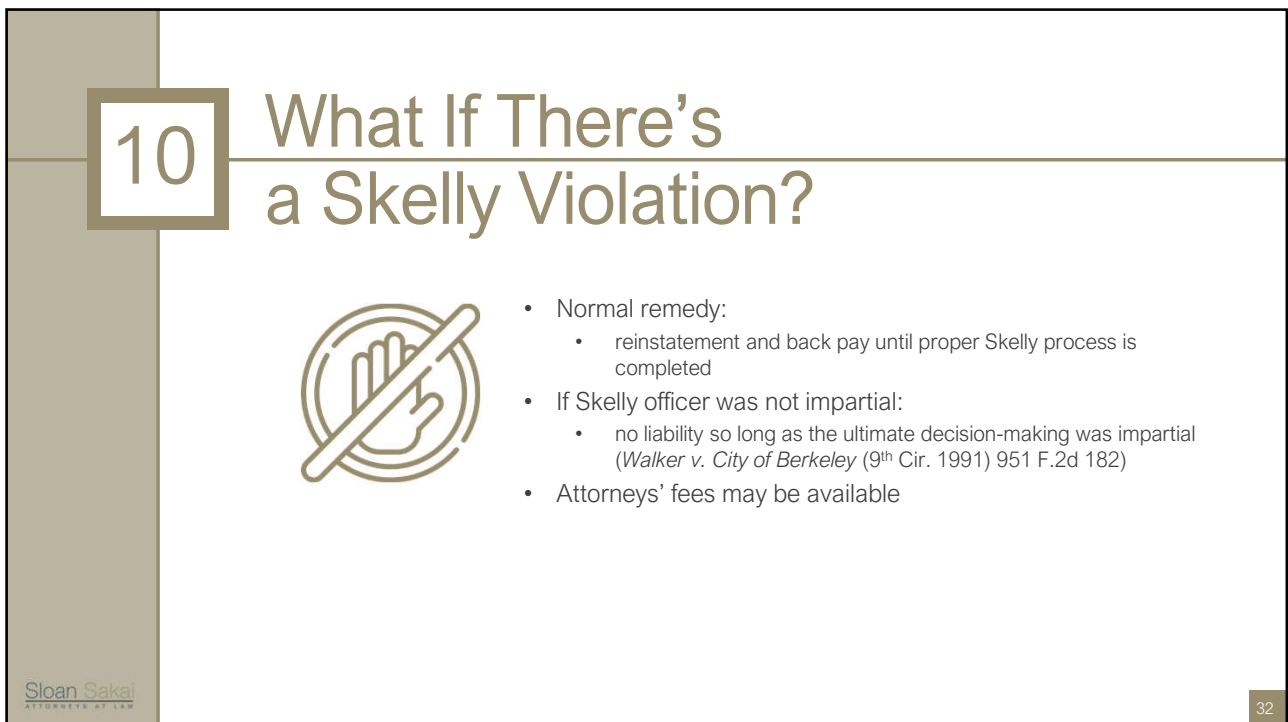
- If the charges are sustained in whole or in part, the final decision-maker determines level of discipline – which is typically not increased but may be reduced
- The final decision-maker cannot add new rule violations or new evidentiary bases for discipline – any new causes would need to be reviewed and potentially investigated and made the subject of a later Skelly notice
- The final decision-maker will typically attach the Skelly notice and attachments to the notice of final action
- The final decision-maker needs to be mindful of any time limits:
 - Imposed by a Collective Bargaining Agreement or local rules
 - For public safety officers and firefighters, once the decision to impose discipline is made, the employee must be informed within 30 days

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Slide 31 features a dark teal background with a white title. On the left, there is a vertical strip showing a photograph of a rocky coastline with waves crashing against the shore under a clear blue sky. The text 'Sloan Sakai ATTORNEYS AT LAW' is visible in the bottom left corner of this strip. The main title 'What If There's a Skelly Violation?' is centered in large white font. A small grey box with the number '31' is in the bottom right corner.

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Slide 32 has a light beige background. A large number '10' is enclosed in a square box on the left. The title 'What If There's a Skelly Violation?' is in a large, dark font. Below the title is a circular icon with a hand and a diagonal slash through it, indicating prohibition. To the right of the icon is a bulleted list. The text 'Sloan Sakai ATTORNEYS AT LAW' is in the bottom left corner, and a small grey box with the number '32' is in the bottom right corner.

10 What If There's a Skelly Violation?



- Normal remedy:
 - reinstatement and back pay until proper Skelly process is completed
- If Skelly officer was not impartial:
 - no liability so long as the ultimate decision-making was impartial (*Walker v. City of Berkeley* (9th Cir. 1991) 951 F.2d 182)
- Attorneys' fees may be available

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