



## Biography



### Michael M. Berger

Partner

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#### Education

University of Southern California, LL.M., 1968 (in real property).

Yale University, Graduate Law School, 1968.

Ford Fellow for work in Urban Law.

University of Southern California, Graduate Law School, 1967.

Title Insurance and Trust Company Fellow for work in Real Property Law.

Washington University School of Law, J.D., 1967.

Brandeis University, 1964.

#### Profile

Michael Berger is one of California's preeminent appellate lawyers and is co-chair of Manatt's Appellate Practice Group. One of the top land use and condemnation lawyers in the United States, his appellate cases have involved planning, zoning, eminent domain, various kinds of business litigation, landslides, contract, due process, equal protection, defective construction, nuisance, insurance and environmental law.

Mr. Berger has argued four cases before the United States Supreme Court, as well as cases before appellate courts throughout California, numerous federal courts of appeal and other state supreme courts. He is also the frequent author of amicus curiae briefs in various appellate courts, particularly the U.S. Supreme Court, pressing client interests in important pending cases.

#### Representative Matters

##### Appellate Matters

- ▶ *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (whether a land use moratorium is a taking of property must be decided on a case-by-case basis).
- ▶ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (right to Seventh Amendment jury trial and Fifth Amendment compensation for regulatory taking).
- ▶ *Preseault v. ICC*, 494 U.S. 1 (1990) (federal "rails-to-trails" statute is valid under the Commerce Clause; however, compensation may be sought in the Claims Court under the Just Compensation Guarantee).
- ▶ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (Constitution requires just compensation for regulatory taking of property).
- ▶ *Metropolitan Water Dist. v. Campus Crusade for Christ*, 2007 WL 2079776 (2007) (restricting role of condemnation trial judge to gatekeeper on value issues).
- ▶ *Mt. San Jacinto Community College Dist. v. Superior Court*, 40 Cal. 4th 648 (2007) (determination of date of value in eminent domain cases).

*Regency Outdoor Advertising v. City of Los Angeles*, 39 Cal. 4th 507 (2006) (compensability of blocked billboards).

- ▶ *People ex rel. Dept. of Transportation v. Southern California Edison Co.*, 22 Cal. 4th 791 (2000) (computation of interest due for prejudgment possession in eminent domain).
- ▶ *City of Manhattan Beach v. Superior Court*, 13 Cal. 4th 232 (1996) (where deed is ambiguous, extrinsic evidence may be used to demonstrate fee transfer).
- ▶ *State Farm Fire & Cas. Co. v. Von Der Lieth*, 54 Cal. 3d 1123 (1991) (third-party negligence is a covered peril under an "all risk" homeowners' insurance policy).
- ▶ *County of Los Angeles v. Berk* (1980) 26 Cal. 3d 201 (years of adverse use shows property impliedly dedicated to public).
- ▶ *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86 (1979) (victims of airport nuisance may recover damages for emotional distress).
- ▶ *Britt v. Superior Court*, 20 Cal. 3d 844 (1978) (First Amendment precludes governmental inquiry into plaintiffs' discussions about lawsuit; interrogatories re medical history limited to injury being litigated).
- ▶ *City of Los Angeles v. Decker*, 18 Cal. 3d 860 (1977) (government attorneys owe duty to litigate fairly and not to mislead jury).
- ▶ *South Coast Regional Commission v. Gordon*, 18 Cal. 3d 832 (1977) (requirements for vested rights under state coastal legislation).
- ▶ *City of San Jose v. Superior Court*, 12 Cal. 3d 447 (1974) (claim for airport noise damage may be filed on behalf of class; but class lawsuit not appropriate, as each parcel is unique).
- ▶ *Nestle v. City of Santa Monica*, 6 Cal. 3d 920 (1972) (government agencies are liable for nuisance).
- ▶ *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 60 Fed. Appx. 123 (9th Cir. 2003) (power of eminent domain cannot be used to condemn for purely private purpose).
- ▶ *Kottschade v. City of Rochester* (8th Cir. 2003) 319 F.3d 1038, cert. pending (whether ripeness rules need correction is for Supreme Court to decide).
- ▶ *Sinclair Oil Co. v. County of Santa Barbara* (9th Cir. 1996) 96 F.3d 401 (use of ripeness and abstention doctrines in regulatory taking and substantive due process land use cases).
- ▶ *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (physical invasion of property by government is a taking, regardless of good intentions of government; U.S. is responsible for actions of state officials acting pursuant to U.S. authority).
- ▶ *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991) (property owner has immediate cause of action for regulatory taking as soon as ordinance affecting property is adopted).
- ▶ *Glosemeyer v. Missouri-Kansas-Texas R.R.* (8th Cir. 1989) 879 F.2d 316 (constitutionality of 16 USC §1247[d] re rails-to-trails conversion of abandoned railroad rights-of-way).

- ▶ *Sinaloa Lake Owners Assn. v. City of Simi Valley* (9th Cir. 1989) 882 F.2d 1398 (arbitrary government action gives a property owner a cause of action for violation of substantive due process).
- ▶ *Lake Nacimiento Ranch Co. v. County of San Luis Obispo* (9th Cir. 1987) 841 F.2d 872 (ripeness of regulatory taking case and propriety of procedural due process claims).
- ▶ *Miller v. City of Los Angeles* (9th Cir. 1985) 755 F.2d 1390 (no federal remedy available for unconstitutional state tax scheme).
- ▶ *Kollsman v. City of Los Angeles* (9th Cir. 1984) 737 F.2d 830 (use of abstention doctrine in regulatory taking land use cases).
- ▶ *Safeco Ins. Co. v. Guyton* (9th Cir. 1982) 692 F.2d 551 (all-risk homeowners policy provides coverage if a cause of the loss is covered, even though another cause of the loss is excluded).
- ▶ *Friedman Bros. Inv. Co. v. Lewis* (9th Cir. 1982) 676 F.2d 1317 (federal decision to fund project makes NEPA dispute ripe for decision).
- ▶ *City of Romulus v. County of Wayne* (6th Cir. 1980) 634 F.2d 347 (adequacy of airport EIR and propriety of appellate review after completion of project).
- ▶ *Lurie v. State of California* (9th Cir. 1980) 633 F.2d 786 (analysis of res judicata in the context of reserving federal claims in state court litigation).
- ▶ *Burbank Anti-Noise Group v. Goldschmidt* (9th Cir. 1980) 623 F.2d 115 (no need for EIR when federal funds used to facilitate public purchase of private airport).
- ▶ *City of Inglewood v. Unnamed Citizens, Residents and Owners of Property Within City of Inglewood* (9th Cir. 1974) 508 F.2d 1283 (law firm standing to protect class members).
- ▶ *City of Inglewood v. City of Los Angeles* (9th Cir. 1972) 451 F.2d 948 (airport neighbors are third-party beneficiaries of airport promises to FAA regarding noise control).
- ▶ *Pasadena Metro Blue Line Construction Authority v. Pacific Bell Telephone Company*, 140 Cal. App. 4th 658 (2006) (compensability of relocated utility lines).
- ▶ *Allegretti v. County of Imperial*, 138 Cal. App. 4th 1261 (2006) (constitutional analysis of relationship between water rights and takings law).
- ▶ *PBA, LLC v. KPOD, Ltd.*, 112 Cal. App. 4th 965 (2003) (Proper interpretation of statutes involving disqualification of judges and declaration of vexatious litigants).
- ▶ *Pieper v. Commercial Underwriters Ins. Co.* (1997) 59 Cal. App. 4th 1008 (how to recover under an insurance policy when there are multiple causes of loss).
- ▶ *Ellis v. State* (1996) 51 Cal. Rptr. 2d 458 (ordinary tort defenses do not bar landowner from recovering in inverse condemnation).
- ▶ *City of Pasadena v. State* (1993) 14 Cal. App. 4th 810 (environmental impact of new probation facility properly analyzed; no due process claim because other cities paid for the move).
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*Palmer v. City of Ojai*, 178 Cal. App. 3d 280 (1986) (failure to act on project application within one year means project is deemed approved).

- ▶ *Remmenga v. California Coastal Comm'n.* (1985) 163 Cal. App. 3d 623 (last case before Nollan to uphold Coastal Commission extortion of easements).
- ▶ *Mitakis v. Department of General Services* (1983) 149 Cal. App. 3d 684 (state's concern in relocating business is compensation for costs incurred).
- ▶ *City of Los Angeles v. Tilem*, 142 Cal. App. 3d 694 (1983) (violation of standards in Uniform Real Property Acquisition Policies Act is unreasonable conduct which requires compensation).
- ▶ *Anderson v. Superior Court*, 142 Cal. App. 3d 112 (1983) (venue change required to provide property owners a neutral forum).
- ▶ *Andrews v. County of Orange*, 130 Cal. App. 3d 944 (1982) (jury misconduct mandated new trial; airport neighbors entitled to recover for emotional distress caused by noise).
- ▶ *Smart v. City of Los Angeles* (1981) 112 Cal. App. 3d 232 (inverse condemnation statute of limitations does not begin to run until government actions have negative impact on private property).
- ▶ *People v. Sunshine Canyon, Inc.* (1979) 94 Cal. App. 3d 599 (entitlement to litigation costs in direct and inverse condemnation).
- ▶ *Stone v. City of Los Angeles* (1975) 51 Cal. App. 3d 987 (compensation must be paid for damage resulting from delay in instituting condemnation action after announcement of intent to condemn).
- ▶ *Drennan v. County of Ventura* (1974) 38 Cal. App. 3d 84 (elements of prescriptive avigation easement not established).
- ▶ *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal. App. 3d 117 (standing of organization to sue on behalf of members).
- ▶ *Blau v. City of Los Angeles* (1973) 32 Cal. App. 3d 77 (government is liable in inverse condemnation if its actions are a substantial contributing cause of the loss).
- ▶ *Greater Omaha Realty Co. v. City of Omaha* (Neb. 2000) 605 NW. 2d 472 (right to take challenge becomes moot when project is built during appeal process).
- ▶ *Killington, Ltd. v. State* (Vt. 1995) 668 A.2d 1278 (regulatory taking suit not ripe where no permit sought for ultimate project desired).
- ▶ *State ex rel. Nagel v. Crookham* (Ore. 1984) 680 P.2d 652 (precondemnation damages may be sought by counterclaim).
- ▶ *Murty v. Lexington-Fayette Urban County Airport Bd.* (Ky. App. 1981) 612 S.W.2d 765 (right to take may not be challenged by interlocutory appeal).

#### **Amicus Curiae Matters**

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- Kelo v. City of New London*, 545 U.S. 469 (2005) (scope of the "public use" concept in eminent domain).
- ▶ *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005) (impact of full faith and credit act on property owner's ability to sue for regulatory taking in federal court).
  - ▶ *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005) (regulatory taking requires economic impact).
  - ▶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (legislation which deprives property owner of beneficial or productive use of land is a taking; exceptions to this rule are narrow and must account for property owner's expectations when property was acquired; legislative "findings" are not conclusive).
  - ▶ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (permit condition which is unrelated to public burden to be caused by proposed development is void).
  - ▶ *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (regulatory taking case held unripe for litigation).
  - ▶ *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1 (1984) (constitution requires eminent domain valuation near date of taking).
  - ▶ *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (regulatory taking case held unripe for litigation).
  - ▶ *Marine Forests Society v. California Coastal Comm'n.*, 36 Cal. 4th 1 (2005) (constitutionally of the California Coastal Commission).
  - ▶ *Yee v. City of Escondido*, 503 U.S. 519 (1992) (mobile home park rent and vacancy control regulations are not a physical taking of property; whether they are regulatory taking was not decided).
  - ▶ *Galland v. City of Clovis*, 24 Cal. 4th 1003 (2001) (city may be liable for damages for deprivation of property without substantive due process).
  - ▶ *City of San Diego v. Neumann* (1993) 6 Cal. 4th 738 (in direct condemnation, "larger parcel" can be determined by examining unity of future use).
  - ▶ *Garvey v. State Farm Fire and Cas. Co.*, 48 Cal. 3d 395 (1989) (homeowners' insurance policy provides coverage if a covered peril is a substantial cause of the loss).
  - ▶ *Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal. 3d 862 (public agency liable in inverse condemnation even if it lacks power to condemn; airport operation is continuing nuisance).
  - ▶ *Redevelopment Agency v. Gilmore*, 38 Cal. 3d 790 (1985) (just compensation guarantee includes interest at market rate).
  - ▶ *Jones v. People ex rel. Dept. of Transportation*, 22 Cal. 3d 144 (1978) (state is liable in inverse condemnation when its highway plans result in elimination of access to private property).
  - ▶ *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2d Cir. 2003) (fairness demands ability of property owner to reserve federal issues for federal court litigation when compelled to litigate in state court).

## Honors & Awards

Named by *Best Lawyers* as "Los Angeles' Eminent Domain and Condemnation Law Lawyer of the Year," 2012.

Named by *Los Angeles Magazine* and *Law & Politics Magazine* as one of Southern California's Super Lawyers 2004-2008, the Best Attorneys in Southern California, and one of the "top 100" in that survey.

Named one of *The Best Lawyers in America*, 2006-2015 (eminent domain and appellate law).

Named as one of the "*Lawdragon* 3000 Leading Lawyers in America," 2006.

Named by *California Lawyer* as one of California's "Lawyers of the Year," 1998.

Named by *Los Angeles Business Journal* as one of 100 most prominent business attorneys, 1995.

Recipient of Harrison Tweed Award for Special Merit in Continuing Legal Education, for career contributions to post-admission legal education, American Law Institute – American Bar Association, 1989.

## Publications

### Partial List

Contributing occasional author, column on land use law for the *Los Angeles Times*, Aug. 1991-present.

Contributing author, monthly column: Takings and Land Use, for *Los Angeles Daily Journal* and *San Francisco Daily Journal*, Jan. 1991-present.

Contributing author, column on property law for the *California Real Estate Journal*, Jan. 1998-present.

Contributing author, column on property law for *The Nation's Building News* (published by the National Association of Home Builders), December 1993-present.

Co-author, "Why Land Use Lawyers Care About the Law of Unmanned Systems," *Zoning and Planning Law Report*, June 2014.

Author, "The Ripeness Game: Why Are We Still Forced To Play?" *Touro Law Review* (vol. 30, no. 2), May 2014.

"What Is Fairness, Anyway?" *Planning*, October 2006, p. 12.

Co-Author, "Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reached the Self-Parody Stage," 36 *Urban Lawyer* 671, 2004.

Co-Author, "To Steal or Not to Steal? That is the Question," 55 *Land Use Law & Zoning Digest* 13, November 2003.

"What's 'Normal' About Planning Delay?" in *ABA Taking Sides on Taking Issues: Public and Private Perspectives*, Chapter 11, (Roberts, ed.), 2002.

"The Shame of Planners," 54 *Land Use Law & Zoning Digest*, no. 6, p. 6, June 2002.

"Vindicating the Rights of Private Land Development in the Courts," 32 *Urban Lawyer* 941, 2000.

"Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings," 3 *Wash. U.J.L. & Policy* 99, 2000.

## Memberships & Activities

Admitted to practice in California and Missouri. Member, United States Supreme Court Bar, United States Claims Court Bar, Ninth Circuit Bar, Eighth Circuit Bar, Seventh Circuit Bar, Sixth Circuit Bar, Fourth Circuit Bar, Second Circuit Bar, First Circuit Bar, Federal Circuit Bar.

Certified Specialist, Appellate Law, The State Bar of California Board of Legal Specialization.

Member, State Bar of California; Member, Appellate Courts Committee, 1978-1982; Chair, 1981-1982; Member, Condemnation Committee, 1985-1988.

Member, California Academy of Appellate Lawyers; President, 1980-1981.

Fellow, American Academy of Appellate Lawyers, 1997-present.

Member, American College of Real Estate Lawyers, 1988-present.

Member, Center for American and International Law; Member, Advisory Board, Municipal Legal Studies Center, 1989-present; Vice-Chair, 1998-2004; Chair, 2004-present.

Adjunct Professor of Law, LL.M. program in Real Property Development, University of Miami School of Law, 1996-present.

Member, Owners Counsel of America.

Member, Advisory Board, California Land Use Law & Policy Reporter.

Member, American Bar Association; Real Property, Probate and Trust Law Sections; State and Local Government Law.

## Speaking Engagements

### Partial List

Panelist, "A Banner Year for the Fifth Amendment," 28th Annual Land Use Law & Planning Conference, January 31, 2014.

"Course of Study in Eminent Domain and Land Valuation Litigation," ALI-ABA, Coral Gables, FL, February 2011.

"American Property Rights and Land Issues Debate," American Planning Association, San Antonio, TX, April 2006.

"Takings, Eminent Domain, and the Attack on Redevelopment," UCLA, January 2006.

"Recent State and Federal Case Developments," ALI-ABA, Inverse Condemnation and Related Government Liability, Washington, D.C., April 2004.

"Is the Supreme Court Really Different?" Los Angeles County Bar Association, Appellate Courts Committee, Los Angeles, CA, March 2004.

"Supreme Court Decisions and Their Impact on the Appraisal Profession," "Complex Appraisal Issues Raised By Current Land Use Trends," Appraisal Institute, Appraisal Litigation Practice and Courtroom Management, Sacramento, CA, April 2003.

"Protecting Property Rights in a Regulatory Era," Georgetown University, Annual §1983 Civil Rights Litigation Seminar, San Francisco, CA, May 2001.

"Advanced Land Use (Planning and Regulatory Issues)," International Council of Shopping Centers, 2000 U.S. Shopping Center Law Conference, Orlando, FL, October 2000.

## **Bar Admissions**

California

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Wendie L. Kellington, Law Offices of Wendie L. Kellington PC, is a Martindale Hubble AV rated attorney, practicing law since 1983. Wendie is known in Oregon and nationally for her expertise in administrative law, on topics ranging from land rights to aerial rights and the emerging law of unmanned vehicles. She is a member of the Oregon SOAR Board of Directors and the Radio Technical Commission for Aeronautics (RTCA), a federal advisory committee, serving particularly on the RTCA SC 228 developing Minimum Operational Performance Standards (MOPS) for UAS airspace integration. She is a member of the Academy of Model Aeronautics. She is a frequent state and national speaker on a variety of topics including UAS, navigable airspace and land development. She is a longstanding member of the faculty of ALI CLE (formerly ALI/ABA). Her recent article (co-written with national constitutional scholar, Michael Berger) on UAS Integration and Navigable Airspace was published in the Zoning and Planning Law Report Summer 2014. Her works are published in a variety of state and national publications.

Wendie represents clients to obtain regulatory entitlements, as well as with monitoring regulatory and legislative developments. She represents institutions and institutional developers; has served as general counsel to the U.S. subsidiary of a German wind turbine manufacturing company, and has been a Board Member and chief Referee at the Oregon Land Use Board of Appeals as well as a member of the Oregon State Building Structures Board.

Wendie volunteers her time advising OESTRA (Oregon Energy Systems and Technology Research Administration). She also loves to play with aerial robots, ride her bike and run.

Wendie has a B.S. in Political Science from Southern Oregon University (1979) and a JD from the University of Puget Sound (1983).