BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	OAH No. 2008100753
JILL SIREN MEONI, M.D.	MBC Case No. 10-2007-185857
Physician's and Surgeon's Certificate No. A 55229	PRECEDENTIAL DECISION No. MBC-2011-01 DMQ

DESIGNATION AS PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Medical Board of California hereby designates as precedential that portion of the decision listed below in the Matter of the Accusation against Jill Siren Meoni:

> *Motion in Limine to Exclude Expert Testimony* (Conclusions of Law Nos. 5 through 14, inclusive)—pages 36 to 45

This precedential designation shall be effective January 28, 2011.

IT IS SO ORDERED this 28th day of January, 2011.

BARBARA YAROSLAVSKY, President
Medical Board of California

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. 10-2007-185857
JILL SIREN MEONI, M.D.,	OAH No. 2008100753
Physician's and Surgeon's Certificate No. A 55229,	
Respondent.	

DECISION AFTER RECONSIDERATION

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Motion in Limine to Exclude Expert Testimony

5. On May 7, 2009, complainant filed a motion in limine seeking "to exclude the expert testimony of each of respondent's six expert witnesses, on the grounds that respondent has violated the mandatory expert witness disclosure requirements of [Business and Professions Code] section 2334." The motion was based primarily on the following arguments: (i) Contrary to the requirements of section 2334, respondent's expert witness disclosure did not occur at least 30 calendar days before the commencement of the hearing; and (ii) the mandatory penalty for the failure to comply on a timely basis with the requirements of section 2334 is the automatic exclusion of the offending party's expert testimony. Complainant also contended that: (iii) Respondent's expert disclosures failed to comply with the requirements of section 2334 in other respects than timeliness (e.g., the description of the expected testimony of respondent's experts); and (iv) respondent's various failures to comply with the requirements of section 2334 were highly prejudicial to complainant's ability to prepare for the hearing.

6. Respondent has violated the requirements of section 2334 in two respects. First, respondent failed to provide its expert witness disclosure within 30 calendar days prior to the commencement of the hearing. On March 5, 2009, OAH granted respondent's motion to continue the hearing, and set the hearing to commence on May 14, 2009. Based on that hearing date, and pursuant to section 2334, subdivision (a), expert witness disclosure was to be made no later than April 14, 2009. Respondent did not, however, make her formal disclosure until April 30, 2009. [1] For purposes of the motion in limine, respondent's disclosure is deemed to have been

[1] The analysis that follows focuses on respondent's formal expert witness disclosure of

16 days late.[2] It is thus concluded that respondent's disclosure was untimely.

Second, respondent failed, as to two of its experts, to provide "a brief narrative statement of the general substance of the testimony that the expert is expected to give, including any opinion testimony and its basis." Complainant argued essentially that the descriptions provided in respondent's disclosure were not adequate to meaningfully inform complainant of the actual substance of the expected testimony of respondent's experts, including the experts' actual opinions and the bases therefor. Complainant's argument is rejected with regard to William Umansky and Luis Becerra. The description of the expected testimony of these individuals as set forth in respondent's disclosure did not constitute the kind of testimony that is typically considered "expert testimony," i.e., as described, it did not consist of formal expert opinions, but instead involved the physician's course of care of respondent.[3] As such, such testimony is properly characterized as percipient witness testimony, not expert testimony per se.[4] On the other hand, the description of the expected testimony of Frank Tiffany and David Sheffner clearly involved, at least in part, the rendering of genuine expert opinions. The description of their testimony adequately set forth the general substance of the testimony, including opinion testimony,[5] but did not set forth any "basis" for such opinion testimony, and thus fails to comply with section 2334.[6]

April 30, 2009. On April 16, 2009, respondent served a Final Witness and Exhibit List. This list may be viewed as constituting respondent's initial expert witness disclosure. Under either view, based on the reasoning set forth below, violations of section 2334 would be found, though the violations would differ to a certain extent. For example, respondent did not disclose the fee to be charged by all of her experts until April 30.

[2] On April 16, 2009, Presiding Administrative Law Judge Alan R. Alvord issued a prehearing conference order, in which the parties were ordered to exchange the information required by section 2334 by April 30, 2009. Complainant objected to that portion of the order and contended in her in limine motion that OAH lacked the authority to grant additional time within which to make a section 2334 disclosure after the 30-day deadline had already passed. For the purposes of ruling on the in limine motion, it is assumed arguendo that the disclosure was to be made on April 14, 2009, notwithstanding the prehearing conference order.

[3] Indeed, the testimony of these two physicians, as described above, was limited to issues directly relating to the course of care, and did not constitute expert opinion testimony.

[4] In the absence of any statutory, regulatory or judicial guidance as to the meaning of "expert testimony," recourse is taken to the somewhat analogous use of expert testimony in civil cases pursuant to Code of Civil Procedure section 2034.

[5] Complainant's contention that the disclosures provide insufficient detail to permit complainant to prepare to meet the testimony of respondent's experts at the hearing was unpersuasive. Absent any guidance—both for respondent and for the administrative law judge—as to how "brief" the required narrative statement may be, it is not appropriate to construe that adjective in an unduly narrow fashion that would in effect constitute a trap for the unwary.

[6] Since respondent's other two experts, Christine Baser and Steven Rudolph, did not testify at the hearing, it is not necessary to address the adequacy of respondent's disclosures of their testimony.

7. In light of the conclusion that respondent has violated section 2334, the remedy for respondent's violations must now be addressed. The Administrative Law Judge denied the motion in limine and rejected exclusion of the expert testimony on the grounds that section 2334 affords both OAH and the administrative law judge a measure of discretion with regard to the remedy for non-compliance to be applied in a given case, depending on the totality of the circumstances.

8. The administrative law judge determined that exclusion of respondent's expert witness testimony would not further the apparent legislative purpose of the statute, but would instead undermine the interests of justice, and based this conclusion on the following considerations.

First, with regard to the timeliness of disclosure, even though formal disclosure did not occur until April 30, the identity of respondent's six experts, and at least a short description of the subject matter of their expected testimony, was provided on April 16, 2009, i.e., just two days after the April 14 deadline.

Second, in the absence of clear guidance as to what level of detail satisfies the "brief narrative statement" requirement of section 2334, great caution and restraint is appropriate before excluding expert testimony based on a finding that a proffered description did not constitute an adequate "brief narrative statement."

Third—and closely related to the preceding point—complainant did not place respondent on notice prior to filing the motion in limine of the alleged inadequacy of respondent's disclosure.

Fourth, complainant did not establish prejudice by virtue of either the untimeliness or the inadequacy of respondent's disclosures.

Fifth, no evidence was presented that respondent's failure fully to comply with section 2334 was in bad faith, i.e., constituted a conscious attempt to "hide the ball" or otherwise circumvent proper disclosure.

Sixth, the administrative law judge presumed that the ultimate decision maker in this case, the Medical Board of California, would desire to have all relevant evidence available for its consideration, so that it can make the most well-informed and appropriate decision possible in this very important matter.

9. In her written argument and during oral argument, complainant asked the board to reverse the decision denying the motion in limine, exclude expert testimony as a result of that reversal, and, in the decision itself, designate its decision as a precedent decision. The board denies these requests for the following reasons.

First, as required by law, the board has read all of the expert testimony in question as part of its review of the record and therefore does not believe it is appropriate, fair or equitable at this

stage of the proceedings to attempt to "unring the bell."

Second, there is a process set out in regulation (Title 16 CCR section 1364.40) for designating precedent decisions and complainant's request is inconsistent with that process. Complainant may certainly renew her request in the manner prescribed in that regulation.

The board does agree with both the administrative law judge and with complainant about the critical need for guidance in interpreting Business and Professions Code Section 2334, in order to carry out the purpose for which that section was enacted, and intends to convey its interpretation of that section in this decision.

10. Business and Professions Code section 2334 provides as follows:

"(a) Notwithstanding any other provision of law, with respect to the use of expert testimony in matters brought by the Medical Board of California, no expert testimony shall be permitted by any party unless the following information is exchanged in written form with counsel for the other party, as ordered by the Office of Administrative Hearings:

"(1) A curriculum vitae setting forth the qualifications of the expert.

"(2) A brief narrative statement of the general substance of the testimony that the expert is expected to give, including any opinion testimony and its basis.

"(3) A representation that the expert has agreed to testify at the hearing.

"(4) A statement of the expert's hourly and daily fee for providing testimony and for consulting with the party who retained his or her services.

"(b) The exchange of the information described in subdivision (a) shall be completed at least 30 calendar days prior to the commencement date of the hearing.

"(c) The Office of Administrative Hearings may adopt regulations governing the required exchange of the information described in this section."
(Stats. 2005, c. 674 (S.B. 231), § 14.)

11. The board finds that Section 2334 governs the entire subject of expert witness disclosures in Medical Board cases, including the penalty to be imposed for failure to comply with the disclosure requirements by the statutory production deadline and therefore Section 2334 prevails over any other provision of law, including provisions of the Administrative Procedure Act (APA). Evidence of this is found in the first sentence of section 2334, subdivision (a), which begins with the phrase: "Notwithstanding any other provision of law . . ." This phrase is indicative of the Legislature's intent to have the provisions of section 2334 control notwithstanding the existence of other laws that might otherwise govern the subject. (See *People*

v. DeLaCruz (1993) 20 Cal.App.4th 955, 963 [phrase "has been read as an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern."].)

12. A review of the legislative history of section 2334 confirms both the problem section 2334 was specifically enacted to address, as well as the legislative intent to place a mandatory obligation on the parties to make the required disclosures by the statutory deadline in order to promote, rather than defeat, its underlying public policy. In her Initial Report to the Legislature, the Medical Board's Enforcement Monitor[7] described the problems that result from defense counsel's failure to disclose the opinions of their experts as follows:

> "As described above, MBC requires its experts to reduce their expert opinions to writing – and those expert opinions are immediately discoverable by the defense. However, defense counsel frequently instruct their experts not to reduce their opinions to writing so the HQE DAG has no idea of the substance of defense counsel's expert opinion until that expert takes the stand at the evidentiary hearing.
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> "This practice results in the unfair 'sandbagging' of the DAG at the hearing, and stifles the possibility of prehearing settlement. Although true bilateral discovery is not a feature of administrative hearings under the Administrative Procedure Act, the general discovery principle of eliminating undue litigation surprise is a public policy with important application here. The expert medical opinions in these MBC administrative hearings go to the heart of the Board's case and are partly or entirely dispositive of the result. Litigation surprise regarding this central element of the administrative action disserves all parties to the process and the public interest as a whole."

(Initial Report, Medical Board of California Enforcement Program Monitor, prepared by Julianne D'Angelo Fellmeth and Thomas A. Papageorge, dated November 1, 2004, at pp. 160-161.)

In the wake of the Enforcement Monitor's Initial Report, Senate Bill 231, as amended, included a new statute specifically designed to address this problem. That statute, as originally introduced, provided that:

> "2334. Notwithstanding any other provision of law, with respect to the use of expert testimony in matters brought by the Medical Board of California, no expert

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[7]. Business and Professions Code section 2220.1 provided for the appointment of a "Medical Board Enforcement Program Monitor" to monitor and evaluate "the disciplinary system and procedures of the board, making as his or her highest priority the reform and reengineering of the board's enforcement program and operations and the improvement of the overall efficiency of the board's disciplinary system." (Added by Stats. 2002, c. 1085, (Sen. Bill No. 1950), § 18; repealed by Stats. 2004, c. 909 (Sen. Bill No. 136), § 3, operative Jan. 1, 2006.)

> testimony shall be permitted by any party unless a detailed written report by the expert witness, including findings and conclusions of the expert witness, is exchanged by the parties in advance of the hearing. The Office of Administrative Hearings shall adopt regulations in consultation with the Medical Board of California governing the required exchange of expert testimony in these proceedings." (Sen. Bill No. 231 (2005-2006 Reg. Sess.) § 11, as amended in Assembly on June 13, 2005.)

Thus, as original introduced, the Legislature only required that the disclosure be made "in advance of the hearing." As the bill moved through the legislative process, the Legislature amended section 2334, never losing sight of its objective to compel the timely production of information regarding expert witnesses. For example, the Legislature eliminated the requirement that "a detailed written report" be produced and, instead, required only that the expert testimony be "reduced to writing by the expert witness, including findings and conclusions of the expert witness, . . ." Thus, as later amended in the Assembly, section 2334 then provided:

> "2334. Notwithstanding any other provision of law, with respect to the use of expert testimony in matters brought by the Medical Board of California, no expert testimony shall be permitted by any party unless ~~a detailed written report~~ *it is reduced to writing* by the expert witness, including findings and conclusions of the expert witness, is exchanged by the parties in advance of the hearing. The Office of Administrative Hearings shall adopt regulations in consultation with the Medical Board of California governing the required exchange of expert testimony in these proceedings." (Sen. Bill No. 231 (2005-2006 Reg. Sess.) § 11, as amended in Assembly on July 11, 2005.)

Then, on August 30, 2005, the Legislature abandoned the requirement that the disclosure simply be made "in advance of the hearing" and, instead, established a <u>specific statutory deadline</u> for the production. In this regard, section 2334, as amended, stated:

"2334. *(a)* Notwithstanding any other provision of law, with respect to the use of expert testimony in matters brought by the Medical Board of California, no expert testimony shall be permitted by any party unless ~~it is reduced to writing by the expert witness, including findings and conclusions of the expert witness, and it is exchanged by the parties in advance of the hearing. The Office of Administrative Hearings shall adopt regulations in consultation with the Medical Board of California governing the required exchange of expert testimony in these proceedings.~~ *the following information is exchanged in written form with counsel for the other party, as ordered by the Office of Administrative Hearings:*

(1) A curriculum vitae setting forth the qualifications of the expert.

(2) A brief narrative statement of the general substance of the testimony the expert is expected to give, including any opinion testimony and its basis.

(3) A representation that the expert has agreed to testify at the hearing.

(4) A statement of the expert's hourly and daily fee for providing testimony and for consulting with the party how retained his or her services.

(b) The exchange of the information described in subdivision (a) shall be completed at least 30 calendar days prior to the commencement date of the hearing.

(c) The Office of Administrative Hearings may adopt regulations governing the required exchange of the information described in this section."
(Sen. Bill No. 231 (2005-2006 Reg. Sess.) § 12, as amended in Assembly on August 30, 2005.)

This would remain the statutory production deadline throughout the remainder of the legislative process (see Sen. Bill No. 235 (2005-2006 Reg. Sess.) § 11, as amended on September 2, 2005) and ultimate approval by the Governor on October 7, 2005 (see Bus. & Prof. Code, § 2334). Thus, subsequent amendments to Senate Bill 231 confirm the Legislature's explicit rejection of the requirement that the expert witness disclosures be made simply "in advance of the hearing" and, instead, its intention that such disclosures shall be made "at least 30 calendar days prior to the commencement date of the hearing." (Cf. *Cooper v. Swoap* (1974) 11 Cal.3d 856, 864-865 [Legislature's direct consideration and explicit rejection of proposal to reduce grants of AFDC recipients sharing housing with an adult aid recipient an "unambiguous indicant of legislative intent"]; see also *Martin v. Szeto* (2004) 32 Cal.4th 445, 450 [subsequent amendments to bill cited as clarifying legislative intent].)

Permitting OAH to order the required expert witness disclosures to be made *less than* 30 calendar days prior to commencement of the hearing was included in an earlier version of Senate Bill 231 that was explicitly rejected by the Legislature and, thus, to permit it now would be entirely inconsistent with legislative intent. (Cf. *Cooper v. Swoap* (1974) 11 Cal.3d 856, 864-865 [Legislature's direct consideration and explicit rejection of proposal to reduce grants of AFDC recipients sharing housing with an adult aid recipient an "unambiguous indicant of legislative intent"].)

13. The board finds that the obligation of both parties to make the required exchange of expert witness information by the statutory deadline set by the Legislature in section 2334 (b), is mandatory, not merely directory. (Business and Professions Code Sections 8, 19) This is also consistent with case law:

> ". . . 'Time limits are usually deemed to be directory unless the Legislature clearly expresses a contrary intent.' (*Id.* at p. 1145.) For example, if the statute attaches consequences or penalties to the failure to observe time limits, the statute is construed as mandatory. (*County of Sacramento v. Insurance Co. of the West* (1983) 139 Cal.App.3d 561, 565-566; see also *Edwards v. Steele, supra*, 25 Cal.3d at p.410.)" (*Matus v. Board of Administration* (2009) 177 Cal.App.4th 597, 608-609.)

14. In the proposed decision, the administrative law judge construed section 2334 as

affording both OAH and the administrative law judge a measure of discretion with regard to the remedy for non-compliance to be applied in a given case, depending on the totality of the circumstances.

(a) The board finds, using well-settled rules of statutory construction, that an interpretation granting discretion as to whether to impose the statutory remedy of exclusion is inconsistent with the legislative intent underlying the statute, would defeat (rather than promote) the statute's general purpose and would lead to absurd consequences.

> "In construing a statute, our fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) We begin with the language of the statute, giving the words their usual and ordinary meaning. (*Ibid.*) The language must be construed 'in the context of the statute as a whole and the overall statutory scheme, and we give 'significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." ' (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) In other words, ' "we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" ' (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 222.) If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day, supra*, 25 Cal.4th at p. 272.) In such circumstances, we choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences. (*Ibid.*)" (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.)
>
> Section 2334, subdivision (a), states that:
>
> "(a) Notwithstanding any other provision of law, with respect to the use of expert testimony in matters brought by the Medical Board of California, no expert testimony shall be permitted by any party unless the following information is exchanged in written form with counsel for the other party, *as ordered by the Office of Administrative Hearings*: . . ." (Italics added.)

The board finds that section 2334 is a self-executing statute in the sense that it applies in all Medical Board cases, regardless of whether OAH orders the parties to comply with its provisions or not.[8] In this regard, section 2334 is similar to a statute of limitations (see, e.g., Bus. & Prof. Code, § 2230.5) which applies whether or not the parties are ordered to comply with its provisions.

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[8]. While OAH has reportedly begun the practice of routinely issuing orders requiring the parties to comply with the provisions of section 2334, issuance of such orders are not required since section 2334 is otherwise applicable in Medical Board cases, regardless of whether OAH orders the parties to comply or not. Such orders do, however, serve a useful purpose by helping to ensure that section 2334 does not become a trap for the unwary.

To interpret the phrase "as ordered by the Office of Administrative Hearings" as requiring an OAH order before the statute could apply in Medical Board cases would violate the general rules of statutory construction cited above. It would also lead to the absurd consequence of section 2334 applying in those Medical Board cases where OAH has issued an order requiring compliance with its provisions but not to those cases where OAH has not issued such an order.

Here, the phrase "as ordered by the Office of Administrative Hearings" is more appropriately read as referring to an order from OAH prohibiting expert testimony offered by a party whenever it has been determined that the party has failed to comply with the expert witness disclosure requirements of section 2334 by the statutory deadline. Without such an order from OAH, the statutory penalty fixed by the Legislature for violation of section 2334 could never be imposed. This reading is also consistent with other prescribed duties and responsibilities of administrative law judges under the APA, including those provisions requiring an administrative law judge to issue orders and decisions. (See, e.g., Gov. Code, §§ 11511.5, subd. (e) ["The administrative law judge shall issue a prehearing conference order incorporating the matters determined at the prehearing conference."]; and 11517 ["If a contested case is originally heard by an administrative law judge alone, he or she shall prepare . . . a proposed decision in a form that may be adopted by the agency as the final decision in the case."].) The Legislature was presumed to be aware of existing law (here, the authority of an administrative law judge to issue orders) when it required an order from OAH to impose the statutorily required penalty for failure to comply with the requirements of section 2334. (*People v. Cruz* (1996) 13 Cal.4th 764, 775)

(b) "The most basic principle of statutory construction is that courts must give effect to statutes according to the ordinary import of the language used in framing them." (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1380-1381, internal quotes and citation omitted.) "If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." (*Id.*, at p. 1381, internal quotes and citations omitted.) Here, there is no ambiguity regarding the penalty to be imposed for a violation of section 2334. The Legislature has made a policy choice to fix that penalty as exclusion of the expert testimony.

The board finds that OAH lacks the authority to refuse to impose the legislatively mandated penalty of exclusion where a party has failed to comply with the requirements of section 2334. Whenever it has been determined that a party in a Medical Board case has violated the expert witness disclosure requirements of section 2334, either by failing to disclose the information specified in section 2334, subdivision (b), and/or failing to make the required disclosures by the statutory deadline contained in section 2334(c), section 2334(a) requires that an order be issued prohibiting that party from presenting the proffered expert testimony in the case.[9]

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[9]. Administrative disciplinary proceedings that are commenced by the issuance of an interim order of suspension (ISO) under Government Code section 11529 constitute an exception to the otherwise applicable provisions of section 2334. In ISO cases, the filing of the accusation and subsequent hearing are necessarily expedited (Gov. Code, § 11529, subd. (f)) and, as a result, the hearing may be scheduled such that is impossible for the parties to comply with the expert witness disclosure requirements of section 2334 by the statutory deadline set

The board notes that the conclusion expressed above applies equally to both complainant and respondent. Based upon its review of the record (Exh. 29 in particular), the board urges both parties in future cases to be diligent in fully complying with Section 2334 in order to fulfill the purposes of the statute.

What constitutes compliance with Section 2334(a)(2)? Merely listing topics or subjects that the expert witness will testify about, without disclosing the general substance of the expert's anticipated testimony, the actual expert opinions he/she will testify to, and the basis for each of those opinions, is plainly insufficient and would clearly violate the statutory requirements of section 2334. A "brief narrative statement" of the "general substance" of the expert's testimony means a short narrative statement that provides the main features of the testimony—the essential nature of the testimony to be proffered. The statement must include any opinion to be presented and the basis for that opinion. By way of example as to what is not acceptable, taken from the record in this matter: A party merely states (see Exh. 29) that an expert will testify "whether Respondent can practice medicine safely, and whether the circumstances surrounding Respondent's use of medication constituted general unprofessional conduct as alleged." This narrative does not state what expert opinion will actually be proffered (i.e. that respondent can practice medicine safely and that respondent's use of medication is not general unprofessional conduct). Nor does it describe whatsoever the basis for that opinion. This is simply insufficient.

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This decision shall become effective at 5 p.m. on June 7, 2010.

IT IS SO ORDERED this 6th day of May, 2010.

HEDY CHANG, Chairperson
Panel B, Medical Board of
California

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by section 2334, subdivision (c). Compliance with section 2234 is excused when it is impossible to comply. (See e.g., *McKenzie v. City of Thousand Oaks* (1973) 36 Cal.App.3d 426, 430 [compliance with procedural statute may be excused when it is "impracticable, impossible or futile" to comply].)