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The legal community mourns the loss of the Honorable Arthur L. Alarcón, whom Ninth Circuit Chief Judge Sidney R. Thomas recalled as “a significant force in improving the administration of justice, not only in California, but throughout the Ninth Circuit.” The first Hispanic judge appointed to the U.S. Court of Appeals, Judge Alarcón celebrated 50 years on the bench in 2014, having served on both the Los Angeles Superior Court and the California Court of Appeal prior to his Ninth Circuit appointment by President Jimmy Carter. He was delighted to be recognized as recipient of the Los Angeles County Bar Association’s 2014 Outstanding Jurist Award.

Judge Alarcón’s accolades are too numerous to list fully in this brief tribute. The son of a baker, Judge Alarcón was a self-made man whose tremendous advocacy for and mentorship of women and minorities are legendary. Judge Alarcón offered judicial law clerk and externship opportunities to a record number of women and minorities, and he touched many more through teaching, publishing, serving on nonprofit boards, and chairing bar committees.

His persistence ended decades of gender restriction that excluded girls from reaping the benefits of educational and leadership programs offered by the Los Angeles Times Boys Club and the national Boys Club of America. In 1990, the Los Angeles and national chapters opened their programs to include girls and changed their names to the Los Angeles Boys & Girls Club and the Boys & Girls Club of America.

He was a founder and chair of the Mexican-American Scholarship Foundation Assisting Careers in Law and the Council on Mexican Affairs. In 2010, the Mexican American Bar Foundation honored him with the prestigious Precursor Para Justicia/Pioneer for Justice Award. Even in his last weeks of life, Judge Alarcón asked that a mentoring lunch be arranged for a Mexican American college student who dreams of graduating from UCLA, the college young Arthur attended following his tour as a sniper and decorated World War II hero. In spite of his terminal illness, Judge Alarcón wanted to continue his periodic review of classes, grades, and goals to encourage his mentee’s hard work.

Judge Alarcón inculcated commitment to public service as a family value. His three children and loving wife are devoted public servants. The Honorable Gregory Alarcón of the Los Angeles Superior Court served as a Deputy Attorney General, a Deputy District Attorney, and an Assistant U.S. Attorney. Lance Alarcón worked tirelessly to educate special needs children before graduating from Stanford Law School and joining the San Mateo county counsel office. Dr. Jan Alarcón dedicated her career to counseling the mentally challenged for the state of California. As a docent for the Los Angeles County Art Museum, devoted wife Sandra Alarcón’s museum tours encouraged school children to appreciate art.

Like many who passed through Judge Alarcon’s chambers, I am a beneficiary of his mentorship, scholarship, wit, and collegiality. I know the chambers’ experience with our beloved judge to be like no other. I treasure the lasting friendships he fostered among his chambers’ family and extended family.

During our many years of friendship, I never heard Judge Alarcón speak or repeat an unkind word. His demeanor both on and off the bench exemplifies the importance of forbearance and consideration in all decision making. He is one tough act to follow, but we should aspire to it.

Mary E. Kelly is a nurse attorney and an administrative law judge II with the California Unemployment Insurance Appeals Board. She is cochair of the California Access to Justice Commission’s Administrative Agency Committee.
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What did you mean in the book by the judiciary’s prosecutorial bent? I don’t blame most judges for having that bent. If judges don’t hew to the prosecutorial agenda, the next time they are up for election, some deputy DA is going to run against them and is going to give his or her job title as gang homicide prosecutor. And, the judges will get defeated. That has a chilling effect on the judiciary.

What was your best job? This is the best job I’ve ever had; I don’t even consider it a job.

What was your worst job? Selling Fuller brushes door to door. Having people slam doors in your face before you could make your pitch.

You’re called a celebrity lawyer. What does it mean to you? I hate the term. Ninety percent of the people I represent you’ve never heard of and hopefully you never will hear of.

You lost Michael Jackson as a client when you were his counsel in the 2005 trial. I think the sentence was an act of barbarism. It’s mind-boggling.

You lost Michael Jackson as a client when you were his counsel in the 2005 trial. I think the sentence was an act of barbarism. It’s mind-boggling.

If you were handed $1 million tomorrow, what would you do with it? Give it to the Armenian Church.

Which fictional hero would you like to be? I’ve always identified with Atticus Finch.

What scared you the most the first time you stood in front of a judge? Not being prepared—that stills scares me the most, whether it’s a judge or a jury. If I lose the butterflies in my stomach, I’ll stop doing it.

Your website refers to you as a bad boy defender. Is that how you see yourself? No. ABC news did a piece on me and that is what they called me.

You and Nancy Grace. Is that a real rivalry? I like Nancy. At the same time, I suspect that a lot of that is an act.

What do you do on a three-day weekend? Work.

What is your favorite hobby? Doing something involving the restaurants I own. I’ll get back and wait tables or cook in the kitchen.

You have said that the U.S. prison population quadrupled since the 1980s. What’s going on? We have more prisoners than China, which is shocking to me. It is almost exclusively a by-product of the War on Drugs. It’s become a prosecution-drug-industrial complex.

AB 109, commonly known as realignment, is in play. What are your thoughts about it? What I thought was a harsh sentence back in 1983 is now considered a slap on the wrist. People toss around double-digit prison terms without a second thought. It’s mind-boggling.

Though you’re best known as a criminal defense attorney, you practice civil law, too. What was your favorite civil case? We prevailed on a bad faith case where the insurance company didn’t pay $24,000 to a veteran of World War II. The jury came back and whacked the insurance company with $7 million in punitive damages. I like cases that involve punitive damages.

What are your retirement plans? I have none. I can’t think of anything I’d rather do less than retire.

Are you on Twitter? I am. I like the idea of 140 characters or less.

Which person in history would you like to take out for a beer? William Saroyan. He was larger than life in the Armenian community.

Who are your two favorite U.S. presidents? FDR and Bill Clinton.

What is the one word you would like on your tombstone? Fluidity.
Consideration of Legal Ethics in Using Social Media

IN A CROWDED MARKET, social media platforms such as LinkedIn, Twitter, Facebook, and even Yelp have become the place for many lawyers and law firms trying to establish and grow their brands. Individuals can set themselves apart and create a personal relationship with clients, potential clients, and other industry professionals. Lawyers write blogs, provide commentary on significant legal issues, and update the status of courtroom successes. However, lawyers must consider the ethical implications of communicating via social media in a way non-lawyer users likely never do. Every California lawyer swears to uphold the California Rules of Professional Conduct, but those rules were established long before the first 140-character tweet, creating a minefield of unanticipated ethical pitfalls for lawyer participants. The American Bar Association and the California Bar Association attempt to provide guidance in certain areas but all have stopped short of issuing a best practices guide. Nevertheless, there are ethical measures every lawyer should consider when using social media for either professional or private purposes.

Social media are by nature casual and hasty forms of communication. On personal accounts, People are often over-enthusiastic and careless in how they share and what they share. But as lawyers, whether or not on the clock, the duty to protect confidential client information is ever-present. The penalty for a breach of confidentiality can range from informal reprimands to suspension from the practice of law. The methods of social media, posting everything from a blog to a comment on CNN, raise unique confidentiality issues. Social media posts often contain geo-tagging and other embedded information that may publicly post locations and other details that could violate the ethical duty of confidentiality.

Privacy settings will not protect social media postings from being discoverable and potentially used as evidence of an ethical violation. The extra time and thought necessary to ensure that social media posts do not violate the Rules of Professional Conduct, while burdensome to the spontaneous nature of social media, are preferable to risking an ethical inquiry or a malpractice claim.

The free-flowing form of social media interaction facilitates communication between lawyers and potential clients thereby assisting to create attorney-client relationships. Potential clients can read a lawyer’s blog about bankruptcy issues or follow a lawyer’s tweets about current events in the legal world or a particular industry. But if a potential client comments on that blog or replies to a tweet with the purpose of consulting a lawyer and possibly forming an attorney-client relationship, an attorney-client relationship could form—as well as the incumbent ethical considerations irrespective of the lawyer’s intent. Depending on the jurisdiction, including a disclaimer in a social media profile or blog post regarding attorney-client relationships can go a long way in ensuring that unintended attorney-client relationships do not form.

The State Bar of California Standing Committee on Professional Responsibility and Conduct issued a formal opinion concerning attorneys’ usage of social media and Rule 1-400 regarding advertising and the solicitation of work that allows attorneys to post general legal information without a disclaimer that the post is advertising. For example, the statement “Settled the case!” would not be considered a violation of Rule 1-400 because it does not include the lawyer's availability of services. However, the statement “Client is thrilled! Settled the case for half a million dollars! Who is next?” poses a multitude of problems. It disseminates a client testimonial without the disclaimer that it is advertising. It also walks the line of guaranteeing the result of representation by suggesting that a successful settlement is in a potential client's future. Also, inclusion of the words “Who is next?” runs afoul of Rule 1-400 if it is not accompanied by disclaimer language.

Including an advertising disclaimer is cumbersome and directly affects the casual, conversational nature of social media, but until the Rules of Professional Conduct address these issues as they relate to social media, all lawyers must comply. Compliance with the applicable ethical rules may require utilizing different forms of social media in a professional context, for example, a Facebook Fan Page that complies with the necessary Business and Professions Code sections, instead of a personal Facebook profile.

Compliance may also require more than a disclaimer. Since all communications that fall under Rule 1-400 must be retained by the attorney for two years—including those on electronic media—every form of social media a lawyer uses to advertise professional services or provide client testimonials must be reviewed for its archival policies. If the social media platform purges all communications older than 24 months, the lawyer must employ an alternate form of record keeping, including manually saving all communications or even printing each one.

Social media are casual, quick, and conversational forms of communication. It is the rare individual who goes a day without using or interacting with social media in some way. However, lawyers must constantly weigh the content and purpose of social media posts and interactions against their ethical obligations as members of the Bar. Until the California Rules of Professional Conduct are written to specifically address lawyers’ presence on and utilization of social media, it is better to be cautious and judicious with postings concerning professional work and opinions than to wind up on the wrong end of a judicial proceeding defending 140 thoughtless characters.
Gauging the Future of Iskanian and FAA Preemption in California

IN JUNE 2014, THE CALIFORNIA SUPREME COURT held in Iskanian v. CLS Transport that a waiver in an employment arbitration agreement of the right to bring a representative action under the Private Attorneys General Act of 2004 (PAGA) is unenforceable.1 Remarkably, the court also held that the Federal Arbitration Act (FAA)2 preempted the court’s prior decision in Gentry v. Superior Court that invalidated class action waivers contained in employment arbitration agreements.3 More specifically, the court held that the four-part test articulated in Gentry could no longer be relied upon as a means of rendering class action waivers in employment arbitration agreements unenforceable. While rejecting a challenge to class action waivers based on the decision of the National Labor Relations Board (NRLB) in D.R. Horton Inc.,4 the court also left open the possibility of future challenges to these types of waivers based on the protections contained in the federal labor laws upon which the Horton decision was based. Arguably, this mixed ruling is an indication of support within the California Supreme Court for carving out an exception, based on public policy concerns, to recent decisions of the U.S. Supreme Court that generally favor enforcement of arbitration provisions while observing AT&T Mobility LLC v. Concepcion,5 in which the Court upheld the legality of a class action waiver in a consumer arbitration agreement. In January 2015, the U.S. Supreme Court denied a petition to review Iskanian, leaving that case in effect in state court actions. The Iskanian court held that representative claims asserted under PAGA were not arbitrable because they are akin to qui tam actions brought on behalf of the state and not private individuals who may be bound to arbitration agreements. The Iskanian court held that a PAGA claim “lies outside the FAA’s coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state....”6 Using this reasoning, it is the state that “directly or through its agents” claims that “the employer has violated the Labor Code.”7 Those who have defended a PAGA claim, however, may point out the unrealistic nature of this assertion and that the filing of PAGA claims is largely driven by the potential award of attorney’s fees as opposed to any effort to actually enforce the public’s interest.

The Court concluded that “We can discern in the FAA no purpose, much less a clear and manifest purpose, to curtail the ability of states to supplement their enforcement capability by authorizing willing employees to seek civil penalties for Labor Code violations traditionally prosecuted by the state.”8 The court reasoned that PAGA is a law enacted for the benefit of the public, and that the ability to bring a representative claim under PAGA cannot be eliminated without undermining its public purpose and the effective enforcement of the state’s labor laws. But all statutes are enacted for the public good, and denying a plaintiff the ability to seek monetary civil penalties of up to $100 per pay period does no more damage to the enforcement of those laws than does the denial of class action treatment of wage and hour claims—which typically seek far larger damages for a much longer time period than do claims under PAGA.

Also, the California rule9 that the U.S. Supreme Court held as preempted by the FAA in Concepcion also furthered an important public purpose that the California Supreme Court arrived at as a matter of public policy because that rule (derived from the Discover Bank v. Superior Court case) permitted parties to unconscionable consumer adhesion contracts to sue collectively on claims involving small amounts of damages.10 As the Ninth Circuit stated in Coneff v. AT&T Corpor

Arguably, this mixed ruling is an indication of support within the California Supreme Court for carving out an exception.
to declare the existence of such an exception.19

In the complete absence of any authority and in derogation of federal case law to the contrary, the California Supreme Court assumed that such an exception to the FAA preemption doctrine exists. In support of its decision, the court relied on EEOC v. Waffle House Inc.,20 which it cited as the “one case in which the high court has considered the enforcement of an arbitration agreement against the government.” However, that case involved an administrative proceeding brought by a government agency, not a private civil action brought by a party to an arbitration agreement. Also, as at least one district court has concluded, Waffle House is distinguishable because unlike PAGA actions, which are commenced and controlled by the aggrieved employee, the litigation in Waffle House was commenced by the EEOC.21

Moreover, in Deck v. Miami Jacobs Business College Company,22 the court held that a claim asserted under the federal False Claims Act23 was arbitrable even though the U.S. government was not a party to the arbitration agreement and any award would not have been binding on it.24 The court noted that the federal government had not withheld its consent to arbitration of the claim and that the FCA claim was still one belonging to the plaintiffs even though it was brought in the government’s name.25 Such an approach in Iskanian would have demonstrated greater deference to the U.S. Supreme Court’s recent decisions championing arbitration in the face of state law impediments and represented a much more reasonable approach.

Furthermore, in 2013, in American Express v. Italian Colors Restaurant,26 the Court held that the policy interests behind the Sherman Antitrust Act did not override the congressional requirement that arbitration agreements be enforced, even when a class action waiver effectively precluded the individual litigants from mounting a challenge to the allegedly monopolistic practices in violation of that statute. This is at odds with the Iskanian court’s conclusion that California’s interest in PAGA enforcement overrides the FAA. As one of the dissenting justices in American Express observed in an examination of the vast distinction between state and federal laws for the purpose of determining whether they conflict with the FAA:

When a state rule allegedly conflicts with the FAA, we apply standard pre-emption principles, asking whether the state law frustrates the FAA’s purposes and objectives. If the state rule does so—as the Court found in AT&T Mobility—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-appointment rule comes into play only when the FAA is alleged to conflict with another federal law, like the Sherman Act here.27

To add to the confusion, federal district courts in California continue to require arbitration of PAGA claims on an individual basis, notwithstanding Iskanian. For example, in Langston v. 2020 Companies, Inc.,28 the court noted that even the Iskanian court acknowledged a private litigant’s ability to sometimes waive the government’s right to bring a PAGA claim, while in Ortiz v. Hobby Lobby Stores, Inc.,29 the court pointed out that most federal district courts within California have held that “a waiver of PAGA claims is enforceable because the FAA prohibits a conclusion holding otherwise.” In a third case, Parvataneni v. E*Trade Financial Corporation, the federal court held that in the wake of Concepcion, “an arbitration agreement that denies a plaintiff the right to pursue a representative PAGA claim is still a valid agreement.”30 It therefore appears that for the time being an employer’s ability to compel individual arbitration of such claims will largely depend on whether the case is pending in state or federal court.

D.R. Horton

Another curiosity of the Iskanian decision is that in enforcing the class action waiver, the court reviewed and declined to adopt the NLRB holding in D.R. Horton, Inc.31 The basis of that case is that Section 7 of the National Labor Relations Act (NLRA)32 guarantees employees the right to engage in concerted activities for the purpose of collective bargaining “and other mutual aid or protection,” and that the right to engage in a collective or class action proceeding with one’s coworkers is a statutory right. The court agreed with the Fifth Circuit’s determination that Horton could not be saved from preemption by the FAA’s savings clause is covered by Horton, and that the NLRA could not have intended to protect a procedural right to participate in class actions because they did not exist when the statute was enacted.33 Addressing the U.S. Supreme Court’s decision in CompuCredit v. Greenwood34 that issued shortly after Horton, the California Supreme Court concluded that the statutory right to engage in concerted activity set forth in Section 7 of the NLRA does not represent a “contrary Congressional command” overriding the FAA’s mandate.35

In resolving the issue of whether Horton remains a viable basis for challenging class action waivers in employment litigation, the court could and should have stopped there. But perhaps in deference to Justice Kathryn M. Werdegar’s lone dissenting opinion in which she fiercely defends the Horton rationale, the court stated:

Our conclusion does not mean that the NLRA imposes no limits on the enforceability of arbitration agreements....[t]he arbitration agreement in the present case, apart from the class waiver, still permits a broad range of collective activity to vindicate wage claims....[T]he agreement here is less restrictive than the one considered in Horton.... We have no occasion to decide whether an arbitration agreement that more broadly restricts collective activity would run afoul of section 7.36 This consideration of the terms of the agreement in question prompts review of the arbitration agreement in Iskanian. In that case, the class and representative action waiver in question provides:

| Except as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.37 |

However, a very similar clause was found to be enforceable in a consumer arbitration contract in Concepcion.38 In that case, the Court upheld a provision in a consumer cell phone service contract providing for arbitration of all disputes and requiring that claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” It also prohibited the arbitrator from “consolidating more than one person’s claims,” and precluded the arbitrator from “otherwise presiding over any form of representative or class proceeding.”39

It is difficult to understand this inconsistency. One may even question whether the Iskanian court considered the arbitration language in Concepcion. The implications of this inconsistency are troubling for the employers that operate in California, since they may now face efforts to invalidate the very kind of class action waiver that was held entirely lawful and enforceable in Concepcion. Parties to arbitration agreements should be provided with clear guidelines regarding what legal rights they have to either enforce or challenge agreements to arbitrate PAGA and class action claims in California. In light of the forgoing, future challenges to Iskanian nevertheless seem likely, and review by the U.S. Supreme Court

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in another case remains quite possible, given the fact that in recent years it has held two other California Supreme Court decisions that were hostile to arbitration to be preempted by the FAA. 40

2 9 U.S.C. §§1 et seq.
3 Gentry v. Superior Court, 42 Cal. 4th 443 (2007).
5 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
6 D.R. Horton, 737 F. 3d at 386-87.
7 Id.
10 See id.; AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011).
11 Coneff v. AT&T Corp., 673 F. 3d 1155 (2012).
12 Id. at 1160. See also McGill v. Citibank, N.A., 181 Cal. Rptr. 3d 494 (Dec. 18 2014) (citing Concepcion, 131 S. Ct. 1740).
16 California Consumers Legal Remedies Act (CLRA), codified at Civ. Code §§1750-84.
17 Ferguson, 733 F. 3d at 932 (citing Boughton, 21 Cal. 4th at 1079).
19 Id. at 386-8.
25 Id. at *7.
27 Id. at 2320 (Kagan, J. dissenting).
31 See Murphy Oil, 361 NLRB No. 72 (2014) (affirming the NLRB holding in Horton).
35 Iskanian, 59 Cal. 4th at 373.
36 Id. at 373-4 (2014) (citations omitted).
37 Id. at 360-61.
38 See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).
39 Id. at n.2.
How to Apply Proposition 47’s Reclassification and Firearms Provisions

IN NOVEMBER 2014, CALIFORNIA VOTERS passed Proposition 47, which immediately went into effect as The Safe Neighborhood and Schools Act. The stated purpose of this act is “to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for non-serious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment.”

In practical terms, Proposition 47 provides that certain drug and theft offenses, which were previously felonies or wobblers, are now misdemeanors, unless the defendant has specific prior convictions. The California Legislative Analyst’s Office estimates that approximately 40,000 people are convicted annually of the offenses covered by this legislation.

Proposition 47 adds to and alters existing provisions of the Penal and Health and Safety Codes. These amendments now make certain enumerated offenses misdemeanors, subject to roughly the same standard disqualifiers: there will be no reduction in cases in which the defendant has “one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 666, or for an offense requiring registration pursuant to subdivision (c) of Section 290.” More simply put, in general, if a defendant has been previously convicted of an offense, commonly referred to as a super strike, or an offense that requires sex offender registration, the current offense does not automatically become a misdemeanor.

The changes to the drug statutes involve some striking and relettering of the drug lists. Proposition 47 amends three existing drug possession sessions: Health and Safety Code sections 11350 (possession of listed or cross-referenced drugs, such as heroin, which was previously a straight felony), 11357 (possession of concentrated cannabis, formerly a wobbler), and 11377 (possession of listed or cross-referenced drugs, such as methamphetamine, previously a wobbler). Under Proposition 47, these offenses are now misdemeanors, subject to the above-referenced disqualifiers for prior convictions.

With regard to the theft-related offenses, Proposition 47 adds two new sections to the Penal Code: 459.5 (shoplifting) and 490.2 (petty theft). In addition, several statutes have been moved or their language has been modified. There is now a monetary amount—$950—that creates a critical threshold. When a defendant commits one of the listed fraud or theft crimes, and the value of the items (either independently or jointly, depending on the charged statute) is less than $950, the offense is now a misdemeanor.

The two new statutes are relatively straightforward. Shoplifting, under Section 459.5, is defined as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).” This crime is a misdemeanor unless the defendant has one of the disqualifying priors. The new statute provides that an offense meeting this definition must be charged under this section and cannot be charged as burglary (Section 459) or theft (Section 484).

Thus, if a defendant commits an act, described under Section 459.5 as shoplifting, he or she cannot also be charged under a more general theft statute.

Concerning petty theft, Section 490.2 provides: “Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor.”

Penal Code Section 473 (forgery) has been amended to provide that any person convicted of forgery of certain listed items (“a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order”), when the value of the listed items does not exceed $950, shall be convicted of a misdemeanor. This amendment does not state if the value of $950 is meant to be the cumulative amount of all items or the value of each item. In addition to the general disqualifiers for prior convictions, this new amendment “shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.”

Penal Code Section 476a (nonsufficient funds, also known as check kiting), has been amended to provide that if the total amount of the checks is less than $950, the offense is a misdemeanor. In addition to the general disqualifiers for prior convictions, this section includes specific disqualifiers for persons who have been previously convicted of three or more violations of the listed offenses. This is a change from the prior language that elevated the offense to a wobbler when the defendant had only one prior conviction of a listed offense.

Proposition 47 also amends Penal Code Section 496 (receiving stolen property) to read that if the value of the property received does not exceed $950, the offense shall be a misdemeanor.

Penal Code Section 666 (petty theft with a prior) is the most convoluted and complex change. Generally speaking, if a defendant commits petty theft, he or she should be charged under the new misdemeanor petty theft statute, Section 490.2, regardless of how many prior theft offenses the defendant has. However, petty theft with a prior under Section 666, which is a wobbler, still applies if the defendant 1) was convicted of a specified prior conviction, 2) served custody time (state prison or county jail) for the prior conviction, and 3) is required to register as a sex offender under any provision of the Sex Offender Registration Act, or has one of the super strike offenses or has a conviction of Penal Code Section 368(d) or (e) (elder abuse).

This disqualifier for registered sex offenders is broader than the other offenses covered by Proposition 47.

How to Use the New Law

Proposition 47 does not specifically address how to apply its new provisions to cases currently pending in trial courts. Although the pro-
Proposition 47 can be required to serve a defendant who is resentenced pursuant to Section 1170.18(d) additionally provides that a defendant who is resentenced to serve a sentence than originally imposed. Section 1170.18(c) provides a very narrow definition of what constitutes an “unreasonable risk of danger to public safety.” It means “an unreasonable risk that the petitioner will commit a new violent felony within the meaning of” Penal Code Section 667(e)(2)(C)(iv). In order to find an unreasonable risk of danger, there must be reason to believe the petitioner will commit a super strike. Section 1170.18(b) sets forth a list of considerations for the court in making the unreasonable risk determination: 1) the defendant’s criminal history, including the types of crimes committed, the extent of the injury to victims, the length of prior prison commitments, and the remoteness of the crimes; 2) the defendant’s disciplinary record and record of rehabilitation while incarcerated; and 3) any other evidence that the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. Proposition 47 also specifically ensures that a defendant who is resentenced under its procedures cannot receive a longer sentence than originally imposed. Section 1170.18(d) additionally provides that a defendant who is resentenced pursuant to Proposition 47 can be required to serve a year of parole.

Penal Code Section 1170.18(f) describes the resentencing procedure for a defendant who has completed his or her sentence for an offense that is now considered a misdemeanor. The defendant must simply file an application before the trial court that entered the judgment of conviction in order to have the felony designated a misdemeanor. This subsection has no unreasonable risk determination. If a defendant qualifies, he or she will be granted relief. This can be done without a hearing, unless one is requested.

Additionally, applicable to both resentencing subdivisions, Section 1170.18(j) states that any petition or application must be filed within three years after the effective date of Proposition 47. Finally, the resentencing hearing is considered a “post-conviction release proceeding” under Marsy’s Law, which means that the victim is entitled to notice and an opportunity to be present at the hearing.

Outstanding Questions

In the aftermath of the passage of Proposition 47, many practical questions have been raised. For example, does the provision in Penal Code Section 1170.18 that uses the term “convicted” apply to juvenile adjudications? Does Section 1170.18(a’s) requirement that a defendant be “serving a sentence” apply to a defendant who is merely on probation? Or, does a prior sentence, for which a defendant served prison time, which is now reduced to a misdemeanor, still qualify as a prison prior under Penal Code Section 667.5(b)22 Proposition 47 also raises public policy questions, including whether defendants will want to go through rigorous Penal Code Section 1000 or Proposition 36 drug rehabilitation requirements (the only way many defendants could previously avoid felony convictions in drug possession cases) if they are now only facing the consequences associated with a misdemeanor? At this early stage in the development of the new law, these questions and many others have yet to be answered.

A quirk of particular note, however, is that Penal Code Section 1170.18(k) provides that any felony conviction that is recalled and resented under subdivision (b) or designated a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm...” Thus, any defendant who uses a postconviction remedy under Penal Code Section 1170.18 will be a misdemeanor who still has a lifetime firearm prohibition. This is an attempt at something new: prohibiting a person, for life, from possessing a firearm, even though that person is not otherwise a “prohibited person” under current California law. In other words, California law sets forth several statutes that criminalize possession of firearms by certain persons, and Proposition 47 misdemeanants are not part of that list.

Furthermore, this provision is unique because it links lifetime firearm consequences to a misdemeanor offense that has no connection to firearms or violence. California currently has lifetime firearm prohibitions for four misdemeanors27 that directly relate to firearm usage: assault with a firearm, maliciously and willfully shooting a gun at an inhabited dwelling,28 and the possession of a deadly weapon with the intent to intimidate a witness,29 selling firearms to criminal street gang members,30 and inflicting serious bodily injury while brandishing a firearm.31 These 10-year prohibited misdemeanors have some kind of relationship to firearms or violence; thus, courts have upheld the state’s interest in prohibiting those misdemeanor persons from possessing firearms for the designated period.

However, if the firearm prohibition under Proposition 47, many practical questions have been raised. For example, does the provision in Penal Code Section 1170.18(k) upheld, it would create a new class of lifetime prohibited misdemeanants who currently are not part of the prohibited persons’ statute and whose crimes have absolutely nothing to do with firearms or violence. This section has the potential to create some unusual, and likely unintentional, circumstances. For instance, under Proposition 47, a misdemeanor who wrote a bad check (lifetime prohibition) will be treated the same, for firearm purposes, as a misdemeanor who shoots an inhabited dwelling (lifetime prohibition), and worse than a misdemeanor who intentionally inflicts serious bodily injury while brandishing a gun (the last would have only a 10-year prohibition).

Additionally, because the firearm prohibition applies only retroactively to persons availing themselves of the postconviction procedures, a person convicted today of a misdemeanor petty theft—who has multiple theft priors—would be able to possess firearms, but a person convicted last year of the same conduct—who subsequently received a new class of lifetime prohibited misdemeanants who currently are not part of the prohibited persons’ statute and whose crimes have absolutely nothing to do with firearms or violence. This section has the potential to create some unusual, and likely unintentional, circumstances. For instance, under Proposition 47, a misdemeanor who wrote a bad check (lifetime prohibition) will be treated the same, for firearm purposes, as a misdemeanor who shoots at an inhabited dwelling (lifetime prohibition), and worse than a misdemeanor who intentionally inflicts serious bodily injury while brandishing a gun (the last would have only a 10-year prohibition).

Finally, this language creates potential practical problems in determining who is eligible to possess firearms. The California Department of Justice performs background checks to determine eligibility to purchase or receive firearms. As part of that check, the department looks at criminal convictions. Prior to Proposition 47, the background check process required the department to simply review the offense of conviction and check it against the list of prohibited offenses. However, under Proposition 47, it is not the fact of the conviction itself that is prohibiting but how the offense became a misdemeanor. Was the offense originally filed as a misdemeanor? Was the offense reduced pursuant to Penal Code Section 17(b)? Was the offense reduced pursuant to Penal Code Section 1170.18? Consequently, for all
offenses affected by Proposition 47, the California Department of Justice now has to look behind the offense of conviction to determine how the offense became a misdemeanor in order to know whether there is a firearm prohibition. This constitutes a significant change.

It is uncertain how courts will view this quirky firearm provision or the oddities that may arise from its implementation, but after the U.S. Supreme Court decisions in District of Columbia v. Heller and McDonald v. City of Chicago, firearm restrictions implicate a Constitutional right and have to meet some, as yet uncertain, level of scrutiny. Therefore, it is likely that there will be challenges to this new misdemeanor lifetime firearm prohibition.

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1 2014 Cal. Legis. Serv. Sec. 2 (Prop. 47); see also Cal. Const. art. II, §10(a).
2 Id.
3 A wobbler is an offense that can be either a misdemeanor or a felony. See Penal Code §17(b).
6 See Penal Code §§459.5(a), 473(b), 476a(b), 490.2(a), 496(a); Health & Safety Code §§11350(a), 11357(a), 11377(a). Penal Code §666(b) varies the wording for the sex offense disqualifiers.
7 A super strike is an offense described in one of eight subsections listed in Penal Code §667(e)(2)(C)(iv), including such crimes as murder, rape, and child molestation.
8 This disqualifier applies only when the offense itself requires registration. Thus, a person who registers under Penal Code §290.066 (court ordered registration) or 290.008 (juvenile adjudication) would not be disqualified. However, the sex offender disqualifier under Penal Code §666 (petty theft with a prior) is broader because it applies to all registered sex offenders. Penal Code §666(b).
9 The statute provides that if the defendant has a disqualifying prior, the offense may be punished under Penal Code §1170(b), which apparently makes it a wobbler, although there is no reference to county jail. Penal Code §459.5(a).
10 Penal Code §459.5(b).
11 Penal Code §473(b).
12 Id.
13 Proposition 47 amends Penal Code §476(a)(b) to increase the loss amount from $450 or less to $950 or less.
14 “This subdivision shall not be applicable if the defendant has previously been convicted of three or more violations of Section 470, 475, or 476, or of this section, or of the crime of petty theft in a case in which defendant’s offense was a violation also of Section 470, 475, or 476 or of this section....” Penal Code §476(a)(b).
15 See Penal Code §476a (West 2013).
16 The designated prior offenses are: petty theft (Penal Code §490.2), grand theft (Penal Code §487), elder abuse (Penal Code §368(d) and (e)), auto theft (Veh Code §10851), burglary (Penal Code §459), carjacking (Penal Code §215), robbery (Penal Code §211), or felony receipt of stolen property (Penal Code §496).
17 See supra note 8.
18 2014 Cal. Legis. Serv. Sec. 3(A) (Prop. 47).
19 Penal Code §1170.18(c) provides that this definition applies “throughout this Code.” Thus, it will likely have a broader effect. For example, Penal Code §170.126, which governs resentencing under Proposition 36, the Three Strikes Reform Act, also uses the “unreasonable risk of danger to public safety” language, but does not define the term. See Penal Code §1170.126(a)(3)–(3). Thus, this new definition may also be applicable in making the “unreasonable risk” determination under Proposition 36. One court has declined to decide whether this new definition applies prospectively to the Three Strikes Reform Act but did find the new unreasonable risk qualification does not retroactively apply to that act. People v. Chaney, 14 Cal. Daily Op. Serv. 13.496.
20 Penal Code §1170.18(e).
21 See Penal Code §1170.18(d).
22 Penal Code §1170.18(f)(h).
23 Penal Code §1170.18(h) (noting Cal. Const. art. I, §28(b)(7)).
24 Penal Code §1170.18(b) provides, in relevant part: “…the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (b) of Section 1170....”
25 This section borrows language from the expungement statute in Penal Code Section 1203.4(a)(2), which provides that “Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his or her custody or control any firearm....” Yet, felons, who receive relief under Section 1203.4 are not only still considered felons for purposes of firearm possession, but for most purposes. See, e.g., People v. Diaz, 41 Cal. App. 4th 1424 (1996); see also Ramirez-Castro v. I.N.S., 287 F. 3d 1172, 1174-75 (2002).
26 See Penal Code §§29800 et seq.
28 Penal Code §245(a)(2), (a)(3).
29 Penal Code §246.
30 Penal Code §417(c).
31 Penal Code §417(a)(2).
32 Penal Code §136.5.
33 Penal Code §186.28.
34 Penal Code §417.6.
35 In upholding the ability to prohibit misdemeanants from possessing firearms—typically for 10 years—California courts have stated that “we can see no principled argument that the government cannot also add certain misdemeanants, particularly those who have committed an assault by ‘means of force likely to produce great bodily injury’.... The public interest in a prohibition on firearms possession is at its apex in circumstances, as here, where a statute disarms persons who have proven unable to control violent criminal impulses.” People v. Flores, 169 Cal. App. 4th 568, 575 (2008).
38 Id.
41 See Heller, 554 U.S. at 634-36; see also McDonald, 561 U.S. at 791.

SEVERAL RECENT CASES have targeted individuals for alleged public corruption. Many of those who have been charged, convicted, or acquitted, argued in their defense that they were “just following orders,” “relying on the decision making expertise of others,” or “just unaware of what was going on.” However, in any defense, the merit of the argument is only as good as the facts. Knowing how to advise and protect a client before, during, and after a government investigation can secure a better result.

In the last five years, the Public Integrity Division of the Los Angeles District Attorney’s Office (LADA) has brought several cases alleging misappropriation of public funds and embezzlement by public officials. California broadly defines a public official as “every member, officer, employee or consultant of a state or local government agency.” Public funds are used to finance government functions such as law enforcement, local city government operations, and public schools. Prosecutions for misappropriation are brought under Penal Code Section 424, which prohibits unlawful acts related to public monies, and Penal Code Section 503 or 504, either of which prohibits embezzlement, with Section 504 being specific to embezzlement of public funds by public officials and others.

The most well-covered recent prosecution by the LADA is the City of Bell case, in which the city manager, the assistant city manager, five sitting city council members, and one nonsitting council member were charged with multiple counts of misappropriation of public funds under Section 424 and embezzlement of public money by a public official under Section 504, primarily based upon what the prosecution argued were their overly inflated council member salaries.

The cases of the Bell city manager and the assistant city manager were severed from the five council members, who went to trial first. The council members presented evidence to support that they had no idea that the actions of the council were illegal, that they were generally unsophisticated, and that they were relying on the decision making expertise of the city manager and assistant city manager. After a five-week jury trial, the jury was unable to reach a verdict on half of the charges.

**Charges of Misappropriation of Public Funds Under Penal Code Sections 424, 503, or 504 Are Necessarily Fact-Specific**

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the counts charged as to five of the council members, and a mistrial was declared on those counts. The jury convicted those same five council members on the remaining counts. One council member was entirely exonerated. In interviews after the trial, jurors stated that they believed the exonerated council member was not fully aware of the council’s actions and had not voted on the raise in question.

In the Bell case, the defense was a combination of “just following orders,” “relying on the decision-making expertise of others,” and “just didn’t know what was going on.” In the context of public corruption prosecutions, the defense has merit because the basis of the organizational structure of a board of directors is to compartmentalize duties and responsibilities in order to increase the functionality of the organization. In fact, in the Bell case, the jury’s inability to reach a verdict on half of the counts charged concerning five of the council members and the outright acquittal of one council member supports the exculpatory value jurors will attribute to a defendant when presented with evidence that the accused was just following orders or was relying on the decision-making expertise of one’s more knowledgeable peers.

The defense was able to demonstrate through evidence that the council members were in fact not sophisticated and relied on the expertise of the leadership. At sentencing, the convicted council members received sentences ranging from community service and home arrest on the low end to two years in custody on the highest end. Those sentences, compared with the sentences imposed upon the city manager and assistant city manager, who received sentences exceeding a decade in custody, are relatively modest. Based upon the court’s comments at sentencing, the lesser sentences were imposed in part because the court recognized that the council members were just following orders and relying on the expertise of others.

Similarly, in a jury trial simultaneously taking place across the hall from that of the Bell council members, two charter school operators were accused in a prosecution brought by the same unit of the LADA. This case involved a husband and wife who also charged with misappropriating public funds under Section 424 and embezzlement of public funds by public officials under Section 504 from the charter school they founded and operated. Both the husband and wife sat on the board of directors of the school. In trial, the wife’s defense was that her role in the operation was compartmentalized to academics and public relations, that there was a division of duties in the administration, leaving her with little to no substantive involvement in the finances, and that she relied on the financial expertise of the other board members and deferred to their judgment and decision making. After a six-week jury trial charging 11 felony counts, followed by posttrial motions, the wife was sentenced to probation on a single count of embezzlement. The case is currently on appeal.

**Stark v. Superior Court**

The pivotal case defining the mental state required for a violation of Section 424 is *Stark v. Superior Court.* Stark states that Section 424 is a general intent crime but the defendant must have the mental state as to the legal authorization. In *Stark* the California Supreme Court outlined the elements of a Section 424(a)(1) violation:

As the statutory language provides, it is not simply appropriation of public money, or the failure to transfer or disburse public funds, that is criminalized. Criminal liability attaches when those particular actions or omissions are contrary to laws governing the handling of public money. Unlike many statutory provisions, these provisions make the presence or absence of legal authority part of the definition of the offense. The People must prove that legal authority was present or absent.

The knowledge requirement of the authorization involved in Section 424 is not limited to public officials. It applies to every person with some control over public funds.

The court recognized that the council members in the charter school case and the council members in the Bell case, facts supported the argument that they were relying on the decision-making expertise of their more knowledgeable peers. For the accused with a subordinate or compartmentalized role in an organization, these types of defenses can be effective when faced with a violation of Section 424. However, if the accused parties had some measure of control over public funds, they also have a commensurate fiduciary duty over those funds. A person with control over public monies has a fiduciary duty to oversee the spending of those monies in the public interest.

The defense in *Stark v. Superior Court* also led to overturning the conviction of former Compton Mayor Omar Bradley. Bradley served as mayor from 1993 to 2001, and in 2004 he was convicted of misappropriating approximately $7,500 in public funds by using city-issued credit cards for personal items. Bradley was also accused of taking cash advances for city business expenses and then charging the items to his city-issued credit card, commonly known as “double dipping.” Bradley, along with Compton’s city manager and one city council member, was convicted of misappropriation and misuse of public funds under Section 424 and sentenced to three years in state prison. From the beginning, Bradley’s defense was that he did not know what he was doing was wrong. He believed all his expenses were proper since they were incurred while on the job and the proper authority, the Compton city manager, had approved his spending. He even testified that he had conferred with the city manager regarding many of the expenses and received permission to use the funds for various purposes.

Bradley appealed in 2006, at which time he continued to maintain that he did not do anything wrong because he believed that the credit card charges were legitimate, that he had relied on the expertise of the city manager to approve the expenses, and that he in no way intended to misappropriate funds. Bradley was unsuccessful in that appeal, but that was before the *Stark* decision. By offering a broader reading of the mental state required in a Section 424 offense, the 2011 *Stark* decision echoed Bradley’s defense by stating, “Public officials and others should
not be criminally liable for a reasonable, good faith mistake regarding their legal responsibilities. Nor is section 424 intended to criminalize ordinary negligence or good faith errors in judgment. Based on this holding, in 2012, California’s Second District Court of Appeal reversed Bradley’s conviction, finding that Bradley “presented evidence, which if credited by the trier of fact, negated his wrongful intent.” Bradley lacked the requisite mental state needed for a Section 424 conviction to stand, which had always been his defense.

In the Bradley opinion, the Second District Court of Appeal highlighted the importance of Stark as to why a higher mental state must be proven in Section 424 offense cases. Quoting Stark, the Bradley court observed: “[A] criminal negligence standard protects both the public and the accused. If public officials and others entrusted with control of public funds subjectively believe their actions or omissions are authorized by law, they are protected from criminal liability.” This subjective standard invites introduction of evidence demonstrating that the public official reasonably believed that he or she was not doing anything wrong or was relying on the expertise of others, much like Bradley. However, the broad interpretation of Section 424 will not work for a defendant if the belief by the public official is objectively unreasonable.

Penal Code Section 424 was recently interpreted by People v. Aldana, which held that in order to violate Section 424, a person charged with the receipt, safekeeping, transfer, or disbursement of public money within the meaning of Section 424 must also have the approval authority that results in the expenditure of the public funds. The Aldana decision caused the reversal of the conviction of the superintendent of the Beverly Hills School District. The charges in that case stemmed from allegations that the superintendent paid the district director of planning and facilities a Section 424 stipend required approval by the district’s board of education—the Superintendent was not “charged with the receipt, safekeeping, transfer, or disbursement of public moneys.” In overturning the conviction, the court stated: “At trial, it was undisputed that both the increased car allowance and the stipend required approval by the district’s board of education—[the Superintendent] did not have the legal authority to order them unilaterally.”

The common theme in these cases is that the accused was following orders and believed that he or she was not only allowed to act as alleged but also, in some instances, actually required to do so. The Bell council members argued they were operating under the understanding that they were legally entitled to their high salaries. The wife of the charter school operating team argued that she was functioning under the assumption that those more knowledgeable of financial affairs were making the financial decisions and that she relied on those decisions. Former Mayor Bradley believed that his expenses were proper due to his belief that he had obtained the appropriate city department’s authorization. The superintendent of the Beverly Hills School District argued that he never had the unilateral authority to approve monetary distributions and was just following the orders of the board. Each of these defendants argued in one respect or another that he or she was subject to carrying out the will of a higher authority. The jury verdicts suggest that in most of the jury trials that ensued, the defense resonated to at least some degree. How well this defense is received by a jury is in great part reliant on the functioning structure of the organization, how well the jury understands that structure, and the facts that establish the client’s individual efforts to comply with his or her obligation to protect the public trust.

Risk Management

Effective representation of individuals under investigation for or accused of public corruption requires that counsel be intimately familiar with the client’s role within the organization and equally familiar with the working of the organizational structure. Any organization, including one regulated under IRC Section 501(c)(3), that receives any public monies has a greater fiduciary obligation because federal and state statutes regulate the use of specially earmarked public funds. Greater board and individual oversight are required for these organizations. Small to medium-sized organizations in which the management team effectively functions as an alter ego of the entity have the greatest ability and incentive to protect board members and executive management.

The board must act and appear independent from the executive management team. A strong working board engaged in the decision-making function establishes the board’s independence. Documenting those exchanges in the board minutes is crucial. Failure to maintain a strong and active board of directors can result in allegations being made that the board is a sham or a rubber stamp.

The structure of the board is equally important to preventing the appearance of corruption. The board members must have experience and expertise that collectively fur-
thers the mission and goals of the organization; however, board members cannot insulate themselves from their fiduciary responsibility by compartmentalizing their board role, particularly as related to financial aspects. Finally, before joining any board, the prospective board member should always confirm that the board carries insurance for directors and officers.

A government investigation into an organization’s spending of public funds will usually start with gathering documents and records, sometimes as a result of a citizen’s seeking records under the Public Records Act or the Brown Act.27 One method of collection is via a subpoena duces tecum. When an organization receives a subpoena duces tecum from the government, the organization should retain competent counsel to manage the production of documents and records. Records should be created that track the production. When retained by counsel, the attorney work product privilege can protect outside vendor review of large amounts of data necessary for responsive production. In addition, experienced counsel can open a dialogue with the investigative or prosecutorial agency to determine the time period in which response is required and the scope of the request. Trained criminal counsel will frequently be able to learn valuable information in the course of this dialogue concerning the targets and objectives of the investigation. Sometimes, compliance can be either negotiated with the prosecutor or challenged through the court process if the request is overly broad or improper for any reason.

Law enforcement can also obtain documents and records via use of a search warrant duly authorized by a judge. Execution of a search warrant is disruptive to business operations. In most circumstances many law enforcement agents will be present during the search. Complete compliance in terms of the documents and records identified in the subpoena is the best approach. Therefore, if asked by a government representative where documents and records are stored and kept, a response should be forthcoming. This does not mean, however, that the representative has an affirmative obligation to offer assistance. That said, each circumstance is unique and subject to the differing personalities and tactics in a given situation. Employees should know that they are not required to submit to an interview if approached by a law enforcement agent. Counsel can advise as to the propriety of employees, management, or board members providing statements. The best practice is to contact counsel immediately upon the arrival of law enforcement bearing a subpoena to search and seize.

If an organization has reason to believe financial improprieties are occurring, the organization can proactively conduct its own independent investigation using outside counsel for guidance. If improprieties are discovered, the organization is then in a position to remedy the defect that may include disciplining the wrongdoers and implementing protocol to prevent reoccurrence. Such steps may serve to prevent or mitigate government action.

Individual criminal liability for accusations relating to acts of public corruption is frequently derived from the corporate and administrative structure of the organization that employs the individual. In California, this area of law is evolving as more prosecutions of public officials and those responsible for public monies are brought. For any client who sits on a board of directors for a company receiving public funds, the best advice is to know what is going on, ask questions, and maintain records of activities.

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1. GOV’T CODE §§2048.


3. See id.


6. Id.


10. Id. at 395-96.

11. Id. at 397.

12. Id. at 397-98 (emphasis in original).


17. Stark, 52 Cal. 4th at 400.


19. Id. at 78-79 (quoting Stark, 52 Cal. 4th at 399).


24. Id. at 3.


27. GOV’T CODE §§54950-54963, 6250-6270.
THE LEAHY-SMITH America Invents Act (AIA), enacted in 2011, commenced a two-year rollout of the most comprehensive revision of patent law since the Patent Act of 1952.1 Its best-known feature switched the U.S. patent system from “first to invent” to “first to file,” bringing the U.S. system in line with the rest of the world.2 The act also substantially modified many of the procedures involved in obtaining and defending patents.

U.S. patent law now applies the first-to-file system to patent applications filed on or after March 16, 2013. More accurately, it applies the first-to-file system to any patent applications with an effective filing date of March 16, 2013, or later. An effective filing date is the earlier of 1) the actual filing date and 2) the filing date of the earliest application to which the current application can piggyback, known as the priority date.3 Subject to certain time limits, a priority date could be, for example, the date on which an inventor filed a patent application for the same invention in a different country. A priority date could also result if an inventor filed a prior patent application with the U.S. Patent and Trademark Office (USPTO) and the patent examiner found the application to cover multiple groupings of inventions, each of which required a separate application. The inventor would then file a divisional application that would cover a portion of the original application. That divisional application would have an effective filing date matching the filing date of the original application.

With the first-to-file rule, whoever first makes it to the patent office gets the patent, which gives inventors reason to maintain secrecy regarding their inventions in development, but there are nuances. For example, an inventor may publicly disclose an invention up to a year before filing a patent application.4 This is because only inventions that are novel may be patented, and novelty depends on finding that nobody already publicly disclosed the same invention. Novelty is evaluated by considering the prior art—the collection of preexisting inventions and technology (patented and not) that would show whether or not a claimed invention is in fact new to the public. Prior art is anything that is “patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.”5 If prior art covers a claimed invention, the USPTO will not issue a patent for the invention because the prior art demonstrates that the invention, as of the patent application’s effective filing date, was not new to the public. Notably, before the AIA, the meaning of patent-defeating prior art was in certain respects limited to what was known, used, or on sale in the United States. Now, the definitional scope of prior art has been expanded to include public disclosures anywhere in the world.

Generally, any public disclosure of relevant information—even by the inventor—is prior art, which could potentially render an invention non-novel and unpatentable at the time of filing a patent application. However, inventors are afforded a one-year grace period. Inventors may publicly disclose their invention up to one year before the effective filing date of a patent application, and such public disclosure (along with repetitions by anyone else) will not be considered prior art. Similarly, if somebody privately obtains “the subject matter disclosed...from the inventor” and publicly discloses it, that public disclosure will not be considered prior art so long as the inventor files an application with an effective filing date within one year of the public disclosure.6

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by VANCE WOODWARD

PATENT INNOVATION

The Leahy-Smith America Invents Act has introduced many welcome reforms to American patent law.
Better still, if the inventor publicly discloses the invention, and somebody else independently discovers the same invention and discloses it, even that will not be considered prior art, at least not for one year. In other words, the one-year deadline for filing a patent application starts running upon the first public disclosure of the invention by anyone. From then on, no subsequent public disclosure matters, even if that subsequent disclosure derives from independently inventive sources.

Public disclosure will always serve as prior art with respect to anyone other than the inventor from which the disclosure derived, even those who could otherwise show that they first discovered or at least independently discovered the invention but kept it secret. Consequently, once any inventor publicly discloses the invention, the first-to-file rule does not strictly apply. For the succeeding year, only the first inventor to disclose may potentially obtain a patent. Meanwhile, nobody else could normally obtain a patent, not even the first inventor if there is one (unless the first inventor can show that the second inventor derived the invention from the first inventor). If, however, anyone publicly discloses an invention and then the inventor waits more than a year to file an application, the public disclosure will serve as prior art and therefore preclude anyone from obtaining a patent for the invention, for a failure of novelty.

In sum, generally, nobody but the first one to publicly disclose may obtain a patent because the public disclosure immediately becomes prior art to all except the first to disclose. After a year elapses, the disclosure acts as prior art to all. In this sense, the new system could be called a first-to-disclose system rather than a first-to-file system.

Preissuance Proceedings
In addition to adopting a first-to-file rule, the AIA also modified preissuance proceedings, which take place before a patent is granted, and postissuance proceedings, which take place after a patent is granted. Significantly, the law now allows for preissuance submissions by third parties. This change promotes transparency and public participation, which is an improvement over the alternative in which third parties had to look to the courts to challenge patents after thousands of dollars and several years had been consumed in obtaining patents. Specifically, the AIA enables anyone to submit any patent, patent application, or any other publication of potential relevance to the patent examiner during the examination of a patent application. A third party could do this to show that prior art renders an invention non-novel and therefore unpatentable, thereby saving the third party potential licensing expenses for use of the possibly-about-to-be-patented invention.

There are time limits for filing preissuance submissions. At the latest, third parties must submit materials before the issuance of a notice of allowance (the document notifying the applicant that the applicant may obtain a patent upon payment of issuance fees). Meanwhile, if the USPTO patent examiner rejects any claims during prosecution of the application (which often happens because patent attorneys typically ask for more than they expect to get) and if the patent application is published (which always happens), the deadline for preissuance submissions will be set at the last of those two events—i.e., before the notice of allowance issues. This is an incentive for interested third parties to act should they want to submit potentially relevant material for consideration in connection with other parties’ patent applications. This, in turn, creates an incentive for full disclosure and efficiency.

Another of the AIA’s innovations is the derivation proceeding, which replaces what was called an interference. The derivation proceeding addresses situations in which two separate parties file two separate patent applications for the same invention. The second applicant can petition for a derivation proceeding to be allowed to bring evidence that the first applicant derived the invention from the second applicant. If successful, the second applicant could therefore establish priority over the invention without regard to who filed first. However, a second applicant may expect to succeed with a derivation proceeding only if the second applicant can show that the first applicant actually derived the invention from the second applicant. Nothing is accomplished by showing that the second applicant was the first to invent. If an inventor independently invented second but disclosed or filed first, it is the second inventor who gets the patent, if one issues.

Postgrant Proceedings
The AIA also created a new set of postgrant procedures that partially replace and partially supplement the previous procedures under which patentees and third parties could contest or validate a patent. The new procedures are postgrant review, inter partes review, supplemental examination, and a transitional postgrant review of covered business method patents. Any person other than the patentee may petition for a newly created postgrant review to contest the validity of the patent. The petitioner may submit evidence in support and participate in the review. Postgrant review is available up to nine months after a patent is granted. The USPTO will undertake a postgrant review only if the petition establishes that it is more likely than not that at least one patented claim will be defeated.

An inter partes review replaces what was called inter partes reexamination. An inter partes review is available only after the up-to-nine-month period for initiating postgrant review. Inter partes review is designed to be an alternative to litigation. Accordingly, if a patentee launches an infringement suit, the alleged infringer has a one-year deadline to petition for inter partes review, which will often earn a stay of the federal court proceedings. However, if the infringer launches a declaratory relief action first (seeking a ruling that the at-issue patent is invalid), the infringer may not subsequently petition for inter partes review.

Another difference between postgrant review and inter partes review is that petitions for postgrant review may be based on many grounds for contesting the validity of a patent, including but not limited to lack of novelty (same invention already existed beforehand), obviousness (prior inventions existed that are so similar that the disputed invention was obvious to anyone familiar with the art), and a failure to comply with formalities. Conversely, petitions for inter partes review may only be based upon a lack of novelty and obviousness, and they may only rely on prior art. Another difference is that postgrant review will commence only if the petitioner is “more likely than not” to defeat at least one claim, whereas inter partes review commences upon showing a “reasonable likelihood” of prevailing, an easier standard to meet. There are other differences as well.

For example, the AIA created a program specifically for the postgrant review of covered business method (CBM) patents. CBM patents claim as the patented invention a method, apparatus, or operation used in the practice, administration, or management of a financial product or service. This distinguishes CBM patents from patents for technological inventions, which are patents that claim a novel and unobvious technological feature that solves a technical problem using a technical solution. A distinguishing feature of postgrant review of CBM patents is that a third party may petition for a CBM postgrant review only after the patentee has asserted an infringement claim against that party. Postgrant review in general (like inter partes review) is not subject to that limitation. Consequently, members of the general public cannot petition for CBM postgrant review unless the patentee claims infringement against them. Also, CBM postgrant review is not subject to the nine-month deadline that generally applies to postgrant review. CBM postgrant review is a transitional program, set to terminate on September 16, 2020. A subsequent bill that would have made the program permanent was recently shelved. A newly created supplemental examination may be instituted only at the request of a patentee. It is approximately the patentee’s counterpart to the third party’s postgrant review, at least in terms of the scope of issues that can be raised. A patentee would initiate a supple-
The Leahy-Smith America Invents Act (AIA) commenced a two-year rollout of the most comprehensive revision of patent law since the Patent Act of 1952.

1. True.
2. False.

2. U.S. patent law now applies the first-to-file system with respect to patent applications filed before March 16, 2013.

3. False.

4. Because of the AIA, “prior art” is now limited to what was known or used or on sale in the United States.

5. False.

5. Public disclosure of an invention before filing a patent application renders the invention unpatentable.

6. False.

6. A derivation proceeding—which addresses situations in which two separate parties file two separate patent applications for the same invention—replaces what was called an interference.

7. True.
8. False.

7. Any person other than the patentee may petition for a newly created postgrant review to contest the validity of a patent.

8. True.

9. The USPTO will undertake a postgrant review only if the petition establishes that it is more likely than not that at least one patented claim will be defeated.

10. False.

10. Inter partes review can be initiated at any time to contest the validity of a patent.

11. Petitions for inter partes review may only be based upon obviousness and lack of novelty, and they may only rely on prior art.

11. False.

12. Business method patents relate to a method, apparatus, or operation used in the practice, administration, or management of a financial product or service.

12. False.

13. A third party must petition for a covered business method postgrant review before the patentee has asserted an infringement claim against that party.

13. False.

14. A supplemental examination may be instituted only at the request of a patentee.

14. False.

15. The USPTO will grant the request for supplemental examination only if the request raises a substantial new question of patentability.

15. False.

16. The AIA modified the parameters of the prior-use defense so that it is available only to those who can show that they commercially used the invention within the United States 1) at least one year before the effective filing date of the application for the at-issue patented invention and 2) at least one year before the invention was disclosed to the public.

16. False.

17. Because of the AIA, only parties that suffered a competitive injury as a result of the false marking may bring suit.

17. False.

18. In a declaratory relief action brought by an alleged infringer, the burden of proof is on the patentee-defendant to show infringement.

18. True.
19. False.

19. Defending a patent infringement suit in federal court on the basis that the infringed patent is invalid requires the defendant to bring clear and convincing evidence of invalidity.

19. False.

20. Less than 50 percent of all patent applications result in a patent being issued.

20. False.

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3. ☐ True ☐ False

4. ☐ True ☐ False

5. ☐ True ☐ False

6. ☐ True ☐ False

7. ☐ True ☐ False

8. ☐ True ☐ False

9. ☐ True ☐ False

10. ☐ True ☐ False

11. ☐ True ☐ False

12. ☐ True ☐ False

13. ☐ True ☐ False

14. ☐ True ☐ False

15. ☐ True ☐ False

16. ☐ True ☐ False

17. ☐ True ☐ False

18. ☐ True ☐ False

19. ☐ True ☐ False

20. ☐ True ☐ False
mental examination to have the USPTO consider or correct any information that may be relevant to patent validity. A patentee would do this to clarify and better delineate the scope of a patent, thereby forestalling attacks from potential infringers. The USPTO will grant the request for supplemental examination only if the request raises “a substantial new question of patentability,” often abbreviated as SNQP, which is an easier burden to meet than reasonable-likelihood and the more-likely-than-not standards applicable in other proceedings.

Meanwhile, a request for reexamination continues to be a device by which anybody may request the reexamination of a patent based on newly submitted prior art. The USPTO will commence the request for reexamination only upon meeting the SNQP standard. The USPTO itself can also initiate a reexamination. If the patentee makes the request, and it is granted, the reexamination is called an ex parte reexamination because it is a proceeding between the patentee and the USPTO alone. For the patentee, this is similar to a supplemental examination to have the USPTO consider or correct any information that may be relevant to patent validity.

A third party may also submit a request for reexamination. But unlike postgrant review and inter partes review (which a third party can initiate), the third party plays no role in the reexamination. In a sense, the third party launches the reexamination by submitting the alleged prior art and then stands back.

Prior Use and False Marking
Before the AIA, patent law provided a defense to prior users of an invention patented by someone else. Under the old law, those defending against infringement suits concerning a class of utility patents called method (or process) patents could show that they 1) had begun practicing the at-issue patented method in the United States more than a year before the effective filing date of the patent and 2) had begun commercially exploiting that method before the effective filing date of the patent. Under the AIA, this prior-use defense is still available, but it has slightly more stringent requirements.

Specifically, the defense is available to those who can demonstrate that they commercially used the invention in the United States 1) at least one year before the effective filing date of the application for the at-issue patented invention and 2) at least one year before the invention was disclosed to the public. Under the AIA, the prior-use defense is broader than before, now applying to any kind of utility patent (not only process but also machine, manufacture, and composition of matter), and to internal commercial use of an invention (for example, a trade secret or nonpublic use), affording greater protection to prior users.

The AIA also has updated the law regarding false marking, which is the counterfeiting of a patented or trademarked invention. False marking occurs when someone makes or obtains goods and marks them with the name of the patentee or the patent number to falsely indicate that the goods were sourced or authorized by the patentee. Before the AIA, members of the general public could bring qui tam lawsuits to challenge false marking. The AIA basically has abolished qui tam suits for false marking. Now, only parties that suffered a competitive injury as a result of the false marking may bring suit. This measure may be regarded as a correction to an area of patent law that was subject to abusive litigation known as one form of patent trolling.

Another form of what is sometimes called patent trolling is done by nonpracticing entities (NPEs), also known as patent-assertion entities (PAEs). These entities 1) own patent portfolios, 2) sue infringers, and 3) do not typically manufacture or distribute any of their patented technology but rather license their patented technology to others. Controversy has arisen about whether these entities that neither discover nor utilize inventions should be so named. Similar to real estate owners that lease space to businesses rather than operating the businesses themselves, trolls simply charge licensing fees to those who use their intellectual real estate, and they evict squatters. The analogy breaks down, however, when considering that real property is limited and measured, whereas intellectual property has no physical limit and can flutter into and out of physical objects.

In any case, PAEs can be said to exist for a reason: Inventing new technology, manufacturing that technology, and licensing and enforcing patents through litigation are very different skill sets. Inventors specialize in invention, not necessarily in mass-scale manufacturing, and not likely in litigation. Manufacturers specialize in creating and distributing products on a massive scale. PAEs specialize in licensing and enforcing patent rights. PAEs are therefore a natural and positive feature of an efficient intellectual property market, and it is difficult to argue that the law should require entities to use patents in order to enforce them. That would be similar to requiring real estate owners to personally manage the businesses operating in their properties rather than renting the properties to other businesses.

Whatever one’s opinion of PAEs, a balance must be struck to disincentivize the assertion of dubious claims of patent infringement. The stakes of litigation are high. Deep pockets can and do threaten individuals and small entities with financial disaster, regardless of the validity of the asserted patent. The need for a cheap,
quick, and reliably predictable process is clear. The AIA contains no explicit antitrolling provisions, but it does contain provisions limiting joinder of parties to suits involving a common question of fact, which arguably limits abusive trolls more than legitimate patent enforcers. However, it arguably does nothing more than correct a few federal district court misinterpretations of Federal Rule of Civil Procedure 20, which calls for the same limitation on permissive joinder. In late 2013, a major antitrolling initiative known as the Innovation Act passed through the House of Representatives. That bill recently met its likely demise in the Senate. Another recently proposed antitrolling bill would, if passed, limit access to the International Trade Commission.

Immediately before the AIA, patent lawsuit filing briefly spiked, probably as plaintiffs sought to avoid the rule that limits joinder of defendants. Otherwise, it is doubtful the AIA significantly affected the litigation landscape. For example, the AIA neither impeded nor accelerated a trend in which PAEs are taking an increasing proportion (from operating companies) of the mix of litigants bringing infringement suits. Likewise, the number of new patent defendants sued per month is somewhat higher now than it was before the AIA, but that may also be attributable to preexisting trends rather than the AIA. Furthermore, the AIA’s switch from first to invent to first to file did not affect a frequently occurring issue.

Meanwhile, frequently litigated issues went largely unaltered by the AIA, including whether or not an invention falls within the statutory definition of patentable matter (which the AIA did not touch), and whether or not specific prior art defeats the novelty or non-obviousness of a patented invention, which is a factual analysis also fundamentally unaffected by the AIA. Recent significant Federal Circuit and Supreme Court cases have also considered the exceptional cases doctrine (which allows for an award of attorney’s fees in exceptional patent cases), the conditions under which a party is liable for inducing patent infringement (it does not happen where a seller performs some steps of a patented method and a buyer performs the remaining steps), and the burden of proof on a declaratory relief action brought by a purported infringer (it stays with the party claiming infringement). Many of these cases were significant. But the issues involved were not affected by the AIA. One frequently litigated issue that the AIA does partially address is claim construction, which is the proper method of constructing patent claims so as to determine whether an invention, as claimed in the patent, covers an allegedly infringing activity or product. For example, the USPTO’s newly created Patent Trial and Appeal Board (which replaces the Board of Patent Appeals and Interferences) construes patent claims by giving them their “broadest reasonable interpretation,” which is, as one might expect, broader than the more reserved standard applied by the federal courts to give the “patent its true and final character and force.”

The AIA also affected the standards to be met before initiating certain types of review, at least notionally. For instance, ex parte reexamination will commence only after meeting the SNQP standard mentioned above (as was the case with the now-replaced inter partes reexamination procedure). The new inter partes review will commence only if the third-party petitioner establishes a “reasonable likelihood of prevailing,” which is a tougher standard to meet. Similarly, the newly created postgrant review will occur only upon showing a reasonable likelihood of success, which is also a tougher standard than the SNQP standard. Meanwhile, the SNQP and reasonable-likelihood-of-prevailing standards used by the USPTO to decide whether to commence further proceedings are easier to meet than is the applicable clear-and-convincing evidentiary standard used to invalidate patents in federal court. It does not appear that these modifications to the applicable standards of claims construction and evidentiary burdens of proof are giving rise to significant amounts of new litigation that would not otherwise exist.

Estimating Costs

Ideas are cheap. Patents are not. The AIA made substantial changes to the patent law, but the

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question remains of whether a patent is worth the price of obtaining one. Generally, an invention should stand to be worth a small fortune to make patent prosecution financially worthwhile. To obtain a utility patent for a very simple invention—for example, something like a pencil—will usually cost at least $6,000.57 At least $10,000 is likely to get a final decision from the USPTO, which could be a denial. A complex invention can run up a bill of tens of thousands of dollars. Even so, many may consider a patent for its prestige. Another factor, however, is that less than 50 percent of all patent applications ever result in a patent being issued.58

Also, if a patent gets challenged in the courts by an alleged infringer, the patent has roughly a 24 percent chance (for NPEs asserting infringement) to a 34 percent chance (for practicing entities asserting infringement) of making it through the litigation-and-appeal gauntlet intact.59 It is unclear what percentage of granted patents get challenged, but one can safely assume that patents on high-value inventions get challenged in court far more frequently than patents on low-value inventions. Patents worth tens of millions of dollars and more face a near certainty of being copied, litigated, and appealed at some point, if not constantly.

Therefore, not knowing anything about a particular invention, one can figure a less-than-50-percent chance of the patent application ever becoming a patent. If the patented invention does anything of much value, at least one interested member of the public is likely to challenge the validity of the patent, and it has only a 24-to-34-percent chance of surviving the challenge. In other words, a potentially high-value invention has something like a 15 percent chance of ever being successfully patented, and that will likely come with a price tag of hundreds of thousands of dollars in patent prosecution and litigation fees.

Fortunately, a new solution to the pricey and dicey patent prosecution process is emerging. Public input, or crowdsourcing, can assist in discovering relevant prior art and commenting on patent claims, which thereby defines and clarifies the scope of, and establishes quality of, each patent that issues from the USPTO. Pilot programs engaging what is sometimes called the peer-to-patent system have been tried and are likely to continue.60 The USPTO is also engaging in projects designed to improve the patent prosecution process and its results. Recently, for example, the USPTO launched a glossary initiative pilot program to expedite prosecution of applications that contain a glossary of terms that satisfies certain requirements.61 Overall, the AIA’s reforms are welcome and may create the impetus for more positive changes.

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1 See William B. Raich, Strategic Planning in the Wake of the New Prior Art Provisions in the America Invents
8 Id.
25 37 C.F.R. §42.301.
26 Id.
29 AIA, §18(a)(1)(A).
38 See, e.g., Pequignot v. Solo Cup Co., 608 F. 3d 1356, 1359, 1359 n.1 (Fed. Cir. 2010), rel’g and rel’g en banc denied, 2010 U.S. App. LEXIS 21187 (Fed. Cir. Sept. 15, 2010).
45 Id.
47 Id.
49 Id.
54 cheese Sys., 725 F. 3d at 1351-52.
57 See, e.g., Microsoft Corp. v. i4i Ltd. P’ship, 131 S. Ct. 2238, 2242 (2011).
60 See PWC Patent Litigation Study, supra note 37, at 12.
A receiver may be held personally liable for the receivership’s taxes

by Chad C. Coombs & David M. Agler

RECEIVERS ARE APPOINTED by federal and state courts in a wide variety of civil and governmental actions to collect, preserve, manage, administer and, in many cases, sell and distribute the assets of the receivership. While receiverships are commonly associated with real property foreclosures and business liquidations, a receiver may be appointed in business and personal civil disputes, fraud and tortious conduct suits, divorce cases and government actions to remedy violations of the law.

No matter the nature of the receivership, the appointment of the receiver raises immediate federal tax issues and obligations that the receiver must address. The extent of the receiver’s responsibility will depend on the facts and circumstances of each case, including the purpose of the receivership, scope of the receiver’s powers and duties, ownership structure of the entity or assets in receivership, and existence of any preexisting tax obligations with respect to the entity or assets in receivership. While federal income taxes may be of primary concern, a receiver may also be responsible for a myriad of other federal, state, local and even foreign taxes such as payroll, sales and use, property and withholding taxes. Failure of the receiver and the receiver’s counsel to fully understand the tax obligations of the receivership and the application of the tax laws to the receiver and the receivership could undermine the success of the receivership and even expose the receiver to personal liability.

A receiver is an agent of the appointing court and acts for the benefit of all who may have an interest in the receivership assets pending final resolution of the action. A receiver owes a fiduciary duty to all parties in interest, including federal, state and local taxing authorities, not just the party who sought appointment of the receiver.

A receiver in possession of all or substantially all of the assets of a party in the receivership must provide notice to the IRS of this fiduciary relationship by filing an IRS Form 56, Notice Concerning Fiduciary Relationship, within 10 days of the appointment. The timely filing of a Form 56 has significant practical and legal implications to

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the receiver and receivership estate. Upon the filing, the receiver assumes the powers, rights, duties and privileges with respect to taxes imposed on the entity or person that is the subject of the receivership, including the right to receive notices from the IRS, and the IRS will have the right to immediately assess any tax liability and file a claim in the receivership action. Should the receiver not file a Form 56, the IRS may send deficiency notices, or ownership structure. This can be especially true in a Ponzi scheme, embezzlement or theft case, or other situations in which the principals made improper transfers to hide or divert assets or when an individual or entity fails to maintain adequate books and records that account for the assets.

For receiverships brought in federal (as opposed to state) court, an additional statute, 28 USC Section 960, provides that a federal court appointed receiver who conducts a business is required to file all applicable federal, state and local returns and pay all taxes due the same as if the business were conducted by an individual or corporation. This statute also applies in a liquidation of a business.

When the receiver is required to file income tax returns, the receiver is required to pay any federal tax due to the extent of available assets in the receivership. A receiver’s obligation to pay federal income taxes will depend in part on the type of entity in receivership. A C corporation is a separate taxable entity, and a receiver responsible for filing the returns of a C corporation is also responsible for paying any federal tax claims against the corporation. In contrast, a flow-through tax entity such as an S corporation, a partnership, or a multiple-member LLC treated as a partnership for income tax purposes will file informational tax returns with such entity’s tax items flowing through to the owners of the entity. Thus, a receiver of a flow-through tax entity responsible for preparing and filing the informational returns is not responsible for any federal income taxes of the owners that are attributable to tax items (e.g., income, deductions, gain and loss) that flow through to the owners. The receiver, however, is responsible for any federal, state or local taxes that are assessed against such entity.

In any case in which the receiver is not required to file returns on behalf of the entity or owner of the assets in receivership, the receiver should provide the entity or owner of the assets with the information necessary for the owner to file its own returns, and the owner is responsible for payment of any tax due on the returns.

Although a receivership generally does not create a separate taxable entity, a receivership that constitutes a qualified settlement fund (QSF) under Treasury Regulation Section 1.468B-1 is generally treated as a separate, additional tax entity that is subject to federal income tax. A QSF is a fund, account, or trust that is 1) established pursuant to an order by a government entity or agency or court of law and subject to continuing juris-
If the receivership qualifies as a QSF, the assets of the receivership will be deemed transferred to the QSF. If the QSF is a separate taxable entity (not a grantor trust), such transfer will be a taxable event to the entity or owner of the assets in the receivership. In such case, the QSF will receive (or be deemed to receive) the receivership assets tax free and have a fair market value tax basis in the assets.

It is possible, depending on the facts of the receivership, that the receiver will have to file two sets of income tax returns, one for the entity or owner of the assets in receivership and one for the QSF. If the QSF is a separate taxable entity, the receiver would report on both returns the deemed taxable transfer of the assets from the owner to the QSF at their respective fair market values. The receiver would be responsible for payment of any tax liability owed by the entity or owner as well as any tax liability owed by the QSF.

Special issues arise when the entity or owner of the assets in receivership failed to file appropriate tax returns prior to the receivership or maintain adequate books or records for the receivership entity or assets. The IRC does not specifically address whether a receiver must file prereceivership returns (including delinquent returns) or amend erroneous prereceivership returns in such cases. For corporations, a receiver is required to prepare returns in the same manner as the corporation, and courts have held that a bankruptcy trustee's obligations to file the corporate debtor's returns include a return due prior to the bankruptcy filing. In addition, the failure of the corporation to file prior year returns could put the receiver on notice of potential federal tax claims for prior year returns, and therefore the receiver may be well advised to seek court approval to prepare and file the prior year returns to help determine any outstanding tax claims. For partnerships, the IRS has taken the position that a bankruptcy trustee is not obligated to file the prior year returns (and, in filing current year returns, may rely on the current year information to the extent possible).

As a practical matter, the receiver will often need to process prior year tax information in order to prepare current year returns, and state and local filing requirements may necessitate filing prior year federal returns or reporting federal tax information on state or local tax returns. If and when the receiver files returns covering periods before the receiver's appointment (including the first portion of the first year in which the receiver was appointed), the receiver should disclose that the receiver does not have personal knowledge of some or all of the records on which the returns are based.

Issues may also arise in the final year of the receivership. For individuals and continuing entities in receivership, there likely will be a portion of the taxable year remaining after the termination of the receivership. Unlike a QSF that generally terminates when the receivership terminates, the receiver may or may not be allowed to file a final return for the entity or owner of the assets in receivership. Depending on the circumstances, the receiver may need to pay all taxes attributable to the receivership period and obtain the cooperation of the individual or owners of the entity or property subject to the receivership in order to timely file a complete return for the taxable year in which the receivership terminated.

**Personal Liability for Failure to Pay Federal Taxes**

Failure to understand the receiver's tax obligations can be very costly not just to the receivership but to the receiver. A receiver may be held personally liable for failure to pay a number of federal, state, or local taxes under various statutes, including taxes incurred prior to the receivership, even if the receiver relied on the advice of counsel or an order of the appointing court in not paying the taxes.

Under the federal priority statute, 31 USC Section 3713, a receiver of an insolvent estate who knew (or should have known) about the existence of federal claims, including tax claims, against the receivership estate may be held personally liable for failing to pay all such claims to the extent funds were available to pay such claims. The federal priority statute provides that claims of the federal government must be paid first when the insolvent debtor 1) makes a voluntary assignment of assets while having insufficient funds to pay all claims, 2) is an absent debtor for whom property is attached, or 3) commits an “act of bankruptcy.” An act of bankruptcy does not mean a bankruptcy filing but is rather a transfer of a debtor's assets for payment of the debtor's liabilities, including to a third party fiduciary.

The federal priority statute provides that a representative of a person or an estate (except a bankruptcy trustee) who pays any debt of the person or estate before paying a federal claim is liable to the extent of the unpaid federal claim. A representative under the federal priority statute includes a receiver.

To be held personally liable, a receiver must be charged with knowledge of the federal claim. This has been the subject of much litigation. The “claim” need not be a formal claim but any debt or liability due the federal government. A receiver will be charged with knowledge of a federal claim if the receiver has sufficient facts to put the receiver on inquiry notice. The receiver is charged with knowledge as long as the receiver is aware of the potential of a federal claim even if not the amount. A receiver may be personally liable even if the receiver investigated but failed to ascertain the existence of such liabilities or erroneously relied on advice of counsel. The receiver has the burden of proving that the receiver lacked knowledge of the federal claim.

While the payment priority under the federal priority statute appears absolute on its face, courts have carved out a few critical exceptions. A receiver may pay necessary and reasonable administrative expenses of the receivership before unsecured federal claims, and the IRS may permit administrative expenses to be paid even when a federal tax claim is secured by a lien.

In addition, perfected secured claims of creditors have priority over and may be paid before unsecured federal claims. The federal priority statute does not create a lien in favor of unsecured federal claims, nor does it give existing federal tax liens greater priority than afforded under IRC Section 6323 (which governs the validity and priority of federal tax liens). A receiver must pay federal liens in order of applicable lien priority and unsecured federal claims before other unsecured claims. It is therefore imperative that the receiver verify the validity and priority of lien claims because payment of a claim with a defective security interest ahead of federal claims could expose the receiver to personal liability.

Although a receiver is required to pay federal claims prior to unsecured claims, in certain circumstances the Department of Justice permits the claim of an investor or victim in investment fraud and related schemes to have priority over tax claims if the investor or victim can trace its property to the fund at issue and both claims arise from the same transaction. Even if the claims do not arise out of the same transaction, the claim of the investor or victim will have priority if the investor or victim can trace the claim to the subject property and either 1) title did not pass to the perpetrator of the scheme, such as in the case of theft, or 2) when a constructive trust has been imposed prior to assessment of the tax.

Federal income taxes incurred during the receivership will have priority either as an administrative expense or pursuant to the federal priority statute. In a federal receivership to which 28 USC Section 960 applies, current taxes are deemed to be ordinary expenses of operation of the business and have the same priority as all other operational expenses, such as repair and maintenance expenses.

While administrative expenses of a receivership may be paid ahead of unsecured federal tax claims, the IRS could assert that any federal taxes arising during the administration of the receivership should be paid pari passu with all other administrative.
expenses (including the receiver’s fees). If there are insufficient unencumbered assets to pay administrative expenses, it is possible that the court may require the party who sought appointment of the receiver to pay outstanding administrative expenses.43 A secured lender who seeks appointment of a receiver for its collateral and the receiver will usually try to reach an agreement prior to the receiver’s appointment with respect to the costs of administration that can be paid out of the collateral. It is therefore important to address potential tax charges that could arise in the receivership.43

The sovereign immunity right of the United States from being sued and the federal Anti-Injunction Act generally prohibit (with limited exceptions) any suit to bar the IRS from assessing and collecting any federal taxes, including income, withholding, excise and estate taxes.44 The Anti-Injunction Act also prohibits any suit for the purpose of preventing the assessment or collection of any liability of a receiver for any federal tax under 31 USC Section 3713.45 The federal courts have held that a receiver cannot rely on an order from the appointing court to grant the receiver relief from the receivership’s federal tax obligations or the receiver’s related personal liability.46

A receiver should therefore seek a closing or other agreement with the IRS to determine the amount and validity of the federal tax claim in the receivership and relieve the receivership and the receiver from any further filing requirements and liability once such agreed tax claims are paid.47 A closing agreement or other similar agreement settling tax claims takes on heightened importance when, despite a receiver’s due diligence, a lack of adequate records and information and/or cooperation from the entity or owner of the assets in receivership make it impossible for the receiver to prepare and file accurate returns and ascertain all potential federal tax claims.

The IRS, however, is not required to enter into a closing or other agreement with the receiver. Absent a closing agreement, a receiver for a corporation or a QSF may seek a prompt assessment of any potential federal income tax liability reported on the federal income tax return, but this only shortens the assessment period to 18 months and therefore may not be practical.48 Otherwise, a receiver should provide for an adequate reserve of cash for payment of any potential federal, state or local tax claims until all tax issues are resolved. As is often the case, however, the best course will depend on the facts and circumstances of the particular receivership.

The Appointment Order

It is important for the receiver and the receiver’s counsel to carefully draft the order appointing the receiver to take into account the receiver’s potential tax issues, obligations and liability exposure and authorize the receiver to take whatever steps are necessary to comply with the tax law without having to seek further order of the court.

At a minimum, the appointment order should provide that the receiver is authorized and has complete discretion and the power to 1) file all tax returns that the receiver is required to file (including any delinquent and amended returns) and satisfy all other tax reporting or filing requirements, 2) pay all taxes and federal claims that the receiver is required to pay, 3) obtain, review, and verify all tax and other information that the receiver believes is necessary for the receiver to satisfy the receiver’s filing, reporting and tax payment obligations and any other obligations the receiver may have with respect to providing accurate tax information to any party, 4) delay distributions until all of the receiver’s tax and debt obligations are satisfied, or alternatively, to establish adequate reserves for tax liabilities (and other federal claims), including potential interest and penalties owed, and 5) enter into a closing or other agreement that establishes the IRS and other federal agency claims and relieves the receiver of any personal liability for receivership federal taxes and claims.

The importance of a well-drafted appointment order highlights that a receiver’s duties and obligations with respect to federal, state and local income taxes, while perhaps appearing simple on the surface, can in fact be quite complex, especially given the different circumstances in which a receivership may arise. Given all of the hidden tax traps, a receiver is well advised to seek guidance from experienced tax professionals from the beginning of the receivership. Once the issues are identified, the receiver can then consider the best course of action to ensure tax compliance and reduce the risk of personal liability.

1 For California receivership purposes, see CAL. R. CT. §3.1179 and CODE CIV. PROC. §568 regarding the role and powers of a receiver.
2 I.R.C. §§6036, 6903(b); Treas. Reg. §301.6036-1(a)(2), §301.6903-1. For California income tax purposes, the Franchise Tax Board has adopted regulations under REV. & TAX CODE §19089 that are similar to those under Treas. Reg. §301.6036-1 and which also require a receiver to give notice within 10 days of the appointment. See also UNEMP. INS. CODE §1090.
3 I.R.C. §5609(a), 6871(a); Treas. Reg. §301.6903-1, §301.6871(a)-1.
5 Form 56, revised as of December 2011, no longer contains a section for termination of the notice of fiduciary responsibility. The IRS has advised through informal communications that receivers and other fiduciaries should provide notice of termination through a letter rather than the current or prior forms.
6 Treas. Reg. §3.6411(b)-2(b). See also I.R.C. §1399 (similar rule with respect to bankruptcy cases).
7 In such cases, receivers should use the taxpayer identification number (TIN) for the entity or owner and not obtain a separate TIN.
8 I.R.C. §6012(b)(2); Treas. Reg. §6012-3(b)(5). See also Priv. Ltr. Rul. 200219018, For California tax purposes, see REV. & TAX CODE §18305.
10 See IRS Gen. Counsel Mem. 36811 (1976) and IRS Gen. Counsel Mem. 38781 (1981). See also Committee Report on P.L. 96-589 (Bankruptcy Tax Act of 1980), which states in connection with new I.R.C. §1399 that a bankruptcy trustee is required to file returns for a partnership. One bankruptcy court held a bankruptcy trustee is not required to file returns for the debtor partnership since there is no specific requirement to do so under I.R.C. §6012. In re Sanamoss Assc., 14 B.R. 408 (Bankr. D. Me. 1981); but see In re Riverside-Linden Investment Co., 95 B.R. 107, 114 (Bankr. S.D. Cal. 1988), aff’d 99 B.R. 439, 443-46 (9th Cir. BAP 1989), aff’d 925 F.2d 320, 324-25 (9th Cir. 1991), which held that a bankruptcy trustee is required under Bankruptcy Code §§546(a) and 728(b) to file income tax returns for a debtor partnership for the period during which the trustee is appointed.
12 I.R.C. §6151(a); 28 U.S.C. §560. See also Holywell, 503 U.S. 47 at 52-54.
13 Although an S corporation is a flow-through tax entity, it is possible that the owners of an S corporation may revoke the S corporation election at any time such that it becomes a C corporation, thereby creating tax obligations for the receivership estate. For the ramifications of such revocation in bankruptcy, see Majestic Star Casino LLC, 716 F. 3d 736 (3d Cir. 2013); Packer v. Saunders (In re Bakersfield Westar, Inc.), 226 B.R. 227 (B.A.P. 9th Cir. 1998).
14 For example, California tax law imposes an entity level tax on S corporations, limited partnerships, and LLCs. While an S corporation is not subject to federal income taxes, California imposes a 1.5% income tax on the net income of an S corporation. California also imposes a minimum tax of 0.8% on all LLCs and requires a single member LLC, which for federal income tax purposes is disregarded and not required to file a return, to file a separate state income tax return.
15 Treas. Reg. §1.468B-1(c); United States v. Brown, et al., 348 F. 3d 1200 (10th Cir. 2003).
16 Treas. Reg. §1.468B-1(g)(3). The Seventh Circuit in United States v. Brown, et al., 348 F. 3d 1200 found that “general trade creditors” are those to whom a debt is owed for providing goods or services and “debtholders” does not refer to just any creditors owed a debt but only those who hold a debt instrument.
17 See Treas. Reg. §1.468B-1(g)(3) and I.R.C. §368(a)(3)(A) which defines a Title 11 (bankruptcy) and similar case to include a receivership.
18 United States v. Brown, et al., 348 F. 3d 1200 (10th Cir. 2003); Treas. Reg. §1.468-1(l), examples 1 and 4; IRS Chief Counsel Advice 201347019 (addressing treatment of expenses and losses incurred in a receivership involving a violation of federal securities law which was treated as a QSF); Priv. Ltr. Ruls. 9838019, 200104030, 200113025, 200435007, and 200609014; I.R.S. Pub. 908 at 22.
19 In general, the tax rate is the maximum rate for a corporation or a partnership involving a violation of federal securities law which was treated as a QSF; see Majestic Star Casino LLC, 716 F. 3d 736 (3d Cir. 2013); Packer v. Saunders (In re Bakersfield Westar, Inc.), 226 B.R. 227 (B.A.P. 9th Cir. 1998).
20 For California, see Treas. Reg. §1.468B-1(c).
Unlike for the entity or owner of assets in receivership, the receiver should obtain a separate TIN for the ship, the receiver should obtain a separate TIN for the QSF. See also Code Civ. Proc. §§1204-1205. Myzer v. Emark Corp., 45 Cal. App. 4th 834 (1996).

The IRS states that it is unclear whether such administrative taxes are entitled to priority as an administrative expense or under the federal priority statute. Internal Revenue Manual 5.17.13.6, Item 7 (10-16-2007). In Department of Justice Tax Division Directive No. 137 (Nov. 3, 2008), addressing claims of victims in various fraud schemes, the Department of Justice states that taxes arising from the administration of a receivership should be paid on or before the due date of the tax and that when the receivership is insolvent, such administrative tax claims may be entitled to priority under the federal priority statute.

Southern Railway Co. v. United States, 306 F. 2d 119, 126-28 (5th Cir. 1962).

For example, a C corporation in receivership or QSF could incur a significant tax liability from continued business operations or upon the sale of assets. I.R.C. §7421(b).

I.R.C. §7241(b).

See SEC v. Credit Bancorp Ltd., 297 F. 2d 127 (2d Cir. 2002).

I.R.C. §7121 (regarding closing agreements).

I.R.C. §6501(d).
Startup Events Offer Opportunities to Develop Ideas and Relationships

WHY ARE LAWYERS ATTENDING HACKATHONS and offering space in their offices to young technology professionals who may be innovative but have little or no corporate experience? Among these new technology developers may be found the next wave of CEOs who may become clients. In the greater Los Angeles area, it is not hard to find startup events. They fall into four main categories: 1) educational classes in technology, business, and design (such as how to launch a campaign using Google adswords or HTML for beginners) offered by companies such as General Assembly, 2) panels and interviews with entrepreneurs and experts, for example Startups Uncensored (past speakers have included Aaron Levine, the CEO of Box, and Scott Cook, the founder of Intuit), Cross Campus, Digital LA, and Innovate Pasadena, 3) networking events that are purely social, such as happy hours put on by LA Tech Happy Hour Meetup or Techzulu, and 4) hackathons.

Hackathons are hosted or sponsored events, usually held on weekends, in which teams of software developers are given 48 hours to build a prototype to demonstrate their solution to a given challenge. Some lawyers find it worthwhile to attend the “demo” day (usually a Sunday) when the teams present their prototypes. Recent hackathons have been sponsored by the LA Mayor’s Office, Salesforce, AT&T, Creative Artists Agency, and various technology companies. A more inclusive hackathon for nondevelopers is Startup Weekend, which hosts events at which creative, engineering, business, and marketing professionals team up over a three-day period to turn ideas into products that are then presented to experts and potential investors for feedback.

When I attended my first startup weekend as a lawyer, I was both intrigued by the concept and scared I would feel out of place. When I walked in on Friday night, everyone was meeting each other and discussing potential startup ideas. Some had come with ideas, while others were looking for the next big thing. I quickly met investors, developers, and MBAs—all had fascinating backgrounds, and none were condescending or dismissive of the fact that I am a lawyer. I came to learn that the startup world is a quite inclusive community. I was inspired to give a one-minute pitch for my own idea and then approached by others wanting to join my team. These included a former Google developer, a marketer, and an investor. We had until Sunday at 5 p.m. to develop a working prototype or presentation for the panel of judges. The day came quickly, and soon we were up on stage presenting to a panel of investors. The weekend ended with my team winning second place and a chance to be incubated by a local accelerator. We did not pursue the idea, but we had a wonderful time.

I know several other attorneys who have attended startup weekends as mentors and as participants. One lawyer I know served as a mentor and actually acquired one of the winning teams as his client. While not all of these people will build a successful startup, many will eventually require an attorney, whether to assist in the equity and debt offerings, to develop company policies, or to help resolve disputes among cofounders.

Some law firms have even partnered with business accelerators, incubators, and coworking spaces. Accelerators and incubators, such as Science, Inc., and Launchpad, provide money, mentorship, and space in exchange for equity to a number of select companies. Coworking spaces sell deskspace and amenities to startups for a monthly flat fee. Examples in the Los Angeles area include Colof (Santa Monica), Cross Campus (Santa Monica, Downtown, Pasadena), Blankspace (Downtown, Santa Monica), HubLA (Downtown) and Unique Space (Downtown) among others. Getting your firm involved with these is a great way to get exposure for your firm and to get access to companies in their early stages.

Networking with startup entrepreneurs at tech events facilitates other opportunities for lawyers. The more that lawyers understand the startup culture and its lingo (and maybe even have learned basic coding), the easier it is for them to develop relationships. Some lawyers leverage their financial expertise and resources to become angel investors in startups, without necessarily becoming involved in representing or helping to manage them. Others leave private practice entirely to take in-house positions at these companies or to help found legal support startups such as Judicata and Ravel Law, whose founders include lawyers.

There are also online opportunities to get involved in the startup community apart from events. Lawyers are steadily increasing their online presence and finding value in using platforms such as Twitter, Reddit, and Quora. Reddit and Quora are forums in which lawyers can showcase not only their legal expertise but also their personalities and opinions on mainstream issues while interacting with potential clients. Most startups are quite active on social media platforms, so engaging on online channels is yet another way to begin fruitful relationships with future clients. Startups appreciate professionals who are tech savvy and keep up to date.

Lawyers have also learned from the startup community how to use technology to make their practices more accessible and transparent to clients and to streamline their internal processes. Several firms and legal support startups have been recognized as innovators in the legal industry. A few examples are CooleyGo.com, an interactive site geared towards providing resources to entrepreneurs, Littler GPS, a gated database for employer clients to look up information and stay informed of developments in employment law, and eFishency, a suite of internal databases and budgeting programs.

Innovation has become a welcome addition in the legal community. No longer should the word “disruption” give lawyers heart palpitations. The legal industry is evolving, and lawyers are adapting and becoming more receptive to nontraditional yet ethical approaches to marketing their practices. Law firms are proactively addressing client demands and desires for greater efficiency and transparency. By becoming involved in the startup community, lawyers will stay up to date on the most recent technological advancements and remain competitive in the long run.

Eva Hibnick is the cofounder of ONE400, a Pasadena-based digital agency focused on helping law firms grow by using creative marketing strategies.
ON WEDNESDAY, MARCH 4, the Domestic Violence Project will host its volunteer training program. Volunteers provide a valuable service to a vulnerable population and gain expertise in the area of family law. No previous experience is required. Attorneys, legal professionals, and law students volunteer for two three-hour sessions per month for seven months. In order to volunteer for LACBA’s Domestic Violence Project, LACBA membership is required. This training provides a very comfortable learning atmosphere with a great opportunity for open dialogue with the presenters. Program attendees will receive substantial materials, and dinner is included. Last year, LACBA’s Domestic Violence Project helped more than 10,000 persons. During the course of a shift, a volunteer can help as many as three victims seek protection from their abusers. Volunteers interview victims on a one-on-one basis, gathering information with which to complete complicated legal documents. This allows the victims to file for restraining orders with professionally prepared petitions. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th Floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration and a meal will be available at 5:15 P.M., with the program continuing from 6 to 9:15 P.M. The registration code is 012522.

$85—LACBA members
$175—nonvolunteer attendees
3 CLE hours

2015 Legal Ports Conference
ON THURSDAY, MARCH 19, the International Law Section will host a conference featuring experts from the ports of Los Angeles and Long Beach, representatives of local, state, and federal government agencies, and experienced international trade and maritime attorneys who will discuss the current legal and business developments in global trade impacting Southern California businesses. The conference will take place in the Pointe Conference Center on the campus of California State University, Long Beach. On-site registration will begin at 7:30 A.M., with the conference continuing from 8:45 A.M. to 4:45 P.M., with a break for lunch. A complimentary reception and networking hour will follow the conference. The registration code is 012516.

$120—CLE+ member
$200—International Law Section member with meal
$235—LACBA member
$260—all others
7 CLE hours

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560, or visit the Association Web site at http://calendar.lacba.org, where you will find a full listing of this month’s Association programs.
FOR OVER 65 YEARS, THE UN SECURITY COUNCIL has held the responsibility for the maintenance of international peace and security. However, the Security Council’s failure to reach adequate solutions to halt humanitarian disasters, including in Syria, demonstrates that it is incapable of holding governments accountable for gross violations of international law. Under a rarely invoked procedure, however, the UN could act to intervene in the Syrian crisis.

Since the Syrian civil war began in 2011, over 191,000 children, women, and men have lost their lives. Six and a half million Syrian people have been displaced within the country; over 2.6 million have been declared refugees; and extremist groups have threatened any chance of stability within the country and region. The impact of the war has also been felt in neighboring countries as violence has spilled over into Lebanon, Jordan, Iraq, and Turkey and caused a financial strain on their economies. Yet the UN Security Council has been unable to act to end the human rights violations in Syria.

When the founders of the UN agreed to place the Security Council in the position of primary entity responsible for global peace and safety, they could not have foreseen the continuing paralysis that has rendered the council ineffective. While an approval of humanitarian military intervention must be given careful consideration and scrutiny, the stalling of the council on matters regarding human life is appalling. The council’s resolutions can be stopped with a single veto of a permanent member, and any of the five permanent members may use its veto power to block resolutions or to fail to consider resolutions to act. This is a resolution that has been invoked only 11 times since its passage. For example, in 1960, a discussion of the mass atrocities occurring in the Republic of the Congo ended with a lack of unanimity among the Security Council’s permanent members. Prevented from authorizing action, the council called for an emergency special session of the General Assembly to make appropriate recommendations under the Uniting for Peace Resolution. Approval for humanitarian military intervention pursued within the scope of the Uniting for Peace Resolution provides an alternative source of authority for member states that are interested in preventing further mass atrocities in Syria or elsewhere. Given the nature of international relations, however, it should not be expected that the Uniting for Peace Resolution will provide a perfect solution to the Syrian crisis. A two-thirds majority vote in the General Assembly would strengthen the political and moral support for a collective use of force in Syria, but opponents to intervention will be able to argue that any recommendation proposed by the Assembly arguably violates international law because only the Security Council can authorize the use of force. Furthermore, while in principle the use of force to prevent serious human rights, such as genocide and crimes against humanity, is noble, it is easily subject to distortion and misinterpretation. To avoid this, the General Assembly faces an essential need to consider factors that help legitimize a recommendation for the use of force and also aid in guiding conduct during and after an intervention. The objective should be to strive to immediately prevent grave violations of human rights and hold perpetrators accountable for violations of international law.

When the Security Council cannot agree, the Uniting for Peace Resolution of 1950 enables the General Assembly to act.

In the future, amending the Uniting for Peace Resolution (or amending the UN Charter—an almost impossible task) to provide the General Assembly with clear legal authority to approve humanitarian military intervention could improve the international community’s ability to stop mass atrocities. While currently there is no appetite at the UN for a charter amendment, Article 108 provides a procedure that requires two-thirds of the members, including all the permanent members of the Security Council, to approve an amendment. This in effect gives the permanent members a veto over any changes. Nonetheless, precedent and common sense call for allowing the General Assembly to be included in the role of protecting and preventing humanitarian catastrophes by authorizing military intervention and serving as a supplement to the Security Council’s authority. Under the Uniting for Peace Resolution and the UN Charter, the General Assembly is empowered with the ability to recommend action on grave and systematic violations of human rights.

The Uniting for Peace Resolution serves as a supplement to the Security Council’s authority. Under the Uniting for Peace Resolution and the UN Charter, the General Assembly is empowered with the ability to recommend action on grave and systematic violations of human rights.

The Uniting for Peace Resolution exists to handle situations in which the Security Council cannot or will not act because of lack of agreement. The drafters of the resolution wanted to provide the member states with a mechanism under which they could immediately respond to address matters that are a threat to international peace and security. When thousands of people are being killed, raped, and tortured and millions more displaced, it is neither morally right nor logical to continue to allow the Security Council or the permanent members to block resolutions or to fail to consider resolutions to act. This is especially true when the General Assembly is willing and able to protect human rights.

Asian C. Udoh works with the U.S. Department of Justice and serves as a pro bono supervising attorney with the Iraqi Refugee Assistance Project at the George Washington Law School.
Please join us for this informative program on recent developments in California and Delaware business law, which will include a **KEYNOTE SPEECH FROM DELAWARE SUPREME COURT JUSTICE KAREN VALIHURA**. The program will discuss recent developments in California and Delaware case law applicable to business lawyers.

**Speakers:**
- C. Stephen Bigler, Richards, Layton & Finger, P.A.
- Keith P. Bishop, Allen Matkins Leck Gamble Mallory & Natsis LLP
- Hon. Karen Valihura, Delaware Supreme Court Justice

**Agenda:**
- 11:45 A.M. – 12:15 P.M. Registration and Seating
- 12:15 P.M. – 1:30 P.M. Lunch & Keynote Address
- 1:15 P.M. – 1:30 P.M. Break
- 1:30 P.M. – 2:45 P.M. California Update
- 2:45 P.M. – 3:00 P.M. Break
- 3:00 P.M. – 4:15 P.M. Delaware Update
- 4:15 P.M. – 4:30 P.M. Break
- 4:30 P.M. – 6:30 P.M. Marvin Greene Awards Presentation and Networking Reception

**Prices:**
- Law students with meal and reception - $140.00
- LACBA members with meal and reception - $265.00
- All others with meal and reception - $315.00
- CLE+ members with meal and reception - $140.00
- Business and Corporations Law Section members with meal and reception - $225.00
- Barristers Section members with meal and reception - $225.00
- Litigation Section members with meal and reception - $225.00

**Registration:**
To register call 213.896.6560 or visit www.lacba.org/calendar
Code #012328 - 3.5 CLE Credit Hours
This program is appropriate for ALL levels.

**Location:**
The Bank of America Building, 335 S. Grand Ave., Los Angeles, CA 90071
Valet Parking in building - $14.00

**JOIN US FOLLOWING THE SYMPOSIUM FOR A COCKTAIL RECEPTION** during which we will present the **MARVIN GREENE DISTINGUISHED SERVICE AWARD** to **MARTIN MURPHY**, a longtime member of the Business & Corporations Section Executive Committee who recently retired from his position as Examinations Director in the SEC’s Los Angeles Regional Office.

**THE DELAWARE COURT OF CHANCERY AND THE DELAWARE SUPREME COURT: THEN AND NOW** - In her address, the Honorable Karen Valihura will share some of her insights from “the other side of the bench,” having recently been appointed to the Delaware Supreme Court after spending twenty-five years as a corporate litigator in Delaware. She will address some unique aspects of these courts as they have developed over time and will highlight some recent areas of focus of Delaware’s business courts.

**RECENT DEVELOPMENTS IN CALIFORNIA LAW** - **Keith Paul Bishop** will discuss recent developments in California legislation and case law applicable to business lawyers. In addition, he will provide a California perspective on recent corporate and securities law developments, including exclusive forum bylaws, shareholder access bylaw provisions, and the status of attorney-client privileged communications in mergers and other acquisition transactions.

**RECENT DEVELOPMENTS IN DELAWARE LAW** - **C. Stephen Bigler** will discuss recent developments in Delaware legislation and case law applicable to business lawyers. Mr. Bigler’s discussion will include, among other topics, regulation of stockholder litigation through forum selection and fee-shifting charter and bylaw provisions, drafting acquisition agreements to effectively limit potential fraud claims, shortening and lengthening the statute of limitations applicable to agreements through survival clauses, binding non-consenting stockholders to indemnity and release provisions in acquisition agreements, proxy puts in debt instruments, avoiding and correcting common defects in corporate authorizations and stock issuances, and other current developments.
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Footnotes:

1. For association members and their spouses or domestic partners who are under the age of 65. The amount of spouse, domestic partner or dependent coverage may vary by state laws and is subject to the limits imposed by the individual states.
2. Unmarried, dependent children aged from 15 days to 19 years (25 if a full-time student) may be insured for $5,000 or $10,000.
3. Insured members with at least $20,000 of coverage may receive up to 80% (to a maximum of $500,000) if they are diagnosed with a terminal illness with a life expectancy of 12 months or less. Living benefits are subject to certain exclusions, which are listed in the Certificate of Insurance. Receipt of living benefits may be taxable.

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