Los Angeles lawyer Julia Sylva deconstructs the nexus of medical marijuana law among California, the federal government, and local jurisdictions.

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HIGH TIME

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More than 50 years ago, Nobel laureate, poet, and songwriter Bob Dylan wrote the prophetic phrase, “For the times they are a-changin’.” Dylan’s song was an ode directed to the people, politicians, journalists, and parents and children experiencing and reacting to the changes being brought about by the civil rights movement of the 1960s.

While not quite at that level of historical significance, the times are nevertheless “a-changin’” at Los Angeles Lawyer in their own profound and positive way. In late December 2016, an announcement was made at the magazine’s monthly Editorial Board meeting that Susan Pettit and John Lowe had been hired as editor-in-chief and senior editor of the publication, respectively. The decision by LACBA management to remove “interim” from Susan’s title and “contract” from John’s represents a new period of stability for the magazine. Perhaps more importantly, as I have already experienced as Chair, these changes create an opportunity to chart and embark upon a course that will not only preserve but enhance its reputation as a preeminent legal publication.

A graduate of the highly respected journalism program at the University of Missouri, this is not Susan’s proverbial first rodeo with Los Angeles Lawyer. She was editor and publisher of the magazine from 1985 to 1995. Following this experience, Susan spent 12 years as a legal and political producer for CNN and CNN.com in Washington and Atlanta. Susan then became a contract editor for the National Geographic Channel.

As for John, he provided editorial and proofreading services for Skadden, Arps, Slate, Meagher & Flom for nearly 20 years. John left to become an independent legal editor and joined LACBA a few years ago. Among his skills as an editor is an encyclopedic knowledge of The Bluebook citation requirements.

Shortly after I became Chair last July, Susan rejoined the publication. One word sums up our relationship since that time—collaborative. This collaboration has been demonstrated in the give and take over her edits to my From the Chair columns as well as the freewheeling and productive discussions we share on the magazine. It was also a pleasant surprise to learn Susan shares my passion for baseball as evidenced by her immediate support when I first proposed devoting a column to Vin Scully and writing another on the Chicago Cubs.

Over the past several months, Susan and John have worked tirelessly with the Editorial Board to handle the myriad of tasks required to publish Los Angeles Lawyer. These critical tasks include continually developing topics relevant to the diverse practices of LACBA members, identifying and securing authors to write articles on those topics, and then editing their work product. Susan and John’s commitment to the magazine has also infused the publication with a new energy. We are now identifying ways to capture that energy and apply it in ways to get all Editorial Board members more engaged and help us recruit new members. Through these efforts, LACBA members can be assured that this valuable professional resource and benefit will continue to flourish.

Please join me in congratulating Susan and John on becoming the permanent editorial stewards of Los Angeles Lawyer.

Ted M. Handel is the 2016-17 chair of the Los Angeles Lawyer Editorial Board and Chief Executive Officer of Decro Corporation, a nonprofit housing developer, which develops and manages affordable multifamily projects for low-income families and seniors.
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Mastering the Art of Meeting the Billable Hours Requirement

WHETHER AN ATTORNEY RECENTLY ADMITTED to the bar or a seasoned practitioner, the often dreaded billable hour requirement is a nearly unavoidable aspect of practicing within a law firm setting. As most firms rank their associates by their billable-hour output and determine bonus and salary increases accordingly, the eager and competitive associate is one who constantly seeks to have his or her billing stand out above the rest. Though the concept of billing time to the client may seem straightforward, its mastery requires not only an understanding of the employer’s expectations but also the ability to work smarter rather than just working harder.

The first step to mastering the billable-hour criterion is to determine the firm’s minimum billing requirement. This inquiry usually begins at the interview or hiring stage of a job search, as a prospective employee gauges whether the firm’s requirement will mesh with his or her desired work-life balance expectations. However, the search for the monthly billable goal must not end there. A budding associate may go into the first month on the job knowing what the requirement is but reaching that target number will not necessarily set the associate above the rest.

Depending on how much time is cut from his or her month, the associate may not even make the minimum requirement—a scenario that must be avoided at all costs. Asking the managing partner or other senior attorney in the appropriate function for a top-performing associate’s monthly billing range is an ideal starting point for a new hire. By doing so, the associate now has a better, more realistic billable goal for the month.

After ascertaining the quantifiable billable hour target, the next step is to determine what the firm considers billable activities and how to adequately enter time under the appropriate task. Having a strong understanding of which billing entries make the cut and the best way to phrase each entry will save new hires from having hours of their time cut or from a stern admonition from a partner as to issues with certain entries.

Don’t reinvent the wheel here and try to be novel with the billing entry style or assume that what has worked at another firm will work at the present one. Ask a partner or a friendly associate in the same practice area for a copy of a recent month’s billing entries to use as a guideline. Reviewing and analyzing an example of a stellar month of billing will provide a new associate with valuable information that serves as a rubric for the associate’s month of billing to come.

Often, an attorney will keep an Excel spreadsheet of the time to accurately capture an attorney’s time spent on a particular task is to enter the time directly after the billing activity. To wait until the end of the day or even a few hours after the task is completed opens up the possibility of forgetting the exact amount of time that was spent or, worse, forgetting the task altogether.

While some firms have designated support staff to input attorney billing entries into the billing software, most firms require attorneys to enter their own time. Many attorneys keep track of their time in an Excel spread sheet, Word document, or handwritten list, and later enter the time into their firm’s billing program at the end of the day, week, or month.

The attorneys who take this route are essentially entering their time twice, once into their personal time-tracking document and again into the billing software—usually taking several hours of non-billable work time to enter their billable time. From an efficiency standpoint, entering time directly into the billing program immediately after the task eliminates the second, more time-consuming entry, which in turn provides the attorney with more time to work on billable tasks.

While the nuances of a billable-hour requirement and best practices will differ among various firm environments, grasping the basic principles of determining firm expectations and time management will allow an already hard-working associate to outsmart the competition.

Anne R. Nash is an associate at Hammons & Baldino LLP, in Torrance, California, specializing in construction and business litigation. She serves on the Barristers Executive Committee.
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THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT Act of 1986, better known as California’s Proposition 65, requires businesses to post warnings if there is exposure on the premises or through the sale of consumer products to any one of more than 900 listed chemicals. In the event a 60-day notice is served claiming a violation of Proposition 65, what should counsel advise? Or suppose that, even if no notice has been served, a vendor regularly sells products containing one or more chemicals or provides services at a location exposing the public to chemicals covered by Proposition 65, should it institute a compliance system to seek to avoid a Proposition 65 lawsuit? Also, how should the compliance system operate in order to meet the legal standard?

The exposure addressed by Proposition 65 can occur almost anywhere—in homes, workplaces, and restaurants, and through exposure to consumer products. While Proposition 65 only applies to companies subject to California jurisdiction, most major companies within the United States and many companies worldwide conduct sufficient business in California to be covered. Therefore, Proposition 65’s reach is expansive, perhaps more so than that of any other state environmental statute currently in effect. Moreover, because of the stiff penalties for violating Proposition 65, businesses must understand how to comply and how to react if they are sued.

Proposition 65—Then Versus Now
Proposition 65 began as an initiative approved by California voters to “protect” the state’s drinking water sources from being contaminated with chemicals known to cause cancer, birth defects or other reproductive harm, and require “businesses to inform Californians about exposures to such chemicals.” The warnings mandated by Proposition 65 are presumed to allow consumers to make an informed decision about whether to risk exposure.

Over the years, the list of carcinogens and reproductive toxins compiled by California’s Office of Environmental Health Hazard Assessment (OEHHA) subject to Proposition 65 has grown to include over 900 chemicals, comprised not only of carcinogens and reproductive toxins but also some chemicals that are classified as both. Today, despite Proposition 65’s stated purpose, the bulk of alleged violations and subsequent lawsuits have little or nothing to do with California’s drinking water.

As the scope of Proposition 65’s coverage has grown, the chance of receiving a 60-day notice has also increased exponentially over time. Prior to 2000, 60-day notice filings were rare, reaching triple digits for the first time in 1992. However, more than 1,000 60-day notices were filed in 2015. In response to these developments, many businesses have chosen to institute preemptive warnings of the presence of listed chemicals that are often not required but are simply adopted to shield against liability. Ironically, the increasing ubiquity of Proposition 65 warnings may have contributed to consumer indifference and dilution of the message that the warnings are meant to convey.

Most 60-day notices are served, and the ensuing lawsuits are brought, by private attorneys on behalf of entities created in part to enforce Proposition 65. While the benefit to consumers of Proposition 65 warnings has become more questionable as the warnings have become more ubiquitous, there is little question that these lawsuits can be costly for the companies sued. Penalties for failure to provide adequate warnings can be as great as $2,500 per day per violation, and resolutions generally include payment of the plaintiff’s attorneys’ fees.

Compliance
What should California businesses do to comply with Proposition 65? Although this is a straightforward question, for many companies there is unfortunately no simple answer. The best option for a particular business depends upon its business objectives, and, ultimately, its appetite for potentially protracted litigation or expensive settlements.

First, many businesses err on the side of caution, instituting preemptive warnings that may not be required. This is often the most cost-effective solution, but this type of “over-warning” is disfavored by Proposition 65 proponents and enforcers because it goes against...
the fundamental purpose of Proposition 65. If businesses do not want to institute preemptive warnings without any investigation or testing, they should first determine whether they are exempt from Proposition 65’s warning requirements. Federal, state, and local government agencies, entities operating public water systems, and businesses with less than 10 employees are exempt.7

If the foregoing exemptions do not apply, a business will also be exempt if it can demonstrate that the exposure in question is so low that it will not exceed certain levels after allowing for a specified margin of safety. For approximately 300 chemicals on the list, the OEHHA8 has determined No Significant Risk Levels (NSRLs) for chemical carcinogens and Maximum Daily Levels (MADLs) for chemicals causing reproductive toxicity. Exposure at or below these levels does not require Proposition 65 warnings. For chemicals that do not have predetermined levels for compliance, the burden is on businesses to calculate their own levels, which can be a complicated and uncertain process requiring expensive laboratory product testing and exposure assessment.9

Businesses, individually or through trade groups, may have the option of requesting Safe Use Determinations (SUD) from OEHHA concerning their particular actions. A SUD is a written statement issued by OEHHA that interprets and applies Proposition 65 and its implementing regulations to a specific set of facts. Thus, a SUD provides a determination of whether an exposure or average use of a specified product is subject to the warning requirement or discharge prohibition.

However, it can only be issued prospectively because it is only available prior to service of a 60-day notice. A SUD also is available only if the subject matter of the request is not at issue in a pending civil case or in any administrative proceeding pending before a federal, state or local agency.

If businesses do not meet the requirements for exemptions, and a SUD is not available or the determination is unfavorable, they should be prepared to provide warnings before new or continued exposure of Californians to listed chemicals occurs.

**Proposition 65 vs. New Regulations**

Proposition 65 governs the content and method of warnings. Specifically, Proposition 65 states that “no person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the State to cause cancer or reproductive toxicity without first giving a clear and reasonable warning.”10 Proposition 65 provides “safe harbor” methods for providing warnings and scripted warning language for specific types of exposure, which are deemed to be clear and reasonable under the law. For example, under the current regulatory text, consumer products warnings may be provided by using one or more of a number of methods, singly or in combination. Warnings can be placed on the product’s label or other forms of labeling. Retailers can identify the product at the retail outlet in a manner that provides a warning—for example, through shelf labeling, signs, menus, or a combination thereof.11 Both of these types of warnings must be sufficiently conspicuous to render them likely to be read and understood by an ordinary individual under customary conditions of purchase or use.12 Warnings may also consist of a system of signs, public advertising identifying the system, and toll-free information services, or any other system that provides clear and reasonable warnings.13

However, what constitutes a “clear and reasonable warning” under this statutory scheme is vague in many contexts, rendering compliance difficult and heightening the risk a business will receive a 60-day notice of violation. For example, the currently operative safe harbor methods and scripted warnings do not account for evolving business models and consumer perception of these pervasive warnings.

The current regulatory text is also unclear as to the burden on manufacturers versus retailers in providing warnings. Recognizing the ambiguities in the law, OEHHA developed proposed regulatory guidelines that were approved by the Office of Administrative Law on August 30, 2016.14 By virtue of this regulatory action, all regulatory provisions of Title 27 of Article 6 of the California Code of Regulations governing clear and reasonable warnings—including, Sections 25601 et seq.—are repealed.15 The repealed sections are now replaced with a new Article 6 that has been divided into two subarticles.

Among other changes, for the first time, the new regulatory text provides a prescribed method of warning for internet sales. It mandates the location and form of internet warnings for consumer products and requires that the warnings be provided by a clearly marked hyperlink using the word “WARNING” on the product display page, or otherwise be prominently displayed to the purchaser before the purchaser completes his or her purchase of the product. The new regulatory text specifies that a warning is not prominently displayed if the purchaser must search for it in the general content of the website. The new regulatory text also seeks to minimize the burden of providing warnings on retailers, shifting that burden, where possible, to manufacturers, producers, packagers, importers, suppliers or distributors. However, retailers can be held liable if the retailer 1) fails to provide warnings for their private label products, 2) has knowingly introduced a listed chemical to be created in or added to a product, 3) modifies or obscures a product’s label warning, or 5) has “actual knowledge” of the potential consumer exposure requiring the warning. The retailer may also be held liable if no upstream person in the product supply chain is subject to Proposition 65.

Finally, the new regulatory text modifies the content of the scripted warnings that are deemed clear and reasonable under Proposition 65. It also differentiates between on-product warnings and other warnings for consumer products. Notably, in complying with the new regulatory text, companies are not required to identify any specific chemical for on-product warnings, as opposed to warnings provided on posted signs, shelf tags, or shelf signs. There are three safe harbor versions of on-product label warnings: one for products containing carcinogens, one for products containing chemicals causing reproductive harm, and one for products containing both. In contrast, for signs, label, and internet warnings, in many situations one or more listed chemicals must be identified by name.

In order to provide businesses with a reasonable grace period in which to implement any necessary changes to their warnings, the effective date of this regulation is August 30, 2018. From now through August 30, 2018, a business may choose to comply with the existing provisions of Article 6, or, it may choose to implement the modified scripted warnings and clarified methods of transmission found in the new regulatory text.16

**Litigation Strategy**

Whether or not a business chooses to implement a compliance strategy, if it has been served with a 60-day notice, it may still be exposed to penalties for past violations and it will have to respond to any lawsuits filed against it.17

The vast majority of Proposition 65 lawsuits settle by way of court and California Attorney General approved consent judgments. These settlements often require warnings, reformulation of products, bans on exposures, the payment of penalties, and the payment of attorneys’ fees. For example, in 2015, there were 582 reported Proposition 65 settlements. Total settlement payments equaled $26,226,761, civil penalties equaled $5,102,341, and attorneys’ fees equaled $17,828,941.18 If settlement is not palatable for a client, litigation may appear to be a legitimate and potentially cost-saving long-term solution because a court judgment of compliance may better shield businesses against future actions than a consent judgment agreeing to certain remedial acts. However, only a handful of
Proposition 65 cases have gone to trial. Taking into account the general lack of precedent and the ambiguities in the law, the strategy for litigating Proposition 65 matters is complex and requires an in-depth understanding of the state of the law, general scientific principles, and the client’s business objectives.

Whatever benefits have come to California consumers from Proposition 65 have been accompanied by a significant cost to California, nationwide and worldwide businesses. While the new regulatory text provides businesses with more guidance as to what constitutes an adequate warning under Proposition 65, the practical effect of these clarified regulations (including whether they will reduce businesses’ litigation and other costs under Proposition 65) remains to be seen.

1 HEALTH & SAFETY CODE §§25249.5-13.
2 Private enforcers may bring Proposition 65 claims at H EALTH & S AFETY C ODE §§25249.5-.13.
4 The list is updated and published annually. The duty to warn requirement in Proposition 65 becomes effective twelve months after a chemical is published on the list. See The Proposition 65 List, OEHHA, available at http://oehha.ca.gov (last visited Sep. 13, 2016).
6 While there is no penalty associated with providing unnecessary warnings, it should be noted that OEHHA discourages businesses from providing generic warnings. See Businesses and Proposition 65, OEHHA, available at http://oehha.ca.gov (last visited Sep. 13, 2016).
7 An employee is generally determined to be “a person who provides services for remuneration,” including full-time employees and part-time employees. HEALTH & SAFETY CODE §25249.11(b); A “person in the course of doing business” does not include any person employing fewer than 10 employees in his or her business…. CAL. CODE REGS. tit. 27, §25102(b).
8 OEHHA, a division of the California Environmental Protection Agency, is the lead agency in charge of the implementation of Proposition 65, Proposition 65 Law and Regulations, OEHHA, available at http://oehha.ca.gov (last visited Sep. 13, 2016).
9 Articles 7 and 8 of Title 27 of the California Code of Regulations provide some guidance to businesses for calculating exposures levels where no NSRLs or MADLs have been determined. See CAL. CODE REGS. tit. 27, §25703; see also CAL. CODE REGS. tit. 27, §25803.
10 Clear and reasonable warnings are defined as follows under the statute: “Whenever a clear and reasonable warning is required under Section 25249.6 of the Act, the method employed to transmit the warning must be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure. The message must clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm. Nothing in this section shall be construed to preclude a person from providing warnings other than those specified in this article that satisfy the requirements of this article, or to require that warnings be provided separately to each exposed individual.” CAL. CODE REGS. tit. 27, §25601.
11 HEALTH & SAFETY CODE §25603.1.
12 Id.
13 Id.
15 Id. An emergency rulemaking related to warnings for bisphenol A took place in April 26. Regulations of Title 27 of Article 6 subject to the emergency rulemaking (Sections 25603.3(f) and (g)) are not repealed. 16 “This article will become effective two years after the date of adoption. A person may provide a warning that complies with this article prior to its two-year effective date; such warning will be deemed to be clear and reasonable. A warning for a consumer product manufactured prior to the effective date of this article is deemed to be clear and reasonable if it complies with the September 2008 revision of this article.” CAL. CODE REGS. tit. 27, §25600(b).
17 If a 60-day notice has been served, no lawsuit has been filed, and a business believes it is compliant, it may consult with the Attorney General or the private enforcer to eliminate claims before a lawsuit is filed. 18 Proposition 65 Settlement Executive Summary 2015—All Settlements Reported, available at https://oag.ca.gov/sites/all/files/agweb/pdfs/prop65/2015-summary-report.pdf?.
Continuation of the Obama administration’s “hands-off” policy toward California’s regime under the Medical Marijuana Regulation and Safety Act is not guaranteed

As patients smoke or otherwise consume medical cannabis to alleviate nausea from chemotherapy or to cope with post-traumatic stress disorder, anxiety, or other disease or infirmity, most are unaware that their use of this drug is at the forefront of two significant legal conflicts: one between the United States and California, and the other between the state and local jurisdictions seeking to ban or regulate it. Prohibited by federal law, California grants limited immunity against criminal prosecution to certain qualified patients who use medical cannabis. While California has enacted laws to regulate medical cannabis, nearly half of its cities and counties have acted at the same time to ban cultivation and dispensaries. And, as if this matter were not sufficiently hazy, California voters approved Proposition 64 (Adult Use of Marijuana Act) in November 2016 allowing the recreational use of cannabis by adults.

Nearly 50 years ago, President Richard Nixon declared a national “war on drugs” to address both civilian and Vietnam War veteran drug epidemics and set out to “consolidate various drug laws…provide meaningful regulation…prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs.” These efforts culminated in enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Title II of this act, the Controlled Substances Act (CSA), makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance, even if based on medical necessity. Marijuana is listed as a Schedule I substance, which is described as having a high potential for dependency and no acceptable medical use. The possession, distribution, and cultivation of marijuana is a federal offense, except for certain limited research purposes. Like federal law, the California Uniform Controlled Substances Act prohibits the use, possession, cultivation, transportation, and furnishing of marijuana.

CSA vis à vis CUA

Notwithstanding these prohibitions, California became the first state to remove obsta-
icles preventing qualified patients from obtaining and using medical marijuana when voters approved Proposition 215, the Compassionate Use Act (CUA), in 1996. The CUA allows a patient’s personal use of marijuana for medical purposes upon a physician’s recommendation.

In 2005, the U.S. Supreme Court in Gonzales v. Raich, was asked to decide if Congress exceeded its authority under the commerce clause by categorically prohibiting the manufacture and distribution of marijuana under the CSA when this act was applied to interstate regulation of the use of this drug for medical purposes as authorized by California law (i.e., the CUA). Respondents sought injunctive and declaratory relief prohibiting enforcement of the CSA after Drug Enforcement Administration (DEA) agents seized and destroyed their cannabis plants. As the Court’s majority acknowledged, each respondent asserted a compelling medical reason for using marijuana. In addition, the majority also noted that the DEA acted after county officials found their use of marijuana was lawful under California law.

The Supreme Court ruled that congressional authority under the commerce clause of the U.S. Constitution includes the power to prohibit the local cultivation and use of marijuana regardless of whether this complies with California law. Relying on its decision in Wickard v. Filburn, the majority held that Congress has the power under this clause to regulate an activity even if it is completely intrastate and not necessarily “commercial,” if that activity nevertheless has a substantial effect on interstate commerce. In Wickard, a farmer exceeded his wheat allotment under the Agricultural Adjustment Act of 1938 (AAA) arguing that Congress had no authority to regulate the excess wheat that he grew for home consumption. The Supreme Court upheld the AAA as a legitimate exercise of congressional authority to control the volume of wheat to avoid surpluses and control market prices. The Court applied this rationale in Raich by finding that “a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets.” Thus, “Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.”

The majority also relied on its holding in United States v. Lopez in which the Court concluded that Congress only needs to present a rational basis to believe that the activity would affect interstate commerce. Here, “Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”

The fact that the CUA exempts the use for patients with a doctor’s prescription was not persuasive in Raich. The Supreme Court noted that “under California law the doctor’s permission to recommend marijuana use is open-ended.” Thus, this exemption “can only increase the supply of marijuana in the California market,” which was a primary concern in the Court’s commerce clause analysis. On remand from the Supreme Court, the Ninth Circuit rejected the respondents’ remaining challenges to the CSA, finding the law does not violate substantive due process or impermissibly infringe upon California’s sovereign powers.

Preemption
A significant issue neither raised nor discussed in Raich was preemption. As the California Court of Appeal acknowledged: The Raich court merely examined the validity of the CSA under the commerce clause; it did not go further and examine the relationship between the CSA and the CUA...’the Court’s holding in Raich did not address the preemption of the (CUA)...Raich ‘neither declared [the CUA] invalid on preemption or any other grounds nor gave any indication that California officials must assist in the enforcement of the CSA.’”

On the contrary, the court stated that “in enacting the CSA, Congress made it clear it did not intend to preempt the states on the issue of drug regulation. Indeed, ‘[t]he CSA explicitly contemplates a role for the States in regulating controlled substances.’” The goal of Congress, in enacting the CUA, was to “combat recreational drug abuse and curb drug trafficking...not to regulate the practice of medicine, a task that falls within the traditional powers of the states.”

The California Court of Appeal has also construed the CUA as a “narrowly drafted statute designed to allow a qualified patient and his or her primary caregiver to possess and cultivate marijuana for the patients’ personal use.” This act does “not alter the other statutory prohibitions related to marijuana, including those that bar the transportation, possession for sale, and sale of marijuana. When the people of this state passed [the CUA], they declined to decriminalize marijuana on a wholesale basis.”

Medical Marijuana Program Act
Before Raich was decided, the California legislature enacted the Medical Marijuana Program Act (MMP) in 2003 granting further limited immunity from criminal prosecution for distribution, cultivation, and use of medical marijuana. As the court noted in People v. Urziceanu, the MMP was the legislature’s initial response to the directive in the CUA that it “implement a plan to provide for the safe and affordable distribution of medical marijuana to those patients who need it.”

Under the MMP, the Department of Public Health (DPH) is required to maintain a voluntary program for issuing identification cards to qualified patients who are entitled to protection under Health and Safety Code Section 11362.5 and who are diagnosed and documented by a medical provider as having a serious medical condition as defined in the CUA. With this card, patients may use medical marijuana and their legally designated primary caregivers may obtain access to nonprofit collectives and cooperative cultivation projects.

California courts have upheld these limitations. In 2008, Roger Mentch sought to defend himself against charges of cultivating and possessing marijuana for sale by asserting that he was a “primary caregiver” under the CUA and MMP. A “primary caregiver” is defined as “the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.” However, Mentch could only prove that he “took a ‘couple’ of patients to medical appointments on a ‘sporadic basis,’” and that he provided shelter to a patient when he was selling marijuana. Based on this, the California Supreme Court rejected his claim that he was a “primary caregiver.” As the Supreme Court stated: While the [Medical Marijuana] Program does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the immunities conveyed by [Health and Safety Code] section 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws.

That same year, the California Department of Justice released the “Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use.” The guidelines explained the actions that qualified patients and primary caregivers must take to comply with the then applicable laws, including obtaining a doctor’s recommendation, receiving an identification card, and limiting patients to...
possessing no more than 6 mature or 12 immature plants. It also created a regulatory scheme permitting nonprofit collectives and cooperatives to operate legally, provided they complied with corporate formalities, required all members to complete a written application to participate in the purchase and sale, and prohibited purchase and sale to nonmembers.33 Finally, the guidelines made clear that medical marijuana could not be smoked within 1000 feet of a school, recreation center, youth center, school bus, or moving vehicle,34 and that storefront dispensaries engaged in mass production or illegal sales could be subject to seizure, arrest, or criminal prosecution.

**Local Bans**

While California voters and legislators support the limited use of medical cannabis, many local governments object to its use and have adopted bans based on their authority to regulate land use. As of January 2016, 43 percent of California cities have chosen to ban medical marijuana business operations within their jurisdictions.35 Historically, land use regulation has been a function of local government under the grant of police power contained in the California Constitution: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”36

As the California Supreme Court stated in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, “The inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed.”37 The supreme court acknowledged that “a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.”38 The legislature imposes a “minimum of limitation in order that cities and counties may exercise the maximum degree of control over local zoning matters.”39

The decision in *Riverside* focused on whether the CUA and MMP preempted a ban in the City of Riverside on medical marijuana dispensaries. In enforcing this ordinance, the city brought a public nuisance action against a medical marijuana distribution facility operated by the defendants. The California Supreme Court affirmed the trial court's issuance of a preliminary injunction barring the facility from distributing marijuana.40

In analyzing whether local bans on dispensaries are preempted by state law, the supreme court stated that “local legislation that conflicts with state law is void....” A conflict exists if the local legislation “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.”41 “Similarly, local legislation is ‘contradictory’ to general law when it is inimical thereto.”42

In this instance, however, the CUA and the MMP were deemed not to preempt Riverside's ban. On the contrary, no express conflict existed between the state’s medical marijuana statutes and the city's action. Further, the court also found no implied conflict:

> [T]he MMP merely exempts the cooperative or collective cultivation and distribution of medical marijuana by and to qualified patients and their designated caregivers from prohibitions that would otherwise apply under state law. The state statute does not thereby mandate that local governments authorize, allow, or accommodate the existence of such facilities.43

Accordingly, the supreme court held that “there appears no attempt by the legislature to fully occupy the field of medical marijuana regulation as a matter of statewide concern or to partially occupy this field under circumstances indicating that further local regulation will not be tolerated.”44 Further, the court stated that “neither the CUA or the MMP expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions.”45 There is thus no conflict between the state medical marijuana statutes and a city's actions in prohibition as the state's statutes “do no more than exempt specific groups and specific conduct from liability under particular criminal statutes.”46

While this legal area evolves and the legislature and voters continue to expand the rights of medical cannabis patients, attorneys representing municipalities have authority that they and their clients can rely upon to support a ban on the sale, cultivation, and distribution of medical marijuana as a legit-
imiate exercise of those jurisdictions’ broad police powers.

Alternatively, municipalities have the option to regulate and tax these businesses. Local regulation and taxation may be extensive. In exercising its land use authority, local governments may impose standards based on location and size and distance of use. They may also conduct background checks, demand that business entities be fully insured and in good standing, and demonstrate the ability to indemnify the jurisdiction if any litigation or any adverse action arises from the medical marijuana business. Also, the hours of operation and parking requirements may be strictly regulated. Further, a city wishing to regulate medical cannabis may benefit from sales tax, a special tax on medical marijuana related business, and development fees.

**MMRSA**

In an effort to adopt uniform standards where medical marijuana is permitted locally, Governor Edmund G. Brown signed three bills in 2015 that are collectively referred to as the Medical Marijuana Regulation and Safety Act (MMRSA). The MMRSA overhauled California law relating to the cultivation, processing, and distribution of medical marijuana to patients and caregivers.

The MMRSA grants regulatory and licensing authority to the Department of Food and Agriculture (DFA) for cultivation sites. This includes the establishment of “State cultivator license classifications,” which are described as “Type(s)” 1 to 4, regulating outdoor and indoor cultivation, square footage and natural versus artificial lighting requirements. Types 3, 3A, and 3B are subject to a limited number of licenses to be issued by the DFA. The DFA has not yet determined the number of licenses that will be issued.

The MMRSA also regulates environmental impacts associated with cannabis cultivation and unlawful water diversions in coordination with the State Water Resources Control Board. In addition, the Department of Pesticide Regulation must monitor appropriate pesticide tolerances on cannabis crops intended for human consumption. Further, as it relates to “edibles,” the DPH must develop standards for the production and labeling of edible cannabis products. A Medical Marijuana Regulation and Safety Act Fund was created to receive fines and civil penalties for specified violations to be appropriated by the legislature in the future.

The MMRSA initially provided that DFA would be the sole licensing authority for cultivation applications if local governments did not adopt land use regulations or ordinances regulating or prohibiting this activity by March 1, 2016. However, this deadline has now been superseded.

The MMRSA requires the issuance of both a state and local license to cultivate medical marijuana. A license is valid for 12 months from date of issuance. Any facility operating in compliance with a local zoning ordinance on or before January 1, 2018, may continue operating until state licensing authorities approve or deny its application for license. Also, any licensee granted a license by a local jurisdiction that demonstrates that it is in good standing with that agency by January 1, 2016, will receive priority from the state.

The act also created a Bureau of Medical Cannabis Regulation (BMCR) within the California Department of Consumer Affairs. The BMCR oversees the overall regulatory scheme and establishes minimum health and safety and testing standards. It also requires the Board of Equalization, in consultation with DFA, to adopt a system for reporting the movement of commercial cannabis and cannabis products. In this regard, the MMRSA requires that transporters be bonded and insured, and that they adhere to minimum security requirements for the commercial transportation and delivery of medical cannabis products. The MMRSA also clarifies that for-profit entities may now be qualified to engage in the medical marijuana business. In addition, the MMRSA also sets forth criteria for licensing medical marijuana businesses, regulating physicians and their recommendations of medical cannabis, and recognizes local authority to levy taxes and fees under a unique identifier and track and trace program. The BMCR will begin issuing licenses on January 1, 2018. The governor’s administration plans to actively engage with local governments and local law enforcement in implementing the MMRSA.

**Federal Enforcement**

The legal quagmire over medical marijuana has been exacerbated by a change in federal enforcement policy. In 2013, the U.S. Department of Justice (DOJ) issued a document entitled “Guidance Regarding Marijuana Enforcement.” In the guidance, the DOJ reiterated its primary objectives to prevent marijuana from being distributed to minors and to thwart criminals from earning revenues from its sale. The DOJ maintains that “[t]he CSA’s prohibitions on the possession, distribution, or manufacture of marijuana remain fully enforceable in this jurisdiction,” including California. However, in exercising its prosecutorial discretion, the DOJ has not prosecuted marijuana users and businesses, provided they comply with state and local laws. The DOJ relies on state and local law enforcement to address marijuana activity through enforcement of their own narcotics laws.

To further complicate the situation, the Ninth Circuit in *United States of America v. McIntosh* held in August 2016 that the DOJ is prohibited “from spending funds...for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.” The court in *McIntosh* relied on the Consolidated Appropriations Act, 2016, which “prohibits the Department of

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Justice from spending funds to prevent states’ implementation of their medical marijuana laws.”72 The appellate court ruled that “the Appropriations Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions.”73

Consistent with this decision, the U.S. attorney in the Northern District of California dismissed a complaint with prejudice in November 2016 against a collective in Oakland that sells cannabis to more than 100,000 patients.74

This hands-off policy by the federal government appears to be consistent with the trend as more states and cities legalize medical cannabis. However, there is no guarantee that the federal government will continue with this liberal policy. Vested interests should be aware that the federal statutes of limitations may range from five to 10 years; thus, it is possible that those engaging in medical marijuana-related businesses could be prosecuted by the federal government in the future.

Attorneys may take sanctuary in the fact that the Los Angeles County Bar Association Professional Responsibility and Ethics Committee has opined that a member does not violate the California Rules of Professional Conduct or the California State Bar Act by advising or assisting clients who wish to engage in medical cannabis and related business activities.75

**Proposition 64**

As if use of marijuana for medical purposes did not already present a myriad of legal challenges, law enforcement and local government will now be further challenged by Proposition 64. Under this recent voter-approved initiative, possession of one ounce for recreational use is allowed, as is the cultivation of up to six plants per residence and the possession of the marijuana produced by these plants for adults 21 or older. Proposition 64 becomes effective on January 1, 2018. This is also the date when the DFA is expected to issue licenses to marijuana retailers, distributors, and microbusinesses.

Plants and harvest exceeding one ounce must be kept in a locked space not in public view at one’s residence. Local governments may still forbid cultivation outdoors but must allow it inside a private residence or accessory structure that is “fully enclosed and secure.”76

Also, under limited circumstances, local jurisdictions “may allow for the smoking, vaporizing, and ingesting of marijuana or marijuana products on the premises of a [licensed] retailer or microbusiness.”77

Proposition 64 is not meant to interfere with the ongoing implementation of the CUA. Medical marijuana patients retain their existing rights under the CUA to possess and cultivate as much as they need for personal medical use so long as they have a doctor’s recommendation, irrespective of the Proposition 64 limits for adult users. Local governments may still restrict cultivation based on their land use and taxation authority, excluding the six indoor plant minimum allowed for personal use.

The administrative, statutory, and taxation scheme of Proposition 64 is complex and comprehensive.77 It imposes excise and cultivation taxes that will be distributed by the state controller to various interested public agencies and entities in the state. However, local governments may not be the recipient of grants that may assist with law enforcement, fire protection, or other local programs addressing public health and safety associated with Proposition 64 if they have banned cultivation for commercial or recreational use.79

Enforcement of Proposition 64 presents unique challenges. For instance, smoking of cannabis is prohibited in “any public place.”80 In addition, local governments may continue to enforce ordinances that regulate reduction of exposure to secondhand smoke or “contact high.”81 The enforcement of these provisions on private businesses and landlords and tenants of public housing is yet to be determined.

**Fiscal Impact**

State and local government anticipate a positive fiscal impact of Proposition 64, but the health and safety and public policy impacts are daunting.82 It is premature to estimate the exact fiscal impact or law enforcement problems associated with the few cities that have opted to regulate medical marijuana pursuant to the MMRSA, as they are still in the entitlement stage. The only likelihood is that medical marijuana is here to stay in one form or another subject to the broad police powers of local governments that can use that power to protect the public health, safety, and welfare of its constituents.

At the same time, however, the risk still exists that with the new presidential administration, Congress could restore funding for prosecution for violations of the CSA. Nevertheless, these prosecutions will not likely be at the forefront of the new administration. President Trump has inferred his deference to states in this public policy issue.83 Further, the CSA was adopted during the Nixon era, when the war on drugs was paramount. It appears that regulation, not prohibition, is the wave of the future for voters and society-at-large, which Congress may seek to honor someday.

1 Gonzales v. Raich, 545 U.S. 1, 10 (2005).
2 Id. at 10.
6 HEALTH & SAFETY CODE §§11000, et seq.
7 HEALTH & SAFETY CODE §§11362.5(d).
8 Gonzales v. Raich, 545 U.S. 1, 10 (2005).
9 Id. at 9.
11 Raich, 545 U.S. at 19.
12 Id.
13 Id. at 22.
14 Id. at 31.
15 Id. at 32.
17 Id.
18 Id. at 382 (citation omitted).
19 Id. at 383 (emphasis in original).
20 Id.
22 Id. at 773.
23 HEALTH & SAFETY CODE §§11362.7 et seq.
24 Urziceanu, 132 Cal. App. 4th at 783.
26 HEALTH & SAFETY CODE §§11362.7.
28 People v. Mentch, 45 Cal. 4th 274 (2008).
29 HEALTH & SAFETY CODE §§11362.5(e).
30 Mentch, 45 Cal. 4th at 280.
31 Id. at 274.
33 As amended in 2016, HEALTH & SAFETY CODE §11362.775 provides that collectives and cooperatives will cease having immunity from criminal sanctions one year after the Bureau of Medical Cannabis Regulation posts a notice on its website that the applicable agencies have begun issuing licenses.
34 HEALTH & SAFETY CODE §§11362.79.
36 CAL. CONST. art. XI, §7.
37 City of Riverside v. Inland Empire Patients Health and WellnessCtr., Inc., 56 Cal. 4th 729, 738 (2013).
38 Id. at 742.
39 CAL. CONST. art. XI, §7; GOV’T CODE §65800; and DeVita v. County of Napa, 9 Cal. 4th 763 (1995).
40 Riverside, 56 Cal. 4th at 729.
41 Id. at 743 (citations omitted).
42 Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897 (1993).
43 Riverside, 56 Cal. 4th at 759. (emphasis in original).
44 Id. at 755.
45 Id. at 762.
47 GOV’T CODE §65800; DeVita v. County of Napa, 9 Cal. 4th 763, 792 (1995).
48 BUS. & PROF. CODE §§19322-19323.
49 BUS. & PROF. CODE §§19322-19323.
Marijuana edibles contain tetrahydrocannabinol or THC and include brownies, cookies, space cake, and firecrackers.

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Of lenders, including New York-based Counsel Financial (backed by Citigroup) recently financed New York's Ground Zero workers' litigation to the tune of about $35 million. The action settled for approximately $680-710 million; the consortium reportedly cleared $11 million.1 The potential upside in this type of third-party litigation funding is staggering. But at what cost to the attorney-client relationship?2 Trial lawyers face myriad ethics issues when representing clients; one of the most important is counsel's promise to protect client interests with undivided loyalty. The attorney-client relationship is thus a fiduciary relationship of the highest degree.3 This relationship may be jeopardized when a third party—which is otherwise a complete stranger to the matter—finances litigation. Third-party litigation funding is solely a financial product that allows an entity to pay the upfront trial costs of a plaintiff or a class of plaintiffs. Funding is nonrecourse; unsuccessful litigants owe nothing to these financiers.4

Trial funding by third parties need not inherently create conflicts, but the financier must understand that its involvement is strictly monetary. The investment must not carry with it any degree of strategic control. Counsel must make clear to all involved that the attorney's undivided loyalty is to the client, not the third-party funder.5 No privileged information can be independently divulged nor can the third party influence the litigation or negotiation strategy: this is strictly within the purview of the client.6 In many outside funding situations, no conflict is likely to arise.

For example, in family law, third-party family members or close friends sometimes pay

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the legal bills of a loved one. While the attorney must ensure that the lender understands his or her role is strictly providing financial support, in a setting where financing is based on an ongoing personal relationship, the lender usually shares a common interest with the client. When the third-party financing a lawsuit is making business decisions based on financial gain, however, the interests of the funder and the client, and at times, counsel, can be at odds.

Litigation funding, although not completely a new concept, is paradoxically both on the upswing and still largely unknown. Also, while third-party funding is increasingly available to litigators, funding issues remain largely opaque. To make smart ethics calls and avoid unexpected ethics pitfalls in the context of trial finance, advocates should familiarize themselves with the substance and procedures involved.

While litigation funding is financing by third parties who offer cash, usually in exchange for a return on successful resolution, this is not the only approach. Another option is online crowdfunding. Plaintiffs receive donations from individuals, or offer rewards ($2 for each $1 contributed, for example). The individual online funders expect a return on their investments upon successful completion of the litigation. Thus, these are not simply donations to cover trial costs, e.g., litigation funding appeals through popular crowdfunding sites that include GoFundMe, Kickstarter, or IndieGoGo.

Considering the ethical disparity triggered by the distance between professional funders and retained counsel, the question arises whether plaintiffs’ counsel may ethically use these options, and if so, how. Also, what would be the appropriate context for representing clients who are contemplating or have already secured this financing on their own?

Most third-party funding agreements implicate some common deal identifiers: 1) a direct contract relationship exists between the funder and the original party to the case or with the advocate, 2) the case continues with the original party to the matter in place, and 3) because no assignment of the underlying claim occurs, financial backers are not parties. Considering these basic qualifiers, the touchstone of the initial analysis is the legality of the transaction itself. Rights to recover money via a judicial proceeding are generally transferable—a thing in action is presumptively assignable, with the exception of most personal causes of action. Prohibition of the common-law concepts of maintenance (intermediating of a disinterested party to encourage a lawsuit) and champerty (the maintenance of a person in a lawsuit on condition that in some way the action is to be shared with the maintainer) are unknown to the laws of California. Based on these concepts, counsel may legally use third-party financing and represent clients engaged in third-party funding relationships. However, advocates may be on slippery ethical ground as they must consider more than legality—they and their clients need to be sensitive to obvious as well as subtle ethics issues.

**Ethical Implications**

Counsel’s ethical obligations to clients may never be infringed based on divergent financial interests triggered by third-party funding. Advocates’ obligations in the context of third parties funding litigation generally focus on maintaining independent control of the litigation, avoiding conflicts, and preventing inadvertent waiver of privilege. For example, in the context of providing financing, funders may require that counsel report case developments. When third-party funders require that the advocate seek consent from the financier regarding file strategy, this may suggest that funders are seeking to influence the progress of the file. The input on strategy by third-party funders results from the fact that, generally, funders take “first resolution dollars,” i.e., traditional priority of repayment is the funder gets paid first from recovery, before counsel and client. For example, in a $50 million case, funded at $10 million, a defendant may offer to settle in the range of $12-15 million. Under the terms of most funding agreements, funders would likely push for acceptance, and they will recover $10 million, plus additional sums as stated in the contract. The plaintiff will resist taking the offer since the plaintiff in this scenario, after funder repayment, receives almost nothing on a $50 million action, thereby setting up a conflict of interest.

The conflict becomes clearer when considering the divergent loyalties and obligations of each side. Counsel’s ethical obligations require that he or she act in the best interest of the client and in conformity with the client’s directives. Alternatively, third-party funders are primarily ethically obligated to bring in the best possible return for investors. None of the third-party funders’ fiduciary duties extend to counsel’s client, before or after contracts are signed and funds are advanced. Therefore, advocates (and their clients) must be sensitive to and resist pressure from trial financiers regarding trial strategy or resolution decisions. Third-party funders’ advocacy regarding trial strategy—informed by loyalty to the financial backers—must never be allowed to compromise counsel’s loyalty to the client.

As a corollary, if a trial file attached to a third-party funding agreement is over-leveraged, counsel’s worries regarding repayment may affect advocacy decisions, even absent blatant funder demands. If the file’s financing commitments become sufficiently unbalanced, the advocate may feel compelled to unreasonably risk trial to attempt generating a verdict large enough to cover all third-party payment obligations and to provide a satisfying return for counsel and client. When reasonable settlement options are rejected on this basis, it harms the client’s interests. This type of conflict can undermine counsel’s duty of undivided loyalty to the client.

As well, counsel may refer clients to funders, but counsel must refuse referral fees that extinguish independence of judgment regarding whether financing is in the client’s interest. An advocate’s consideration of financial commitments on a client’s matter must never compromise candid advice regarding financing terms.

Conflict rules may prohibit an attorney, or a company the attorney substantially owns, from financing clients whom the attorney, or the attorney’s firm, represent. Likewise, if counsel signs the finance agreement, the client may later direct counsel not to pay the funder, thus arguably rendering counsel and client adverse, which in turn likely violates California Rule of Professional Conduct 3-300 (avoiding interests adverse to a client). Third-party financing may cause counsel to inadvertently compromise the client’s confidences, even without direct counsel-client conflict. These ethics challenges may arise in the discovery process. If so, this could place counsel in conflict with Rule of Professional Conduct 3-310(F) (avoiding representation of adverse parties) and Business and Professions Code 6068(e) (protecting client confidences), a difficult ethical gauntlet for counsel.

**Privilege and Discovery**

Privilege may accidentally be compromised and therefore lost in the ordinary course of litigation if an outside funder reads the file when considering a finance contract. As part of the negotiation regarding funding, most funders demand case data. Funders sometimes seek access to information before and after committing funds, which may require updates and sometimes direct file access as preconditions of financing or continued financing. Counsel’s discussions with potential funders could unintentionally waive attorney-client privilege, implicating discovery conflicts and maybe trial results. This analysis creates ethics pressure points on clients.

One possible hot-spot is the potential for outside financing to raise additional conflicts, despite client authorization. A paradigm may be created in which clients believe they must choose between revealing confidential information that they are uncomfortable disclosing to third parties and losing the funding for
MCLE Test No. 266

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at http://www.lacba.org/mcleselftests.

1. Third-party funders’ receiving case data as part of the negotiation regarding funding has no effect on discovery of privileged material.
   - True. 
   - False.

2. A fundamental ethical conflict that arises in the presence of third-party funding is independent judgment regarding control of the litigation.
   - True. 
   - False.

3. If counsel realizes that the third-party funding contract is usurious, counsel must immediately secure written waivers from the client in order to save the deal.
   - True. 
   - False.

4. Monetary advances that are actually loans, which litigants must repay, constitute usury per se.
   - True. 
   - False.

5. Third-party funding agreements can be structured so they are outside usury laws.
   - True. 
   - False.

6. If class counsel discusses the ethics issues in a third-party funding arrangement with the lead plaintiff, counsel’s ethical obligations to the class are satisfied.
   - True. 
   - False.

7. Third-party funders and the lawyers they are backing share a community of interest, with similar goals and motivations.
   - True. 
   - False.

8. Class counsel are under no ethical obligation to disclose to anyone the involvement of a third-party funding agreement.
   - True. 
   - False.

9. When privilege logs are needed in the context of discovery, they should note specific, applicable privileges, and not “common interest.”
   - True. 
   - False.

10. Courts are never permitted to seek disclosure of the existence of a funding agreement.
    - True. 
    - False.

11. Plaintiff’s counsel can never be compelled to turn over third-party funding agreements to the defense.
    - True. 
    - False.

12. The involvement of third-party financiers with potential lead class counsel could raise questions about that law firm’s resources to meet the demands of representing the class.
    - True. 
    - False.

13. Material transferred between counsel for the company and an investor or potential investor in that company is not always protected by the joint defense doctrine.
    - True. 
    - False.

14. The common interest doctrine insulates from discovery material shared between lawyers who are negotiating adversaries in the course of representing their respective clients.
    - True. 
    - False.

15. If negotiations with third-party funders are purely financial, the common interest doctrine may not protect the sharing of privileged material from discovery.
    - True. 
    - False.

16. Paying the lender a portion of attorney fees could be considered prohibited fee-sharing.
    - True. 
    - False.

17. Counsel may waive work-product protection by disclosing counsel’s work product to a third party—including, potentially, prospective funders—who have no interest in maintaining confidentiality.
    - True. 
    - False.

18. California advocates seeking third-party funding for litigation in California must be careful to avoid accidental champerty.
    - True. 
    - False.

19. Disclosures to third-party funders might be protected under Evidence Code §912.
    - True. 
    - False.

20. Counsel’s discussions with potential funders can create ethics pressures for clients.
    - True. 
    - False.
Third-party funding is fundamentally a business negotiation, not seeking or providing legal advice, but some courts have recognized that communications between parties to a business negotiation are within the contemplation of the attorney-client privilege.

As background, attorney-client privilege generally falls when lawyers voluntarily disclose confidences to unrelated third parties. The privilege holder’s purpose in seeking legal advice can, therefore, in some circumstances, insulate from discovery material shared between negotiating adversaries. Trial lawyers involved in negotiating third-party funding arrangements arguably function as both transactional attorneys negotiating business commitments and as trial lawyers zealously representing clients in adversarial proceedings. The added wrinkle is that funders are never advocates with a client in the mix.

As a subsidiary issue concerns the potential for and consequences of waiver of privilege. Counsel should consider demanding contract terms that include recourse for the funder’s breach of counsel’s obligations to safeguard client confidences. A subsidiary issue concerns the potential for and consequences of waiver of privilege. Counsel should assist the parties to the transaction in defining the limits of disclosures and the legal and financial obligations to defend against intrusion into the client’s confidential information. Counsel should consider demanding contract terms that include recourse for the funder’s breach of counsel’s obligations to safeguard client confidences.

The underlying issue is that, during financial negotiations on the file, participants are adverse, rendering disclosures potentially outside attorney-client privilege. In California, evidentiary privileges are purely statutory, and courts cannot recognize new privileges. As a result, the fact that the Evidence Code does not recognize a joint defense privilege for separately represented parties is the final word in California litigation. However, disclosures may be protected under Evidence Code Section 912, which provides some shelter: disclosure does not waive privilege if it is both confidential and reasonably necessary for the accomplishment of the purpose for which counsel was consulted.

Most cases construing Section 912, though, contemplate several attorneys representing multiple clients who are parties to a single action—for example, codefendants pool resources for efficiency or consistency. This is not the case during third-party funding discussions, however, in which parties who claim common interest as a defense to disclosure of privileged material are adversarial. A priori, the common interest necessary for waiver protection—although not obvious in financial negotiations—has recently been recognized among nonlitigants and adverse negotiating parties. Because the funder relationship during negotiations is both adversarial and exclusively financial, the common interest doctrine may not be available. Thus, sharing privileged information is only selectively protected.

Third-party funding is fundamentally a business negotiation, not seeking or providing legal advice, but some courts have recognized that communications between parties to a business negotiation are within the contemplation of the attorney-client privilege. However, while some communications outside litigation may come under the rubric of the common interest doctrine, these types of communication must be shared for a legal rather than business purpose. Entities must share identical, or nearly identical, legal interests for the common interest doctrine to apply.
as part of trial financing. Courts recognize that the waiver analysis covers work product (Wells Fargo Bank v. Superior Court). The trend is to protect financing-related disclosures as protected attorney work product, prepared in anticipation of litigation. Unfortunately, counsel may unexpectedly waive work-product protection by disclosing counsel’s work product to a third party with no interest in maintaining confidentiality.

Considering these analyses, are litigation funding arrangements discoverable? In some jurisdictions, courts have compelled disclosure of documents shared with potential third-party investors during discussions about potential financing.

In Nidec Corp. v. Victor Co., a federal court sitting in California held that material transferred between counsel for the company and an investor was not protected by the joint defense doctrine. In Nidec, the plaintiff sought access to documents about the defendant’s patents, which the defendant had shared with a potential investor. The court did not recognize the existence of any common legal interest; the seller shared privileged legal advice predominantly to further a business interest, not a legal interest, because the investor was unlikely ever to be a defendant.

Counsel must understand the nuances of, and advise clients about, potential discovery consequences of sharing otherwise-protected material disclosed pursuant to purely financial conversations. Once counsel secures the funding contract, splitting fees with non-attorneys may be implicated, depending on the deal’s structure, and this may violate Rule 1-320 (financial arrangements with nonlawyers). California Rule of Professional Conduct 1-320(A) generally prohibits members from directly or indirectly sharing legal fees with nonlawyers. Although agreements structured as traditional loans or purchase agreements of claim proceeds are likely consistent with Rule 1-320, paying a lender from attorney fees could be prohibited fee-sharing.

**Class Actions**

The overall growth in third-party litigation funding extends to class actions. However, based on the unique dynamics of class-action relationships, the ethics analysis is not identical to nonclass relationships. One aspect of class litigation affecting third-party funding analysis is the additional pressure to disclose the fact of funding to the court. Class certification requires court approval and, to some extent, supervision of the development of the matter.

The involvement of third-party financiers with potential lead class counsel may raise questions about the law firm’s resources to meet the demands of representing the class. Counsel’s motives are then already in conflict with the court’s curiosity and potentially with an unknown number of class members. This raises concerns about counsel’s avoiding interests adverse to the client, as proscribed by Rule 3-310.

When, early in the process, the court designates lead class counsel, clients are both known and unknown. If a third party has a seat at the table, with a meaningful voice regarding whether to settle and the particular terms, the court will likely seek disclosure of information in this regard. Another ethical concern in this context concerns zealous representation—revealing the need for funding may appear to weaken the firm’s ability to effectively represent clients in litigation. This may compromise the firm’s ultimate success in the case.

For these reasons, some courts seek disclosure of the existence of a funding agreement, perhaps pressuring a trend toward greater transparency. Thus, with whom should class counsel be consulting? The lead plaintiff is a single discussion; at early stages of class litigation, the identities, and even the total number, of clients and potential clients is not solidified. Class members who may want to react to a class counsel’s strategy to seek outside funding lack channels to hear this news or be heard in response. The plaintiff’s counsel may be ethically obligated to separately disclose the existence of the funding agreement to all known and potential class members as part of the opt-out discussion. Once the funding is widely disclosed, confidentiality may be broken, exposing funding material in discovery. This disclosure would likely occur without input from clients, raising additional ethical concerns.

Further conflict may arise regarding funders who are working to create a business paradigm to secure the best financial return. Unlike ethics requirements for class counsel, funders are not necessarily bound to the best interests of a group of injured individuals. Courts hearing contested lead counsel petitions may require firms to disclose third-party funding.

Another complicated situation arises when multiple counsel from different firms are designated to represent a class, but one of the attorneys is using third-party financing. Although the attorney is fundamentally obligated to represent the class, he or she has brought a nonlawyer participant into the management cadre without approval or consent from co-counsel, potential clients, or perhaps even some of the clients already identified in the class. In this situation, although plaintiffs’ lawyers owe a duty of undivided loyalty to class clients, counsel has a financier participating in important analyses who has little focus on what is best for injured parties. Co-counsel and clients may not be aware of the undisclosed divided loyalty that may arise when bankers influence settlement moves. Class counsel cannot realistically secure consent from all class action clients since not all clients have yet been identified at early stages. This raises questions about counsel’s effective compliance with ethics obligations under Rule 1-310 (forming a partnership with a nonlawyer).

Guidelines for California class actions offer robust due process protections for class members, which could safeguard the class against possibly troubling third-party litigation financing contracts. If class members have intragroup conflicts of interests, the issues are more complex. Certification of a class encompassing these types of conflicts may trigger designation of subclasses, each with its own class counsel and representative. In a third-party funding context, this type of internal conflict may stimulate separate funding contracts with the attorneys, possibly raising competing approaches to strategy and resolution. Thus, third-party litigation financing, as currently practiced, may have difficulty falling within all of a counsel’s ethics obligations in class actions with designated subclasses.

To help the courts efficiently deal with approving class settlements, some plaintiff’s lawyers are obtaining experts, sending out releases, and scheduling mediators at something earlier stages than in the past. This suggests more court scrutiny at preliminary procedural stages. With larger expenses earlier in the process, third-party financing will be a larger and more common occurrence. Analogizing to the plaintiffs’ bar demands in discovery for disclosure of all insurance policies, the defense bar has argued that it is entitled to see the agreements if third parties are financing plaintiffs in class actions because third-party funding maintaining litigation is the corollary of this entrenched discovery rule. The defense would be looking for language in the agreement that highlights ethics conflicts or other pressures affecting the course of litigation. Indeed, on January 23, 2017, the U.S. District Court for the Northern District of California posted a rule change requiring that plaintiffs in proposed class, representative, and collective actions disclose the identity of third-party funding sources.

Ethical implications in the area of third-party funding are being recognized more slowly than the industry is growing, so counsel must be watchful regarding possible ethics pitfalls. Maintaining independence, avoiding conflicts, and preventing inadvertent waiver of privilege should be at the forefront of counsel’s analyses when considering third-party litigation financing. The following activities represent practical approaches to apply when
considering third-party funding litigation:
• Discuss with clients, in detail, all of the potential risks and adverse effects of third-party funding.
• Obtain detailed and clear written waivers delineating ethical, strategic, and financial consequences of third-party funding.
• Maintain privilege logs that note specific, applicable privileges (e.g., attorney-client or attorney work product) rather than common interest since the common interest doctrine is not one of California’s statutorily decreed privileges.49


5 Rules of Prof. Con. R. 3-300, 3-100.


8 GoFundMe (https://www.gofundme.com), for example, is an online platform on which users create Web pages summarizing financial needs and share experiences via Facebook, Twitter, LinkedIn, and e-mail. Kickstarter (https://www.kickstarter.com) and Indiegogo (https://www.indiegogo.com) operate similarly.

9 This discussion does not apply to insurance policies covering costs of defense.

10 This discussion does not apply to insurance policies covering costs of defense.


12 Matthewson v. Finch, 22 Cal. 86, 95 (1863); Civ. Code §§5953, 954; see In re Cohen’s Estate, 66 Cal. App. 2d. 450 (1944).


17 Cal. Rules of Prof. Con. R. 3-300; Bus. & Prof. Code §6066(e)(1); Flatt v. Superior Ct. (Daniel), 94 Cal. 4th 275 (1994); RETAITEMENT (THIRD) OF LAW GOVERNING LAWYERS §121, Comment b.


19 Cal. Rules of Prof. Con. R. 3-100, 3-110; Bus. & Prof. Code §6068(e)(1).


22 Evid. Code §592; see, e.g., Wei v. Investment Indicators, Research & Mgmt., Inc., 647 F. 2d 18 (9th Cir. 1981).

23 Evid. Code §592 (citing Solon v. Lichtenstein, 39 Cal. 2d 74 (1952)).
(1989).
25 Id.
28 EVID. CODE §§912, 952.
30 OXY, 115 Cal. App. 4th at 889.
36 Wells Fargo, 22 Cal. 4th at 215.
39 Id. at 579.
40 Funding terms vary widely. Although funders label transactions “purchases” or “assignments” of anticipated proceeds termed “assets”—arrangements that fall outside usury laws—they could be loans. When litigants must disgorge the bulk of their recoveries, and the advances are actually loans, this may be usury. Ghirardo v. Antonioli, 8 Cal. 4th 791, 798 (1994). If the funding arrangement is usurious (or otherwise unlawful), the agreement is unenforceable. Counsel should notify the client of the issue and cease participation.
42 Background on California Class Certification, Class Certification in California, 4-5 (Feb. 2010), available at http://www.courts.ca.gov. The court’s approval is needed for, inter alia, certification, notice, and resolution. 4 WITKIN, CALIFORNIA PROCEDURE §§267 et seq. (5th ed. 2008).
43 CAL. RULES OF PROF’L CONDUCT R. 3-310.
47 Id., (Comments by Brad W. Seiling, co-chair of Manatt, Phelps & Phillips’ class action defense practice group).
Bankruptcy professionals face a significant risk of fee dilution when forced to address objections to their billing.

**COMPENSATION** of professionals, including attorneys, employed in bankruptcy cases is subject to court approval. Under U.S. Bankruptcy Code Section 330(a), the bankruptcy court is authorized to award “reasonable compensation for actual, necessary services” rendered by attorneys and other professionals employed by the bankruptcy estate’s representative. The clear intent of the Bankruptcy Code is that attorneys and other professionals serving in bankruptcy cases be compensated no less favorably than they would for performing comparable services in nonbankruptcy cases. The Bankruptcy Code specifically provides for compensation for preparing a fee application that is required to be filed with the court yet lacks explicit language authorizing compensation to professionals for work performed in defending a fee application.

Before a professional is eligible to be compensated under Section 330(a), the professional’s employment must be approved by the court. Pursuant to Section 327(a) of the Bankruptcy Code, the debtor in possession or bankruptcy trustee is authorized, subject to court approval, to employ professionals to represent and assist them in carrying out their statutory duties. Accordingly, unlike most nonbankruptcy situations, the employment and compensation of attorneys and other professionals in bankruptcy cases is subject to court approval after notice and a hearing.

Outside the bankruptcy context, there is the long-established “American Rule” that each side must pay its own attorney’s fees unless a statute or contract provides otherwise. In *Baker Botts L.L.P. v. ASARCO LLC*, the U.S. Supreme Court addressed a collision between the American Rule and the intent of the Bankruptcy Code that attorneys in bankruptcy cases be compensated at the rate they would be compensated outside of bankruptcy court. The Court considered “whether §330(a)(1) permits a bankruptcy court to award attorney’s fees for work performed in defending a fee application in court.” Justice Clarence Thomas delivered the opinion of the Court holding that a departure from the American Rule was not warranted and, accordingly, the rule precluded the award of fees. The dissenting opinion filed by Justice Stephen Breyer asserts, among other things, that “the American Rule is a default rule that applies only where ‘a statute or contract’ does not ‘provid[e] other-
Fifth Circuit Court of Appeals reversed, opposed by ASARCO, which was now “once section 330(a). The fee applications were seeking court approval of compensation under satisfaction of all environmental issues.12

Thus, while the law firms’ client objected to ASARCO’s parent company and ultimately obtained a judgment against it worth between $7 and $10 billion.”11 The judgment played obtained a judgment against it worth between $7 and $10 billion.”11 The judgment played

ASARCO’s counsel filed fee applications seeking court approval of compensation under section 330(a). The fee applications were opposed by ASARCO, which was now “once again controlled by its parent company.”13 Thus, while the law firms’ client objected to their fees, the parent company—the unsuccessful defendant in the litigation—was now in control and attempting to seek retribution against former opposing counsel.

After extensive discovery and a six-day trial on fees, the Bankruptcy Court rejected ASARCO’s objections and awarded the law firms approximately $120 million for their work, plus a $4.1 million enhancement for exceptional performance. The court also awarded the firms over $5 million for time spent litigating in defense of their fee applications.14

ASARCO appealed, and the district court held that the law firms could recover the fees incurred for the fee-defense litigation. The Fifth Circuit Court of Appeals reversed, concluding that without a specific statutory provision explicitly providing for the recovery of attorney’s fees for defending a fee application, the American Rule barred the law firms from being paid for fee-defense litigation.15 This was an unusual application of the American Rule in which the client (although now controlled by the former adversary) was challenging fees of its counsel based on the American Rule, rather than the other party to litigation raising the issue. The Supreme Court granted certiorari on the issue of whether the fees incurred defending the fee applications are compensable under Section 330(a).

Justice Thomas began the majority’s analysis by identifying the American Rule as the “bedrock principle” when considering the award of attorney’s fees, with “roots in our common law reaching back to at least the 18th century...”.16 Moreover, the Court explained that “[w]e have recognized departures from the American Rule only in ‘specific and explicit provisions for the allowance of attorneys’ fees under selected statutes.”17 Acknowledging that statutory deviations from the American Rule may take various forms, the Court emphasized that “they [statutes] tend to authorize the award of ‘a reasonable attorney’s fee,’ ‘fees’ or ‘litigation costs,’ and usually refer to a ‘prevailing party’ in the context of an adversarial action ....”18 The Court cited the attorney’s fees provision of the Equal Access to Justice Act (EAJA)19 as an example of the clarity required of a fee-shifting statute that trumps the American Rule.20 Under this provision, a court is to award a prevailing party other than the United States fees incurred in a civil action in accordance with certain conditions.21 The Court stated that there could be little dispute that this type of fee-shifting provision adequately authorizes deviation from the American Rule.22

In contrast, the Court reasoned that in the Bankruptcy Code “Congress did not expressly depart from the American Rule to permit compensation for a fee-defense litigation by professionals hired to assist trustees in bankruptcy proceedings.”23 In considering Section 327(a), which governs the estate representative’s employment of professionals, the Court found that professionals are employed to serve “for the benefit of the estate.”24 Turning to Section 330(a)’s authorization of payments to professionals of “reasonable compensation for actual, necessary services rendered,” the Court concluded that the “text of the Bankruptcy Code cannot displace the American Rule with respect to fee-defense litigation.”25

The Court recognized that the statute’s provision for “reasonable compensation for actual, necessary services rendered” authorizes courts to award attorney’s fees for work done in representing the estate’s representative, “as the Bankruptcy Court did here when it ordered ASARCO to pay roughly $120 million for the firms’ work in the bankruptcy proceeding.”26 However, the Court concluded that “the phrase ‘reasonable compensation for actual, necessary services rendered’ neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other—in this case, from the attorneys seeking fees to the administrator of the estate—as most statutes that displace the American Rule do.”27

Language Limitations
The Court identified limitations in the language of Section 330(a) allowing “reasonable compensation” only for “actual, necessary services rendered.” The Court determined that this language dictates that compensable work only can be work done in service of the estate’s representative. Further, the Court found that the dictionary definition of the word “services” involves labor performed for another.28 The Court reasoned that litigation the fee application “against the administrator of a bankruptcy estate” does not constitute labor performed for the estate’s representative.29

The Court asserted that Congress could have shifted the burdens of fee-defense litigation under Section 330(a) by including such language in that provision. Moreover, the Supreme Court cited a particular Bankruptcy Code section in which this had been done.30 Interpreting Section 330(a) to embody a legislative decision to limit compensation, the majority concluded that the statute precludes the redistribution of litigation costs. The Court was not persuaded by the arguments of the law firms, the United States as amicus curiae, and the dissent and characterized them as resisting its “straightforward” interpretation of the Bankruptcy Code.31

The law firms argued that fee-defense litigation falls within “services rendered” to the representative of the estate under Section 330(a). The Court rejected this reading of the term “services” asserting that this approach “could end up compensating attorneys for the unsuccessful defense of a fee application.”32 While it would seem that this concern could be mitigated by the exercise of the court’s discretion, the majority found this potential result would be a particularly unusual and inappropriate deviation from the American Rule.33

Unlike most nonbankruptcy situations, to be paid, a professional in a bankruptcy case needs to file a detailed application seeking compensation.34 The application will only be granted following notice and a hearing.35 Further, the Bankruptcy Code specifically provides that “[t]he court may, on its own motion or on the motion of the United States Trustee,...the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.”36 Moreover, unlike in symmetrical litigation, multiple parties may object to fee applications in bankruptcy cases. Nonbankruptcy fee litigation typically involves a lawyer and his or her client. In contrast, the process for obtaining compensation in bankruptcy cases is more complicated, involves multiple parties, and may impose substantially greater costs. The Court discounted this concern as resting “on unsupported predications of how the statutory scheme will operate in practice.”37 Reaching a different conclusion, the dissent contended that “to
maintain comparable compensation, a court may find it necessary to account for the relatively burdensome fee-defense process required by the Bankruptcy Code. Accounting for this process ensures that a professional is paid ‘reasonable compensation.’”38

The dissent accepted the Court’s view “that a professional’s defense of a fee application is not a ‘service’ within the meaning of the Code.”39 The dissent, however, found it significant that the Bankruptcy Code provides broad discretion for the courts to determine what constitutes “reasonable compensation” and cited the statutory language providing that a court should consider the nature, extent, and value of services rendered, “taking into account all relevant factors.”40 Agreeing with the brief filed by the government, the dissent reasoned that it is appropriate to view compensation for fee-defense work as part of the compensation for the underlying services in a bankruptcy case.41

The dissent further found that a bankruptcy court has discretion to “consider as ‘relevant factors’ the cost and effort that a professional has reasonably expended in order to recover his or her fees.”42 The dissent explained that it was taking a restrained approach and that “where fee-defense work is not necessary to ensure reasonable compensation for some underlying service,…a court should not consider that work when calculating compensation.”43

The dissent recognized the risk of fee dilution if fee-defense work were uncompensated. As an example, the dissent stated:

Consider a bankruptcy attorney who earns $50,000—a fee that reflects her hours, rates, and expertise—but is forced to spend $20,000 defending her fee application against meritless objections. It is within a bankruptcy court’s discretion to decide that, taking into account the extensive fee litigation, $50,000 is an insufficient award. The attorney has effectively been paid $30,000, and the bankruptcy court might understandably conclude that such a fee is not ‘reasonable.’44

The dissent argued that in a previous case cited by the majority, involving the EAJA, the Court acknowledged that work performed in defense of a fee application is relevant to determining reasonable compensation.45 The dissent reasoned that to interpret “reasonable compensation” differently would run counter to a basic objective of the Bankruptcy Code. Under section 330(a)(3)(F), bankruptcy courts are directed to consider “whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under” the Bankruptcy Code.46 This provision arises from the intent of Congress to “ensure that high-quality attorneys and other professionals would be available to assist trustees in representing and administering bankruptcy estates” and would “remain in the bankruptcy field.”47

The Court was unconvinced by this “flawed and irrelevant policy argument.”48 The majority was not concerned with the warning that absent compensation for fee-defense litigation bankruptcy attorneys will have their fees diluted, and thus the congressional goals that bankruptcy attorneys receive compensation comparable to nonbankruptcy lawyers so talented attorneys take on bankruptcy works will be undermined. The Court asserted that “[i]n our legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization. Requiring bankruptcy attorneys to pay for the defense of their fees thus will not result in any disparity between bankruptcy and nonbankruptcy lawyers.”49

The majority sought to assuage concerns regarding potential frivolous objections to fee applications that will have the effect of diluting attorney’s fees, noting that “Federal Rule of Bankruptcy Procedure 9011—bankruptcy’s analogue to Civil Rule 11—authorizes the court to impose sanctions for bad-faith litigation conduct, which may include an order directing payment...of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.”50 Section 330(a)(6) provides that “any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.”51 The dissent explained that “[i]t is not necessary to ensure reasonable compensation, but rather assumes (through the words ‘any compensation awarded’) pre-existing authorization under § 330(a).”52 The dissent asserted that because time spent preparing a fee application is compensable, time spent defending it must be, too.

The Court, however, found that Section 330(a)(6) “cuts the other way.”53 The majority concluded that while preparation of a fee application is a “service rendered” to the estate’s representative, defense of that application is not. The Court made an analogy to an auto mechanic:

[I]t would be natural to describe a car mechanic’s preparation of an itemized bill as part of this ‘services’ to the customer because it allows the customer to understand—and, if necessary dispute—his expenses. But it would be less natural to describe a subsequent court battle over the bill as part of the ‘services rendered’ to the customer.54

The dissent countered the majority’s argument by stating:

[Customers do not generally pay their mechanics for time spent preparing the bill. A mechanic’s bill is not a sep-

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Compensable Work

In re Stanton1 involves a situation in which the law firm employed by a Chapter 7 bankruptcy trustee supplemented its fee application in response to an objection of the U.S. Trustee. Applying the analogy used by the majority in ASARCO, the Florida bankruptcy court characterized counsel’s “work supplementing his fee application and responding to the U.S. Trustee’s objection [as being]...akin to the mechanic’s preparation of an itemized bill as part of his ‘services’ to the customer.”2 At issue were fees incurred after the case was converted from Chapter 11 to a Chapter 7 case, and the U.S. Trustee was asking in its objection for the type of detail required in a Chapter 11 case even though the local rules did not require such detail in a Chapter 7 case. As a result, the bankruptcy court held that supplementing the fee application should be compensable, stating “[t]he U.S. Trustee simply objected to...[the] fees because they were unnecessarily duplicative, the outcome might be different. A fight over whether fees were unnecessarily duplicative is more akin to time spent on a subsequent court battle over the mechanic’s bill which would not properly be understood as part of his services. Here, the parties were not fighting over the amount of the bill, but whether it was detailed enough.”3

The Stanton court found that the supplemental disclosure benefitted the administration of the bankruptcy estate by providing additional information allowing the parties to understand the work performed. Applying ASARCO, the court concluded that “[t]he takeaway from the Supreme Court’s decision...is clear: It is the nature of the work—not when it is performed—that determines whether it is compensable. Only work done in service of the estate administrator is compensable. Because supplementing the detail provided in his initial fee application benefitted the estate and was necessary for the administration of the case,...[counsel] is entitled to recover...fees incurred performing that work.”4

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1 In re Stanton, No. 8:11-bk-22675, 2016 Bankr. LEXIS 3827 (Bankr. M.D. Fla. 2016.)
2 Id. at *8-9.
3 Id. at *9.
4 Id. at *14.
arate ‘service’ but rather is a medium through which the mechanic conveys what he or she wants to be paid. Similarly, a legal bill is not a ‘service’ rendered to a client…. A bill prepared by an attorney, or another bankruptcy professional, is not a ‘service’ to the bankruptcy estate.55

The Court seemed to take offense at what it characterized as a change in position by the U.S. Trustee.56 The Court cited to statements of the U.S. Trustee a few years prior and in filings with the lower courts in this case that reasonable charges for preparing fee applications are compensable, but time spent defending them ordinarily is not. Accordingly, the Court asserted that the U.S. Trustee previously (before changing its position) properly characterized such work as being for the benefit of the professional and not the estate.57 Further, the majority used the U.S. Trustee’s change of position to support its rejection of policy-based arguments in this case, stating: “The speed with which the Government has changed its tune offers a good argument against substituting policy-oriented predictions for statutory text.”58 The dissent argued that the Court is unable to reconcile its narrow interpretation of “reasonable compensation” with the provision under Section 330(a)(6) for fee-application preparation fees.59 The dissent rejected the majority’s apparent adoption of the view that preparation of a fee application must be a “service” because it is not required of lawyers in areas other than bankruptcy as a condition to getting paid. The dissent explained:

[I]f the existence of a legal requirement specific to bankruptcy were sufficient to make an activity a compensable service, then the time that a professional spends at a hearing defending his or her fees would also be compensable. After all, the statute permits a court to award compensation only after ‘a hearing’ with respect to the issue. §330(a)(1). And there is no such requirement for most attorneys, who simply bill their clients and are paid their fees. But the majority does not believe that preparing for or appearing at such a hearing—an integral part of fee-defense work—is compensable.60

In concluding that the majority wrongly distinguished between recovery of fees for fee application preparation and fee-defense litigation, the dissent contended that the basic purpose of the Bankruptcy Code’s fee award provision is undermined.61 On the other hand, the Court stated that it is simply applying the text of the Bankruptcy Code and that the arguments of the dissent and the government are “too insubstantial to support a deviation from the American Rule.”62 Moreover, the Court rejected the statutory basis for fee-defense compensation identified by the dissent as inadequate since “[t]he open-ended phrase ‘reasonable compensation,’ standing alone, is not the sort of ‘specific and explicit provision’ that Congress must provide in order to alter this default rule.”63 Further, the majority justified its conclusion: “[W]e would lack the authority to rewrite the statute even if we believed that uncompensated fee litigation would fall particularly hard on the bankruptcy bars.”64 As a result, the Court concluded, “because §330(a)(1) does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation.”65

**Boomerang Tube**

ASARCO did not address the contract exception to the American Rule. Subsequently, in *In re Boomerang Tube, Inc.*, a bankruptcy court in the District of Delaware, applying ASARCO, considered the contract exception. In this case, the Official Committee of Unsecured Creditors filed applications seeking approval for the employment of counsel that included a provision indemnifying counsel for expenses incurred in any successful defense of their fees. The U.S. Trustee contended that ASARCO precludes payment of fees under the provision. The U.S. Trustee also argued that the fee defense provision should not be approved because such fees are outside the scope of employment and are unreasonable.66

Unlike ASARCO, in which the professionals’ employment was under Section 327, approval of the fee defense provisions in *Boomerang Tube* were sought pursuant to Section 328 of the Bankruptcy Code, which is an express exception to Section 330 and allows compensation to professionals (subject to advance approval by the court) “that would otherwise not be available under section 330 (such as fixed fees, contingent fees, etc.).”67 Recognizing that Section 328 is an exception to Section 330, the *Boomerang Tube* court determined this distinction to be irrelevant since “[t]he text does not refer to the award of defense fees to a prevailing party. Therefore, the Court concluded that section 328 does not provide the statutory exception to the American Rule and cannot provide authority for approval of the fee defense provisions.”68

In *Boomerang Tube*, the bankruptcy court found that “the contract exception to the American Rule is not precluded by the ruling in ASARCO.”69 However, the court explained that to be enforceable any contractual exception to the American Rule would have to be consistent with the other provisions of the Bankruptcy Code.70 The *Boomerang Tube* court viewed the retention agreements between the committee and counsel as contracts. However, they are not conventional bilateral agreements since they are “subject to objection by other parties and…ultimately subject to approval (and modification) by the Court.”71 The bankruptcy court next examined whether such contracts are exceptions to the American Rule.

Determining they are not, the court again focused on the unconventional nature of the contracts, stating:

[T]here is not a contract between two parties providing that each will be responsible for the other’s legal fees if it loses a dispute between them. Rather, here there is a contract between two parties (the Committee and Committee Counsel) that in the event Committee Counsel win a challenge to their fees, the third party (the estate) will pay their defense costs even if the estate is not the party who objected.72

The court noted that this was not the typical contract modifying the American Rule and found that the contract cannot bind the estate, which is not a party to it.

The court further explained that retention agreements in bankruptcy are more complicated than simple contractual matters. Regardless of the terms of an employment contract, court approval in accordance with the requirements of the Bankruptcy Code is necessary. Accordingly, “if the Court finds that a contract that the Debtor or the Committee negotiated is impermissible, the Court may not approve it or may modify it.”73 This led the court to determine that the retention agreements do not constitute contractual exceptions to the American Rule. The court added that “[e]ven if they were, however, the Court must still determine if they are permissible under the Bankruptcy Code.”74

Following the approach taken by the majority in ASARCO, the *Boomerang Tube* court found that the fee defense provisions do not involve services for the creditors’ committee but rather would only be for the benefit of committee counsel. The court concluded that such provisions are not reasonable terms for employment of counsel. The committee pointed out that exculpation and indemnification clauses are relatively common in retention agreements in large Chapter 11 cases and should be approved if the clauses are reasonable in accordance with section 328(a). The court acknowledged that the Third Circuit, in a case that predates the ASARCO decision, “has held that indemnification provisions sought by professionals may be approved as reasonable under section 328(a).”75 The court distinguished the Third Circuit decision that “did not address whether section 328(a) is an explicit statutory exception,
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or whether a retention agreement approved under that section is a contractual exception, to the American Rule.”77 Further, the court pointed out that the Third Circuit case involved indemnification of financial advisors, which are “typically provided similar protections outside of bankruptcy.”78

The Boomerang Tube court found cases that predate ASARCO to be unpersuasive. Under ASARCO, the court concluded that it is prevented from ruling that Section 328 allows defense fees, even if they were routinely allowed by the market in bankruptcy or nonbankruptcy contexts prior to that ruling.”79 The court also rejected the attempt to recover defense fees as expenses as opposed to fees, stating “there is no difference in the analysis between approving the defense costs as fees (because the retained professional defends its own fees) or as expenses (because the retained professional hires outside counsel to represent it). Both are subject to the American Rule and to the Supreme Court’s ruling in ASARCO.”80 The court concluded by advising that it would reach the same conclusion if the fee defense provisions were in a retention agreement submitted by any professional under Section 328(a), including professionals retained by the debtor. “Such provisions are not statutory or contractual exceptions to the American Rule and are not reasonable terms of employment of professionals.”81

Amendment to Section 330

An amendment to Section 330 of the Bankruptcy Code specifically authorizing the court to award fees for the successful defense of a fee application would address the threat to comparable compensation posed by ASARCO. While the Bankruptcy Code already directs the court to consider all relevant factors when determining reasonable compensation, the Supreme Court finds this directive inadequate to overcome the American Rule. As a result, bankruptcy professionals face a significant risk of fee dilution when forced to address objections to their fees. This risk is heightened by the asymmetrical nature of bankruptcy cases in contrast to the ordinarily bilateral litigation from which the American Rule arose. The suggestion of the ASARCO majority that this issue may be addressed through the recovery of sanctions would likely only work in extreme cases since courts are constrained in imposing sanctions. Further, as reflected by Boomerang Tube, under ASARCO, the door may have closed on the ability to contract around the American Rule in the bankruptcy context.

2 See In re Nucorp Energy, Inc. 764 F. 2d 655, 658 (9th Cir. 1985). See also Burgess v. Klenske (In re
Manoa Finance Company, Inc.), 853 F. 2d 687, 689-90 (9th Cir. 1988).
8 Id. at 2162.
9 Justices Roberts, Scalia, Kennedy and Alito joined in the entirety of the opinion; Justice Sotomayor concurred in the judgment and all but one section of the opinion. Justice Breyer, Ginsburg and Kagan filed a dissenting opinion.
10 ASARCO, 135 S. Ct. at 2171 (dissent).
11 ASARCO, 135 S. Ct. at 2171 (citations omitted) (dissent).
12 Id. at 2163.
13 Id.
16 ASARCO, 135 S. Ct. at 2164, (citing Arcambel v. Wiseman, 3 U.S. 306.)
17 ASARCO, 135 S. Ct. at 2164 (citing Alyska Pipeline Service Co., v. Wilderness Society, 421 U.S. 240 (1975)).
20 ASARCO, 135 S. Ct. at 2164.
22 ASARCO, 135 S. Ct. at 2164. The dissent, however, asserts that “[t]he fee provision of the Equal Access to Justice Act, as enacted at the time, permitted an ‘award to a prevailing party—of fees and other expenses incurred by that party in any civil action…brought by or against the United States…’…The provision did not mention fee-defense work—but the Court [in Jean] nonetheless held that such work was compensable.…I would do the same here.” Id. at 2171-72 (dissent) (citations omitted) (citing Commissioner v. Jean, 496 U.S. 154, 158, 160-66 (1990)) (quoting 28 U.S.C. §2412(d)(1)(A) (1988)).
23 Id.
24 Id.
25 Id. See also 11 U.S.C. §330(a)(1).
26 ASARCO, 135 S. Ct. at 2165.
27 Id.
28 Id. (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1934); BLACK’S LAW DICTIONARY 3d ed. 1933, and OXFORD ENGLISH DICTIONARY (1933).
29 ASARCO, 135 S. Ct. at 2165.
30 The Court references section 110(i), which provides that “[i]f a bankruptcy petition preparer...commits any act that the court finds to be fraudulent, unfair, or deceptive, on the motion of the debtor, trustee, United States trustee (or the bankruptcy administrator, if any), “the bankruptcy court must order the bankruptcy petition preparer to pay the debtor ... reasonable attorneys’ fees and costs and moving for damages under this subsection.” ASARCO, 135 S. Ct. at 2165-66 (citing 11 U.S.C. §110(i)(1)(C). Other fee-shifting provisions in the Bankruptcy Code appear at §§503(i)(1)(C), 563(k)(1), 523(a)(2), 526(c)(2), 707(b)(4)(A), and 707(b)(5)(A).
31 ASARCO, 135 S. Ct. at 2166.
32 Id.
33 Id.
34 See FED. R. BANKR. P. 2016(a).
37 Id. at 2168.
38 Id. at 2171 (dissent).
39 Id. at 2169 (dissent).
40 Id. (emphasis in original), (citing 11 U.S.C. §330(a)(3)).
41 Id. at 2169.
42 Id. at 2170.
43 Id. at 2172.
44 Id. at 2071.
45 Id. (citing Commissioner v. Jean, 496 U.S. 154, 160-166 (1990). The dissent asserts that in Jean “[t]he Court quoted with approval the Second Circuit’s statement that ‘[d]enying attorneys’ fees for time spent in obtaining them would dilute the value of a fee award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees.” ASARCO, 135 S. Ct. at 2170 (dissent, (citing Gagne v. Maher, 594 F.2d 336, 344 (1979) (internal quotation marks omitted)).
48 ASARCO, 135 S. Ct. at 2168.
49 Id.
50 Id. at 2168 n.4 (quotation marks omitted), (quoting Law v. Siegel, 571 U.S. __, __, 134 S. Ct. 1188,1198 (2014)).
52 ASARCO, 135 S. Ct. at 2170.
53 Id. at 2167.
54 Id.
55 Id. at 2172 (dissent).
56 The U.S. Trustee is a division of the Department of Justice with responsibility for monitoring bankruptcy cases and in the opinion, the U.S Trustee is generally referred to by the Court as the “Government.”
57 ASARCO, 135 S. Ct. at 2167.
58 Id. at 2168.
59 Id. at 2173 (dissent).
60 Id.
61 Id.
62 Id. at 2168.
63 Id. (citing Alyska Pipeline, 421 U.S. 240, 260, (1975).
64 ASARCO, 135 S. Ct. at 2169.
66 Id. at 70.
67 Id. at 72.
68 Id. at 73.
69 Id. at 74.
70 Id. at 74-75.
71 Id. at 75.
72 Id. at 76.
73 Id. at 76 (citing In re United Artists Theatre Co., 315 F. 3d 217, 230 3d Cir. 2003).
74 In re Boomerang Tube, Inc., 548 B.R. at 76.
75 Id. 76 Bletchley Hotel at O’Hare Field LLC v. River Rd. Hotel Prtnrs, LLC, B.R. No. 09-B-30029, 2016 U.S. Dist. LEXIS 102884 (N.D. Ill. 2016). The district court in this case holds that under ASARCO the American Rule precludes fee-shifting.
77 In re Boomerang Tube, Inc., 548 B.R. at 78.
78 Id.
79 Id. at 79 n.6.
The Potential of New Digital Assistants for Office Use

**THE LATEST CROP OF DIGITAL ASSISTANTS** offers much promise. Amazon Echo, which incorporates Amazon’s Alexa voice assistant software, has been on the market for about a year, and Google recently introduced Google Home, which incorporates the Google Assistant software that is already bundled with the Android operating system. The vision is simple: have a conversation with your digital assistant in whatever form it may take—a computer, cell phone, wrist watch, or, in the case of the Amazon Echo and Google Home, a device about the size of a couple of cans of soda that can be set on a desk or shelf—and the assistant takes care of the rest. It can turn on the lights, play music, read the latest news, send an e-mail, schedule an appointment, make a phone call, find a document, or maybe even draft a document. However great the potential, these devices are not at the point where they can be used to significantly improve work flow because various hurdles remain with regard to security, privacy, and utility.

Both devices incorporate an excellent microphone system for picking up the user’s spoken conversation—including commands and queries—from within a 10-foot radius of the device. They also have a speaker system that allows the digital assistant to voice its responses to user requests. In the case of Amazon Echo, the digital assistant is called Alexa, while Google Home’s assistant is simply called the Google Assistant. Both devices require an active Internet connection. They also must call back to Amazon or Google, as the case may be, in order to use the computing power of their makers to handle voice recognition and most other operations.

Here is a snapshot of the present state of both devices and the current challenges to their integration into a business environment. The Amazon Echo is more capable than the Google Home. The device had a head start in development and can be set up with multiple operating systems, including Windows, Apple, and Android. Amazon Echo has attracted a large base of developers who create what are called skills for Alexa. Moreover, other companies—for example, Lenovo—have incorporated the Alexa software into their own Amazon Echo alternative devices. Amazon has also rolled out variations of the Echo such as the Amazon Tap, which is a battery-powered portable version of the Echo. As of this writing, Alexa-based systems have 116 skills. The Alexa development kits are available for free. They include a number of scripts—let’s call them building blocks—that are available to make the development of new skills easier and faster.

Google Home, on the other hand, is limited to Android devices for setup and operation. Although the Google Assistant software has been around for many years, Google is in the early stages of rolling out its development platform for the Google Home. Perhaps Google can quickly close the gap, but this process will likely be driven by developer interest. As an example of the difference between the operating level of the two devices, Amazon Echo allows a user to retrieve and have Alexa read aloud e-mail—including Gmail, send a reply to an e-mail, and access multiple e-mail accounts. However, Google Home only permits access to one Gmail account, and while Google Assistant will read the content of the e-mail to a user, it cannot create or send a response.

The basic features for these devices include playing music from online sources, searching the Internet for answers to questions, making to-do lists, and checking weather and traffic. The low-hanging fruit for the integration of these devices into your physical environment is their application with household appliances. Wireless adapters—allowing you to operate appliances with voice commands—are presently available for lights, refrigerators, televisions, stereos, thermostats, and door locks, and there are more are on the way. At this time the Amazon Alexa has a lead in the number of compatible appliances. Of course, there is a price for connectivity that should be factored into the total cost, so add $50-100 extra for a compatible set of lights, special bulbs, and a connecting hub.

There are no current applications that integrate these devices into a law firm or law department environment. No time billing or case management programs are linked to these devices. Applications and data that are stored and operated in the cloud have the best development potential as these devices are not set up to interact with local computers and servers directly. It may be possible to program one of these devices to access cloud storage such as Dropbox, but access is likely to be through the Amazon or Google servers. Then, upon locating documents in the cloud storage, will the user be able to transmit them to or open them on a desktop PC in a seamless manner? Not at this time, and, aside from the problem of technical feasibility, a number of security issues are raised by this scenario.

Voice recognition is the essential interface for using these devices. The degree of user satisfaction with the voice recognition of these devices will vary on an individual basis, but, on average, they perform fairly well. Those who have used voice-recognition dictation software or experienced the use of voice-based customer service telephone lines are aware that it can range from humorous to extraordinarily frustrating when the user’s spoken word is inaccurately interpreted by the voice-recognition software. Advances in computing power have reduced the issue. Since voice commands are routed through the Amazon and Google servers, the available computing power is much greater than on a single-user computer. One proviso: because user experience can vary greatly, if a significant portion of the users in a given office may have poor results with the voice recognition, these devices then would not improve productivity.

As with person-to-person speech recognition, accuracy improves with experience. Frequent interaction with another person increases familiarity with his or her accent, speech patterns, and vocabulary. In similar fashion, Amazon and Google keep copies of user conversations with their devices on databases so their computers can better learn to understand requests made by thousands of users.

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Because user conversations are captured by these devices and transmitted to the Amazon and Google servers on which they are stored for use, privacy concerns have been raised. In order to improve the responsiveness of these devices, Amazon and Google recommend keeping them on, which means that they can record all conversations in the room for as long as they are switched on. Both companies say that their devices will constantly listen for their wake-up command word or phrase—Alexa or Hello Google—and that they only keep a few seconds of recorded sound before the command word and the questions or commands that follow the command word or phrase.

Both devices retain the user’s questions on the company servers, and both companies offer a way to manually remove these logs. The companies also say that the data, including voice recordings transmitted by these devices to the company servers, is encrypted. Moreover, both companies reserve the right to use the recordings as part of their general speech database to improve overall performance of their speech recognition software, but when used in this manner the recordings are not associated with a particular user. A fair amount of trust must be given that these practices are accurate and will be maintained by these companies. Amazon is facing a suit to compel it to disclose information and recordings taken by an Amazon Echo at a home in Bentonville, Arkansas that is the site of a murder investigation. So far, Amazon has refused to disclose the information.

The devices are intended to be located on a desk or other location where the user can easily be heard. While Amazon and Google may limit the amount of audio they record and send to their servers, the devices are designed to be continuously listening and connected to the Internet. Thus, a nefarious third party could modify the devices to make them full-time eavesdropping tools. Amazon Echo and Google Home have on-and-off switches for their microphones. Switching the microphone on whenever the device is to be used reduces its usefulness but also reduces eavesdropping exposure.

Neither device has a password protection feature, and the wake-up word or phrase for these devices cannot be changed significantly. Say “Alexa” or “Google” on purpose or by accident and you have instant access to the system, so there is potential for access by guests and intruders. Several user profiles can be created on Amazon Echo that can enhance security because an unauthorized user must identify the correct profile before querying the calendar, e-mail, or to-do lists associated with the profile. Alternatively, the devices can be turned off and locked up at the end of each day. However, these additional security steps interfere with the ease of use of the devices and create more opportunities for human error in implementing a strong security environment.

These devices are ready to go out of the box in terms of playing publicly available music or searching the Internet. Although controlling some appliances will require more money to be invested, the results are promising. However, they are not ready for office use at this time.

It is worth mentioning that a potential user probably can use Siri on the iPhone or Google Assistant on an Android phone to accomplish many of the current core functions of Amazon Echo or Google Home that are applicable to business such as checking calendars and e-mail. Also, an interesting alternative to these two devices is Cortana, the digital assistant built into Microsoft Windows 10. Since it is already part of the PC operating environment, it can access some of the software running on the user’s PC. For office use there may be more opportunity for integration with law office software. Cortana uses information stored on the PC as well as information sent to Microsoft’s servers, so there is some opportunity to limit the disclosure of certain private information, but to the extent information passes through the Microsoft servers there are privacy and security concerns.
Is the Emoluments Clause a Threat to Trump’s Presidency?

TO THANK BENJAMIN FRANKLIN for his service as American minister to France from 1776 to 1785, King Louis XVI gave him a snuff box festooned with 408 diamonds. Two years later when the Founders wrote the new Constitution, fearing public officials could be corrupted by such gifts, they included in Article I (Section 9) a prohibition known as the Foreign Emoluments Clause, which states: “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State.” Today, could this obscure provision threaten the presidency of Donald J. Trump and result in his impeachment and removal from office?

After Trump was sworn in, Citizens for Responsibility and Ethics in Washington (CREW) filed a lawsuit accusing Trump of violating “the Constitution during the opening moments of his presidency and is poised to do so continually thereafter for the duration of his administration.” Never before has anyone with “business interests as vast, complicated, and secret as those of Donald J. Trump” been elected president, creating “countless conflicts of interest, as well as unprecedented influence by foreign governments.”

CREW, a nonprofit, nonpartisan organization dedicated to holding public officials accountable for their actions, is led by ethics lawyers who worked for George W. Bush and Barack Obama and represented top to constitutional law scholars, including Laurence Tribe, Erwin Chemerinsky, and Zephyr Teachout, author of Corruption in America: From Benjamin Franklin’s Snuff Box to Citizen’s United (2014).

CREW’s complaint accuses Trump of violating the emoluments clause as a result of his ongoing business dealings (from which he has refused to divest ownership) with more than 20 governments around the globe. The lawsuit cites transactions with entities owned by foreign governments, which include leases at Trump Tower in New York City, room reservations and use of venues and services at Trump’s new Washington D.C. hotel, hotel stays, property leases, and other business transactions at Trump’s domestic and international properties, and payments from foreign-government-owned broadcasters for the rebroadcast and foreign versions of The Apprentice and its spinoffs.

The lawsuit raises several serious legal and constitutional issues, but the two most intriguing are whether CREW has standing to sue and whether fair value exchanges constitute prohibited emoluments. To establish standing, CREW must show not merely a theoretical injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes far more than a setback to the organization’s abstract social interests.” CREW also cites Ragin v. Harry Macklowe Real Estate Co., in which the Second Circuit—where CREW filed its case—upheld standing in a similar situation. Consequently, CREW alleges that without the injunctive and declaratory relief requested, it will suffer “a significant diversion and depletion” of its “time, resources, and efforts,” which it would otherwise devote to the myriad of ethical issues it has been addressing for 15 years.

CREW’s lawsuit triggered reports that competing hotels such as the Four Seasons, which are losing business because foreign governments are flocking to Trump’s properties to curry favor with the new president, may join the lawsuit. That would strengthen standing. But even if the lawsuit survives this threshold procedural challenge, do Trump’s business deals in which foreign governments get something in return for their payments run afoul of the Constitution?

CREW points out that the clause broadly prohibits not only presents, but also “Emoluments...of any kind whatsoever,” which “could cover anything else of value, including remuneration at, above, or below market rates.” The dictionary definition of “emolument” favors CREW’s position. According to Merriam Webster, it means “a return arising from office or employment usually in the form of compensation or perquisites.” Obviously, compensation is a fair value exchange, just like rent at Trump Tower. The Constitution itself supports the idea that an emolument may involve a fair value exchange. Article II provides that “the President shall, at stated times, receive for his services, a compensation...and he shall not receive within that period any other emolument.”

It remains to be seen whether the courts will agree with CREW that Trump’s business dealings with foreign governments pose “a grave threat to the United States and its citizens” in violation of the Constitution. Trump doesn’t think so. He has boldly declared: “I have a no-conflict situation because I’m president.” That sounds hauntingly like Richard Nixon’s infamous statement that “when the president does it, that means it is not illegal.” Remember what happened to him.


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