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When I set out to write the “From the Chair” column, my last, as this magazine’s outgoing Editorial Board Chair, my mind drifted back over prior columns. In my first “From the Chair,” I wrote of the sea change in recent decades in the legal profession, which has, in the view of many, exited its golden age and entered an era of diminished prospects and greater instability.

Looking over my subsequent columns, I discerned a theme: the need for us attorneys, practicing in the wake of this sea change, to find a greater sense of community with our fellow attorneys and a greater sense of meaning in the practice. Hopefully, you can see this too, in the columns in which I proposed that the State Bar help increase mobility for young California attorneys (who have a tougher road ahead than prior generations); that (especially those young) attorneys acknowledge but also look beyond their role as advocates for others and find meaning in their work product itself and their membership in the legal profession; that attorneys reconnect with the pure love of learning that led them to the profession by taking MCLE outside their practice areas; and that attorneys stand together firmly against the threats to the profession’s independence represented by partisan attacks on judges and the public tendency to punish or shame attorneys who represent unpopular clients.

It is crucial for us attorneys to find meaning and connection through our work and membership in the legal profession. I am not alone in thinking those benefits may now be harder to find elsewhere. In a recent piece for New York magazine, Andrew Sullivan saw in America’s opioid epidemic “a sign of a civilization in more acute crisis than we knew, a nation overwhelmed by a warp-speed, postindustrial world” marked by “a sense of permanent economic insecurity and spiritual emptiness,” and “an accelerated waning of all the traditional American supports for a meaningful, collective life”—religion, family, communities and the local businesses that supported them and provided stable, fairly-paid work—“and their replacement with various forms of cheap distraction.”

In two recent pieces for The New Yorker, Jia Tolentino connects this sense of alienation and insecurity to the gig economy (which I have also discussed in this space) and America’s deification of self-promotion and entrepreneurialism. Tolentino decries the gig economy’s “essentially cannibalistic nature” and the “contrast between [its] rhetoric (everyone is always connecting, having fun, and killing it!) and the conditions that allow it to exist (a lack of dependable employment that pays a living wage).” She also finds our love for self-promotion and entrepreneurialism unnervingly captured by Teen Boss, a magazine aimed at budding teen girl tycoons looking to “establish a brand—or make themselves into a brand—with their social media channels.”

Our profession is not yet primarily a gig economy, but it seems to be moving that way, and I’ve seen countless ads for legal marketing services aimed at enhancing my “personal brand.” Maybe this just means that, even as learned professionals, we’re not immune to the forces reshaping so much else around us. So, let’s all try to connect a bit more while we can (but maybe those of you with kids should tell them to start honing their brands now).

John Keith is the 2017-18 chair of the Los Angeles Lawyer Editorial Board. He practices business litigation with the law firm of Fenigstein & Kaufman in Century City.
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New Study Shows Lawyers Are America’s Loneliest Professionals

According to an article in the April 2018 ABA Journal, lawyers are the loneliest professionals in America. The article points to research showing that lawyers ranked highest (61 percent) on the UCLA Loneliness Scale, which measures subjective feelings of loneliness and social isolation. Lawyers, the data revealed, outranked engineers (57 percent) and research scientists (55 percent) in loneliness.

That the practice of law is a lonely profession may be surprising. It certainly was for me. I had often heard the same complaint for years from judicial officers as the move from a law firm environment seemingly full of camaraderie and collaboration to the bench was the hardest part of becoming a judicial officer.

Reflecting on the statistic further, and as the article points out, the isolating nature of technology and information readily available online has made lawyers and the practice of law often a solitary and isolating profession. That may be the case but it doesn’t have to be the rule.

LACBA members receive cutting edge CLE programming, discounts on insurance, car rentals, office products, specialty expertise, mentoring, pro bono opportunities, e-filing preferred providers, and more, but, to my mind, the single and most compelling reason you should become a member and stay a member is the fellowship of friends old and new. Those who have experienced what you are experiencing have felt the same insecurities and savored the excitement of a trial or a successful resolution. These relationships—forged through good times and bad—and the reminder that at every stage of professional and personal life you are not alone are why we stay.

For over 140 years the LACBA family has worked to help you build and sustain a practice through the many challenges that come our way. You chose a career of service and commitment to the law, dedicated to justice, fairness, and the realization that what you do matters a great deal to the lives of your clients and your peers. That is why you should be a member and hopefully why you have remained. It is why, as lonely as the practice of law may sometimes be, you are not alone—you are family, and we’ve got your back.

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The next time you visit LACBA, be sure to stop by the Member Lounge, located adjacent to the visitor reception area on the 27th floor.

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Michael E. Meyer is a real estate partner in the Los Angeles office of DLA Piper and the current president of the Los Angeles County Bar Association (LACBA). He developed the definition of fair market rental rate. His accolades include: Real Estate Professional of the Year (CoreNet Global), one of the 25 most powerful attorneys in Los Angeles (Los Angeles Business Journal), one of the 100 most influential lawyers in California (Los Angeles Daily Journal and San Francisco Daily Journal), among the 500 leading lawyers in the United States for five years (Lawdragon), and Best of the Best for over 20 years (Woodward White Inc.). In 2011, LACBA named Meyer Real Estate Lawyer of the Year, as did Woodward White Inc. in 2014. In addition to serving as a judge pro tem in the Los Angeles Municipal Courts, he is also a member of the board of directors of the Jackie Robinson Foundation, the Los Angeles Police Foundation, and the Los Angeles Sports and Entertainment Commission.

What is the perfect day? I feel blessed. I have a great family, I love practicing law, and I get to do a lot of great things because of the various foundations I’m on. Life has been good.

At first you studied social work but later went to the University of Chicago Law School. Why did you want to become a lawyer? I actually thought that I could make some positive changes to the world by being a lawyer.

You grew up in Chicago. Why did you move to Los Angeles? My father was a lawyer in Chicago, and everybody expected I would go into practice with him. I wanted to see if I could make it on my own. It was a hard decision; I loved my parents very much.

Were you frightened the first time you appeared before a judge? No, I was terrified.

You’re a partner at DLA Piper, a global firm with lawyers located in 40 countries. Who is your typical client? They are almost all tenants.

You’ve represented huge corporations, such as City National Bank, Nestlé, and ICM. What is one commonality these companies look for in their leases? They want to make sure that they’re protected.

You developed the definition of fair market rental rate, which is used in numerous lease transactions. What is it? It’s a full-page definition because it’s not just a dollar amount.

What do you think the future of office space is in Los Angeles? The old saying, “location, location, location” needs to be changed to “flexibility, flexibility, flexibility.” Tenants sign shorter leases with options to renew because the world is changing so quickly that what they need today may not be what they need years from now.

What is the biggest misconception about your job? A lot of people think it’s just a lease—I hate that expression. A lease is a very complicated document. I got to like most of the landlords I negotiated with, but I had to pretend that tomorrow they were going to sell the building to Attila the Hun. The only thing that was going to save my clients was what was written on those pages.

What was your best job? I worked for Walgreen’s on the corner of Chicago and Michigan Avenues for $1.15 per hour. I have my employee identification card in my wallet to keep me grounded.

What was your worst job? I never had a bad job. I’d just throw myself into it no matter what it was.

Lots of accolades: Named as one of the Top 100 of all Super Lawyers in Southern California, LACBA Real Estate Lawyer of the Year, and one of the 100 Most Influential Lawyers in California. What’s next? I just don’t want a lifetime achievement award because that means I’m dead.

Your firm provided nearly 200,000 pro bono hours in 2017. Do you have a pro bono case close to your heart? An immigrant from El Salvador came here illegally to escape a vicious gang. He was to be killed by them because they thought he witnessed a murder. We needed the kid to be able to stay.

As part of a reform slate, you were elected president of the Los Angeles County Bar Association in the first contested ballot in more than 30 years. What needed reforming? The association had become incestuous, and everything was a secret.

LACBA is a voluntary bar association with approximately 15,000 members. Can it afford the pro bono projects it maintains? Our projects do amazing things. People need a chance, and our programs give them a chance. The projects were floundering because they were running out of money.

Hasn’t bar membership across the country diminished? Yes, 40 years ago, they could survive because they were a primary source of errors and omissions insurance and CLE. That is no longer the case.

LACBA was dipping into its reserves before you became president. Have you been able to stem the tide? Yes.

What does LACBA do to engage young professionals? The association had become
tired and kept on doing the same old, same old. We want to become more relevant and more proactive.

**How?** For instance, in April, at Loyola Law School, we facilitated a program called “Bridging the Gap: From Books to Billables.”

One of your goals upon becoming LACBA president was to embrace change. Has there been a change? We’re becoming more financially solvent, and our meetings are more productive and organized. I don’t want people to tell me what they think I want to hear. Don’t be afraid to get in my face. Tell me how we can do things better.

You said your grandfather, a hardworking immigrant from Minsk, taught you how to treat people. What was his lesson? He came here without speaking English and had no money. He told me to treat everyone with the same degree of courtesy.

What trait do you wish you could change in yourself? I’d like to be a little bit more patient.

If you were handed $10 million dollars tomorrow, what would you do with it? I’d give half to the Jackie Robinson Foundation and the other half to eight other charities.

Do you have a favorite song? “My Girl.”

If you could have dinner with just one author, who would it be? Michael Connelly—I am in love with his Harry Bosch character.

Which are your favorite magazines? *The New Yorker* and *Vanity Fair*.

What is your favorite vacation spot? Paris.

Do you answer your e-mail while you’re away? Yes.

What do you do on a three-day weekend? Go to Chicago to watch the Cubs play.

The Cubs vs. the Dodgers—who do you root for? The Dodgers. I made my deal with God when he let the Cubs win the World Series in 2016.

Mr. Cub—Ernie Banks—was a client, and you are a director for the Jackie Robinson Foundation. Is baseball your favorite sport? Yes. I played at various levels and always thought I could hit, but that was because I never really faced true major league pitching. In exhibition games, I faced major league pitchers way past their prime, and it was humbling. I was delusional.

What is your favorite meal and where? Spago, for their smoked salmon pizza.

What is your Starbucks’s order? Venti Double Cup Sleeve with Room, with either dark or Pike—whichever is hottest.

What are your retirement plans? None.

If just President Trump and you had a beer together, what would you ask him? I’d ask him to choose his words more carefully.

What do you make sure you have in your briefcase? The two current documents I’m working on, my iPad, and my checkbook.

What are the three phrases that best describe you? Little boy (I still think there’s a lot of kid in me), twinkle in the eye, and irreverent.

Who are you two favorite world leaders? Churchill and Truman, because they both did more with less.

What is the one thing you would like to change in the world? I wish that everybody could become color-blind.
The Importance of Self-Care in Balancing Life and Work

WE HAVE ALL BEEN GUILTY of not sleeping well, not eating well, not being well, and not spending our time well—except for work, that is. Such is the life of most attorneys. As important as our work is, the better we take care of ourselves, the better we can perform in life and work. It is especially difficult for newer attorneys to find this balance when there is so much to learn, so much to prove, and so much work to do. How then do we take care of ourselves while pursuing our careers? Different things work for different people.

One purely technical procedure that can greatly facilitate balancing life and work is using a project management software. In addition to software that the firm may use to track cases and tasks, there is a personal project management software that can track and schedule both life and work tasks.

Asana is an efficient software for project management that is free, and there is also an app for it. With Asana, projects can be created by case and for each life project, including individual tasks for each project. Moreover, a realistic deadline can be assigned to each project. Asana will send a gentle reminder when deadlines are near or when a task is overdue. The app’s visual representation of tasks helps determine whether there is overscheduling during any week or month. Apps like Asana are preferable to other calendars that have more limited capabilities. In working with a team, it is possible to collaborate, add files, and write comments for each task. Using project management software is a good step toward creating a better work-life balance.

As helpful as external devices and procedures can be to maintaining harmony in our lives, the tried and true method involves how we process daily input within our own bodies. Transcultural experience has validated attention to three main components.

Meditation. There are many forms of meditation techniques. Body scan meditation works well for high-stress careers in law. Unlike meditation aimed at miraculously clearing the mind of all thoughts, body scan meditation trains one to take the time to notice the physical manifestation of thoughts and emotions in the body. Here is a quick summary:

1. Find a quiet location and take 10 minutes to lie or sit down.
2. Take a few deep breaths.
3. Now, focus on each part of the body, step by step, starting with the head. Notice the sensation you are feeling. Then, move to the face, following the same process. Repeat the procedure throughout the entire body, spending five to 10 seconds on each part of your body.

The point of body scan meditation is to become aware that the sensations of your body are manifestations of your thoughts and emotions. With increased awareness, these feelings and sensations will actually subside, allowing you to feel more focused and ready to take on the next task.

To assist with the process, there are also apps specifically designed for body scan meditation. Try Headspace, Smiling Mind, iMindfulness, or Mindfulness Daily.

Breathing. Too often, with the fast pace of being lawyers, we scarf down food, barely bothering to breathe. As obvious as it sounds, it is important to take time to breathe throughout the day. While some people swear by and benefit from deep breathing, others swear by the Buteyko method of breathing to create more oxygen flow to the organs. Either way, it is crucial to pay attention to breathing in a way that allows you to stay relaxed (as much as we can under tight deadlines).

Eating. The tacos many of us surely ingested for lunch this week attest that it is not always easy to eat well and fast. Between wondering whether the organic chicken I am buying is really organic—since it looks just as plump as the nonorganic chicken—and whether I will actually have time to cook a healthy meal from it, I buy at least three types of vegetables each week that require no cooking but make great snacks. I find this to be a great way to absorb vitamins and fiber, as well as to complement my otherwise questionable diet. Keep vegetables in the work refrigerator or take them to work every day. Just do it. Your doctor will be impressed at your next physical. I guarantee it.

Breathing. The long and the short of it is: self-care is important to a happy and healthy life. So, do things that make you happy. This is the best form of self-care and absolutely necessary to sustain a long and successful career. The first question I ask myself after I wake up (even before checking my work e-mail) is: “What can I do today that will make me happy?” Sometimes what will make me happy is something as simple as getting coffee at my neighborhood mom-and-pop café, and sometimes it’s carving out 15 minutes to go for a walk.

Create a plan with the project management software, breathe, meditate, eat well, and do things to make yourself happy, or, in the words of the Sufi mystic, Rumi: “Let yourself be silently drawn by the strange pull of what you really love. It will not lead you astray.”

Saba Zafar is the principal attorney of Playa Law Firm, APC, in Manhattan Beach, California.
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A CRITICAL QUESTION in interpreting indemnity contracts is whether the indemnity obligation is a fault-based obligation or whether it creates a form of strict liability for the indemnitor. This issue arises most commonly in construction defect litigation but is by no means limited to that context. California courts have taken three approaches to this issue. In the first group of cases, there is a presumption that an indemnity clause applies only if the indemnitor is at fault, and the parties must include clear language if they intend for the clause to apply when the indemnitor is not at fault. In the second group of cases, the contract is applied as written (and it is typically written to sweep as broadly as possible), without any presumptions or rules of interpretation relating to the indemnitor’s fault. In the third group, which actually comprises only a single case, the court narrowly construed the entire indemnity agreement because it required the indemnitor to pay even when it was not at fault.

While it is difficult to reconcile these three lines of analysis, all of the cases reflect the courts’ skepticism about interpreting indemnity clauses literally without taking into account the commercial context of the parties’ relationship. However, this judicial skepticism has not yet created a concrete rule of general applicability. Ultimately, the courts will need to provide greater clarity to allow contract drafters to ensure their contractual language reflects their mutual intent and to help parties satisfy contractual obligations without resorting to expensive and uncertain litigation.

Indemnitor Fault Required

The clearest application of the rule requiring fault by the indemnitor occurred around 20 years ago in *Heppler v. J.M. Peters Company.* The court stated that given the “commercial context” of the parties’ indemnity agreements, “indemnitor fault was a prerequisite for indemnity.” The agreements at issue contained broadly worded indemnity clauses. One version of the clause required the construction subcontractor to indemnify the project developer for “damage to property arising out of or in connection with Subcontractor’s...performance of the Work” (as well as for “any breach or default” by the subcontractor) and the other version required another subcontractor to indemnify the developer for damage “growing out of the execution of the work...”

The court relied on a number of facts to distinguish an earlier decision, *Continental Heller Corporation v. Amtech Mechanical Services,* and concluded that the indemnity clauses were triggered only when the indemnitors (the subcontractors) were negligent. These facts included: 1) the indemnity agreements were contained in preprinted form contracts; 2) the indemnitors were subcontractors who had limited scopes of work on a residential construction project (such as grading or roofing) and did not have complete control over the final product; 3) the indemnitors might suffer “ruinous liability” from their indemnity obligations; and 4) the indemnitees were the project developers, who are better able to insure against the underlying liabilities, and who (unlike the indemnitors/subcontractors) were strictly liable for construction defects. (This final point no longer applies as broadly following *Jimenez v. Superior Court,* which held that manufacturers of products used in construction projects can be held strictly liable for product defects that cause harm to other parts of the project.)

In light of these key facts, the court said that in order to render the contracts’ terms “reasonable and capable of being put into effect,” the subcontractors’ obligation to indemnify the developer for claims “arising out of” and “growing out of” their work applied only if they performed that work negligently.

In addition to the fact-specific aspects of its analysis, the court also relied on a few sweeping statements about California indemn...
Indemnity law. The court endorsed the view that “[i]ndemnity provisions are to be strictly construed against the indemnitee” and, on the basis of this expansive rule of interpretation (which comes up from time to time in the cases, though it is not universally accepted), the court suggested that the parties “would have had to use specific, unequivocal contractual language” in order for an indemnity provision to “apply regardless of the subcontractor’s negligence...” The court could not cite any authority specifically on point; instead, it relied on cases addressing the interpretation of indemnity contracts with respect to the indemnitee’s fault.8 This is a very different issue that has a long lineage of support in California law.9 Heppler appears to be the first decision to articulate this rule. Based in part on its newly articulated “unequivocal” statement rule, the court held that the parties’ contracts did not contain the requisite clear statement providing that the indemnitors could be held strictly liable for indemnification.10

**Crawford Case**

In the most recent California Supreme Court case addressing the fault of contractual indemnitors, *Crawford v. Weather Shield Manufacturing Inc.*, the court wrote: [I]t has been said that if one seeks, in a noninsurance agreement, to be indemnified for his or her own active negligence, or regardless of the indemnitor’s fault—protections beyond those afforded by the doctrines of implied or equitable indemnity—language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee.11

This assertion was dictum, as the court did not examine whether or not the language in the parties’ indemnity agreement required the indemnitor to be at fault (the trial court had ruled that the agreement did require a showing of indemnitor fault, and the indemnitor did not appeal that order).12 Nonetheless, the court’s endorsement of a “clear statement” rule should be influential as the issue comes up in the future, particularly because it is supported by the decision in *Heppler*.

Other appellate courts have pointed in the same direction but offered less reasoning in support of their conclusions. Along with *Crawford*, these cases suggest that the presumption requiring fault by the indemnitor may be gaining acceptance in the courts. Several years prior to *Heppler*, in *Regan Roofing Company v. Superior Court*, the court raised, but did not definitively decide, whether the indemnitor needed to be at fault for its indemnity obligations to apply.13 The court held that summary adjudication regarding the indemnitor’s duty to defend was premature because “[i]n this determination has yet been made as to whether the [indemnitors] were negligent in the performance of their work, giving rise to a duty to indemnify and a related duty to defend.”14 (The court’s analysis of the duty to defend has since been superseded by the Supreme Court’s decision in *Crawford*.)15 While one might assume that this conclusion was based on an indemnification provision that expressly required indemnitor fault, in fact the clauses provided broadly that the indemnitors (various subcontractors on a construction project) agreed to indemnify the project’s developer for claims “of any nature or kind arising out of or in any way connected with [the indemnitors’] performance” of their subcontractors.16 The court offered a single explanation for why such an expansive clause was triggered only when the indemnitors were negligent—it was “unclear” whether the indemnitors (who were subcontractors) should indemnify the developer for claims in which the developer was strictly liable but the subcontractors were not.17 In other words, the court was simply raising the question of indemnitor fault without deciding it.18 (Indeed, the *Heppler* court did not cite *Regan Roofing* as precedent on this issue.)

Following *Heppler*, the court in *Baldwin Builders v. Coast Plastering Corporation* stated that “an indemnitor/subcontractor generally will not be liable or have a duty to defend its general contractor pursuant to the terms of an indemnity agreement unless it was negligent in performing its work under the subcontract.”19 The court concluded that the parties’ contract did not include “unequivocal language” requiring the indemnitors to indemnify “in the absence of their fault or negligence,” even though the contract required the indemnitors to cover any claims “arising out of acts or omissions [of the indemnitors] in any way connected with the performance of the subcontract....”20 In light of the presumption identified in *Heppler*, the court concluded that the indemnification provision could be enforced only if the indemnitors were at fault.21 The decision is thus a faithful application of *Heppler*, though, technically, the court was not deciding the scope of the indemnity obligation. Instead, it was addressing the reasonableness of the attorneys’ fees the putative indemnitors incurred to prove that they were not negligent and thus had no indemnification obligation.22

Another case, *Gowis Engineering v. Superior Court*,23 is sometimes cited to support the notion that indemnitor fault is required, but the case does not actually support that conclusion.24 The court stated that the indemnitees were required “to prove the amount that has been paid by virtue of injury caused by [the indemnitee’s] fault.”25 However, the court was addressing equitable indemnity, not contractual indemnity, so this comment should have no bearing on cases involving contractual indemnity.26 As one court noted, *Gowis* is “pure dictum” to the extent that it could be read to suggest that fault is required to trigger contractual indemnification obligations in all cases.27

Finally, various courts have given effect to contractual provisions clearly requiring indemnitor fault as a trigger for indemnification. For example, in *Peter Culley & Associates v. Superior Court*, the indemnification clause required the indemnitor to cover losses “resulting from [its] negligent performance of services provided” to the indemnitee.28 In *UDC-Universal Development, L.P. v. CH2M Hill*, the agreement required the indemnitor to cover losses that “arise out of or are in any way connected with any negligent act or omission by...” the indemnitor.29 Although the issue was not disputed in those cases (likely because of the clauses’ clarity), this language seems to clearly require indemnitor negligence as a prerequisite for indemnification and provides a good model for parties looking to draft a clause that unambiguously requires the indemnitor to be at fault.

**Fault Not Required**

The opposite position—that an indemnitor does not necessarily need to be at fault to be held liable—was explained most comprehensively in *Continental Heller*.30 The plaintiff was a general contractor that oversaw the expansion of a meat packing plant. After a valve in the plant’s refrigeration system caused an explosion, the plaintiff was sued, and sought indemnification from the subcontractor that had installed the system.31 The subcontractor’s indemnification clause required the subcontractor to indemnify the general contractor for loss that “arises out of or is in any way connected with the performance of work under this Subcontract.”32 The clause added that the indemnification obligation applied “to any acts or omissions, willful misconduct or negligent conduct, whether active or passive, on the part of the Subcontractor.”33 The trial court found that although the subcontractor was not negligent, it owed a duty to indemnify the contractor for losses arising from its work.34 The Second
watered-down version of the “specific, unequivocal contractual language” rule stated in Heppler. The “some expression” test can presumably be satisfied by a broad indemnity clause that does not mention fault (such as the clause covering claims relating to “all work” by the indemnitor), as long as the result is reasonable in light of the commercial context.

Another Second District case, Morlin Asset Management LP v. Murachanian, suggests yet another line of interpretation: when an indemnity clause does not require indemnitor negligence or fault, the entire indemnity clause should be read strictly in favor of the indemnitor.44

In Morlin, the indemnitees were the owner and manager of a commercial building who were sued by a janitorial worker who had been injured in the building’s common area while cleaning one of the tenant’s units.45 The indemnitees sought indemnification from that tenant under a clause that required the tenant to cover “any and all” claims “arising out of, involving or in connection with, the use and/or occupancy of the” unit.46 The court agreed with the indemnitees that, but for the tenant’s hiring of a janitorial service to clean its unit, the worker would not have been injured.47 Nevertheless, the court held that the accident “did not arise out of the tenant’s use of the” unit for purposes of the indemnification clause because the link between the tenant’s use of the unit was “too remote” from the accident, which occurred in a part of the building over which it had no control.48 The court reached this conclusion based in part on a narrow construction of the indemnity clause that was informed by Crawford’s dictum that when an indemnity clause purports to apply “regardless of the indemnitor’s fault...language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee.”49 The court thus appears to have extended Crawford’s strict-construction rule to apply to an entire indemnity clause, not simply to the portion of the clause purporting to require an indemnitor to cover losses which it did not negligently cause.

More Questions
Taken as a whole, these three groups of cases raise more questions than they answer. Is there a general rule requiring that indemnification clauses clearly state whether they apply regardless of the indemnitor’s fault? Crawford suggests that there is, and no case has clearly rejected that proposition. It seems odd, though, that such a significant rule first appeared less than 20 years ago and has not been continuously repeated in the same way as the long-standing rules about indemnitee fault. It is also curious that courts often purport to examine whether the contract language is “clear” while relying heavily on notions of “commercial context” and “reasonableness” rather than express contractual language.

The Heppler rule that indemnitees are not liable without fault can also be criticized on the ground that it tends to blur the distinction between express contractual indemnity and implied equitable indemnity. Equitable indemnity is available only when the indemnitor is at fault (or at least is more culpable than the indemnitee).50 If the default rule for interpreting contractual indemnities requires indemnitors to be at fault, express indemnity clauses have relatively little significance. For potential indemnitees, this is obviously a good thing because when courts require a showing of fault on the indemnitor’s part, the indemnitor will be in a better position to obtain insurance coverage for its liabilities to the indemnitee.51

Reviewing the mixed holdings, one could reasonably ask whether the results are driven more by concerns about imposing heavy liability on less affluent defendants (such as construction subcontractors) than about faithful application of clear contract language. Perhaps one can argue that these holdings should be limited to disputes between general contractors and subcontractors in light of the dynamics of that commercial relationship.52 Since Continental Heller and Centex, each of which rejected a “clear statement” rule, involved disputes between a general contractor and subcontractor, it would be hard to say that a general contractor-subcontractor relationship is the decisive factor. Moreover, indemnity clauses often appear in other contexts in which the indemnitee may have greater bargaining power than the indemnitor, particularly when the indemnitor provides unique goods or services that are not easily substituted (in licensing contracts for highly specialized technology products, for example). In addition, Morlin, which involved a commercial landlord-tenant relationship, did not try to distinguish Crawford’s strict-construction rule on the ground that it applies only in construction contracts.

Until courts provide further guidance on the issue, litigants will be left guessing whether their obligation to indemnify “any and all claims” actually means that they have to indemnify “any and all claims, but only if the indemnitor was at fault.” Contract drafters will have to fight over whether the indemnitor’s obligations will apply “regardless of the indemnitor’s fault”
or “only if the indemnitor is at fault”—and if they are not able to reach agreement on the language, they will probably just leave the contract silent on the issue and let the litigators sort it out. Perhaps most troublingly of all, indemnitors on tighter budgets—who are most likely to benefit from a “clear statement” or “strict construction” rule that limits their obligations—are at a disadvantage if they fail to hire knowledgeable counsel to advise them that their promise to pay “any and all” losses might not actually require them to pay anything. Until these questions are cleared up by the courts, it will be difficult to predict how a particular clause will be interpreted.

2 Id. at 1277.
4 Heppler, 73 Cal. App. 4th at 1277-81 (quoting Continental Heller, 53 Cal. App. 4th at 507). Curiously, the court relegated to a footnote a key admission by the indemnitees’ counsel that “negligence was an element his clients were required to prove…” Heppler, 73 Cal. App. 4th at 1281 n.9. The court’s entire analysis is arguably dictum in light of that concession.
7 Id. at 1278.
9 See, e.g., Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 628 (1975) (noting that where “an indemnity clause does not address itself to the issue of an indemnitee’s negligence,” it “may be construed to provide indemnity for a loss resulting in part from an indemnitee’s passive negligence” but “will not be interpreted to provide indemnity if an indemnitee has been actively negligent”).
10 Heppler, 73 Cal. App. 4th at 1278.
12 Crawford, 44 Cal. 4th at 550; see also id. at 560, 561 n.9.
14 Id.
15 Crawford, 44 Cal. 4th at 565.
16 Regan Roofing, 24 Cal. App. 4th at 430 (italics omitted).
17 Id. at 436-37.
18 Six years later, a panel from the division that decided Regan Roofing (including the justice who authored the decision) offered the following clarification: “In Regan Roofing we merely held that it was premature to decide whether a subcontractor could be required to contribute to the defense of a claim before either its fault had been established or any determination

had been made that such a defense existed notwithstanding fault. We did not suggest that an agreement which required indemnity from a faultless indemnitee was in any manner improper or unusual.” Centex Golden Constr. Co. v. Dale Tile Co., 78 Cal. App. 4th 992, 997 n.1 (2000).
20 Id. at 1342, 1347.
21 Id. at 1347.
22 Id. at 1347-48.
26 Id. at 648 n.3.
27 Continental Heller, 53 Cal. App. 4th at 505.
31 Id. at 503.
32 Id. at 505 (italics omitted).
33 Id. (italics omitted).
34 Id. at 503.
35 Id. at 505.
36 Presumably the subcontractor could have asserted a claim against the manufacturer of the valve if the valve was the underlying cause of the accident. See, e.g., Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 628 (1975), which required indemnity from a faultless indemnitee on the theory that “negligence was an element his clients were required to prove…” Heppler, 73 Cal. App. 4th at 1281 n.9. The court’s entire analysis is arguably dictum in light of that concession.
37 Id. at 506-07.
38 Id. at 997-98.
39 Id. at 998.
40 Id. at 999.
41 Id. at 998 (quoting Heppler v. J.M. Peters Co., 73 Cal. App. 4th, 1265, 1280 (1999)).
43 Id. at 187.
44 Id. at 188 (italics omitted).
45 Id. at 193.
46 Id.
47 Id. at 191 (quoting Crawford v. Weather Shield Mfg. Inc., 44 Cal. 4th 530, 532 (2008)). The court also emphasized that its holding was consistent with prior holdings involving tenants’ indemnification of owners/managers. Id.
49 See, e.g., Val’s Painting & Drywall, Inc. v. Allstate Ins. Co., 53 Cal. App. 3d 376, 384 (1975) (contractual liability exclusion in general liability insurance policy did not prevent indemnitor from obtaining defense coverage where indemnitee sought both contractual and equitable indemnification).
50 See generally Civ. Code §2782(c) (establishing specific rules governing indemnity provisions in construction contracts).
New Federal Law Eliminates the Alimony Deduction

**THE TAX CUTS AND JOBS ACT** has a major impact on tax rates and deductions, but it also has a significant effect on separating and divorcing spouses. This act repeals Internal Revenue Code Section 71 and related sections, which defined alimony and allowed an above-the-line tax deduction to the payor spouse and requires the receiving spouse to declare this as income on his or her tax return. This provision of the new act becomes effective as to “(1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after December 31, 2018, and (2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification.”

This means that agreements and orders made after January 1, 2019, will be affected by the new law. Until then, alimony can still be deductible to the payor and includible in the recipient’s income. If a pre-2019 order or agreement is modified after January 1, 2019, it will be deductible to the payor and includible as income to the payee as long as the post January 1, 2019, order or agreement expressly states that it is deductible to the payor and includible as income to the payee.

It was not known until virtually a couple of days before the Tax Cuts and Jobs Act was signed that there would be a one-year period before this part of the act would be effective. Before practitioners in the field knew there would be delay in the elimination of the alimony deduction, they were advising their clients to obtain a judgment of dissolution of marriage by the end of last year to take advantage of the alimony tax deduction. Now, couples have the rest of this year to obtain a judgment of dissolution of marriage or legal separation that will allow them to take advantage of the alimony deduction. It is likely that some divorcing spouses will accelerate their divorces so they can enter a judgment before the end of this year to be able to deduct spousal support on their tax returns and obtain the corresponding tax benefits.

Spousal support, however, is not going away. It is a fundamental element of any divorce when there is a disparity of income. For marriages less than 10 years long, the duration of spousal support typically is one-half the length of the marriage. For marriages of more than 10 years, there is no presumption with regard to duration. A court must determine how long spousal support is needed and justify any reductions (step-downs) in the amount of spousal support. Courts are reluctant to terminate jurisdiction over spousal support in marriages of more than 10 years long.

Roughly speaking, if the receiving spouse’s net taxable income is over $41,000 per month ($500,000 annually), including any spousal support, he or she is going to be in the same tax bracket as the payor, so the alimony tax deduction simply shifts the tax from the payor to the payee. For these high earners, there may be no benefit to the deduction. On the other hand, when there is a differential between the payor’s higher tax bracket and the payee’s lower tax bracket, there is a tax savings, and in some cases it is significant.

The software used by family lawyers to determine temporary spousal support (and often permanent spousal support), shows the tax savings and in “recommending” an amount of spousal support it divides the tax savings between the parties. Many couples benefited from the savings. With the tax savings, payors of spousal support could pay more support (than if there was no deduction at all). Consequently, there was more money available to the family than there will be after January 1, 2019, when the alimony deduction is eliminated.

Support software is one of the essential tools of family law practice. In order to calculate spousal support, the support software is programmed with an algorithm that calculates the tax savings for the alimony deduction. It then recalculates the net income available for support and repeats this process again and again until an internal stasis is reached. The algorithm could be turned off by hitting the “B” key on a computer keyboard. The spousal support number is lower without the algorithm engaged. Some attorneys (and maybe some judges and mediators) might take the average of the “B” key output and the temporary spousal support guideline output to arrive at a settlement number for permanent spousal support. Some in the industry call this algorithm “the bump.”

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of quantum physics and Zen philosophy... reminiscent of an attempt to pin down an electron or the image of a snake eating its own tail.” Soon, this method of recalculating spousal support to maximize the benefits of deductibility will be a relic of family law history.

**County Guidelines**

The spousal support calculation built into the software applies Santa Clara, Alameda, Marin, Yolo, Humboldt, or Kings County guidelines depending on which county the case resides. The Santa Clara County guideline,8 used by the Los Angeles County Superior Court, states as follows:

Temporary spousal or partner support is generally computed by taking 40% of the net income of the payor, minus 50% of the net income of the payee, adjusted for tax consequences. If there is child support, temporary spousal or partner support is calculated on net income not allocated to child support and/or child-related expenses. The temporary spousal support calculations apply these assumptions.9

Because this formula was developed when spousal support was tax deductible, leaders in the field believe it will have to be adjusted to reduce the 40 percent of the payor’s income now that the payor will have less net income available to pay spousal support under the new tax law. Changes are anticipated to be coming to local court guidelines soon. In the meantime, practitioners should be prepared to argue that the guideline does not any longer represent a fair allocation of the financial resources between the payor and the payee. The rule in Los Angeles states that the court may use the Santa Clara County guideline, not that it must apply the guideline.

Another consequence of the loss of alimony deductibility will be that there is going to be no need for family support orders (also known as Lester Agreements).10 Family support is a combination of undifferentiated child support and spousal support.11 The benefit was that the entirety of the combination of the support was deductible (and thereby taxable to the recipient). In some cases the differential in the tax brackets of the payor and the payee resulted in more money to take care of the family. The caveat of drafting these orders was that the order for family support could not change in amount when a child reached the age of majority, graduated from high school, or graduated from college.12 These orders were difficult to draft properly. These orders are essentially a thing of the past—there will be no deductions for family support beginning in 2019.

Another quirk relating to the tax deductibility of alimony that will be eliminated are the recapture rules.13 The drafters of the laws allowing for deductibility of alimony wanted to prevent parties to a divorce from disguising a property settlement as alimony to obtain a significant tax deduction. The rules were arcane at best and trapped many an unwary party to a divorce, not to mention the attorneys that represented them. Essentially, if the order for alimony reduced in amount (i.e., were stepped down) too much in the first three years that spousal support was paid, the deduction would be disallowed and recaptured later. No one should miss this arcane provision of the Internal Revenue Code, except the family law test examiners who loved to stump the so-called experts.

According to Mother Jones,14 eliminating the deduction for alimony will save the government less than $1 billion a year. That is very little compared with the enormity of this $1 trillion tax bill. If that is so, why did Congress seek to terminate the alimony tax deduction? Mother Jones speculates that some republicans saw this deduction as a divorce subsidy and that it encouraged people to get a divorce. Regardless of the politics, because of the loss of the alimony deduction, it will be more costly for many people to live after divorce. Divorce was never good financial planning. Now it is even worse because there will be less money to support a divided family.

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2 Id. §11051(c).
3 Fam. Code §4320(b).
7 In re Marriage of Schulze, 60 Cal. App. 4th 519 (1997).
8 L.A. COUNTY SUPER. CT. FAM. DIV. R. 5.10.
9 SANTA CLARA SUPER. CT. FAM. L.R. 3.C.
11 Fam. Code §92.
12 I.R.C. §71(c), Treas. Reg. §1.71-1T, Q 16.
13 I.R.C. §71(f).
A BRIDGE TO JUSTICE

MANY CALIFORNIA BAR ASSOCIATIONS, INCLUDING LACBA, HAVE ESTABLISHED LAWYER REFERRAL SERVICE PANELS FOCUSING ON LIMITED SCOPE REPRESENTATION

EVERY DAY, substantial numbers of litigants in Los Angeles courtrooms represent themselves. For example, in Department 94 (more commonly known as “eviction court”) in the Stanley Mosk Courthouse in downtown Los Angeles, dozens of unrepresented tenants nervously await their turn for what promises to be a rough and confusing ride. In contrast, many (though not all) landlords have an attorney, or at least a practiced property manager, by their side. Although tenants with little or no income may be eligible for free legal aid lawyers, and others are able to hire lawyers at market rates, the vast majority will go it alone. One wrong move—a blown deadline, a misunderstanding, some misplaced paperwork, or bad Internet advice—could result in an eviction judgment and, ultimately, homelessness for the unrepresented tenant.

In addition to Department 94, there is usually a sea of nervous, tense faces at the window that accepts restraining order applications. Also, in the family law courts, a young mother may be trying to cross-examine an expert witness about the effects of alleged child abuse by her soon-to-be ex-husband, or a father may be attempting to establish the proper amount of child support he should receive from the reluctant other parent. These scenarios are played out every day in courthouses all over Southern California. The stakes for these pro se litigants, for their future, and for their children are extraordinarily high.

Some resources for these litigants do exist. For example, on the fourth floor at Stanley Mosk, near the small claims department, the court’s self-help center is perpetually abuzz with activity. The self-help center provides information on family law matters, conser-
vatorship, evictions, and restraining orders. Across the street, in the Los Angeles County Law Library, patrons from all socioeconomic backgrounds forage through law books, attend informational classes, perform computerized research, prepare appeals, and draft all sorts of motions and pleadings based on samples they can find with the help of the law librarians. Far too often, the law library or the court's self-help center and website are the only places a litigant of modest means can turn for legal information.

However, what of the old adage that the person who represents himself or herself has a fool for a client? Why are so many people defying common wisdom and going to court without an attorney by their side? Why have the lawyers that used to fill the halls of Los Angeles courthouses disappeared? It would seem that because there are plenty of attorneys in Los Angeles, finding representation should be a simple task. Paradoxically, it is true that there are more lawyers than ever in California. Why, then, the disconnect between attorneys and the clients that so desperately need their services? It is certainly not a result of lack of work or too few clients. Rather, it is a symptom of a legal marketplace that has undergone a radical change over the last few years. Many new law graduates, for example, are unable to secure a job at a law firm—even those who have recently passed the bar examination. Thus, to make their student loan payments, they accept jobs that underutilize their law licenses, such as document review or performing low-paid hourly work for other attorneys. Some even find themselves employed outside of the legal profession, which is surely not their first choice. Even those lawyers who have practiced for a while are not immune to drastic professional change in the form of consolidation, downsizing, outsourcing, and other shifts in the legal landscape.

**Demand for Low-Cost Legal Services**

Of critical importance is the fact that over the past decade, the demand for low-cost legal services has spiked. This is a result of numerous factors, including severe cuts to legal aid funding. At the same time, online legal technology companies are selling legal document services directly to consumers at a price that appear to be less costly than hiring an attorney in the short run. Yet, by their own admission, these services “are not a substitute for the advice of an attorney.” They urge clients to consult an attorney for legal advice on a specific or complex matter. It is not uncommon for consumers then to be referred back to a state bar or legal aid office to find information on obtaining “free or low cost representation.”

The recent weak economy also knocked many for a financial loop that has been difficult to overcome, even now that the economy is improving. In many cases, lawyers may have priced themselves out of reach for most Californians. Too few litigants can afford the typical up-front retainer and then bear the uncertain cost of unpredictable litigation.

Despite the seemingly ample supply of willing lawyers, many litigants cannot find affordable representation. The chasm that exists between lawyers wanting to serve and Californians needing legal services is often referred to as the “justice gap.” There is no real dispute that the disconnect between service providers and customers exists or that it must be confronted before we can have any meaningful impact on bridging the “justice gap.” We, as legal professionals, must find ways to connect people to affordable legal services, even if it means offering those services a la carte, or on a limited scope basis, rather than taking on traditional, full-scope representation. Closing the justice gap is critical because the justice system should allow everyone the ability to confidently resolve their legal disputes and order their lives. This means that Californians need the opportunity to get help from an attorney and should not simply fend for themselves in a court of law.

Recently, the Conference of Chief Justices and Conference of State Court Administrators acknowledged that “the promise of equal justice is not realized for individuals and families who have no meaningful access to the justice system.” The conference resolved to support the “aspirational goal of 100% access to effective assistance for essential civil legal needs.” The resolution noted that this goal could only be met through assuring the provision of a continuum of meaningful and appropriate services.

Some litigants, for a number of reasons, are capable of handling their legal needs with either little or no guidance from an attorney. In Los Angeles, self-help centers are available in or near the courts to give people information and assistance with forms in family law, restraining orders, eviction, and a few other limited areas. While basic information is available, it tends to be general, and not tailored to the individual’s particular situation. Even then, many litigants are unable to handle their matters without an attorney present every step of the way, either because the issues are too complicated, or the litigant’s knowledge and skill set call for more detailed guidance.

Indeed, much ink has been spilled over the past several years identifying the justice gap problem and expressing various ways to solve it. For example, there are at least five separate legal incubator programs in California that collaborate with law schools and legal aid organizations to help recent law school graduates navigate the waters of establishing their own solo practices, with an emphasis on solving the problems of low- and middle-income folks. Last year, the legislature added an additional $5 million dollars to the Equal Access Fund, giving legal aid a much-needed economic boost. While these and other efforts show promise toward moving society closer to full access, none of them standing alone will bridge the justice gap.

On January 1, 2010, the then-chief justices of New Hampshire and California opined in *The New York Times* that “unbundling,” or limited scope representation, was a critical part of connecting litigants with the attorneys they need to assist them with their legal problems. The limited scope concept is simple. An individual can employ an attorney for assistance in a legal dispute for as much or as little legal help as the client desires. For example, in California, a client can retain an attorney to represent him or her in a single court hearing, or for a specific issue in a case, or for a specific out-of-court event, or to draft pleadings.

The procedures for limited scope representations are set forth in Rule 5.425 of the California Rules of Court for family law cases, and Rules 3.35 through 3.37 for civil cases. The process is intended to be relatively simple and straightforward, with court filings largely form-based, with (in many cases) mandatory forms promulgated by the Judicial Council. With these tools, limited scope representation presents another option for individuals who are able and willing to handle some of the work on their case by themselves but would appreciate having a lawyer’s perspective and counsel at critical junctures.

**Initial Distrust**

At first, the limited scope concept was met with suspicion: would it be possible for attorneys to meet fiduciary duties to clients and duties of candor to the courts if they did not control the trajectory of their cases? After an exhaustive analysis of state, local, and ABA ethics opinions, as well as ABA Model Rules and interviews with real-life practitioners, ABA’s Modest Means Task Force answered in the affirmative. Their findings were published in a 2003 *Handbook on Limited Scope Legal Assistance*. In a nutshell, the task force recognized that without limited scope help, people
who cannot afford full-scope representation go to court without
counsel. The task force concluded, “We believe that in the
great majority of the situations some legal help is better than none. An
informed pro se litigant is more capable than an uninformed one. A partially represented litigant is more effective than a
wholly unrepresented litigant.”9 The Handbook provides the
two standards that govern limitations on the scope of services—
the client must give informed consent and the services should be
reasonable under the circumstances—and gives practical advice
about how to fashion retainer agreements and court documents
consistent with those standards.10

From a judicial standpoint, judges are well aware of the
various aspects of limited scope representation, including its
advantages for all concerned. As time has progressed since the
Judicial Council first adopted limited scope forms in 2003, most
judicial concerns have been addressed and mitigated. Judges are
not only pleased to see a limited scope attorney but they are
equally willing to let the attorney go, once the appropriate work
has been accomplished.

On the bar side, there is a significant amount of good work
being done locally to assist modest means litigants on the limited
scope front. The State Bar of California’s annual meeting has
had limited scope presentations for at least the last three years.
The Los Angeles County Bar Association (LACBA), among other
bar associations, has established a panel on its Lawyer Referral
Service (LRS) that focuses on limited scope representation and
the needs of modest means litigants. In addition, LACBA’s
www.smartlaw.org connects clients with attorneys who are willing
do certain tasks on an unbundled basis or for a flat fee. Smartlaw.org was launched in April 2016 to provide Southern Californians with an alternative to full representation. Options like Smartlaw.org allow clients a broader range of more affordable
services, allowing attorneys to better compete with online legal
service firms. Additionally, the LRS provides attorneys with exposure
to more clients in a broader geographic area than the attorney
would otherwise reach.

Limited Scope Practice
Increasingly, individual attorneys are seeing real value in a limited
scope practice. Attorneys with a thriving limited scope practice
have been able to provide efficient service while drawing the
appropriate time boundaries. Further, many limited scope attorneys
report higher client satisfaction rates and frequent conversions
from limited scope to full representation on a paid basis. Limited
scope service also provides some real advantages: when done
properly, there are no collectables, bills, or other financial pinch
points, and both lawyer and client know exactly what is to be
done and how much it will cost.

To date, most attorneys have focused their limited scope
services on family law, but as a society we need to think in
broader terms. There are many landlords, tenants, and small
businesses that need legal representation in one or two areas, or
with one or two issues in a case. A small business owner may
need help in negotiating a settlement, drafting a purchase agree-
ment, or responding to a threat of litigation. A landlord who
owns just a few units may only need assistance in an occasional
unlawful detainer hearing or in negotiating with the city over
some tax or regulatory issue. An individual who has arguably
been defamed may need nothing more than a cease-and-desist
letter. A consumer may need help negotiating or mediating a con-
tract dispute.

Finally, while most attorneys think in terms of court-based
litigation, the wide world of administrative hearings occurring
every day in Southern California cannot be ignored. Driver’s
licenses and professional licenses are often at risk in administrative
hearings. There may be a noncourt hearing with the city attorney’s
office to resolve an issue or a tax-related hearing, either of which
could benefit from an attorney’s limited scope appearance. Any
of these administrative settings may not require a full-service
attorney. A limited scope attorney would not only assist the
administrative hearing officer but also would be able to explore
the entirety of potential outcomes before a final result is reached.

A number of years ago, the California Commission on Access
to Justice prepared a lengthy package of materials entitled “General
Civil Limited Scope Representation Risk Management Mate-
rials.”11 These materials provide numerous sample fee agreements,
checklists, and best practices. In fact, from a practitioner’s point
of view, these materials provide an almost complete guide to
conducting a limited scope representation. As a result, with some
minor revisions, a limited scope practice is easy to establish. The
risk management materials are already in existence and freely
available on the California courts website (www.courts.ca.gov),
and the forms are clear and easy to use. All an attorney needs to
do is to select the proper case for limited scope and start providing
legal services.

Safety Net
Los Angeles family law attorney Michelle Hopkins equates unbun-
dled legal services to a “safety net” for self-represented litigants.
After working with the Los Angeles Superior Court’s self-help
programs for ten years and as a supervising attorney in the Self-
Help Center at Stanley Mosk Courthouse, she saw that most
people are able to understand fundamental legal concepts, follow
step-by-step procedures, and complete the Judicial Council forms.
However, many people need advice and counsel related to the
development of a legal strategy with consideration of issues such
as the relevance and admissibility of evidence, the burden of
proof, and the standard for review. She observes that many people
in family law cases are shell-shocked as well as filled with grief
and panic. These emotions create confusion not to mention impair
memory and good decision-making. Others are simply terrified
to appear in front of a judge alone. Thus, Hopkins offers legal
coaching, help with document preparation, and one-time court
appearances to otherwise self-represented litigants for affordable
flat fees that clients “pay as they go.”

Hopkins emphasizes, however, that unbundled services are
not a fit for all attorneys. She cautions that the best limited scope
attorneys are the ones with the most experience who have handled
a variety of cases from start-to-finish and understand how all
the complex pieces fit together. There can be unfavorable results
for litigants who act on short-sighted advice from paralegals and
attorneys without the requisite experience.

Millenial attorneys like Brooke Moore are embracing the
limited scope concept. After serving on the Arkansas Access to
Justice Task Force on Self-Represented Litigants, Brooke founded
MyVirtual.Lawyer in Arkansas.12 There is no “brick and mortar”
office. Instead, self-represented litigants interface with attorneys
and support staff via the website client portal, e-mail, telephone,
and video.

The bulk of the firm’s work relates to family law. However,
self-represented litigants can also purchase guidance on drafting
wills, trusts, and basic business contracts. Prices are listed on
the website (e.g., a divorce case with property but no children
is listed at $1,000 and $1,500 if there are children).13 Help
with basic contracts like operating agreements also can be pur-
chased “a la carte.” Potential clients may also purchase a monthly
subscription.

At an Access to Justice Conference in Atlanta in April 2018,
Moore explained that a fully virtual, limited scope law firm model is working so well that she is now expanding into other states, with attorneys currently offering services in Arkansas, Georgia, and California (San Diego County, Orange County, and Los Angeles County).

**Real-World Examples**

In practice, consumers like “Olivia”14 appreciated the two limited-scope “coaching” sessions she had with a family law specialist. As a professional woman who had been through a divorce before, and whose divorce was mostly amicable, Olivia was not interested in spending thousands of dollars to have a lawyer represent her in court. What she wanted, and what she received, was a calm and knowledgeable female lawyer to walk her through the process, answer some specific questions, and review her paperwork. The divorce remained amicable, expenses were kept low, and the lawyer was paid for her time.

Family law is not the only context in which limited scope representation is useful. For example, a young couple whose landlord refused to return their security deposit when they moved paid a lawyer $250 to explain the small claims process, court decorum, and help organize their $250 to explain the small claims process, service the client would receive under a full-service representation. Conversely, the clients must have sufficient self-confidence and ability to represent themselves in the other parts of the legal matter. A client may not want the attorney involved in every aspect of the matter; the client may want the ability to control at least part of the outcome.

**Ethical and Legal Rules**

It is crucial for lawyers to understand that limited scope representations do not limit an attorney’s professional liability—the same general ethical and legal rules apply as if it were a full scope representation. California law is quite clear: an attorney has a duty of care to advise a client of available remedies beyond the scope of his or her representation.17 As a result, while a limited scope lawyer may not have a duty to actually perform a specific legal act, the lawyer may very well have an obligation to at least advise the client of legal remedies that are outside of the limited scope’s boundaries.

The legal system we have today is far from the ideal we all share of fair and effective justice. Limited scope is a “win-win” for all: clients get needed legal assistance while attorneys get more clients, and society moves closer to the ideal we all share of equal justice for all.
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AMERICANS value their personal freedom, and most Americans are skeptical when government attempts to legislate in the realm of personal freedom. When the government passed a law to require cyclists to wear a helmet, for instance, some Americans objected to the government’s authority to pass such a law. This tension between personal freedom and governmental authority plays out at the beginning of every school year when parents are told their children must be immunized before they can enroll in school. There are few decisions more personal than a parent’s decisions relating to his or her children.

Until recently, California parents could exempt their school-age children from mandatory immunizations for philosophical reasons or based on their personal belief that vaccinations may be harmful to their children. However, because of the increasing number of parents refusing to immunize their school-age children, the legislature passed SB 277 in 2016 to eliminate the personal belief exemption (PBE) for mandatory childhood vaccination. In response to this legislation, a very vocal and well-organized group of parents opposed to mandatory vaccination filed Whitlow v. California Department of Education,1 an action seeking to enjoin the enforcement of SB 277 on the grounds that eliminating the PBE violates the parents’ rights to equal protection and due process, as well as various other claims.

Background

According to the Centers for Disease Control and Prevention (CDC), vaccination is one of the “Ten Great Public Health Achievements in the 20th Century” due to its sig-

By Dennis F. Hernandez

In Whitlow v. California Department of Education, parents opposed the enforcement of SB 277 as a violation of their children’s rights to due process, equal protection, and education.

Dennis F. Hernandez is of counsel to the Los Angeles firm of Alvarado Smith. He also serves as a member of the Editorial Board of Los Angeles Lawyer magazine.

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significant impact on morbidity and mortality in the United States. Vaccination is one of the means of protecting the public's health through disease prevention and one of the goals of public health is community immunity. Community or "herd" immunity occurs when a significant proportion of the population is vaccinated, which provides greater protection for unprotected individuals. The larger the number of people who are vaccinated in a population, the lower the likelihood that a susceptible (unvaccinated) person will come into contact with the infection. Disease is thereby less likely to spread between individuals if large numbers of people are already immune.

All 50 states require children to receive certain vaccinations before attending public school, and some states extend these requirements to day care and private schools. Generally, there are three types of exemptions to the requirement that children be vaccinated before entering school: medical, religious, and philosophical or personal belief. The medical exemption, which is recognized in all 50 states, requires a written statement by a licensed physician to the effect that the condition of the child or the medical circumstances of the child are such that immunization is not considered safe.

Religious exemptions allow parents to exempt their children from vaccination if it contradicts their sincere religious beliefs. In order to qualify for these exemptions, families have to demonstrate that vaccinations violate the teachings of a recognized religion to which they belong. In some cases, state health boards ask parents to get notes from a clergyman. In California, there was not a separately recognized exemption based on religious beliefs; the religious exemption was included in the personal belief exemption. Most states grant exemptions for persons who have bona fide religious beliefs against immunization.

The legal basis for mandatory vaccination is well established. For more than 100 years, the U.S. Supreme Court has upheld the right of the states to enforce laws requiring citizens to be vaccinated. An outbreak of small pox and the state's mandatory vaccination response caused the Supreme Court to consider the competing interests of the individual's liberty interest and the public's need for safety. In Jacobson v. Commonwealth of Massachusetts, the Supreme Court considered a criminal complaint alleging Mr. Jacobson's failure to comply with the Board of Health's regulation that required citizens to be vaccinated against smallpox. The Court rejected the arguments that the regulation constituted an unconstitutional invasion of his liberty and that compulsory vaccination is unreasonable, arbitrary, oppressive, and hostile to the inherent right of every free man to care for his own body and health in such a way as to him seems best. The Court reasoned that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." An orderly society and the common good require "manifold restraints to which every person is necessarily subject"; otherwise "disorder and anarchy" would prevail without "safety to its members." The Court stated unequivocally that "[R]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." The Court concluded that even liberty is regulated by law:

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.

The Court's opinion was based in large measure on the principle of self-defense that the community had the right to protect itself against an epidemic of disease that threatens the safety of its members. Because "every well-ordered society" has "the duty of conserving the safety of its members," an individual's liberty interest "may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Therefore, an individual's Fourteenth Amendment liberty interest does not preclude the state from compelling individuals to "submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger.

California's Immunization Law

California has had some form of mandatory vaccination for school age children since 1889. Currently, state law mandates immunization of school-age children against 10 specific diseases. Each of the 10 diseases was added to the California code after careful consideration of the public health risks, costs to the state and health system, communicability, and rates of transmission.

Prior to 2014, obtaining a PBE was rather simple. All that was required was signing a form stating a personal objection to vaccination based on a parent's personal beliefs. In 2014, however, the legislature required parents to obtain the signature of a health care provider attesting to the fact that they were given information about the risks of vaccine-preventable diseases before making the decision not to vaccinate their child. In his signing statement, Governor Jerry Brown recognized a religious exemption when he directed the Department of Public Health "to oversee this policy so parents are not overly burdened in its implementation...[and] to allow for a separate religious exemption on the form. In this way, people whose religious beliefs preclude vaccinations will not be required to seek a health care practitioner's signature." After the passage of AB 2109, legislators remained concerned that the rate of PBEs had increased dramatically since 1994. In 1994, approximately 0.6 percent of kindergarten students claimed PBEs. By 2009, the percentage had increased to 2.3 percent and in the 2013-14 school year, the number had increased to 3.15 percent, with some school districts showing much higher rates. While the information requirement of AB 2109 helped to decrease the percentage of PBEs, the overall immunization rates went up only slightly, leading legislators to conclude that informed refusal was not sufficient to achieve effective immunization rates. The measles outbreak that triggered the event causing legislators to move to eliminate PBEs led to 131 confirmed measles cases with 19 percent of those infected requiring hospitalization.

SB 277

On June 30, 2015, Governor Brown signed SB 277 into law abolishing PBEs to school immunization requirements. The law provided that if a parent had on file or filed a PBE prior to January 1, 2016, his or her child could be enrolled in school or day care, unless that child was at a "checkpoint," i.e., was a first-time enrollee in day care or kindergarten or was enrolling in the seventh grade. Those first-time enrollees and students entering seventh grade were no longer...
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1. Community or “herd” immunity occurs when a significant proportion of the population is vaccinated.
   True. False.

2. All 50 states require children to receive certain vaccinations before attending public school.
   True. False.

3. Generally speaking, there are three types of exemptions to the requirement that children be vaccinated before entering school: medical, religious, and philosophical or personal belief.
   True. False.

4. Not all states grant exemptions from mandatory vaccination of children for medical reasons.
   True. False.

5. Most states grant exemptions for persons who have bona fide religious beliefs against immunization.
   True. False.

6. All states grant exemptions for persons who have personal or philosophical beliefs against immunization.
   True. False.

7. An individual’s Fourteenth Amendment liberty interest always precludes the state from compelling individuals to submit to reasonable regulations for the purpose of protecting the public.
   True. False.

8. California’s immunization law is codified in Health and Safety Code Section 120325 et seq.
   True. False.

   True. False.

10. Before SB 277, parents could exempt their child from immunization based on their personal belief.
    True. False.

11. The personal belief exemption (PBE) to mandatory childhood vaccination was eliminated under SB 277.
    True. False.

12. The religious exemption to mandatory childhood vaccination was eliminated by SB 277.
    True. False.

13. Under SB 277, children are able to attend school if they either receive the immunizations required by law or obtain a medical exemption from the requirement from an authorized health care provider.
    True. False.

14. Authorized health care providers include school nurses and certain naturopaths, in addition to medical and osteopathic doctors.
    True. False.

15. The regulations enacted under SB 277 do not apply to private schools or day care centers.
    True. False.

16. Kindergarteners are allowed to conditionally enroll in school if they have not completed the required vaccinations under certain conditions.
    True. False.

17. After SB 277, parents with personal or philosophical objections to vaccinations may home school their children on their own or in collaboration with a few other families, or participate in certain independent study programs offered by public schools.
    True. False.

18. The courts have found that SB 277 violates due process and equal protection under the U.S. Constitution.
    True. False.

19. Education is a fundamental interest under the California Constitution.
    True. False.

20. After the passage of SB 277, the number of children claiming PBEs declined, but the rate of children claiming medical exemption increased dramatically.
    True. False.
allowed admission to the state’s public and private schools and day-care centers unless they complied with the vaccination requirements.22

Under SB 277, children are able to attend school or daycare—public or private—if they either receive the immunizations required by law or obtain a medical exemption from the requirement from a licensed physician.23 The medical exemption requires a written statement by a licensed physician to the effect that the condition of the child or the medical circumstances of the child are such that immunization is not considered safe.24 Children may also be conditionally accepted into a school or day-care program if they are in the process of completing a series of vaccinations. In other words, if parents wish to leave their children unvaccinated, absent an acknowledged medical reason to do so, they cannot send them to school or daycare. After enactment of SB 277, the options for parents with personal or philosophical objections to vaccinations were to homeschool their children on their own or in collaboration with a few other families or to participate in certain independent study programs offered by public schools.25 The law also provided an option for students who qualify for an individualized education program, or IEP.26

The Challenge

In July 2016, a group of parents and organizations filed Whitleow v. California Department of Education,27 seeking to block the implementation of SB 277. The lawsuit claimed, among other things, that the law would deprive their children and families of due process and equal protection, as well as violate their rights of access to a public education under Serrano v. Priest.28

Due Process. In their complaint, the plaintiffs in Whitleow alleged that SB 277 impinges on fundamental liberties by denying children with PBEs the opportunity to attend school and stigmatizing children with PBEs as “vectors of disease” and by violating both parental rights regarding decision-making concerning their child’s health and education and children’s rights to bodily integrity. In response, the court cited Zuecht v. King, a 1922 decision in which the court rejected arguments that vaccination laws denied the plaintiffs due process and equal protection when the plaintiffs’ children were excluded from a Texas public school because they were not vaccinated.29 Based on the reasoning in Jacobson, the court stated it was “settled that it is within the police power of a State to provide for compulsory vaccination.”30 The court additionally found that imposing a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process. The court in Whitleow noted that this case is even one more step removed from a due process violation since it involves the removal of an exemption that is not required under the law. The removal of the PBE subjects the children to mandatory vaccination, but the state is well within its powers to condition school enrollment on vaccination.31

Equal Protection. The plaintiffs claimed that SB 277 was a denial of equal protection under the law because it treats children with PBEs differently from other children in denying them an education. The court noted, however, that the Equal Protection Clause of the U.S. Constitution does not forbid classifications. “It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.” The court found that children with PBEs are not similarly situated to children without PBEs.32

The plaintiffs also argued that children with PBEs were treated differently from children who were not yet vaccinated but at a “checkpoint.” The “checkpoints” provision in the law provides a grace period for children with PBEs to remain in their grade span while their parents comply with the new law. Rather than drawing legislation that would have immediately impacted all children with PBEs (approximately 200,000, according to the plaintiffs), the legislation has a more limited effect by initially focusing only on those children with PBEs who are advancing to the next grade level (approximately 33,000, according to the plaintiffs). The “checkpoints” provision therefore provides parents with an orderly opportunity to comply with the law and softens the impact of SB 277 through graduated application. The court therefore concluded that the law is rational.33

The court also determined these classifications did not burden any fundamental right and are therefore subject to rational basis, not strict scrutiny, review. Under this test, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification. First, the court found a rational basis for treating children with PBEs differently from other children: children with PBEs are not completely vaccinated, if at all, while the latter are fully vaccinated. Allowing the latter to attend school and excluding the former is rationally related to the state’s interest in protecting public health and safety.34

Serrano Claim. The plaintiffs in Whitleow also claimed that SB 277 violates their rights to education under the California constitution. In Serrano v. Priest, the California Supreme Court found in a series of cases that the state’s financing of California schools denied equal protection to some students on the basis of income distribution.35 The court held in this case that education is a fundamental interest.36

The state in Whitleow stipulated that education is a fundamental interest and that the heightened “compelling interest” test is the applicable standard.37 Applying this standard, the court cited a long line of cases that held society has a compelling interest in fighting the spread of contagious diseases through mandatory vaccination of school-aged children.38 The court observed that this was the legislature’s intent in enacting SB 277.39 The plaintiffs attempted to distinguish these cases on the grounds that the vaccine mandates in some of those cases were enacted during times of outbreaks. The court responded that the state’s interest in protecting the public health and safety of children does not depend on or need to correlate with the existence of a public health emergency.40

The safety interest exists regardless of the circumstances of the day and is equally compelling whether it is being used to prevent outbreaks or eradicate diseases. Finally, the plaintiffs argued that SB 277 was not narrowly tailored because the previous law, which allowed for PBEs, served the same purpose as SB 277 and was a less restrictive means of achieving that purpose.41 The court stated that comparing new law to old has nothing to do with heightened scrutiny analysis and that the correct analysis is whether removal of the PBE by SB 277 is narrowly tailored to address the identified interest, that is, “a means for the eventual achievement of total immunization” of appropriate school-aged children.42

The court stated: “The objective of total immunization is not served by a law that allows for PBEs, whether the PBE rate is 2% or 25%. Conditioning school enrollment on vaccination has long been accepted by the courts as a permissible way for states to inoculate large numbers of young people and prevent the spread of contagious diseases.” Moreover, states can impose those vaccination requirements without providing religious or conscientious exemptions. While removing the PBE is an aggressive step, so, too, is the goal of providing a means for the eventual achievement of total immunization. An aggressive goal requires aggressive measures, and the State of California has opted for both here.43

The court concluded that the right of education—fundamental as it may be—is
no more sacred than any of the other fundamental rights that have readily given way to a state’s interest in protecting the health and safety of its citizens, particularly school children. Because a personal belief exemption is not required in the first instance, the state can remove it—and impinge on education rights—in light of the compelling interest here. In this context, removal of the PBE is necessary or narrowly drawn to serve the compelling objective of SB 277.44

Religion Exemption Claim. The plaintiffs additionally argued that SB 277 violates their free exercise of religion under the First Amendment by failing to provide a religious exemption to the vaccine mandate and by forcing parents to choose between their faith and their children’s education. They also contended that their religious liberty was infringed by the state by allowing for “secular” exemptions, such as medical reasons, an IEP or home schooling, but not for religious reasons.45

The court first held that the strict scrutiny standard was not applicable in this case because SB 277 was, as the plaintiffs conceded, a neutral law of general application and, as such, was subject to rational basis review, “even when ‘the law has the incidental effect of burdening a particular religious practice.’”46 The court thereafter found that the plaintiffs were unlikely to succeed on the merits of their free exercise claims, citing the authorities to the effect that the right to practice religion freely does not include the liberty to expose the community or the child to communicable diseases.

Epilogue
The plaintiffs’ efforts to prevent the enforcement of SB 277 in Whitlow were summarily rejected by the court, and, after the court denied their application for injunction, the plaintiffs in Whitlow quickly dismissed their complaint. That is not to say, however, that the opposition to mandatory vaccination has disappeared. Some parents have sought other means to avoid vaccination of their school-age children. After the passage of SB 277, the number of children claiming PBEs declined, but the rate of children claiming medical exemption increased dramatically. A study published in the Journal of American Medical Association found that the percentage of kindergartners with medical exemptions was mostly stable between .15 percent and .17 percent between 2005 and 2015; however, between 2015 and 2016, the rate jumped from .17 percent to .51 percent.47 The authors noted:

The increase in the number of [med-
ichal exceptions] granted in 2016 further weakens the immediate effect of S.B. 277 and may limit its long-term benefits if sustained. Moreover, because the largest increases in medical exemptions percentage occurred in regions with high past [personal belief exemption] use, portions of California remain susceptible to vaccine-preventable disease outbreaks in the near future.48

As a result, additional measures may be required to ensure optimum immunization in the school-age population. One option is to increase scrutiny of and enforcement against doctors who help parents circumvent the vaccination requirements. Another is to further amend the law to clarify what constitutes a valid medical reason for exemption from vaccination.49

Other approaches are more extreme. For instance, a school district could conceivably be held liable for negligently allowing an infected child to attend school. Alternatively, there may be potential liability of a parent who fails to vaccinate his or her child. Physicians and law professors have written extensively about the potential legal ramification of not vaccinating a child, including civil or criminal liability of parents who refuse to vaccinate their children to the detriment of the health of other school children or the community.50 At present, it is not clear what steps are necessary. What is clear is that children have a right to attend school in a safe environment and parents have a responsibility to ensure that their children do not pose a risk to the safety of others.

5 HEALTH AND SAFETY CODE §120370.
6 Id. at 2 (cataloguing 9 attributes in exemptions within various states).
8 Id. at 26.
9 Id. at 29-30.
10 Id. at 26-27 (quoting Crowley v. Christensen 137 U.S. 86, 89 (1890)).
11 Jacobson, 197 U.S. at 28.
12 Id. at 29-30.
13 In 1889, students who were not vaccinated against smallpox were not allowed to attend school. S.B. 92 (Breciland), Ch. 24; see S.B. 277 Senate Third Reading Bill Summary, http://www.leginfo.ca.gov/pub/15-16/bill/sen/sh_0251-0300/sh_277_cfa_20150407_101248_sen_comm.html [hereinafter S.B. 277 Senate Third Reading].
14 HEALTH & Safety Code §120325 requires immunization of appropriate age groups against diphtheria, hepatitis B, haemophilus influenzae type b, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, tetanus and varicella (chickenpox).
18 S.B. 277 Senate Third Reading, supra note 14.
20 HEALTH AND SAFETY CODE §120355(g).
21 HEALTH AND SAFETY CODE §120355(g)(3).
22 HEALTH AND SAFETY CODE §120370. S.B. 277 added a requirement that the doctor consider medical history, though it’s unclear what effect that will have, if any. The provision seems to give doctors broad discretion to grant medical exemptions, and there is currently no real path to oversee that discretion. See Rubinstein Reiss, supra note 18.
23 HEALTH AND SAFETY CODE §120370.
24 HEALTH AND SAFETY CODE §120335(f).
25 HEALTH AND SAFETY CODE §20335(b), (f).
27 Id.; Serrano v. Priest, 18 Cal. 3d 728 (1976).
29 Id.
30 Whitlow, 203 F. Supp. 3d at 1089.
31 Id. at 1088 (citing Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)) (“Evidence of different treatment of unlike groups does not support an equal protection claim.”); Wright v. Incline Village Gen. Improvement Dist., 665 F.3d 1128, 1140 (9th Cir. 2011).
32 Whitlow, 203 F. Supp. 3d at 1088.
33 Id.
34 Serrano, 18 Cal. 3d at 766.
35 Id.; see Butt v. State of California, 4 Cal. 4th 668 (1994).
36 The court assumed, without necessarily agreeing that the heightened standard was the correct standard. Looking at the issue more closely, Professor Rubinstein Reiss concluded that the heightened standard was not the appropriate standard, arguing that the class of children intentionally unvaccinated does not constitute a suspect classification, since it is a choice not to vaccinate, as opposed to an income status or ethnic group whose status is immutable. Rubinstein Reiss, supra note 18.
37 Among the cases cited by the court are Abeel v. Clark, 84 Cal. 230 (1906) (“The legislature has power to enact such laws as it may deem necessary, not repugnant to the constitution to secure and maintain the health and prosperity of the state, by subjecting both person and property to such reasonable restraints and burdens as will effectuate such objects.”); Zucht v. King, 260 U.S. 174, 176 (1922) (stating it is “settled that it is within the police power of a state to provide for compulsory vaccination.”); Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905) (“The police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”); Workman v. Mingo County Bd. of Ed., 419 Fed. Appx. 348 (4th Cir. 2011) (holding that there is a “compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs.”); Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979) (holding that “protection of the great body of school children attending the public schools” against diseases through mandatory vaccination serves a “compelling public purpose”); Cude v. State, 237 Ark. 927, 932 (1964) (holding that mandatory vaccination of school children “does not violate the constitutional rights of anyone, on religious grounds or otherwise.”); Board of Educ. v. Maas, 56 N.J. Super. 245, 164 (1959) (similar); Viemeister v. White, 84 N.Y.S. 712 (1903).
38 See HEALTH AND SAFETY CODE §20325 (“In enacting this chapter….it is the intent of the Legislature to provide: (a) A means for the eventual achievement of total immunization of appropriate groups against the following childhood diseases…. “).
39 See Maricopa County Health Dep’t v. Harmon, 136 Ariz. 161, 166 (1987) (rejecting argument that “there is no compelling state interest in taking limited and temporary steps to combat a reasonably perceived risk of the spread of measles absent a serologically confirmed case.”); Soddock v. Bd. of Educ., 137 N.J.L. 65 (1948) (rejecting argument that compulsory vaccination law could not stand “since at the time of its adoption, there was no epidemic or threatened epidemic of smallpox… and that, therefore the resolution performed no reasonable exercise of the police power.”); Mosier v. Varren County Bd. of Health, 308 Ky. 829, 831 (1948) (“the health authorities are not required to wait until an epidemic exists before acting, but it is their duty to adopt timely measures to prevent one.”).
40 Id. at 1091.
41 Id. (citing HEALTH AND SAFETY CODE §120325(a)).
42 Id.
43 Id.
44 Id. at 1085-86.
45 Id. at 1086.
46 Paul L. Delamater et al., Change in Medical Exemptions From Immunization in California After Elimination of Personal Belief Exemptions, 318 J. AM. MED. ASSN 863 (2017).
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Absent statute of limitations defenses, the United States is a favorable venue for Nazi-looted art claims, even when the art is located abroad.

MORE THAN 70 YEARS AFTER THE FALL OF GERMANY’S THIRD REICH,

many victims of Nazi-art looting and their families still have neither recovered their stolen art nor been compensated for it. This is attributable to the extent of Nazi-art looting, historical circumstances, and inadequate efforts to provide justice to these families and their heirs. However, recent bipartisan legislation, the Holocaust Expropriation Art Recovery Act (HEAR Act), aims to remedy the injustice by preempting and extending state statutes of limitations (SOLs). Congress passed the act after finding that lawsuits in the United States to recover art looted and confiscated by the Nazis during World War II have faced “significant procedural obstacles” due to SOLs. The act establishes a six-year statute triggered upon actual discovery of stolen art, preempting a patchwork of state SOLs, some of which only required constructive notice.

In what has been described as the “greatest displacement of art in human history,” the Nazis and their collaborators pillaged approximately 20 percent of European art between 1933 and 1945, worth $2.5 billion in 1945 ($34 billion today). Occupying much of Europe, they plundered museums, galleries, castles, and private collections.

The looting took various forms, including outright plunder, coerced transfers, and other sham sales, some of which appeared “legal in form.” Dehumanizing Jews and other “undesirables” opened the door to stealing without restraint. For example, legislation during the Nazi era (such as the Nuremberg Laws enacted in Germany in 1935), sometimes called “Aryanization laws,” barred Jews from owning property with more than nominal value. Moreover, the need for cash by persecuted people fleeing Germany and Nazi-occupied countries led to duress sales. Property belonging to Jews sent to death camps was free for the taking, and the Nazis sometimes even forced Jews to sign over their rights to artworks and other property while in, or en route to, death camps. Indeed, this looting spree was part of the “Final Solution”: “We must kill all the Jews because if we don’t…their grandchildren will ask for their property back,” SS Reich Leader Heinrich Himmler, Adolf Hitler’s henchman, explained.

The sheer numbers illustrate the scale of Nazi theft. From France alone, 26,000 railway wagons of paintings and sculptures were shipped from France to Germany, including 16,000 artworks stolen from Paris. Many of these works were simply expropriated by the Nazi leadership, e.g., 8,500 artworks amassed by Hitler and 5,000 paintings.
sculptures and tapestries by Nazi Reichsmarschall Hermann Goering (a collection worth approximately $2.7 billion today). Allied troops also discovered 2,000 looted artworks in a sealed salt mine in Altanusee, Austria. More recently, 1,406 artworks worth more than $1 billion were stumbled upon by German officials in the 1,076-square foot Munich flat of octogenarian Cornelius Gurlitt during an unpaid tax investigation in 2012. Worldwide, the Nazis looted approximately 650,000 works. Thus, soon after World War II ended in 1945, art markets around the world were saturated with stolen art. Some curators, art dealers, and collectors knew they were buying Nazi-tainted art while others lacked diligence in investigating the provenance of art they bought.

Recovery Efforts to Date

The proliferation of Nazi-looted art prompted The New York Times in 1943 to publish a front-page article titled “Europe’s Looted Art: Can it be Recovered?” In 1947, The New Yorker carried a three-part series by Janet Flanner called “Beautiful Spoils.” These and other press reports shined a spotlight on the issue, and in 1951 and 1954 the U.S. State Department issued warnings of widespread Nazi-looted art trafficking. Nevertheless, looted art ended up in the United States where buyers took advantage of fire sales and let only “the Germans have the advantage of the fire sales and let only “the Germans have the paintings that Nazi big-wigs got.”

During World War II, the State Department’s Monuments, Fine Arts, and Archives Section employed Army officers known as the “Monuments Men” to return Nazi-looted art to the countries of the art’s origin so these countries could return the art to families from whom it had been stolen. Yet, many of these countries never did. Furthermore, by 1951, with attention turned to the Cold War, the section closed shop. Ardelia Hall, the State Department’s cultural affairs officer at the time, expressed regret for taking advantage of the fire sales and let only “the Germans have the paintings that Nazi big-wigs got.”

By the 1990s, efforts to restore looted art once again gathered momentum, and some European countries, pushed to make amends for the past, opened archives improving access to World War II-era records, which enabled journalists, scholars, and interested families to reexamine the past. The information uncovered led to articles and books, such as Lynn H. Nicholas’s The Rape of Europa, renewing interest in Nazi-era art restitution. In addition, new electronic registries and databases helped families, art historians, and private investigators track down missing art. A growing movement for justice also led to the Washington Principles on Nazi-Confiscated Art (1998) and the Terezin Declaration on Holocaust Era Assets of 2007—international accords encouraging the resolution of claims and the return of Nazi-confiscated art to its rightful owners.

Despite these developments, recovery efforts were hindered by the loss and destruction of documents, false and incomplete provenance records, serial sales, black-market trafficking, indifference, and greed. As U.S. Ambassador Ronald Lauder, chairman of the Commission for Art Recovery, noted: What makes the Nazis’ crime “even more despicable” is that it “was continued by governments, museums, and many knowing collectors in the decades following the war. This was the dirty secret of the postwar art world, and people who should have known better were part of it.”

Against this backdrop and at a time of rising nationalism—exemplified by neo-Nazi rallies in Europe and the United States, the growing influence of Nazi sympathizers in Austria’s parliament, and new laws in Poland severely restricting restitution prospects—efforts to locate and restitute Nazi-looted art continue. In particular, the HEAR Act gives victim families and their heirs a better opportunity to open the historical record, reclaim their familial and cultural legacy, and achieve a measure of justice. It preempts existing state and federal SOLs for “a civil claim…to recover any artwork or other property that was lost…because of Nazi persecution” in any case pending at the time of the HEAR Act’s enactment and for 20 years going forward. (California had a narrower six-year statute, which recently expired.)

“Portrait of Wally”

Although Nazi-looted art began flooding worldwide art markets decades ago, the victims did not view American courts as vehicles for redress until late in the twentieth century when claimants and their lawyers were able to take advantage of renewed interest in restoration, technical advances, and serendipitous events to bring a number of groundbreaking lawsuits. Such a seminal and successful lawsuit was sparked by a New York Times exposé and the seizure of Austrian painter Egon Schiele’s “Portrait of Wally” from a New York museum, which captured international attention and led to the Bondi family’s 10-year quest to recover that painting.

Prior to 1925, Lea Bondi (Jaray), a Viennese art gallery owner, bought Schiele’s oil portrait of his one-time lover, “Wally” Neuzil, to hang in her apartment. In March 1938, Germany annexed Austria with the overwhelming support of Austrians. Because of Aryanization laws preventing Jews from owning businesses, Bondi had to sell her gallery (though not “Portrait of Wally,” as it was part of her private collection) to Frederick Welz, an art dealer and Nazi, for $5,441 (today $91,245). Shortly afterward, she and her husband moved to London. On the eve of departure, Welz demanded “Portrait of Wally,” which Bondi reluctantly parted with after her husband reminded her that Welz could prevent their escape. No idle fear since they knew that Welz had coerced Dr. Heinrich Reiger, a Jewish dentist, to give him two Schiele paintings before the Nazis sent Reiger to Theresienstadt.
imposed as a precondition to litigate there. After World War II, the United States imprisoned Welz for war crimes and sent “Portrait of Wally” to Austria to be returned to Bondi. Instead, Austria kept the painting and later traded it to Dr. Rudolph Leopold for another Schiele painting. Leopold sold “Portrait of Wally” to the Leopold Museum in Vienna, which he had founded. Also, Leopold had earlier pretended that he was going to help Bondi recover the painting but instead surreptitiously acquired it.

In 1997, while the painting was on loan to the Museum of Modern Art (MoMA) in New York, Judith H. Dobrzynski wrote an article for the New York Times exposing its history along with Leopold’s dark past as a collector of Nazi-looted art. Her article prompted the Manhattan district attorney to subpoena “Portrait of Wally” as stolen property one day before the MoMA was to return the painting to the Leopold Museum.

Although the New York Court of Appeals, the state’s highest court, quashed that subpoena, the U.S. Attorney’s Office for the Southern District of New York seized “Portrait of Wally” and started a forfeiture action. Finally, after years of litigation, the district court held that Welz had stolen the painting and that the Leopold Museum knowingly imported stolen art into the United States. This finding made the painting subject to forfeiture and shifted the burden onto the Leopold Museum to establish a legitimate ownership interest. In 2010, on the eve of trial, the museum settled the dispute by buying “Portrait of Wally” for $19 million, which was paid to the Bondis, and agreed to post signage when the painting was exhibited telling the story of its theft.

**Woman in Gold**

Recounted in the film titled *Woman in Gold*, *Altmann v. Austria*, was a case in which Maria Altmann sought to recover from Austria two Gustav Klimt portraits of her aunt Adele Bloch-Bauer and three Klimt landscape paintings purchased by her uncle Ferdinand Bloch-Bauer, a Jewish Viennese sugar magnate. The most famous of these paintings, “Portrait of Adele Bloch-Bauer I,” portrays an elegant Adele wearing a gold dress and standing in front of a gold background. Altmann, Ferdinand’s niece and heir, saw the Klimt paintings as a girl and sued to recover them when she was 82.

Prior to Germany’s annexation of Austria, Ferdinand Bloch-Bauer, an opponent of the Nazis, fled Austria and settled in Zurich, Switzerland. Hitler, Goering, and Reinhard Heyrich—the architect of the Final Solution—divided up Ferdinand’s paintings and real properties—including his refinery—which at the time processed 20 percent of Austria’s sugar.

Bloch-Bauer died in 1945, the year that Altmann became an American citizen. Altmann was not barred from suing Austria in the United States. Despite winning this battle—given her age and years of potential litigation ahead of her—Altmann took a calculated risk and submitted her claims to arbitration in Austria, where she recovered the Klimt paintings. She then sold them collectively for $325 million, with some of the proceeds covering legal services. The remainder was devised upon her death five years later at 94 to her heirs and various charities.

**HEAR Act and Ongoing Litigation**

Restrictive SOLs deny claimants the opportunity to litigate their cases on the merits, deter potential claimants, and reduce the value of claims. Side litigation over SOLs also has been costly to claimants. Absent steep SOLs hurdles, courts in the United States are a favorable jurisdiction for Holocaust-era looting cases. The availability of contingent fee arrangements, a lack of fee-shifting, the absence of litigation bond requirements, a common-law tradition, the right to appeal, and the rule that a thief cannot obtain good title via adverse possession make the United States a favorable jurisdiction for such cases.

In Europe, restitution claims typically are decided by governmental restitution commissions. The HEAR Act aims to ensure “claims to Nazi-confiscated art are fairly adjudicated”—a goal internationally espoused by the Washington Principles on Nazi-Confiscated Art and the Terezin Declaration on Holocaust Era Assets. “The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations…defenses especially burdensome,” Congress stated in explaining the need for the legislation. Congressional reports add: “Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.”

Court decisions have reduced the barrier posed by the FSIA, and similarly the HEAR Act seeks to limit SOLs barriers. Consequently, the HEAR Act already has been proven useful in pending cases. One such case is *Cassirer v. Thyssen-Bornemisza Collection* (TBC), in which for 18 years—including 12 years of litigation—two generations of the Cassirer family have assiduously sought to recover the Camille Pissarro painting of a rain-swept Paris street, “Rue Saint-Honoré dans l’apres-midi. Effet de Pluie” ("Saint-Honoré Street in the Afternoon. Effect of Rain") that Lilly and Fritz Cassirer were forced to sell to a Berlin dealer in 1939 because of German Aryanization laws. Following three Ninth Circuit appeals reversing dismissals, their case heads toward a bench trial in Los Angeles (as the FSIA bars jury trials for extraterritorial cases).
Purchased in 1898 by Julius Cassirer, this Impressionist painting remained in the Cassirer family for 40 years before passing to Lilly Cassirer (Neubauer), who fled Germany. In 1939, she and her husband, Fritz, exchanged their Pissarro painting for safe passage to England. The Nazis appraised the painting to be worth $360, which was deposited into a blocked account before the painting was sold at an auction.

In 1976, Baron Hans Heinrich Thyssen-Bornemisza purchased the painting from the Stephen Hahn Gallery in New York for $275,000 ($1.2 million today). The painting has since been appraised at approximately $30 million. In 1993, the Kingdom of Spain purchased the Thyssen-Bornemisza collection (TBC) for $350 million and converted its Villahermosa Palace in Madrid into the Thyssen-Bornemisza Museum.

In December 1999, Claude Cassirer, Lilly’s grandson, learned that the Pissarro painting was displayed there. After unsuccessfully petitioning for its return, he sued in Los Angeles to recover the painting. Subsequent to Claude Cassirer’s death in 2010, his son David and daughter Ava took control of the case.

The Ninth Circuit has reversed jurisdictional, SOL, and summary judgment decisions favoring the TBC. In the first appeal, expanding on Altmann, the Ninth Circuit held the FSIA’s jurisdictional exemption applied to the TBC even though the defendants had not looted the painting, but instead were alleged beneficiaries of the looting. In the second appeal, the Ninth Circuit upheld the constitutionality of a revised six-year California SOL for Nazi-looted art (subsequently expired) as a proper exercise of state power that was not preempted by the foreign policy doctrine, which gives the executive branch exclusive authority to conduct foreign policy. In the third appeal, the Ninth Circuit partly held the HEAR Act applies both retroactively and prospectively. (While retroactive application helps claimants in existing cases, prospective application is important because many state SOLs are shorter than six years and are triggered based on constructive, not actual, notice.)

The Ninth Circuit also held that the HEAR Act did not govern substantive legal issues. Thus, California law under which thieves cannot pass good title did not apply because Spanish ownership rules applied instead. Nevertheless, the Ninth Circuit overturned the district court’s holding that Spain acquired the painting by acquisitive prescription (continuous possession) because the district court ignored a Spanish law provision preventing an encubridor (accessory) who receives stolen property from acquiring valid title.

Whether the Thyssen-Bornemisza family were encubridores is a triable issue, with the Cassirer family contending that the defendants ignored red-flag warnings that the painting they acquired was looted. These warnings included: 1) the low purchase price indicative of “dubious provenance”; 2) the fact that the Stephen Hahn Gallery, which brokered the sale, sold other Nazi-looted art; and 3) the fact that the back of the painting had a torn label from the “Cassirer Gallery,” owned by renowned Berlin collectors related to the plaintiffs, and which noted trial lawyer David Boies, who represented the family in their recent appeal, calls the “smoking gun.”

In Philipp v. Federal Republic of Germany, the heirs of three Jewish art dealers sued in federal court in Washington, D.C., alleging that by forced sales instigated in 1935, Prussia (then part of Germany) acquired 42 ancient church artifacts for approximately 35 percent of their value. The dealers were forced to deposit some of these funds into a blocked account subject to “flight taxes” that Jews paid to escape from Germany. Afterwards, Goering gave the artifacts to Hitler as a “surprise present.” These jewel-encrusted, intricately wrought artifacts, known as the “Guelph Treasure,” are worth more than $250 million.

In 2017, based on Altmann, the D.C. district court held that it had jurisdiction to adjudicate Philipp, and that the HEAR Act applied to the action. Germany has appealed.

A recent case, Zuckerman v. The Metropolitan Museum of Art, was brought in late 2016 by the estate of Alice Lefferman—who, with her husband Paul, fled Nazi persecution and eventually moved to Brazil—against the Metropolitan Museum of Art for $100 million based on the distressed sale of Pablo Picasso’s oil painting, “The Actor.” The estate alleged the museum accepted it as a donation in 1952 without investigating its provenance. The defendants asserted a SOL defense based on a three-year New York statute that the estate contends the HEAR Act mooted.

Dismissal of SOLs Cases

Despite the finding in Altmann, there are a number of subsequent art-looting cases brought in the United States that have been dismissed or sidetracked because of SOLs defenses. One such case, Orkin v. Taylor, was particularly high-profile since it involved a dispute between actress Elizabeth Taylor and Margarete Mauthner’s heirs, the Orkins, over ownership of Van Gogh’s “Vue de l’asile et de la Chapelle de Saint-Remy” (“View of the Asylum and Chapel of Saint-Remy”).

Mauthner, a Jewish art collector, left the painting behind when she fled Berlin in 1939 and moved to South Africa. It then passed through various hands before Taylor’s father—an art dealer—purchased it for her in 1963 at a London Sotheby’s auction. In 2003, Mauthner’s descendants demanded its return. Taylor immediately responded by bringing a declaratory action in Los Angeles to establish title in her name. The Orkins then asserted restitution counterclaims alleging: 1) they began investigating Mauthner’s collection in 1998 after passage of the Holocaust Victims Redress Act and later learned that Mauthner

Camille Pissarro: Rue Saint-Honoré in the Afternoon. Effect of Rain, 1897, oil on canvas, Museo Thyssen-Bornemisza.
owned “Vue de l’asile et de la Chapelle de Saint-Rémy” 127 and 2) in 2002, they discovered Taylor possessed the painting through an Internet rumor that she sought to sell it.128 The Ninth Circuit affirmed a district court ruling barring the Orkin’s counterclaims based on a three-year SOL accruing at the time of the 1963 Sotheby auction.129

In another dispute involving Oskar Kokoschka’s “Two Nudes (Lovers),” Museum of Fine Arts, Boston v. Seger-Thomschitz, the Museum of Fine Arts in Boston (MFA) successfully invoked a SOL defense to avoid merits-based adjudication.130 Oskar Reichel, a Jewish Viennese doctor who owned “Two Nudes,” lent it to Otto Kallir for display in Kallir’s Vienna gallery and possible sale.131 After annexing Austria, the Nazis forced Jews to file declarations listing their property as a prelude to confiscation. Reichel listed “Two Nudes” and other paintings Kallir held. The Nazis closed Reichel’s practice, stole his home and other property, deporting his eldest son to Lodz, Poland—where he was killed—and sent his wife to the Theresienstadt concentration camp. His wife survived, but Reichel died of natural causes in 1943.132

Kallir, a Jewish art dealer who arranged art deals for Hitler and was investigated by the FBI for being a Nazi agent,133 was more fortunate. He opened a New York gallery, and sold art to MoMA and the Guggenheim as well as to the National Gallery in Washington, D.C.134

Although the details are sketchy, Kallir supposedly sent the Reichel children $250 in 1941 or 1942 for five Kokoschka paintings including “Two Nudes,”135 a tiny fraction of the paintings’ value. Then, in 1943, Kallir sold “Two Nudes” to the Nierendorf Gallery in New York for $1,500 (now $20,300). The painting later changed hands before being donated to the MFA.136

In 2003, Claudia Seger-Thomschitz, heir to the last surviving Reichel son, Raimund, received four Nazi-looted Reichel paintings

### FSIA-Related Reclamation Cases

**Von Saher v. Norton Simon Museum of Art at Pasadena.** This case concerns two life-size Lucas Cranach paintings (the Cranachs).1 One, titled “Adam,” stands under the Tree of Knowledge holding the apple of temptation. The other Cranach depicts “Eve” also cradling an apple while listening to a serpent.2 The Nazis stole these paintings from Jacques Goudstikker, who bought them from the Soviet Union in 1931 at auction.3

Goudstikker owned a preeminent Amsterdam gallery specializing in European masters. In May 1940, fearing for their safety, Goudstikker, his wife, Desi, and their son, Edo, fled Holland to board a freightliner bound for South America.4 At sea, Goudstikker fell through an uncovered hatch in the ship’s deck, broke his neck, and died.5 However, he had kept a pocket-size notebook describing 1,113 artworks, later relied upon by his daughter-in-law Marei Von Saher to recover some family art.6

With the Goudstikkers gone, Hermann Goering and Alois Miedl, a Nazi collaborator, expropriated their property. In shams sales, Goering acquired 779 masterpieces, including the Cranachs along with Goudstikker-owned paintings by Rembrandt, Rubens, Van Dyck, Van Gogh, and others for $1.1 million (now $59 million), a fraction of their value.7 Miedl purchased 334 paintings and Goudstikker’s canal-side gallery, twelfth-century castle, Amsterdam home, and country estate for a total of $307,000 (now $5.3 million).8 Without authorization, Goudstikker employees negotiated these shams sales.9

While Goering and Miedl sold many Goudstikker paintings, after World War II the Allies recovered and returned 400 paintings to the Dutch government with the understanding that the artworks would be returned to the Goudstikkers. Characterizing the Goering and Miedl “sales” as valid, though, the Dutch government kept everything.10

In the 1950s, the Dutch government sold dozens of Goudstikker paintings,11 and in 1966 it sold the Cranachs for an undisclosed price to a Russian whose family had once owned them. He sold them in 1971 to the Norton Simon Foundation for $800,000 (now $4.8 million). Today, the paintings are estimated to be worth approximately $30 million.12

Von Saher and her two daughters (Goudstikker’s granddaughters)—all now Americans—spearhead family efforts to recover the Cranachs. Thus, in 2006, the Dutch government returned 200 artworks plundered by Goering to Von Saher after determining its earlier restitution policy was “legalistic, bureaucratic, cold and often even callous”—a decision that came too late to recover the Cranachs.13 In 2007, after unsuccessful settlement negotiations, Von Saher sued the Norton Simon Foundation to recover “Adam” and “Eve.”14

The case is now before the Ninth Circuit for the third time.15 Most recently, the district court granted summary judgment in Norton Simon’s favor upon deciding the Cranachs were lawfully acquired by Goering and became the property of the Dutch government after World War II, giving that government the right to sell them.16 Von Saher has appealed.

**deCsepel v. Republic of Hungary.** This case stems from the Herzog family’s decades-long efforts to recover more than two thousand paintings, including works by El Greco, Velazquez, Renoir, and Monet, looted by Hungary while allied with the Nazis. The Herzogs fled Hungary in 1944, and the government required them to leave their art behind. Hitler henchman Adolf Eichmann shipped his favorite pieces to Germany. Other artworks were left in Hungary, and some exported artworks were returned to Hungary after World War II, where they were placed in Hungarian museums and the Budapest University of Technology and Economics.17

Before suing in D.C., Herzog descendants unsuccessfully attempted to recover much of this art by petitioning Hungary and pursuing litigation there.18 In June 2017, the D.C. Court of Appeals held that:

- The Herzog heirs could sue the Hungarian entities holding family artworks, but not Hungary.
- The FSIA did not bar U.S. jurisdiction because the artwork was taken in violation of international law and is possessed by instrumentality agents or agents of a foreign state engaged in U.S. commerce.
- A treaty with the United States barred some, but not all, claims.
- The heirs could amend their complaint “in light of” the HEAR Act.19

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3 Id. at 276; Von Saher, 754 F. 3d at 276; Alan Riding, Goering, Rembrandt and the Little Black Book, N.Y. TIMES, Mar. 26, 2006 (hereinafter Riding).
4 Demarsin, supra note 2, at 276; Benjamin Genocchio, Seized, Reclaimed and Now on View, N.Y. TIMES, Apr. 27, 2008.
5 Von Saher, 754 F. 3d at 715. Demarsin, supra note 2, at 277; Riding, supra note 3.
6 Id.
7 Demarsin, supra note 2, at 277.
8 Von Saher, 754 F. 3d at 715.
9 Id. at 716-17.
10 Id. at 716.
12 Von Saher, 754 F. 3d at 718, 722-23.
13 Demarsin, supra note 2, at 280.
14 Von Saher, 754 F. 3d at 721-22 (holding conversion and replevin claims were not preempted).
17 Id.
18 Id. at 1100-10.
from the Museum of Vienna sold at “the same time” as “Two Nudes” and “under similar circumstances.” 137 The return of these paintings prompted Seger-Thomschitz to investigate the provenance of “Two Nudes” and demand its return. In response, the MFA sued in Boston to obtain quiet title. Seger-Thomschitz counterclaimed for conversion and replevin, and the MFA moved for summary judgment. The First Circuit affirmed a district court ruling that her counterclaims accrued when the Museum of Vienna contacted her and were time-barred pursuant to Massachusetts’ controlling three-year SOL. 138

In yet another circumstance, the heirs of Martha Nathan brought two cases, Toledo Museum of Art v. Ullin and Detroit Institute of Arts v. Ullin. In the Toledo case, they sought Paul Gaugin’s “Street Scene in Tahiti,” 139 and in the Detroit case, Vincent van Gogh’s “Les Becheurs.” 140 Nathan, the wife of a Jewish art collector who died in 1922, fled Nazi Germany in 1937. 141

In 1999, the American Association of Museums adopted guidelines for handling Nazi-era art. 142 Pursuant to these guidelines, museums listed on their websites paintings in their collections with Nazi-era provenances, leading to these lawsuits. 143 District courts dismissed both Ullin cases, based on similar three- and four-year SOLs, holding Nathan had constructive notice (imputed to her heirs) of any claims in the 1940s 144 during the chaos of World War II, when no court would have entertained either action.

Grosz’s estate, prior to filing suit on April 10, 2009,151 demanded the return of the caricatures, and the following events occurred: 152 1) the MoMA retained counsel to recommend disposition; 153 2) on July 20, 2005, the museum represented that even though its counsel had not made a recommendation, it believed it had superior title; 154 and 3) on April 12, 2006, the museum accepted counsel’s recommendation to keep the art. 155 Under New York law, a buyer of stolen property becomes a wrongdoer after refusing the owner’s demand to return the property. 156 Whether this case was barred by the applicable three-year SOL, therefore, turned on when the MoMA’s refusal occurred.

The district court held that the museum’s July 20, 2005, letter coupled with its retention of the caricatures constituted a refusal, meaning the statute expired July 20, 2008, barring the case filed April 10, 2009. 157 The district court rejected the Grosz’s estate’s arguments that the SOL should have been tolled during the parties’ extended settlement discussions and that it had not started to run until April 12, 2006, when the museum accepted counsel’s recommendation. 158 The Second Circuit affirmed. 159

As is evident from the cases that have been dismissed due to SOLs, the struggle to see justice done in the arena of Nazi-looted artwork is far from over. Nevertheless, the HEAR Act holds out hope that in the future victims may have recourse to reclaim family art that had been lost due to the extreme conditions of that era, including art located overseas. 160 As actress Helen Mirren, who portrayed Maria Altmann in the film, Woman in Gold, testified before the U.S. Senate for adoption of the HEAR Act: The Act “gives Jewish people and other victims of the Nazi terror the opportunity to reclaim their history, their culture, their memories and, most importantly, their families.” 161

2 Id.
3 Id.
5 Id.
7 See generally Lynn H. Nicholas, The Rape of Europe: The Fate of Europe’s Treasures in the Third Reich and the Second World War (1995) [hereinafter Nicholas].
11 See, e.g., Kreder II, supra note 11, at 126.
12 Bazyle, supra note 6, at 295.
13 Martin Gayford, Cracking the Case of Nazis’ Stolen Art, THE TELEGRAPH, Nov. 9, 2013 [hereinafter Gayford].
14 Kenneth Turan, War’s Forgotten Casualty: Art, L.A. TIMES, Sept. 28, 2007; Sarah Wildman, The Revelations of a Nazi Art Catalogue, NEW YORKER, Feb. 12, 2016 (requiring requisitioning of the Galerie nationale du Jeu de Paume to store their stolentrove) [hereinafter Wildman]; Gayford, supra note 14 (The Nazis also confiscated avant-garde artworks to display as “degenerate art” or sell); Kreder II, supra note 11, at 95.
15 Frederic Spotts, Hitler and the Power of Aesthetics, 216-17 (2002) (Hitler planned to open the Führermuseum, a mega-museum in his hometown of Linz, Austria.).
17 Wildman, supra note 15.
18 Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F. 3d 954, 962 (9th Cir. 2010). (Allies discovered looted caches in castles, bank vaults and mines).
21 Jennifer A. Kreder, Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court, 159 U. PA. L. REV., 253, 253 (2011) (many museums and collectors knowingly acquired Nazi-looted art); Kreder II, supra note 11, at 97 (2012) (since the 1930s, warnings of a contaminated market have been pervasive).
22 Id.
23 Francis Henry Taylor, Europe’s Looted Art: Can it be Recovered?, N.Y. TIMES, Sept. 19, 1943 (“Not since...Napoleon Bonaparte has there been the wholesale looting...going on today”).
26 Riding, supra note 21.
27 Kreder I, supra note 4 at 317-18.
works could be held in trust for their lawful owners:

1946, the Allies returned much of the Goudstikker

at Pasadena, 754 F. 3d 712, 716 (9th Cir. 2014) (“In

101, 110, 115, 117, 127.

663 F. 2d at 246.

623 F. 2d 1, 3 (2010).

115 Melissa Eddy, German Panel Says Medieval Treas-
ure Should Not be Returned to Heirs of Jewish Owners,


117 Id. at *11 n.11.

118 Graham Bowley, Met Picasso Belonged to Family

119 See Zuckerberg v. Metropolitan Museum of Art,
16-cv-07665, available at https://www.sdnblog.com/
files/2016/10/16-Civ.-7665-Complaint.pdf.


121 Id.

122 Id. at 737.

123 Id. at 738.

124 Holocaust Victims Redress Act, Pub. L. No. 105-

125 Id. at 739, 742.

126 Id.

127 Museum of Fine Arts, Boston v. Seger-Thomschitz,
623 F. 2d 1, 3 (2010).

128 Id. at 3.

129 Id.

130 Id. supra note 11; Kreder II, supra note 11 at

126.

131 Museum of Fine Arts, Boston, 623 F. 2d at 4.

132 Id. at 3-4.

133 Id.

134 Id. at 8-10.

135 Toledo Museum of Art v. Ullin, 447 F. Supp. 2d
802, 803 (N.D. Ohio 2006).

136 Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007

137 Toledo Museum of Art, 447 F. Supp. 2d at 804.

138 Raymond J. Dowd, Nazi Looted Art and Cocaine:
When Museum Directors Take It, Call the Cops, 14
RUTGERS J. L. & RELIGION, 529, 541(guidelines adopted
to stave off legislation).

139 Toledo Museum of Art, 447 F. Supp. 2d at 805;
Detroit Inst. of Arts, 2007 WL 1016996, at *2.

140 Toledo Museum of Art, 447 F. Supp. 2d at 803-
09; Detroit Inst. of Arts, 2007 WL 1016996, at *3.

141 Grosz v. Museum of Modern Art, 772 F. Supp. 2d
473, 476 (S.D. N.Y. 2010).

142 Id.

143 Id. at 481.

144 Id. at 476.

145 Id. at 477.

146 Id. at 477, 480.

147 Id. at 482.

148 Id.

149 Id.

150 Id. at 486-88.

151 Id. at 485.

152 Id. at 482.

153 Id. at 486, 490.

154 Id. at 483-90.

155 Grosz v. Memminger Modern Art, 403 F. App’x
375 (2d Cir. 2010).

156 Reif v. Nagy, Index No. 1617799/2015, decided
April 5, 2018, by the New York Supreme Court in
plaintiffs’ favor with summary judgment holding deny-
ing a laundry list of eighteen defenses, including two
timeliness defenses, further illustrates the potential
impact of the HEAR Act, offering hope to other families
victimized by Nazi looting. The decision literally
quotes from the HEAR Act and its legislative history.
It stands in contrast to earlier post-Altman cases,
where other families apparently similarly situated never
were able to litigate their cases on the merits.

157 Emmarie Heitteman, Senate Bill Would Help
Recover Art Stolen by Nazis, N.Y. TIMES, June 7,
2016.

158 Id.

159 Id.

160 Id.

161 Id.

162 Id.

163 Id.

164 Id.

165 Id.

166 Id.

167 Id.

168 Id.
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To Establish Justice for All: The Past and Future of Civil Legal Aid in the United States

By Earl Johnson Jr.
Praeger, November 2013
$194, 3 volumes

Andrew Carnegie and Theodore Roosevelt agreed to serve as honorary vice-presidents of the organization, with Roosevelt ultimately taking a seat on the board of directors. Later, Charles Evans Hughes, future chief justice of the United States, became chair of that board shortly after narrowly losing the presidency to Woodrow Wilson.

Among many other prominent names who pass through the pages of Johnson’s work, the reader will find an array of bipartisan supporters of legal aid for the poor. Weaving a thread throughout the book, Justice Johnson ably recounts the repeated efforts by politicians and others to stymie the growth and availability of legal services to low-income litigants facing the loss of housing, medical care, and custody of their children. The stories of political and social measures intended to thwart the rise and viability of legal aid are ripe with intrigue, twists and turns, and ultimately a cast of disparate heroes who stepped up to defend the defenseless.

Johnson’s book tells the stories of many different attempts to establish and then disestablish support for legal services. He himself was at the forefront of the modern effort to formalize government support for poor people who find themselves facing an overwhelmingly complex judicial system. At the age of 33, he was named by Sargent Shriver to be first the deputy director, then interim acting director, and finally permanent director of the Office of Economic Opportunity-Legal Services Program, the country’s first federally funded legal aid project. As part of the war on poverty, the OEO set policies and precedents that continue to evolve and to be the subject of political and funding challenges today.

**Surprise Guest Star**

One of the surprise guest stars in the story is Richard Nixon. In 1962, the former vice-president and future president gave a speech in which he resoundingly endorsed the mission of legal aid for the poor. As his presidency was teetering in 1974, he signed legislation creating the Legal Services Corporation, painting a picture of intrigue surrounding the then-president’s decision to enact the legislation. Was there a deal in the works? Or was Nixon’s support a logical outgrowth of that 1962 speech? While Democrats such as Walter Mondale, Ted Kennedy, and Alan Cranston were stalwart supporters of the movement to create the Legal Services Corporation, it was Nixon who signed it into law, and it was

**Leading Figures of the Day**

The beginnings of the civil legal aid movement featured some of the most well-known figures of the day. The first legal aid organization to offer free representation to the poor was the German Legal Aid Society, started in 1876 and headed by Edward Solomon, the former governor of Wisconsin. In 1901, foreshadowing issues that remain prominent in this day of “#MeToo,” Rosalie Loew became the first attorney-in-chief of the New York Legal Aid Society, overseeing a male-dominated staff in a male-dominated profession at a time when it was very difficult for women to be accepted into law school—and even impossible for them to vote. And who donated space for one of the Legal Aid Society offices? None other than John D. Rockefeller. No less well-known figures

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his chief of staff, Alexander Haig, who made sure it happened.

**Funding Threatened**

In recounting the challenges launched by the Reagan administration to the continuation of the Legal Services Corporation, To Establish Justice for All details the strategies and personalities involved on both sides of the dispute. Spoiler alert: the program was saved by a bipartisan coalition that included House Republicans Tom Railsback, Caldwell Butler, and Harold Sawyer, as well as Democrats Barney Frank and Robert Kastenmeier. In the Senate, Republican Lowell Weicker teamed with Democrat Fritz Hollings to help save the program. Later, it was Senator Warren Rudman, Republican from New Hampshire, who fought long and hard to protect the Legal Service Corporation from elimination in 1986. He wrote, “In the Spring of 1981, I began a twelve-year battle with the Reagan and Bush administrations to keep the Legal Services Corporation alive…. Equal justice under the law is a meaningless slogan if you can’t afford a lawyer…. I thought that providing legal services to the poor was profoundly conservative. What kind of country would this be if a third of our people had no access to justice?”

As Justice Johnson recounts, hopes ran high for support of legal aid during the Clinton Administration. Hillary Clinton had earlier served on the board of directors of the Legal Services Corporation and was known for her strong belief in the organization’s mission. Of course, Speaker of the House Newt Gingrich had other ideas and proposed a three-year schedule for phasing out and completely defunding the Legal Services Corporation. Again, a bipartisan compromise saved the program. Republican Senator Pete Domenici of New Mexico pushed for an agreement that, in support of creating a permanent standing committee on legal aid). John Levi, the current chair of the Legal Services Corporation board and a partner at Sidley Austin, hired a young Barack Obama as a summer associate at the firm and asked a young associate, Michelle Robinson, to oversee the future president’s orientation at the firm. When they ascended to the White House, President Obama gave Senate Republican leader Mitch McConnell unfettered discretion to name five of the 11 Legal Services Corporation board members, further underscoring the importance of bipartisan support for what the president believed was a cornerstone of our democracy. During the recent era, the George W. Bush and Barack Obama administrations saw relatively few attacks on legal aid. Harriet Meier and Alberto Gonzalez, two high-ranking White House officials during the Bush years, were both strong advocates for legal aid. President Obama created within the Department of Justice an office specifically dedicated to overseeing efforts to ensure equal access to justice for the poor.

**Battle Against Poverty**

Naturally, throughout Justice Johnson’s treatise there is a constant reminder of the role that legal aid plays in the battle against poverty. The personalities and stories keep the reader turning the pages, and the history lessons, one after the next, never fail to keep the reader engaged. But it is the cause, the litigated cases, and the life stories of the clients that make it all so real and important. Justice Johnson is at his most eloquent in using the many well-known names and tales to paint a picture of the legal aid landscape and its often unseen and underappreciated impact on the lives of so many.

At a time when attacks on legal aid have reached another crescendo and the defunding of the Legal Services Corporation remains a policy goal among powerful governmental factions, the voice for justice that the Honorable Earl Johnson Jr. brings to the national discourse is perhaps his magnum opus’s most vital accomplishment. To Establish Justice for All is a must-read for every lawyer who wants to better understand the impact of the law on government, the lives of the indigent, and the strength of our democratic institutions. It also should be read by anyone interested in historical novels and potential screenplays. Hollywood, are you listening? The casting alone will be momentous.

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Coaching Clients to Healthier and More Optimal Outcomes

IN MARCH 2017, the State Bar Board of Trustees approved a proposed new set of ethics rules for California attorneys. Of particular interest is Chapter 2 of the Proposed Rules of Professional, titled “Counselor.” Rule 2.1, titled “Advisor,” states, “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” As drafted, the proposed rules appear to acknowledge the current movement in the law to permit a lawyer to delve deeper into the heart of the matter, i.e., employ the “coach approach.” This approach goes beyond advocacy and includes counseling clients. Coaching is about honest, heart-to-heart conversations with the intention of empowering clients to break through self-limiting beliefs and patterns. Unlike therapy, which is past-oriented, the coach approach is future-oriented. Coach and client collaborate in moving the client forward from place A (where the client is) to place B (where the client wants to be).

In a transactional context, for instance, the coach approach can be applied by asking the client a series of open-ended questions. The client’s responses permit the lawyer to serve the clients more dutifully by obtaining a greater understanding of what is important to the client and what the client truly needs from a transaction. Questions may include: What do you hope to achieve by completing this deal? What makes you want to enter into the transaction? What do you need from the other party in order for the deal to be worthwhile? What are you willing to give up in exchange for receiving the benefit that you seek? What are your deal-breakers, i.e., what are you not willing to give up? What do you think are the other party’s deal-breakers? And so on.

Indeed, a good predictor of whether the transaction will be successful in the corporate context is whether the client and the other party share similar corporate cultures. Are their vision, mission, and values compatible? If so, the better the odds are that they will enter an agreement that serves both well.

The coach approach may be applied to the attorney-client relationship itself by asking transparent and direct questions such as: What are your expectations of me as your lawyer? What has been your past experience working with lawyers, if any? What worked for you? What did not work for you? What is the best thing that I can do for you as your lawyer?” When assumptions are exposed, the practitioner can meet the client’s expectations head on.

In the litigation context, the coach approach might be used to ask clients what they hope to achieve through litigation. What is the desired outcome? What is the dispute really about? Are they looking for justice or seeking revenge? Emotions need to be acknowledged. However, they need not be amplified. During high-stress situations, the brain’s fear-based anger response may be hijacking decision-making. Consequently, the client’s ability to make rational decisions might be compromised. There may be legal grounds to take action, but that does not mean it is necessarily in the client’s best interests to do so. A client may be attempting to “process” negative feelings through the litigation process.

Creating an environment in which the lawyer can listen to the client speak openly about the conflict can help the strong emotions dissipate. Practicing empathy may be useful to demonstrate that the client is being heard. However, uncritically identifying with a client’s initial position can be a disservice. Feeding a client’s negative perspective, in fact, can lead the client to believe that the story he or she has created about the conflict is the absolute truth instead of one interpretation of the facts. One exercise that may be helpful is to ask the client to write about the conflict from the perspective of the person with whom they are in conflict.

A client can look at circumstances from a victim’s perspective, believing that things have happened to him or her, or choose to look at circumstances from a more empowered perspective, believing that there are lessons to be learned. Similar to reframing a health challenge as a “health opportunity,” clients can choose to believe that conflicts appear in their lives to help them grow and transcend unhealthy patterns and self-defeating behaviors.

As lawyers, we are more than our technical expertise. We are the wisdom that comes with experience. While there may be times when it is appropriate for a lawyer to be a “gladiator in a suit,” for the vast majority of matters, early resolution is the preferred path. By encouraging clients to explore more peaceful ways of resolving conflict, we are honoring our fiduciary duty to put their interests before ours. If our clients are unable to choose to resolve their conflicts in this manner, the more expensive, more stressful, and more time-consuming methods are always available as an alternative.

Philip J. Daunt is an attorney-mediator in Monterey, California, who uses a coach approach in his small business and real estate practice. Arezou Kohan is a Los Angeles-based litigator turned certified professional coach and the author of Coaching Your Client.
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