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The Right to Asylum

Los Angeles lawyers Judith L. Wood (right) and Federica Dell’Orto delineate the current legal framework of U.S. asylum law against the historical evolution of U.S. asylum policy page 18
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18 The Right to Asylum
BY JUDITH L. WOOD AND FEDERICA DELL’ORTO
Although post-World War II U.S. immigration policy has tended to favor providing protection to people from other countries who face persecution, the actual legal framework for asylum seekers has had a checkered career.

Plus: Earn MCLE credit. MCLE Test No. 297 appears on page 21.

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Stop, please. Before reading another line, stand up. Now, read this entire column standing. Next, flip to page 36 and read the “Closing Argument” column, still standing. Author Laurel Brauer will explain why. Standing while you read is good for you, physically and mentally. Brauer’s article on fighting back against most lawyers’ sedentary schedule leads off a planned series of Los Angeles Lawyer articles aimed at helping our legal community stay mentally and physically healthy while doing the work that our articles on substantive law aim to support.

In March’s cover article, “The Right to Asylum,” Judith Wood and Federica Dell’Orto outline a history every American lawyer should learn: the twisting, ambivalent story of our nation’s immigration laws. The article then analyzes current issues concerning some of the most baffling and troubling categories of asylum applications, those of refugees from domestic and/or gang violence, rather than government action.

If you practice in the area of civil rights, be sure to read Barry Wolf’s analysis of California’s Bane Act (Civil Code Section 52.1), showing when and how that act can provide a more achievable remedy for violations of civil rights than the more commonly utilized civil rights action under Title 42 (Public Health and Welfare), section 1983 of the U.S. Code.

If you practice intellectual property, and trademark rights in particular, read Dariush Adli’s explanation of U.S. Patent and Trademark Office v. Booking.com, in which the U.S. Supreme Court recently granted certiorari. The issue before the high court will be whether a generic term like “booking” is entitled to federal trademark protection if followed by “.com.” The U.S. Patent and Trademark Office says no. The Fourth Circuit has disagreed, finding such term to be protectable. SCOTUS hears arguments on the question on March 23.

Three offerings in this issue are less concerned with particular issues or practice areas than with broad questions about how our profession can best be practiced. Yujun Chun outlines the benefits of becoming a legal specialist. Elizabeth Bradley analyzes the benefits and risks in the increasingly common practice of limited scope representation.

Finally, we proudly bring you the most recent Ethics Opinion of the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee (PREC). The opinion holds that a lawyer may neither agree to indemnify an opponent against a third-party action as a condition of settling litigation nor demand that the other side agree to such indemnification and explains why. It is number 532 in PREC’s century-long series of Ethics Opinions. Over 250 of PREC’s opinions, reaching back to 1959, are readily available on LACBA’s website.

In his “President’s Page” column, LACBA President Ron Brot talks about the importance of LACBA membership to each member and to the legal community. PREC’s invaluable guidance around and past our profession’s ethical trapdoors is another reason why our community needs, as Benjamin Franklin exhorted, to hang together lest we hang separately, and why LACBA is the place to do it.

Tyna Thall Orren is the 2019-20 chair of the Los Angeles Lawyer Editorial Board. She is an appellate attorney and a partner in the firm of Orren & Orren in Pasadena, California.
Together, We Can Turn the Tide of LACBA’s Membership

AS I HAVE OFTEN SAID, it is a great time to be a member of the Los Angeles County Bar Association and a great time to be the LACBA president. Significant strides have been made to reach our primary goals. We have become transparent at all levels, our practice sections continue to operate independently, and we have made substantial progress toward financial stability.

The rising energy and enthusiasm for LACBA continues. Our new Cannabis Section and the Privacy and Cybersecurity Section continue to attract members with their innovative programs and activities. Our Small Firm and Sole Practitioner Section also continues its dramatic resurgence. We will soon roll out our most ambitious member benefit in years: an attorney-to-attorney referral program with approximately 20 hubs meeting throughout Los Angeles County.

So, what’s the problem? Despite remarkable progress, LACBA membership has continued to decline. This issue is not particular to LACBA. To the contrary, membership retention is the primary issue for national, state, and local bar associations across the nation. However, we should take no comfort that others share our problem. Shared difficulty may be a statistic but it is not an explanation and surely not an excuse.

LACBA is uniquely situated as a geographic bar in a county larger than many states, with a population larger than many states, a lawyer population far larger than that of many states, a major metropolitan city at our center, and every practice area represented in our communities. We are well positioned to reconceptualize and reposition our organization.

Looking back, for many years, LACBA served the needs of the Los Angeles legal community as the sole provider of local continuing legal education. In those days, for example, the Family Law Section hosted over 1,000 lawyers for the annual Family Law Symposium. Likewise, LACBA formerly provided members with access to attorney malpractice insurance at significantly discounted rates. Situated in downtown Los Angeles, LACBA traditionally was supported by the “large” law firms of the day, although large at that time was small by the standards of today.

Today, CLE is readily available from multiple sources, and CLE programming has become a highly competitive market. Moreover, law firms large and small present their own educational programs. In this context, a bar-sponsored CLE program in downtown Los Angeles finds itself in a difficult competitive position. Discounted malpractice coverage? While LACBA continues to offer access to attorney malpractice insurance, again times have changed. Access to LACBA-sponsored coverage is no longer a benefit sought by a majority of our members. Large law firm participation? Large law firms today barely resemble the firms that historically supported LACBA with firmwide membership. Large billable hour requirements, national firms without historical ties to the local organized bar, cost, associate indifference, and other miscellaneous factors are often cited among the reasons that Big Law declines to pay for all lawyers, or even all associates, to join LACBA. (However, many of those firms will pay for an associate to join if requested.) During the past few years, our efforts to bring large law firms back to LACBA with firmwide membership have not been successful.

Is the result for LACBA destined to be dismal or worse? I think not. With the cooperation of our members, sections, and staff, I foresee a bright future for LACBA. The benefits of LACBA membership continue to include personal relationships, professional relationships, and business relationships; continuing legal education; a significant opportunity for business referrals; service to the courts and the public; pro bono service through our legal services projects and otherwise; and other economic member benefits. Most lawyers in Los Angeles County would appreciate one or more of these benefits from membership.

How will we increase membership? First, we must look to our existing members who receive an annual renewal notice. If we are doing our job correctly, our renewal rate should remain high, except perhaps for lawyers who retire from practice or relocate outside California. Second, we need to do far better with membership from our newer lawyers after their first two years of free membership. Our retention in this area has been poor. The incremental cost of year three is very low, so cost cannot truly be the issue. It is apparent that we need to better communicate the significant benefits of LACBA membership to the new lawyers in this group. We must look to our Barristers/Young Attorneys Section to take the lead in this effort, supported by the bar’s senior leadership. Given the benefits of LACBA membership throughout a legal career, there is no reason for this group of lawyers to decline to pay the small cost of initial paid membership.

Countywide Membership

Next, we must recognize that our future members will come from all areas within our county, from Lancaster to Long Beach, and Pomona to the Pacific. Our members will come from Glendale, Santa Monica, Pasadena, the San Fernando Valley, the South Bay, Beverly Hills and Century City, to name but a few. Our challenge is to provide programming and other LACBA benefits throughout these areas. Our sections and committees...
are vital to this task. We have urged them to plan programs and activities in all these locales, not just downtown Los Angeles. Our rapidly expanding technology must be employed as well, so that members throughout Los Angeles County can use their computers as well as their vehicles to obtain LACBA benefits. New members also will come from our affiliate and affinity bar associations, with whom we are partnering to better represent the rich diversity among lawyers in this county. We are creating a unified calendar and a roster of bar leaders as the first step in this process. We have established an agenda for our joint efforts, which includes, among other things, addressing the legal needs of our homeless population within Los Angeles County.

**Government Lawyers**

We have already reached out to other groups of lawyers who have not participated in LACBA in large numbers in recent years. Lawyers in government service are an example. We have met with our City Attorney, District Attorney, and Public Defender to urge their attorneys to join with us. We have been to the Board of Supervisors to explore how LACBA membership can be facilitated. New ideas and new approaches are welcome.

Who has the responsibility to carry the membership message? Is it the sections? The officers and trustees? Our executive director and his staff? The answer is yes, the burden is nominally on all of them. However, for us to be successful in turning the membership tide, we must accept that the responsibility for membership actually rests on each of us. We have heard countless narratives of how LACBA has helped lawyer after lawyer build a career and a happy, successful life. Each of us should redouble our efforts to invite non-members to share the benefits of LACBA membership. Our “Bring a Guest” program allows us to bring a non-member to a regular Section CLE program of three hours or less without charge. We have a full calendar of other programs and events that will surely interest potential members. It will not take much effort, and we will be providing a benefit both to the potential new member and to LACBA. The new member and LACBA will thank you, and both will be the better for your effort.

I ask for your help in addressing this membership challenge. The LACBA officers, trustees, and section leaders have a deep commitment to meeting this challenge. All we are missing is your help. Join us.
THERE COMES A TIME in every young lawyer’s career when someone—although mostly not in the legal industry—asks what kind of law the lawyer studied in law school. With this question comes the assumption that, as with undergraduate studies and with practically all doctorate degrees, a person selects and studies a specialty within the chosen profession in which he or she would then go on to work.

Lawyers, of course, know this is not quite the case for them since lawyers take the same foundational courses in the first year of law school and generally tend to take whatever interests them and is available in the second and third years. Consequently, lawyers often find themselves practicing in areas in which they did not take a single course in law school.

Thus, lawyers often grapple with the “kind” of law to practice. There are seemingly many options but, at the same time, limited opportunities. Early on, beginning lawyers are advised to acquire experience in as many different areas as possible to find out what he or she likes. This is, of course, easier said than done. Most newly minted lawyers are lucky to at least stay on their preferred side of the litigation-versus-transactional divide and otherwise end up working in the field in which they are most employable.

Benefits of Specializing

New lawyers and those who originally began their careers as generalists may be presented with opportunities to start practicing in a specialized field. Similarly, there may be an opportunity to switch specialties. There can be many benefits to choosing a specialty, and there are several things every young lawyer should consider in making that decision.

A key advantage of specializing in an area of law is the ability to become an expert in that area. Especially in limited, niche fields, it is easier to become the go-to expert for that area of practice. That expertise builds confidence, which the lawyer is then able to instill in his or her clients. As with the specific skills involved in the practice of law, this knowledge compounds over time and makes it easier for the specialist lawyer to quickly spot issues, respond to problems, and devise creative solutions within the known boundaries of law.

For example, while a skilled general litigator could proficiently handle a contract dispute involving hospitals and health systems, he or she may need to spend time becoming familiar with the healthcare marketplace and may miss issues that, to an industry insider, would be immediately apparent. An attorney who only practices healthcare law would be more likely to spot issues quickly and thus would be the first person that the prospective client or referring attorney would have in mind.

In the same vein, specializing streamlines the networking process. Attorneys often benefit from the assumption of expertise: an attorney is immediately presumed to be familiar with the general practice of law and this extends to specific areas of law as well. A lawyer who has a specialty is easily remembered both as a person and as a lawyer for referral when one comes across a case in that particular field or even a related one. Furthermore, the lawyer or law firm can target prospective clients and professionals who work in the chosen industry and thus can focus on creating and maintaining relationships.

In choosing a special area of practice, it is important for a lawyer to consider not only personal interest in that field but also the general expected trajectory. Is it in an area that can grow or is it on its way out? Are technological advances or legislative reforms in the field expected to create legal issues requiring specialized attorney work? While it is impossible to accurately predict everything, some educated guesses can and should be made before deciding on an area of specialization.

Industry-Specific Knowledge

In addition, a lawyer must be willing and able to learn. Even with a few years of general practice under the belt, delving into a new area of law comes with challenges. Most skills, especially if a lawyer stays on the same side of the litigation-versus-transactional divide, are transferable, but industry-specific knowledge takes time to learn. Are there resources available for newcomers? Is the lawyer willing to spend nonbillable time studying up and in keeping up with industry news?

In many cases, choosing to specialize is akin to learning a new language, which takes dedication, practice, and passion. As with learning a new language, the experience also can be incredibly rewarding and fulfilling, making everything worth it.

Yujin Chun is a healthcare litigation associate in the Los Angeles office of King & Spalding LLP. She serves as the assistant vice president of public relations for the Los Angeles County Bar Association Barristers/Young Lawyers Section.
Guidance on Using the Bane Act to Redress Government Misconduct

PLAINTIFFS HAVE FOR DECADES used Section 1983 of Title 42 of the U.S. Code to redress police and other government misconduct. Part of the federal Civil Rights Act of 1871, this statute provides for damages and injunctive relief against anyone acting under the color of law who violates a person’s federal constitutional or statutory rights.1 Attorney fees are also recoverable in Section 1983 actions.2 The possibility of receiving such fees provides additional incentive for counsel to represent plaintiffs, as well as increased leverage for plaintiffs in settlement negotiations. However, Section 1983 case law poses two serious obstacles for plaintiffs suing individual or public entity defendants. These problems have been exacerbated by the increasingly conservative outlook of the U.S. Supreme Court.

The first obstacle concerns individual defendants in Section 1983 cases who are not absolutely immune and therefore will be granted “‘qualified immunity’” even if they acted illegally, so long as the defendant’s “‘conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”3 The Supreme Court has in recent years emphasized that “‘clearly established law’ should not be defined ‘at a high level of generality.’ [Citation]…. The clearly established law must be ‘particularized’ to the facts of the case.”4 The Court has applied this standard to consistently hold defendants qualifiedly immune in Section 1983 actions by distinguishing the facts of the case being considered from those of previous decisions.5 As one academic put it, “[t]he United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal.”6

Second, Section 1983 does not provide for vicarious liability. In Monell v. Department of Social Services of the City of New York, the Court held that only when “execution of a government’s policy or custom…inflicts the injury” can a public entity be held liable.7 The law that has developed pursuant to Monell can be confusing. Supreme Court Justice Stephen G. Breyer has written that “Monell’s basic effort to distinguish between vicarious liability and liability derived from ‘policy or custom’ has produced a body of law that is neither readily understandable nor easy to apply.”8

Possible Workaround

Perhaps in part as a result of dissatisfaction with Section 1983, California attorneys increasingly have attempted to use Civil Code Section 52.1 to redress government misconduct.9 This statute is part of the Tom Bane Civil Rights Act,10 “enacted by the Legislature in 1987 in response to the alarming escalation in the incidence of hate crimes in California and the inadequacy of existing laws to deter and punish them.”11 Section 52.1 provides for damages and injunctive relief when one or more persons, whether or not acting under the color of law, interferes or attempts to interfere by threat, intimidation, or coercion with the exercise of California or federal constitutional or statutory rights.12 There are advantages to using Section 52.1 as an alternative to Section 1983. For example, despite the Bane Act’s origin as an anti-hate crime measure, plaintiffs suing under Section 52.1 need not show discriminatory intent.13 Qualified immunity is inapplicable to Section 52.1 actions, and public entity defendants can be held vicariously liable.14 As in Section 1983 actions, plaintiffs suing under Section 52.1 can potentially recover attorney fees.15 Moreover, a plaintiff whose Section 52.1 claim is based on the violation of California’s constitution or statutes can avoid removal to federal court premised on federal question jurisdiction. However, Section 52.1 has its own set of requirements. The government claims presentation requirement and state law immunities, though inapplicable to Section 1983 actions,16 are operative when Section 52.1 is invoked.17 The claims presentation requirement, which allows maintenance of an action against public entities only if an administrative claim has previously been timely filed, can be “‘a trap for the unwary and ignorant claimant.’”18 If a client has fallen into that trap, no Section 52.1 claim can be brought.

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BY BARRY M. WOLF
California’s state law immunities apply to numerous types of conduct by government employees, although in some cases, these immunities may be easier to defeat than qualified immunity. For example, a court held a defendant liable for excessive force in a Section 52.1 action despite the fact that he was qualifiedly immune on the plaintiff’s corresponding Section 1983 claim.19 The court reasoned that the relevant California immunity statute—Penal Code Section 820.4—requires a government employee to use “due care,” and this standard was not satisfied if the officer’s actions violated the Fourth Amendment, even though the officer received qualified immunity because he reasonably believed the actions were lawful.20

Difficulty with Section 52.1

The most significant obstacle to successful Section 52.1 actions is that, unlike their Section 1983 counterparts, interference with rights must be accomplished by attempted or actual threat, intimidation, or coercion. California state courts have disagreed regarding what plaintiff must show to satisfy this requirement, and decisions within the last three years have created a split between two principal lines of cases that only the California Supreme Court can resolve.

The first line of cases requires that plaintiffs show threat, intimidation, or coercion other than that inherent in the alleged violation of constitutional or statutory rights. The seminal case in this line is Shoyoye v. County of Los Angeles, in which the court concluded that “where coercion is inherent in the constitutional violation alleged, i.e., an overdetention in County jail, the statutory requirement of ‘threats, intimidation, or coercion’ is not met.”21

The overdetention in Shoyoye was deemed negligent, and the court found that the county’s employees took no intentional actions amounting to threat, intimidation, or coercion.22 Some courts have nonetheless cited Shoyoye in holding that even intentional acts will not give rise to Section 52.1 liability when the alleged threats, intimidation, or coercion are inherent in the constitutional violation alleged.23 However, other courts have found that Section 52.1 liability is possible under the Shoyoye standard in cases in which the threat, intimidation, or coercion is sufficiently egregious that it is not deemed inherent in the constitutional or statutory violation alleged.

Thus, a court held that even if the Shoyoye standard applied, a defendant was properly found liable under Section 52.1 when he unlawfully arrested the plaintiff and used excessive force.24 The court concluded that “the Bane Act applies because there was a Fourth Amendment violation—an arrest without probable cause—accompanied by the beating and pepper spraying of an unresisting plaintiff, i.e., coercion that is in no way inherent in an arrest, either lawful or unlawful.”25 Another court held that even a lawful arrest would not preclude Bane Act liability for excessive force, stating “[w]e need not determine whether a plaintiff can establish Bane Act liability without showing the challenged conduct is separate and independent from inherently coercive underlying conduct (like an arrest),” as the defendants allegedly engaged in “multiple nonconsensual, roadside, physical body cavity searches” constituting “intentional conduct that is separate and independent from a lawful arrest....”26

The second line of cases rejects Shoyoye’s conclusion that Section 52.1 is violated only when threats, intimidation, or coercion are not inherent in the constitutional violation alleged. The key case in this line is Cornell v. City & County of San Francisco, in which defendants chased and arrested plaintiff without having reasonable suspicion to detain him.27 In discussing the requirements of Section 52.1, the court stated:

Nothing in the text of the statute requires that the offending “threat, intimidation or coercion” be “independent” from the constitutional violation alleged. Indeed, if the words of the statute are given their plain meaning, the required “threat, intimidation or coercion” can never be “independent” from the underlying violation or attempted violation of rights, because this element of fear-inducing conduct is simply the means of accomplishing the offending deed (the “interfere[nce]” or “attempted...interfere[nce]”).28

Cornell instead requires a plaintiff to show that a defendant “had a specific intent to violate” the right in question.29 Cornell derived the “specific intent” requirement from case law interpreting 18 USC Section 241, “the most similar federal civil rights statute to Section 52.1....”30 To show specific intent, a plaintiff must demonstrate two things.

First, the plaintiff must show that the “right at issue [is] clearly delineated and plainly applicable under the circumstances of the case,” a legal question that the court decides.31 Although “clearly delineated” may sound similar to the “clearly established” standard applied in Section 1983 cases, the Cornell court evaluated the claimed right at a much higher level of generality than would be considered permissible in Section 1983 cases, stating that the “right at issue” was the “right to be free from arrest without probable cause.”32 The court concluded that “there is nothing vague or novel about that claim under the circumstances of this case.”33 When claims are vague or novel, however, courts might well use a more particularized standard.34

Second, the plaintiff must show that the defendant acted “with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that...right.”35 The Cornell court found that the jury could have properly concluded that the defendants “acted with the ‘particular purpose’ of depriving [plaintiff] of his right to be free from arrest without probable cause,” as a “rational jury could have concluded not only that [defendants] were unconcerned from the outset with whether there was legal cause to detain or arrest [plaintiff], but that when they realized their error, they doubled-down on it, knowing they were inflicting grievous injury on their prisoner.”36

Another California state court decision followed Cornell in holding that a plaintiff’s Section 52.1 claim based on excessive force should have gone to the jury.37 As in Cornell, the court required the plaintiff to “prove the defendant acted with a specific intent to violate the plaintiff’s civil rights.”38 The court found that because the plaintiffs’ evidence “suggested Defendants deliberately subjected [plaintiff] to excessive force beyond that which was necessary to make [an] arrest,” summary adjudication had been improperly granted to defendants.39

Although the Shoyoye and Cornell lines of cases use different tests to decide whether Section 52.1 has been violated, the outcomes under both tests are likely to be similar in most cases. Both tests preclude negligence as a basis for Section 52.1 liability.40 Moreover, even intentional actions will not necessarily result in liability. The decisions cited above make it clear that the defendants’ conduct must be at the very least unnecessary to carry out an otherwise justified activity such as an arrest. As a practical matter, the more egregious a defendant’s actions appear to be, the likelier it is that a Section 52.1 violation can be established under either Shoyoye or Cornell. However, until the California Supreme Court clarifies how the “threat, intimidation, or coercion” re-
requirement can be met, plaintiff’s counsel in California state courts would be wise to attempt to satisfy both the Shoyoye and Cornell tests.

In contrast, counsel litigating in federal court probably need only satisfy the Cornell test except in cases in which a plaintiff alleges negligent conduct. Although the U.S. Court of Appeals for the Ninth Circuit twice followed Shoyoye prior to Cornell’s being decided, later panels have adhered to Cornell. The first Ninth Circuit decision to follow the latter case stated that “we are now guided by Cornell to interpret Shoyoye’s holding as limited to cases involving mere negligence....” Ninth Circuit panels are theoretically bound by prior panel decisions subject to limited exceptions, including new state court decisions interpreting a state law. Nevertheless, it is not beyond possibility that another Ninth Circuit panel might disregard as dicta the limitation of Shoyoye to negligence cases and adhere to Shoyoye even in a case involving intentional conduct, as both Ninth Circuit cases that followed Shoyoye involved such conduct. Ultimately, only the California Supreme Court or the Ninth Circuit sitting en banc can settle this issue in that circuit.

At present, it seems likely that most acts that would give rise to a successful Section 52.1 claim also would suffice for Section 1983 liability if government actors are involved. As noted, however, there is at least one case in which a court held a defendant liable under Section 52.1 although the defendant had been deemed qualifiedly immune under Section 1983.46

It is also possible that the reverse could be true, with a defendant’s being held liable under Section 1983 but not under Section 52.1. For example, a police officer could be subjected to Section 1983 liability for garden variety excessive force, the illegality of which was clearly established by case law, while escaping Section 52.1 liability because the force was not deemed independent of the illegal action (Shoyoye) or sufficiently excessive to have been committed with the specific intent to deprive a plaintiff of his civil rights (Cornell).

Therefore, even if Section 52.1 liability is possible, plaintiffs’ attorneys should seriously consider also asserting a Section 1983 claim against governmental defendants. If counsel deems it strongly desirable to avoid federal court and the parties’ citizenship is not diverse, then alleging only a Section 52.1 claim based on the violation of California constitutional or statutory provisions would prevent the defendant from invoking federal question jurisdiction to remove the case to federal court. However, uncertainty in California courts regarding the meaning of Section 52.1’s threat, intimidation, or coercion requirement renders this course of action risky. Counsel should therefore weigh the benefits of litigating in state court against the possibility that the plaintiff might prevail under Section 1983 but not under Section 52.1. In this scenario, even if the plaintiff prevails under other state law provisions, the chance to recover attorney fees will be lost unless one or more of the plaintiff’s other causes of action provide for attorney fees.

9 A Westlaw search of California and federal cases.
using the terms civ! /2 code /2 52.1 garnered 82 hits for 2008, and 217 hits for 2018.

10 Civ. Code §52.1(a).

11 In re M.S., 10 Cal. 4th 698, 706-707 n.1 (1995).

12 Civ. Code §52.1(b), (c).


15 Civ. Code §52.1(e).


20 Id. at 949.


22 Id. at 961-62.

23 Allen v. City of Sacramento, 234 Cal. App. 4th 41, 69 (2015) (no Section 52.1 liability for allegedly unlawful arrest without coercion beyond the coercion inherent in any arrest); Quezada v. City of Los Angeles, 222 Cal. App. 4th 993, 1008 (2014) (Section 52.1 was not violated either by requiring peace officers to take a breathalyzer test, as this was a condition of employment, or by stating that a car could be impounded if consent to a search was not given, as that action is lawful pursuant to a search warrant); Julian v. Mission Commty. Hosp., 11 Cal. App. 5th 560, 395 (2017) (conclusory allegations that police “engaged in tactics to scare” plaintiff failed to state a Section 52.1 cause of action when the only interference with plaintiff’s constitutional rights was that inherent in a justified detention).


25 Id. at 978.

26 Id. at 979.


29 Id. at 800.

30 Id. at 801.

31 Id. at 792.

32 Id. at 803. (Internal quotation marks omitted.)

33 Id.

34 Id.

35 See, e.g., Sandoval v. County of Sonoma, 912 F. 3d 509, 520 (9th Cir. 2018) (Because it was legally unclear whether 30-day impounds were seizures when the impounds occurred, plaintiffs’ right was not clearly delineated, so defendants “could not have had the requisite specific intent to violate the plaintiffs’ Fourth Amendment rights.”)

Limited Scope Representation: A Trap for the Unwary

CALIFORNIA RULE OF PROFESSIONAL CONDUCT 1.2, Scope of Representation and Allocation of Authority went into effect on November 1, 2018. One of the primary objectives of Rule 1.2 is to clarify the relationship between lawyer and client. Rule 1.2, paragraph (b), authorizes a lawyer to “limit the scope of representation if the limitation is reasonable” under the circumstances, is not otherwise prohibited by law, and the client gives informed consent. “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer and is therefore governed by an objective standard, as opposed to the hybrid objective and subjective standard applied where the reasonableness of a lawyer’s personal belief is in question. “Informed consent,” as distinguished from informed written consent, means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained 1) the relevant circumstances and 2) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

Comment [4], which is not part of Rule 1.2, but which gives guidance regarding its application, provides that “[a]ll agreements concerning a lawyer’s representation of a client must accord with the Rules of Professional Conduct and other law.”

Although Rule 1.2, paragraph (b), has no direct counterpoint in the former California Rules of Professional Conduct, Comment [2] to former Rule 3-400 recognized a lawyer’s ability to reasonably limit the scope of the lawyer’s representation consistent with existing case law, which has long authorized that practice. Rule 1.2, paragraph (b), is substantially similar to existing American Bar Association Model Rule of Professional Conduct 1.2, paragraph (c). Moreover, the Commission for the Revision of the Rules of Professional Conduct expressly recognized that the concept of allocation of a lawyer’s authority is derived from the California Constitution, the California Penal Code, and California Supreme Court precedent.

Lawyers often seek to limit the scope of a representation for a variety of reasons. These might include a lack of knowledge or experience in a practice area, the need for expertise, or the lawyer’s or client’s limited resources. Examples of related matters that an attorney might seek to exclude from a representation include enforcement of judgment, transactional matters related to a litigation or vice versa, matters in which a specialist may be needed, such as tax, bankruptcy, family law, antitrust, estate planning, and regulated business (liquor licenses, gaming licenses) matters, appeals, legal malpractice claims, insurance matters—e.g., the potential existence or applicability of insurance coverage or the potential bad faith denial of insurance coverage, potential affirmative cross-claims or third-party claims in which counsel is retained by an insurer to defend an insured under a policy of insurance, or advice as to potential claims against the employer when the employer hires counsel to represent an individual manager under Labor Code Section 2802. Perhaps the lawyer and client wish to limit the lawyer’s role in the litigation setting to drafting or assisting in drafting legal documents but not to make an appearance in the case. Whatever the reason, the lawyer should be diligent in ensuring that he and the client are on the same page and have reached agreement as to the scope of the lawyer’s representation.

Civil Cases

Rules 3.35 through 3.37 and 5.425 of the California Rules of Court address instances in which the lawyer and client expressly agree to limit the scope of the representation in civil cases to particular tasks. Rule 3.35 defines a limited scope representation as “a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person.” The Rules of Court recognize two types of limited scope representation: 1) Noticed representation, when a lawyer and a party notify the court and other parties of the limited scope representation, and 2) undisclosed representation. Noticed representation is governed by Rule 3.36 under the California Rules of Court, which sets forth the procedures for providing notification of a limited scope representation, while Rule 3.37 applies to undisclosed limited representations.

Limiting the scope of a lawyer’s representation of a client can be easily accomplished in civil matters when the lawyer’s and client’s objectives are clear and the scope of the representation is easily defined to encompass discrete tasks, such as an appearance at a particular court hearing. California Judicial Council Form CIV-150 is a simple method to notify the court and opposing counsel of the lawyer and client’s agreed-upon limited scope representation. When the scope of the representation or any limitation thereto is unaddressed, unclear, or when the lawyer’s and client’s understanding as to the intended scope of the representation diverge, serious problems can arise, potentially exposing the client to harm and the lawyer to liability.

Written Fee Agreement

Though Rule 1.2 of the Rules of Professional Conduct does not expressly require an agreement limiting the scope of the representation or the client’s informed consent to be in writing, many fee agreements are required to be in writing (such as those falling under Business and Professions Code Sections 6147 and 6148).
Fee agreements required by Business and Professions Code Section 6148 to be in writing must contain the general nature of the legal services to be provided to the client, as well as the respective responsibilities of the attorney and the client as to the performance of the contract. A written fee agreement is the most obvious place to express any intended limitation on the scope of the representation and to make the disclosures necessary to obtain informed consent.

However, it would also be advisable when a written fee agreement is not required, when any agreed upon limitation is not addressed in a written fee agreement, or when the need to limit the scope of the representation arises after the representation is underway to reduce any agreement limiting the scope of the representation to a writing signed by the client, which simultaneously documents that the client’s consent was informed. If this is not feasible, it would be prudent to document or confirm in writing any discussion or oral agreement limiting the scope of the representation, as well as the facts establishing that the client consented and that the consent was informed, in order to avoid any subsequent factual dispute.

Whether written or oral, even a carefully crafted attempt to limit the scope of the engagement may not relieve the attorney of the duty to advise the client on matters the attorney intended to exclude. When a client sues the attorney for legal malpractice for failing to advise the client on matters the attorney assumed, intended or believed in good faith fell outside the scope of the engagement, even an express limitation of the engagement will be scrutinized as to whether it achieved the intended goal of limiting the scope of the representation and the attorney’s duties to the client, whether the limitation was reasonable under the circumstances as required by Rule 1.2(b) and whether the client gave informed consent.

Failed Attempts to Limit Scope
In Nichols v. Keller, plaintiff consulted an attorney regarding a workplace injury and his legal rights and remedies. The attorney filed a worker’s compensation claim and associated with a second attorney to prosecute the claim. Apparently neither attorney had a written engagement agreement. The plaintiff later learned from a third attorney that a third-party claim could and likely should have been brought. The plaintiff sued his counsel for legal malpractice for failing to advise him as to a potential third-party claim. The first attorney claimed he only agreed to file the plaintiff’s worker’s compensation case and to refer him to the second attorney to prosecute the claim. The second attorney maintained that his representation was limited to prosecuting the claim that had already been filed and that he had no duty to prosecute or advise as to any third-party claim.

The plaintiff’s expert, a certified worker’s compensation specialist, opined that both attorneys fell below the standard of care by failing to advise the plaintiff of the different remedies available—including a civil action—by failing to advise of the statute of limitations applicable to any third-party claim, by failing to advise plaintiff to consult another attorney concerning any rights against third-parties, and by failing to provide plaintiff with written advice as to the precise scope of the representation, such as which rights the attorney would protect or which needed to be reviewed by other competent counsel.

The court concluded the representation was not limited to the worker’s compensation claim:
“...A significant area of exposure for the workers’ compensation attorney concerns that attorney’s responsibility for counseling regarding a potential third-party action…. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client’s objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered…. Generally speaking, a workers’ compensation attorney should be able to limit the retention to the compensation claim if the client is cautioned (1) there may be other remedies which the attorney will not investigate and (2) other counsel should be consulted on such matters….Even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client’s legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney’s representation and of the possible need for other counsel.”

In Janik v. Rudy, Exelrod & Zieff, the issue was whether class counsel in an overtime wage class action owed a duty to consider and advise the class representatives to add an Unfair Competition Law (UCL) claim to their Labor Code claim. Because a UCL claim was subject to a four-year statute of limitations instead of the three-year statute applicable to the Labor Code claim, the plaintiff claimed a UCL claim would have produced an even larger recovery than the $90 million recovery obtained. The trial court found that class counsel had no duty to advise of any potential UCL claim.

The reviewing court disagreed, however. It agreed with defendants’ analogy of a class certification order to a retainer agreement but rejected their assertion that “an attorney cannot be sued in malpractice for failing to raise claims beyond the scope of a retainer agreement.” While the scope of the attorney-client relationship may be limited by the retainer agreement, “an attorney who undertakes one matter on behalf of a client owes that client the duty to at least consider and advise the client if there are apparent related matters that the client is overlooking and that should be pursued to avoid prejudicing the client’s interests.”

Appellate Court Ruling
The appellate court ruled that “a cause of action under the UCL would have been based on precisely the same practice, and subject to much the same legal analysis, as the certified cause of action under the Labor Code.” Furthermore, the court found that “Class counsel therefore was obliged to consider the advantages and disadvantages to the class of seeking to add a UCL cause of action to their complaint, to bring these considerations to the attention of the class representatives, and to take or recommend such action.”

As the Janik case demonstrates, class counsel can face unique challenges in limiting the scope of the representation, particularly in light of their representation of absent class members with whom they have no fee agreement. Alternatively, in Barboza v. West Coast Digital GSM, Inc., a trial court’s finding that class counsel’s job did not end with entry of judgment and extended to enforcement of the judgment was affirmed on appeal: [UNLIKE situations in which the litigant has retained an attorney to conduct litigation, where the litigant and the attorney agree upon the scope of the engagement, and their rights and duties are governed by their agreement, in class actions,
where there is no agreement with absentee class members to define the scope of the engagement, class counsel must represent all of the absent class members’ interests throughout the litigation to the extent there are class issues, and it is the duty of the trial court to ensure at every stage of the proceeding that counsel is adequately representing those interests.19

Faced with a judgment, a potential attorney fee award, and a defendant who may not have had sufficient or any assets to satisfy a judgment or fee award, the trial court in Barboza found counsel’s duty extended to enforcement of the judgment and investigation into the existence of assets to satisfy the judgment, even if it meant associating in counsel with enforcement expertise, subject to the trial court’s subsequent determination whether the attorney should be relieved of any further obligations to the class if counsel discovered defendant lacked recoverable assets.20

Obtaining Informed Consent

Though Rule 1.2 permits an attorney to limit the scope of the representation, the Nichols and Janik decisions provide useful guidance to ensure that any attempt to limit the scope is effective. Even though both cases were decided long before Rule 1.2, paragraph (b), went into effect, they also assist in understanding the reasonableness and informed consent requirements.

The Janik court’s language confirming an attorney’s duty to at least consider and advise the client if there are apparent related matters that the client is overlooking and that should be pursued to avoid prejudicing the client’s interests should be enough to keep all attorneys alert as to any “apparent related matters,” both at the outset of the representation and on an ongoing basis as issues arise throughout the representation, and to express and document the intended scope of the representation, to ensure that any attempt to limit the scope is reasonable under the circumstances, and to obtain informed client consent.

One way to attempt to ensure that a client’s consent to any limitation of the representation is informed would be to include a carefully worded provision in a written engagement agreement signed by the parties, which expressly 1) identifies the intended scope of the representation, 2) limits the representation to matters falling within the expressed scope, 3) specifically identifies any matters the attorney intends to exclude from the representation, and/or that the parties have otherwise agreed to exclude, 4) explains or confirms that the attorney has explained the relevant circumstances and material risks, including any actual and reasonably foreseeable adverse consequences of the proposed limitation, and 5) advises the client to seek legal advice as to matters outside the scope of the representation. Again, while informed consent need not be in writing to effectively limit the scope of representation, a writing may avoid disputes as to the nature of the parties’ understanding, or the quality or sufficiency of the lawyer’s communication of the circumstances and material risks of the proposed limitation.

The takeaway is to always carefully consider the lawyer’s intended scope of the representation at the outset of the lawyer-client relationship, to consider and discuss the client’s reasonable expectations as to the scope of the engagement, and to ensure compliance with Rule 1.2 and other decisional authorities in order to effectively limit the scope of the representation by ensuring that any limitation is objectively reasonable under the circumstances and secured by the client’s informed consent.
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The Right to Asylum

The Convention Against Terror only requires an applicant demonstrate the likelihood of torture upon return to the home country

At the end of the Second World War, with the Displaced Persons Act of 1948, the United States decided to open its doors to refugees who had escaped Nazi persecution. However, the decision was the product of a long and tormented internal debate on migration flows and the possibility of welcoming a large number of refugees from Europe. This was a historic turning point as the United States finally took steps to end a long history of closing the door on immigration.

Throughout American history, in fact, federal laws often have targeted and restricted specific groups from entering the United States on the basis of race, class, or other characteristics. The Chinese Exclusion Act was the first significant law restricting immigration into the United States. In the 1850s, Chinese workers began migrating to the United States to work in the gold mines but also to take agricultural jobs and factory work, especially in the garment industry. The act was passed by Congress in 1882 and provided a 10-year moratorium on Chinese labor immigration. It also declared the Chinese ineligible for naturalization. The act was renewed in 1892 for another 10 years, and, in 1902, Chinese immigration was made permanently illegal. The Chinese remained ineligible for citi-

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Not long after the end of World War I, the law of 1921 and that of 1924 were based on a precise calculation that took a given year as a reference point. In the first case, the Emergency Immigration Act dated May 19, 1921, limited the number of foreigners admitted annually and by nationality to 3 percent of the number of their respective compatriots who were admitted to the United States in 1910. This law was applied until July 1924, when the Immigration Act, or Johnson-Reed Act, was adopted. The policy underlying both acts favored immigrants of Anglo-Saxon and northern European origin. The Immigration Act of 1924 included the National Origins Formula, in which the quotas for each nationality were reduced to 2 percent of the respective nonnaturalized nationals registered in the United States in 1890. Indeed, while no specific “derogatory references” regarding Jews (or for that matter Catholics from both Southern and Eastern Europe) were made in the congressional debate that preceded enactment of the prior 1921 law, the fact that restriction of the immigration of large numbers of Eastern European Jews escaping persecution played a significant role in the national debate, which can be ascertained from contemporary data such as that reported in the New York Times that then-current Secretary of State Charles Hughes had submitted an immigration report to Congress which stated that “prospective immigrants were largely composed of ‘Jews of an undesirable type.’”6

Although denied by Hughes subsequently, such information is indicative of prevailing views of the period.7 Certainly, later, the window between 1938 and 1941 could have offered an excellent opportunity to save the lives of many Jewish people but saw instead a strengthening of the barriers against inbound migration.8 The United States and a large part of the western world, i.e., other countries of the Western Hemisphere and Europe, only began committing to human rights after the end of the Second World War.

Immigration law in the United States historically also has been influenced by international political movements and events. For example, in 1903, following the assassination of President William McKinley in 1901, the Anarchist Exclusion Act was issued and barred entry to the United States to immigrant anarchists and people judged to be political extremists.9 More recently, in 1979, after the beginning of the Iran hostage crisis, President Jimmy Carter issued Executive Order 12172, which banned Iranians from entering the United States unless they were against the Iranian regime or had a medical emergency. Iranians present in the United States with student visas were demanded to report to immigration officials within one month or face possible deportation. In 2017, a similar ban was issued regarding nationals from seven Muslim-majority countries (Iran, Iraq, Libya, Somalia, Syria, Sudan, and Yemen). The original travel ban, Executive Order 13769, banned entry into the United States for 90 days while pausing all refugee resettlement for 120 days and indefinitely banning the entry of all Syrian refugees. The final edited version of the ban, Executive Order 13780, is limited to various visa restrictions depending on the country of nationality; it also added three new countries to the original list, including North Korea and Venezuela.10

Despite the adoption of a more liberal outlook on immigration after World War II, in 1952, the “laws relating to immigration, naturalization, and nationality” were revised to include a regulation aimed at restricting entrance to the United States based on various kinds of health criteria.11 Some of the grounds barring entrance were: mental health disorders, tuberculosis, leprosy, epilepsy or “any dangerous contagious disease.”12 Furthermore, the category of contagious diseases was later expanded and, in the 1980s, HIV/AIDS was added to the list.13 Aliens infected with HIV were considered ineligible for admission to the United States. This restriction was finally lifted in 2010.14

**Turn Toward Human Rights**

Together with international human rights law, refugee law originated for the most part in the aftermath of World War II, prompted by the horrifying crimes that had been committed by the Axis powers (Germany, Italy and Japan). It became clear that the international community needed to elaborate a legislative system that did not yet exist in order to protect individuals from human rights violations and genocides. Article 14 of the Universal Declaration of Human Rights,15 which was adopted in 1948, guarantees the right to seek and enjoy asylum in other countries.16 Subsequent regional human rights instruments17 have elaborated on this right, guaranteeing the “right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions.”18 The convention’s definition of “refugee” has been adopted and assimilated into U.S. law.19

The Displaced Persons Act20 was enacted by Congress in 1948, after having admitted over 250,000 displaced Europeans.21 This legislation provided for the admission of an additional 400,000 people coming from Europe.22 Later laws provided for admission of people fleeing Communist regimes, largely from Hungary, Poland, Yugoslavia, Korea, and China, and (in the 1960s) Cubans fleeing Fidel Castro.23

Under current immigration law, the attorney general of the United States may grant asylum to a “refugee”24 who proves that he or she is unwilling or unable to return to the country of origin “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”25 The 1980 Refugee Act incorporated the definition of “refugee” established under the protocol in the Immigration and Nationality Act (INA), and it did so by using practically the same language.26

The Refugee Act of 1980 made firm resettlement a statutory bar to refugee status, but not to asylum. In 1990, though, the U.S. attorney general amended the regulations and extended the firm resettlement bar to asylum cases. Congress codified firm resettlement as a statutory bar to asylum by passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.27 As a result, an applicant is ineligible for asylum if he or she was “firmly resettled in another country prior to arriving in the United States.”28

According to the definition of “firm resettlement” in Section 1208.15 of Title 8 of the Code of Federal Regulations, an alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement. Matter of A-G-G- is the leading case from the U.S. Department of Justice’s Board of Immigration Appeals (BIA) with regard to firm resettlement.29 In Matter of A-G-G-, the BIA established a four-step analysis to evaluate whether the bar applies. The Department of Homeland Security (DHS) bears the burden of presenting prima facie evidence of an offer of permanent status. It is irrelevant whether or not the applicant accepted the offer, so long as “status” was available to him or her.30 If the DHS is able to prove that an offer of permanent status existed, the burden of proof then shifts to the applicant who will then have to demonstrate he or she did not receive an offer of firm resettlement or did not qualify. If firm resettlement is established, the burden
**MCLE Test No. 297**

The Chinese Exclusion Act prohibited Chinese people from entering the United States.
A. Entering the United States.  
B. Naturalizing.  
C. Immigrating to the United States.  
D. All of the above.

**2.** Jews were restricted from entering the United States. 
A. In the early 1900s.  
B. In the late 1990s.  
C. In 2000.  
D. Never.

**3.** The Convention Against Torture prohibits the expulsion of  
A. Nationals from China.  
B. Communists.  
C. People who prove that the government of their country will most likely torture them.  
D. Women from Central America.

**4.** A refugee must prove that he has a well-founded fear of persecution based on  
A. Sexual preference.  
B. Philosophical differences.  
C. Abortion.  
D. Race, religion, political opinion, particular social group.

**5.** Withholding of removal can be based on fear of persecution based only on a central protected ground.  
A. True.  
B. False.

**6.** Asylum applicants are barred from asylum if they have firmly resettled in a third country.  
A. True.  
B. False.

**7.** Exceptions to “firm resettlement” include a well-founded fear of persecution in the original country.  
A. True.  
B. False.

**8.** Central American refugees are subject to third country removal due to agreements with Russian and Pakistan.  
A. True.  
B. False.

**9.** The Universal Declaration of Human Rights protects the right to apply for asylum.  
A. True.  
B. False.

**10.** Membership in a particular social group is codified.  
A. True.  
B. False.

**11.** Matter of A-B: greatly expands the right to apply for asylum for women from Central America.  
A. True.  
B. False.

**12.** Matter of A-B: makes it almost impossible for a victim of domestic violence to be granted asylum based on membership in a particular social group.  
A. True.  
B. False.

**13.** The Anarchist Exclusion Act barred entry of people considered to be political extremists.  
A. True.  
B. False.

**14.** Genocide was the inspiration for the refugee law.  
A. True.  
B. False.

**15.** The Johnson-Reed Act favored immigrants from  
A. In the early 1900s.  
B. in the late 1990s.  
C. Immigrating to the United States.  
D. All of the above.

**16.** The Refugee Act made firm resettlement a bar to asylum.  
A. True.  
B. False.

**17.** The United States barred entry to Jews fleeing persecution between 1921 and 1944.  
A. True.  
B. False.

**18.** The Displaced Persons Act provided for admission for people from Cuba.  
A. True.  
B. False.

**19.** Board of Immigration Appeals case Matter of A-G-G: determines the factors for a finding of “firm resettlement.”  
A. True.  
B. False.

**20.** Women who suffer from persecution on account of their gender are most likely to be granted asylum.  
A. True.  
B. False.
of proof is on the applicant to demonstrate that an exception applies. There are two exceptions to the firm resettlement bar. Under 8 CFR Section 1208.15(a), if an asylum seeker’s entry into that country was a necessary consequence of his or her flight from persecution, and he or she remained in that country only as long as was necessary to arrange onward travel, and did not establish significant ties in that country, then there is no firm resettlement. Likewise, 8 CFR Section 1208.15(b) excludes resettlement if the conditions of the asylum seeker’s residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled.

Worldwide, women continue to suffer from discrimination, whether implicitly or explicitly, and they are often denied the opportunity of being equal to men in all aspects of daily living. Forced marriage, honor-related violence, domestic violence, rape, and forced prostitution are only some of the examples of gender-related persecution. It is undeniable that millions of women around the world are persecuted solely because of their gender. In Central America and various other parts of the world, women struggle to have governments ensure, or in some cases recognize, their right to protection. In some countries, criminal law does not adequately address domestic violence. With regard to domestic violence, one of the most significant decisions was Matter of A-R-C-G-, in which the BIA specifically recognized domestic violence-based asylum claims and held that “married women in Guatemala who are unable to leave their relationship” can constitute a cognizable particular social group and form the basis of a claim for asylum. In Matter of A-B-, though, U.S. Attorney General Jeff Sessions overruled the precedent established in Matter of A-R-C-G-, because he found that in A-R-C-G- the BIA did not accurately apply the board’s precedents regarding social distinction and particularity. The attorney general further found that “generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”

In spite of Matter of A-B-, domestic violence claims can still be viably proposed and upheld if they are cognizable under the BIA’s test of immutability, particularity, and social distinction as established in Matter of M-E-V-G.-

Gang-related claims based on persecution from gang members face the same difficulty as claims related to domestic violence. Gang violence is a common denominator in the Central America northern triangle and, in light of A-B-, it is a complicated process for an applicant to obtain asylum under this ground. As for domestic violence, a membership within a particular social group needs to be defined and found cognizable. However, the determined criteria make it nearly impossible for a judge to grant asylum based on membership within a Particular Social Group (PSG). As stated, an applicant qualifies as a refugee if he or she is unable or unwilling to return to the home country because of a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Specifically, the category of PSG has never been precisely defined. The Immigration and Nationality Act (INA) does not define PSG nor does the 1951 United Nations Refugee Convention. As a result, the PSG category and its tentative definition have been elaborated by case law. The most relevant interpretation of PSG was given in the BIA’s decision in Matter of Acosta, in which the board held that “A particular social group is composed of members who share a common immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is not so fundamental to the identity or conscience of the member that he or she should not be required to change it.” This standard and definition remained unchanged for many years, until more restrictive PSG requirements were introduced through Matter of A-B-.

**Convention Against Torture Act**

Oftentimes, in cases involving domestic violence and/or gang violence, the only remedy available for the respondent is withholding of removal or relief under the Convention Against Torture (CAT). To receive protection under CAT, the applicant must establish that it is more likely than not that he or she would be tortured if returned to the home country. The applicant must prove that government authorities would be responsible for the torture or would not act to prevent it. Protection under CAT does not require applicants to establish that the torture is based on one of the five protected grounds, as is required for asylum or withholding of removal under the INA.

Withholding has even stricter criteria than asylum and requires the applicant to prove that he or she would face a more than 50 percent chance of persecution because of one of the protected grounds if returned to the home country. The asylum statute expressly requires the applicant to show that a protected ground is “one central reason” for the persecution, but the INA is silent as to whether this standard extends to withholding of removal. In Barajas-Romero v. Lynch, however, the Ninth Circuit held that Congress did not intend for the “one central reason” standard to apply to withholding of removal and “a reason is a less demanding standard than ‘one central reason.’” There is currently a split among federal circuit courts regarding the standard to be applied for withholding. The Ninth Circuit, as explained in Barajas, holds that the withholding standard with regard to the reason for persecution is lower for withholding than for asylum.

Article 33 of the 1951 Convention states that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Countries are allowed to remove asylum seekers to a third country when the third country is considered safe and therefore there is no formal violation of Article 33 of the Convention.

According to the U.N. High Commissioner for Refugees (UNHCR):

In determining whether a country is “safe”, states should take into account the following factors: its respect for human rights and the rule of law, its record of not producing refugees, its ratification and compliance with human rights instruments and its accessibility to independent national or international organizations for the purpose of verifying and supervising respect for human rights.

The Safe Third Country Agreement between Canada and the United States was signed in 2002. This agreement establishes that refugees traveling from the United States to Canada cannot seek political asylum in Canada simply because they should have asked for it in the United States. The United States and Canada have entered into this agreement on the assumption that both countries have comparable standards for asylum procedures as well as formal guarantees to asylum seekers, so that a person transferred from one country to another will have a fair assessment of his asylum request.

In July 2019, Acting Secretary of Homeland Security Kevin K. McAleenan and Guatemalan Minister of Government Enrique A. Degenhart Asturias signed the Agreement between the Government of
the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims.\(^4\) Article 3 of this agreement provides a process for protection of applicants transferred to Guatemala by the United States after arriving in the United States at or between ports of entry. It also says that Guatemala will not return or expel the applicants, thereby applying the principle of non-refoulement embodied in the refugee convention and protocol.

On September 20, 2019, the United States signed a similar agreement with El Salvador\(^47\) and on September 25, 2019, with Honduras.\(^48\) These agreements require migrants on their way to the United States to seek protection in those countries first.

Under the 1980 Refugee Act, safe third country agreements are not considered treaties and therefore can be entered into without the approval of Congress.\(^49\) It is in fact established that the right to apply for asylum in the United States “shall not apply to an alien if the attorney general determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country…in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.”\(^50\) Often, though, Central American countries cannot provide to migrants the protection or due process that is required under the law, and migrants are therefore left without an adequate system for adjudicating their asylum applications.

While the United States has a long history of providing protection and assistance to people facing persecution, the record also demonstrates that official government policy has also periodically switched between generously admitting migrants and denying them entry.

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7 Id.
8 Until 1948, the U.S. immigration policy was restrictive. The Immigration Act of 1924 limited the number of immigrants allowed into the United States yearly through nationality quotas. In 1948, the Displaced Persons Act of 1948 was passed, authorizing for a limited period of time the admission of hundreds of thousands of Europeans into the United States. Pub. L. 80-774, 62 Stat. 1009.
9 Immigration Act of 1903 (also known as the Anarchist Exclusion Act), Pub. L. 77-162, 32 Stat. 1213 (1903).
12 Id. at §212(a)(6).
16 “Asylum” is defined as “[t]he grant, by a State, of protection on its territory to persons from another State who are fleeing persecution or serious danger.” It encompasses various elements, including non-refoulement, permission to remain on the territory of the asylum country and humane standards of treatment. United Nations High Com’r for Refugees Global Report (UNHCR), Glossary (2005) [hereinafter UNHCR].
18 Various other international treaties have been elaborated in an effort to render the protection not only of civil and political rights but also of economic, social, and cultural rights more efficient.
20 The 1951 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (A/CONF.2/108/Rev.1) [hereinafter 1951 Convention] contains what is still the most widely accepted definition of “refugee,” but the convention leaves it to each state to create suitable and widely accepted definition of “refugee,” but the convention leaves it to each state to create suitable and adequate asylum procedures and refugee status determinations. The United States is only a party to the protocol, but through its ratification of the protocol in 1968, it committed to most of the obligations contained in the original 1951 document. In the U.N. High Commissioner for Refugees Glossary “refugee” is defined as “A person who meets the eligibility criteria under the applicable refugee definition, as provided for by international or regional instruments, under UNHCR’s mandate, and/or in national legislation.”
23 Id.
32 See generally Janet Momen, Gender and Development (2009).
33 Id.
36 Id.
39 8 C.F.R. §208.16(c)(3).
40 Id.
41 Barajas-Romero v. Lynch, 846 F. 3d 351 (9th Cir. 2017).
42 Id. at 360.
43 Under the treaties to the treaty are bound by its provisions, the convention contains provisions for withdrawing from the treaty or modifying it. Article 44 includes a provision that any contracting state may denounced the convention by notification addressed to the secretary-general of the United Nations, and article 45 of the convention states that any contracting state may request renewal of the convention at any time by a notification addressed to the secretary-general of the United Nations.
50 Id.
U.S. Supreme Court recently granted certiorari in United States Patent and Trademark Office v. Booking.com, a decision of the Fourth Circuit Court of Appeal, which found the brand name BOOKING.COM to be non-generic and protectable as a trademark. Booking.com B.V. is a business entity that has used BOOKING.COM as a trademark to identify its reservation services for hotel and other travel accommodations to customers. The company applied to register BOOKING.COM with the U.S. Patent and Trademark Office (USPTO) as a trademark for online hotel reservation services. The USPTO rejected the application, finding it to be a generic term and therefore not qualified for trademark protection. Booking.com appealed the USPTO decision to a federal court, and, in support of its position, it introduced a survey showing that 75 percent of consumers recognized BOOKING.COM as a brand rather than a generic identification of reservation services.

Relying on the survey and other evidence presented during the court proceedings, the district court found that the primary significance of BOOKING.COM to the consuming public was as a brand and not a generic identification of hotel reservation services. Accordingly, the court reversed the USPTO determination finding that the survey results established that it had acquired distinctiveness for registration and held that BOOKING.COM is eligible for trademark protection as a descriptive mark.

The USPTO appealed the district court’s decision to the Fourth Circuit Court of Appeals, which was affirmed.1 The USPTO appealed the Fourth Circuit decision to the U.S. Supreme Court by way of a petition for a writ of certiorari. The petition was granted on November 8, 2019.2

In the petition, the USPTO argues that the issue is a legal matter, namely, given the non-registrability of generic terms under the Lanham Act, can the addition of a generic top-level domain, i.e., “.com,” to an otherwise generic term result in a protectable trademark. The USPTO contends that the Supreme Court must overturn the Fourth Circuit decision to give effect to its long-standing nineteenth century precedent, under which addition of business identifiers, such as “Inc.,” “Co.,”...
or “Corp.” to a generic term does not render the combination mark non-generic. Just as “Inc.” signifies a commercial entity, “.com” signifies a commercial website. In other words, “generic.com” is not protectable.

Booking.com tries to frame the legal argument more narrowly, namely, whether the Fourth Circuit was incorrect in affirming the district court decision, finding that decisions on the grounds that the act liberalized the common law by allowing registration of descriptive terms when they have been found to have acquired secondary meaning. In addition, the Federal Circuit has also distinguished Goodyear Rubber as not creating a “per-se” rule with respect to top-level domain names such as “.com.” Moreover, Goodyear Rubber did not discuss, much less apply, of genericness as “one that refers to the genus of which the particular product is a species.” Booking.com advocates a modification of this definition as “one whose primary significance is identifying such a genus.” In that regard, the Federal Circuit has defined genericness as one which “immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.”

The evidence presented to the Supreme Court shows that BOOKING.COM has established secondary meaning and that the mark is primarily recognized by consumers as a source identifier rather than as a description of the service itself. Courts of appeal have emphasized the importance of surveys to the determination of genericness. However, there is evidence of other composite domain trademarks that contain the terms “booking” and “.com,” such as “hotelbooking.com” and “ebooking.com,” which may suggest that consumers understand BOOKING.COM as referring to online hotel booking services. Courts have found such composite use to be an indication of genericness. However, even in such cases, the deciding courts have considered surveys to be relevant to a determination of the public’s understanding of the proposed mark.

One factor countering a finding of genericness is that it can apply to a wide range of services in addition to hotel- and travel-related services, including, for example, theatrical or musical engagements. Another pertinent question is whether genericness is determined by reference to the public’s use of a term or the public’s understanding of a term. Courts have made clear that the proper legal standard is whether the public would understand a mark to refer to a product or service rather than as a source identifier. However, usage is often an indication of the public’s understanding.

As the USPTO frames the issue as a legal one to be determined by the court, it does not find the survey evidence presented by Booking.com to be relevant to the issue. To be sure, there are instances

Determination of genericness of a trademark depends on whether consumers understand the mark as describing the product or service itself, an issue of fact to which survey evidence may be highly probative.

the USPTO had failed to carry its burden of proving by clear evidence that BOOKING.COM, is primarily understood by consumers as a generic term for online hotel reservation services.

The decision of the Supreme Court case may well turn on the framework of analysis which the Supreme Court will adopt for its review, including the applicable burdens of proof, the standard of review and the question whether the Court will view the issue as factual or legal in nature.

Question of Law

In its argument, the USPTO advocates a de novo legal approach based on nineteenth century Supreme Court precedent. Specifically, it argues, back in 1888, in Goodyear’s India Rubber Glove Manufacturing Co. v. Goodyear Rubber Co., the Supreme Court held that the addition of corporate identifiers, such as “inc.” “co.” or “corp.” do not turn an otherwise generic mark into a non-generic combination. According to the USPTO, “.com” merely identifies a commercial website and is similar to a corporate identifier as found in Goodyear Rubber. That position does find some support in more recent precedents from the Federal Circuit that has found similar domain name trademarks, including “HOTELS.COM” and “MATTRESS.COM” to be generic and unprotectable.

However, at the time of the Goodyear Rubber decision and prior to enactment of the Lanham Act, descriptive trademarks were not protectable and the Court did not make a specific finding of genericness of the mark at issue. Instead, it referred to “Goodyear Rubber” as a descriptive term. In fact, the Supreme Court has distinguished pre-Lanham Act trademark the “primary significance” standard for determining registrability of trademarks.

Finally, the USPTO has allowed registration of marks similar to BOOKING.COM, including STAPLES.COM for online retail services for office supplies, WEATHER.COM for “on-line publications...in the field[] of meteorology,” ANCESTRY.COM for “on-line electronic databases in the field of genealogy research,” and ANSWERS.COM for “[p]roviding specific information as requested by customers via the Internet.”

A key to the Supreme Court’s resolution of this dispute relates to determining and applying the relevant burdens of proof. To start with, the USPTO must prove genericness by clear evidence. The Fourth Circuit Court of Appeal concluded that the district court correctly found that the USPTO had failed to satisfy its burden of proving that the relevant public primarily understood BOOKING.COM to refer to general online hotel reservation services rather than a source identifier.

Determination of genericness of a trademark depends on whether consumers understand the mark as describing the product or service itself, an issue of fact to which survey evidence may be highly probative. Booking.com claims that the USPTO has failed to meet its burden. The USPTO does not challenge the validity of the survey presented by Booking.com, which demonstrates that consumers recognize BOOKING.COM as a brand rather than as referring to hotel reservation services.

Definition of Genericness

The USPTO, seeking to meet its burden of proving genericness, urges a definition
in which courts have found marks to be generic despite contrary evidence shown by surveys. For example, in Hunt Masters v. Landry’s Seafood Rest., Inc., the court disregarded survey evidence and found the term “crab house” to be generic. In that regard, courts have recognized two distinct bases for genericness. The first category of generic terms concerns those found to have become generic through gradual public understanding of the term as referring to the service or product itself, rather than as a source identifier. The second category of generic terms relates to those that were commonly used prior to an attempt to use them as a source identifier. Courts have explained that consumer surveys are relevant to the first category but not the second. Here, the district court found that the term “BOOKING.COM” was not in prior use before its selection by Book-ing.com as a source identifier and, as such, survey evidence was relevant to the determination of its genericness.

**Bright Line Rule**

The USPTO asks the Supreme Court to adopt a bright line rule when addition of a top-level domain such as “.com” to a generic term will render the combination generic as well. The USPTO argues that its position is supported by the Goodyear Rubber decision, in which the Supreme Court held that the addition of business entity identifiers such as “Inc.,” “Co.,” and “Corp.” to generic terms does not render the combination non-generic.

Goodyear Rubber, however, was decided long before enactment of the Lanham Act in 1946 and, notably, did not apply the “primary significance” test of genericness provided for in the act. In addition, as noted by the Fourth Circuit, there is no precedent for adoption of the broad legal rule advocated by the USPTO, and, in fact, courts have left the door open to protection of marks in a “.top-level domain” combination with a generic term in which there is a showing of the public’s understanding.

The USPTO further argues for an additional bright line that a mark made up of two generic parts is necessarily generic as well. It reasons that, since “booking” is a generic term for hotel reservation services and “.com” is generic identifier for an online company, the consuming public would understand the resulting combination to be generic for the online booking services at issue. However, courts have explained that the primary significance of individual terms in a compound word mark is relevant but not conclusive to the determination of genericness for the whole mark. For example, in Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC, the Trademark Trial and Appeal Board (TTAB) evaluating genericness of PRETZEL CRISPS observed that, in addition to determining the public’s primary understanding of “PRETZEL” and “CRISPS,” it must also consider evidence whether “PRETZEL CRISPS” is perceived primarily to refer to a crispy pretzel or to a particular source. In the case of BOOKING.COM, the Fourth Circuit declined to adopt a bright line rule that the combination of a generic term with a top-level domain is always generic. More to the point, the district court found that the term BOOKING.COM was not commonly used prior to its adoption as a mark by Booking.com. Therefore, its admission of evidence presented, such as surveys, was appropriate to the determination of genericness.

With respect to domain name marks, the Fourth Circuit distinguished its prior decisions finding genericness of combination marks such as “crab house,” by explaining that consumers are more likely to recognize domain names to indicate specific locations on the Internet. The Fourth Circuit found this distinction to be significant in that while a domain name mark may generally refer to the service provided, evidence may nonetheless show that consumers recognize the domain name as a source identifier, rather than the service it describes.

**Anticompetitive Impact**

One concern expressed by the USPTO in support of its position before the Supreme Court is that a decision finding BOOKING.COM as a protectable trademark would result in anticompetitive harm by allowing Booking.com and other similar businesses to extend their trademarks to include other domain name marks, which include their second-level domain. Courts have expressed such potential anticompetitive concerns in similar situations.

However, the Fourth Circuit pointed out that protection of BOOKING.COM would only extend to the limited category of hotel reservation services. Accordingly, other domain name marks, which include booking, such as vacationbooking.com or travelbooking.com, would not necessarily be impacted by the decision. The Fourth Circuit also noted that domain names are unique by nature, which would make it difficult for a domain name trademark owner to demonstrate “likelihood of confusion” with other domain name marks that utilize the same second-level domain as part of his or her longer domain name marks.

**Supreme Court Scope of Review**

As noted, the framework within which the Supreme Court will conduct its review will likely have a significant impact on the outcome of its decision. In general, direct appeal of a decision of the TTAB must be brought in the Federal Circuit Court of Appeal where the review will be based on the record without the opportunity to introduce new evidence. A challenger who seeks to develop and supplement the record considered by the TTAB has the option of initiating an action in a district court in which additional evidence may be received by the court. The district court’s decision, can, in turn, be appealed to the appropriate court of appeal.

Importantly, in a direct appeal of a TTAB decision, the Federal Circuit reviews the TTAB’s factual findings for substantial evidence while reviewing legal issues de novo. When a case is initiated first at the district court and new evidence is presented, the district court reviews the TTAB decision de novo. In an appeal of the district court decision, a court of appeal reviews the district court’s factual findings for clear error and its legal determinations de novo.

Since the USPTO contends that the Supreme Court should review the matter before it as one of law and thus subject to de novo review by the reviewing courts, the USPTO insists that “.com” identifies an Internet domain and that its addition to a generic term does not render the combination protectable. The USPTO cites other court of appeal decisions, which have found structurally similar “.com” domain marks to be generic and non-protectable. For example, the Federal Circuit upheld the TTAB’s denial of protection for the proposed mark (HOTELS.COM) that shared the same legal and factual framework as BOOKING.COM. In that case, Hotels.com also stated that determination of genericness is a factual issue and that the standard of review of factual determinations by the TTAB is substantial evidence.

The Supreme Court faces a choice in the standard of review it applies to the Fourth Circuit decision. On the one hand, there is no disagreement that under long-standing precedent, determination of genericness is a question of fact rather than a question of law. Therefore, the Supreme Court is unlikely to change that standard from a factual one to a legal one. On the other hand, the Supreme Court did hold, albeit prior to the codification of trademark law under the Lanham Act, in Rubber
Glove, that “generic.inc.” is still generic as a matter of law, regardless of the “primary significance” of the combination to the consuming public.32

In conducting its review, the Supreme Court will likely find that the Fourth Circuit applied the proper standard of review to the determination of the district court that the primary significance of BOOKING.COM to the consuming public is as a trademark rather than a description of the services provided. In that light, the Supreme Court is more likely to uphold the Fourth Circuit decision.
Counsel for Justice

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Domestic Violence Legal Services Project
For over 10 years, dozens of volunteer O’Melveny attorneys have given their time to help victims of domestic violence receive potentially life-saving legal assistance. In 2019 alone, five volunteers gave over 100 hours of pro bono time. Each month, these dedicated volunteers help a victim through the difficult court process of obtaining a restraining order.

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A total of 32 staff members, including 24 attorneys, hosted nearly 20 veterans at a unique legal clinic held at O’Melveny’s offices in downtown Los Angeles, providing 96 hours of pro bono assistance in one day to assist veterans on the path to stabilizing their lives. The clinic focused on helping veterans clear outstanding tickets and warrants and clean their criminal records which create legal barriers to obtaining employment, maintaining housing, and achieving financial stability.
Opinion No. 532: Lawyer Agreeing to Indemnify Opposing Party as a Condition of Settlement

NOTE: The text of this formal opinion by the Los Angeles County Bar Association Professional Responsibility and Ethics Committee is published verbatim as the committee first issued the opinion except that the authorities section has been conformed to Los Angeles Lawyer style guidelines, i.e., modified Bluebook style.

SUMMARY: 1. Plaintiff’s counsel in a personal injury action may not enter into an agreement to defend and indemnify defendants, defense counsel or their liability insurers against an action brought against them by third parties, such as Medicare or health insurers, to recover a debt plaintiff might owe the third parties. First, such an agreement is prohibited as an improper payment of the client’s personal and business expenses under rule 1.8.5(a). Second, such an agreement would create a conflict of interest between the lawyer and the client by compromising the lawyer’s exercise of independent professional judgment and, even if the lawyer nevertheless could continue the representation under rule 1.7(b), the lawyer would remain barred from agreeing to indemnify by rule 1.8.5(a). Third, rule 1.16(a)(2) would require the lawyer to withdraw if the client were to demand that the lawyer provide the indemnification.

2. Because plaintiff’s counsel’s agreement to such an arrangement would violate the rules of professional conduct, defendant’s counsel’s demand that plaintiff’s counsel agree to indemnify defendants and their agents would violate rule 8.4(a), which prohibits a lawyer from soliciting or inducing a violation of the Rules of Professional Conduct or the State Bar Act.


BACKGROUND
Plaintiffs in personal injury actions often seek financial assistance for medical services from Medicaid, Medicare, workers compensation carriers, or private insurance carriers. These payors may be entitled by statute or contract to reimbursement by the plaintiff if the plaintiff recovers damages. To protect themselves
against liability from such claims for reimbursement, a defendant and defendant’s lawyer might demand that plaintiff or plaintiff’s lawyer agree to indemnify them as a condition of settlement.

ISSUES

1. May plaintiff’s counsel, as part of settling a personal injury action, agree to defend and indemnify the defendants, including defense counsel and liability insurers, against an action brought against them by third parties, such as Medicare or health insurers, to recover a debt plaintiff might owe the third parties?

2. May defendant’s counsel ethically request or demand that plaintiff’s counsel enter into a such an agreement with defendants, including defendant’s counsel and liability insurers, as a condition of settlement?

DISCUSSION

Introduction

Every jurisdiction that has addressed the issues presented in this opinion has answered both questions in the negative. At least twenty-one jurisdictions and two local bar associations have concluded that a lawyer agreeing to such an indemnification agreement would violate one or more rules of professional conduct. At least ten jurisdictions and one local bar association have also concluded defendant’s counsel cannot request or condition a settlement on a plaintiff’s lawyer agreeing to indemnify. As discussed below, this committee agrees with these conclusions.

Issue 1: Whether plaintiff’s lawyer in a personal injury action may agree as a condition of settlement to indemnify and hold harmless defendant, defendant’s counsel, and liability insurer.

This issue requires a consideration of the plaintiff’s lawyer’s ethical obligations when a defendant seeks indemnification in a personal injury action. Although the lawyer’s exposure can become complicated when a defendant seeks to protect itself against liability under the Medicare, Medicaid and SCHIP Extension Act of 2007 (“MMSEA”), the Committee’s opinion regarding the ethics of the situation is the same regardless of whether the potential claim for reimbursement against the defendant arises under that Act, Workers Compensation, or a private insurance policy.

Payment of Personal or Business Expenses Incurred by a Client. Rule 1.8.5 is relevant to whether a lawyer may provide financial assistance to a client in the form of an indemnification agreement. Rule 1.8.5(a) provides “[a] lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer’s law firm will pay the personal or business expenses of a prospective or existing client.” Paragraph (a) applies whether the lawyer provides financial assistance “directly or indirectly.” An agreement to indemnify and defend defendant or defendant’s lawyer from an action by third parties to collect on a debt owed by the lawyer’s plaintiff client fits squarely within paragraph (a)’s prohibition on “indirectly providing financial assistance to a client. In effect, the lawyer promises to provide the necessary assistance, i.e., pay the client’s debts to medical service providers, to prevent the client from being subject to a collection action. Such a promise in effect provides the client with credit, a form of financial assistance. Further, the lawyer’s agreement to indemnify the defendants and their agents to induce the defendants to go forward with the settlement is a “guarantee” within the meaning of the rule and would provide another basis for finding a rule 1.8.5(a) violation.

Paragraph (b) provides several exceptions to the paragraph (a) proscriptions, but the Committee concludes that none of them is applicable. First, subparagraph (b)(3) permits a lawyer to advance the costs of prosecuting or defending a claim or otherwise protecting the interests of the client and further provides that the repayment may be made contingent on the matter’s outcome. The “costs” under this subsection, although not restricted to taxable costs recoverable under statute or rule of court, are “limited to any reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or in providing other legal services to the client.” (Emphasis added.) The liability that a lawyer could incur under the indemnification agreement are not “reasonable expenses” as contemplated under the rule. To the contrary, by agreeing to indemnify defendants and their agents, the lawyer is exposed to liability for potentially substantial reimbursement payments.

Second, although subparagraph (b)(2) permits a lawyer, “[a]fter the lawyer is retained by the client to lend money to the client based upon the client’s written promise to repay the loan,” provided the lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1. The Committee does not believe that an agreement to indemnify a creditor of a client constitutes a loan within the meaning of rule 1.8.5(b)(2). The exception in subparagraph (b)(2) to rule 1.8.5(a)’s prohibition on providing financial assistance to a client is not applicable.

A third exception appears at first glance to apply in an indemnity situation. Subparagraph (b)(1) permits a lawyer to pay or agree to pay business or personal expenses to third persons “from funds collected or to be collected for the client as a result of the representation,” provided the client gives consent. Generally, it would be expected that reimbursement payments a personal injury client would make to medical service providers or their insurers would be made from funds that the client’s lawyer would have collected in the action. However, the indemnification clause addressed in this opinion would not be limited to holding the indemnifying lawyer liable only to the extent that funds “collected for the client” remained in the lawyer’s possession. The lawyer would be subject to open-ended liability to third persons regardless of whether any recovered client funds remained in the lawyer’s trust account and were available to be used. The exception in subparagraph (b)(1) of rule 1.8.5 thus would not be applicable.

Accordingly, it is the Committee’s opinion that rule 1.8.5 prohibits a lawyer from providing the contemplated indemnification of defendants and their agents, including their lawyers. This conclusion conforms to that of nearly every ethics opinion that has addressed the issue.

Conflict of Interest and Independence of Professional Judgment. Under rule 1.7(b), a lawyer is prohibited from representing a client “if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person, or by the lawyer’s own interests.” (Emphasis added.) The contemplated indemnification agreement would appear to create a financial interest of the lawyer in the subject matter of the litigation that goes beyond a source of payment of the lawyer’s fees. Rule 1.7(b), however, authorizes a lawyer to continue representing a client if the client gives “informed written consent.” However, we conclude that informed written consent is not available under rule 1.7(b) because it would not overcome the rule 1.8.5 prohibition and because of the additional requirements of rules 1.2 and 2.1. Rule 1.2(a) provides in pertinent part that “[a] lawyer shall abide by a client’s decision whether to settle a matter.” Rule 2.1 provides in relevant part that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” Taken together, these rules operate to prohibit a lawyer from agreeing to the indemnification. The Arizona opinion on indemnification explains how the interaction of these rules create an impermissible conflict between the interests of the client.
and those of the lawyer:

The mere request that an attorney agree to indemnify [defendants] against lien claims creates a potential conflict of interest between the [plaintiff] and the [plaintiff’s] attorney. The attorney’s refusal, for ethical reasons, to accede to such a demand as a condition of settlement could prevent the client from effectuating a settlement that the client otherwise desires.

The insistence upon an attorney’s agreement to indemnify as a condition of settlement could, for example, cause the lawyer to recommend that the client reject an offer that would be in the client’s best interest because it would potentially expose the lawyer to the payment of hundreds of thousands of dollars in lien expenses, or litigation over such lien expenses.

The attorney’s acceptance of such a condition would also create a conflict of interest with an existing client under ER 1.7 because the client’s failure or refusal to repay a lien could make the client’s lawyer its guarantor.

That might materially limit the representation by virtue of the lawyer’s own interest in having the client (rather than the lawyer) pay the liens in full. Even if the lawyer were willing to accept that potential financial burden, and even if the lawyer were ethically permitted to provide such financial assistance, such an agreement might compromise the lawyer’s exercise of independent professional judgment and rendering of candid advice in violation of ER 2.1.

While ER 1.2 requires an attorney to abide by a client’s decision whether to accept an offer of settlement, a settlement agreement that requires the attorney to indemnify, or hold the [defendants] harmless, violates ER 1.8.

Since, under ER 1.8, an attorney cannot ethically provide financial assistance to a client by paying, or advancing, the client’s medical expenses before or during litigation, an attorney cannot ethically agree, voluntarily or at the client’s or [defendant’s] insistence, to guarantee, or accept ultimate liability for, the payment of those expenses.15

This Committee has concluded that the reasoning of the Arizona opinion is persuasive, and rule 2.1 is identical to Arizona Rule 2.1, which requires that a lawyer exercise independent professional judgment.15 That independent judgment would be compromised by the lawyer agreeing to indemnify the defendants.

Second, California Rule 1.2(a) contains language identical to Model Rule 1.2(a) that requires that a lawyer “abide” by the client’s decision to settle a matter.16 Notwithstanding rule 1.2, however, the client lacks authority to impose liability on the lawyer with respect to the client’s obligations. Under the facts presented, the lawyer would be hard pressed to independently evaluate the settlement, leaving the client without the lawyer’s impartial advice on making an informed decision. The lawyer’s exercise of independent professional judgment on behalf of the client would be compromised, creating an impermissible conflict between the client’s desire to finalize the settlement of the client’s action and the lawyer’s understandable reluctance to be liable for a reimbursement payment or the costs of defending against such a claim.

Withdrawal from the representation.

Rule 1.16(a)(2) provides that a lawyer must withdraw from the representation if the lawyer “knows or reasonably should know that the representation will result in violation of these rules or of the State Bar Act.” The Committee concludes that a client’s request that the lawyer execute an indemnification agreement would not by itself implicate rule 1.16(b)(2). A client might suggest particular actions in the hope that the lawyer is not constrained by a professional duty, and the lawyer’s proper response would include communicating with the client as required by rule 1.4(a) and (b) so that the client can make informed decisions. However, the lawyer must withdraw if the client were to demand that the lawyer agree despite the lawyer’s explanation. Accord, Georgia State Bar Formal Advisory Opn. 13-2 (citing to Georgia Rule 1.16, cmt. [2].) See also Arizona State Bar Ethics Opn. 03-05; Indiana State Bar Association Legal Ethics Opn. 2005-1.

In sum, a plaintiff’s lawyer may not, as a condition of settlement, enter into an agreement to indemnify and defend the defendant, or defendant’s counsel or liability insurer against claims that might be brought by plaintiff’s third-party medical service providers to collect on plaintiff’s debts.

Issue 2: Whether defendant’s lawyer in a personal injury action may condition settlement of plaintiff’s matter on defendant’s counsel’s agreement to indemnify

Rule 8.4(a) provides it is professional misconduct for a lawyer to: “violate these rules, the State Bar Act, knowingly assist, solicit, or induce another to do so, or do so through the acts of another.” As discussed in relation to the first issue, a lawyer’s agreement to indemnify under the circumstances posited would violate rules 1.8.5, 1.7(b), and 2.1. Consequently, defendant’s lawyer can neither request nor demand that plaintiff’s lawyer agree to indemnify as a condition of settlement because the defendant’s lawyer would violate rule 8.4(a) by soliciting, if plaintiff’s lawyer were to refuse, or by inducing or assisting in a violation if the defense lawyer were successful in obtaining plaintiff’s lawyer’s agreement. Other jurisdictions that have addressed this second issue are unanimous in this conclusion.17

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the inquiry.

1 Unless otherwise indicated, all references to a “Rule” or “rule” are to the California Rules of Professional Conduct.
2 Comment [4] to Rule 1.0 of the California Rules of Professional Conduct provides in relevant part: “[O]pinions of ethics committees in California, although not binding, should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.”
3 This opinion is limited to these two questions and does not address what the lawyer’s duties might be if the third party provider has a valid and enforceable statutory or contractual lien against the plaintiff. See, e.g., rule 1.15(a) and Comment [1].
4 Jurisdictions that have answered the first issue in the negative include: Alabama State Bar Ethics Opn. RO 2011-01; Alaska Bar Association Ethics Opn. 2014-4; Arizona State Bar Ethics Opn. 03-05; Delaware State Bar Committee on Professional Ethics Opn. 2011-1; Florida Bar Staff Opn. 30310 (2011); Georgia State Bar Formal Advisory Opn. 13-2; Illinois State Bar Association Advisory Opn. 06-01; Indiana State Bar Association Legal Ethics Opn. 2005-1; Maine Ethics Opn. 204 (2011); Missouri Formal Advisory Opn. 125 (2008); Montana State Bar Opn. 131224 (2013); Supreme Court of Ohio Opn. 2011-1; Oklahoma State Bar Ethics Opn. No. 328 (2011); Oregon State Bar Formal Opn. 2015-190; South Carolina Ethics Advisory Opn. 08-07; Tennessee State Bar Formal Ethics Opn. No. 2010-F-154; Utah Ethics Advisory Opn. 11-01; Vermont Bar Formal Ethics Opn. 2013-1; Virginia Legal Ethics Opn. 1858 (2011); Washington State Bar Association Advisory Opn. 1736 (1997); Wisconsin Formal Opn. E-87-11 (1998). In addition, at least two local bar associations have reached the same conclusion. See New York City Bar Association Formal Opn. 2010-3; Philadelphia Bar Association Professional Guidance Committee Opn. 2011-6 (2012).
5 Jurisdictions that have addressed the second issue, all of which answered in the negative are: Alabama State Bar Ethics Opn. RO 2011-01; Alaska Bar Association Ethics Opn. 2014-4; Florida Bar Staff Opn. 30310 (2011); Michigan Formal Advisory Opn. 125 (2008); Supreme Court of Ohio Opn. 2011-1; Oklahoma State Bar Association Ethics Opn. No. 328 (2011); Oklahoma State Bar Association Ethics Opn. No. 328 (2011); Utah Ethics Advisory Opn. 11-01;
Vermont Bar Association Advisory Opn. 2013-1; Virginia Legal Ethics Opn. 1858 (2011). In addition, the New York City Bar Association reached the same result.

6 The Committee notes that pursuant to California Rule of Court, rule 3.1130(b), a lawyer may not act as a surety ("An officer of the court or member of the State Bar may not act as a surety."). However, whether the indemnification clause sought by defendants might make plaintiff’s lawyer a surety is a question of law beyond the purview of this committee.

7 Of particular concern for defendants under the MMSEA are the new reporting requirements enacted in 2007. Under these new requirements, when there is a settlement, the defendant and its insurer have a duty to report certain payment details to the government and can be fined substantial amounts if they fail to report accurately. Because the defendant typically must rely on information provided by the plaintiff and because, as explained in the next paragraph, defendants and their agents might be subject to personal liability, there is an incentive for defendants to seek protection from the risk that the plaintiff has provided inaccurate information.

Further, pursuant to 42 U.S.C. §§ 1395y(b)(2)(B)(ii) and 42 C.F.R. 411.24(c) and (g), Medicare has a “direct right of action” against a primary plan, entity, insurer, physician or lawyer that received a primary payment. This would include plaintiffs and defendants as well as their respective lawyers or other agents. In addition, under 42 C.F.R. 411.24(c)(i)(2), if Medicare takes legal action, it “may recover twice the amount” from a recipient of the funds. See, e.g., United States v. Harris, (N.D. W.Va. March 26, 2009) 2009 WL 891931 ("[Plaintiff’s lawyer] is individually liable for reimbursing Medicare in this case because the government can recover ‘from any entity that has received payment from a primary plan,’ including an attorney.")

8 Compare L.A. County Bar Formal Opn. 517 (2006) ("An attorney may agree to advance reasonable expenses of prosecuting or defending a client matter and waiving the right to repayment by the client if there is no recovery. Similarly, at either the inception of the representation or during the course of litigation, an attorney may agree to indemnify the client for court-ordered costs if the client is not the prevailing party.") (Emphasis added.)

9 Subparagraph (b)(4), newly enacted effective November 1, 2018, similarly permits a lawyer to pay the costs to prosecute or defend a claim or action, “or of otherwise protecting or promoting the interests of an indigent person in a matter in which the lawyer represents the client.” (Emphasis added.) For the same reasons cited with respect to subparagraph (b)(3), this provision is inapplicable here.

10 Even if an agreement to indemnify a creditor of a client could be deemed a “loan” to a client, it is not certain that subparagraph (b)(2) is intended to permit such a loan. Few other jurisdictions have a provision that permits a lawyer to lend money to a client even after the lawyer has commenced representation. Those that do limit loans to clients whose ability to initiate or maintain the matter for which the lawyer has been retained would be adversely affected without such financial aid, (see La. Rule 1.8(e)(4)(i)), or would otherwise be put under “substantial pressure” to settle a case because of financial hardship and not on the merits, (see Minn. Rule 1.8(e)(3); N.D. Rule 1.8(e)(3)). Moreover, such loans are limited to the minimum sum necessary to meet the needs of the client and the client’s dependents. Here, the indemnification agreement is not intended to maintain an action and avoid a settlement but is presented as a prerequisite to settlement.

11 Cal. State Bar Formal Opn. 1988-101, decided under the former Rules, is not contrary. In that opinion,
Of the ethics opinions the Committee has reviewed, within the rule 1.8.5(b)(1) exception. Funds. Such an undertaking by a lawyer does not fit the clause contemplates open-ended personal liability for the rule 4-210(A)(1) [now rule 1.8.5(b)(1)] exception still remained in the lawyer’s trust account, thus making the lien amounts were known and the recovery funds to the provider’s interest in being paid out of any recovery. However, when recovery was had, the client directed the lawyer not to pay any proceeds of the recovery to the provider but to pay them to the client alone. That opinion advised that the lawyer’s best course of action under these facts was to retain the disputed amount in the lawyer’s trust account and commence an action in interpleader. That opinion stated that “[u]ndertaking such obligations [i.e., acknowledging the provider’s lien] to a third party places the attorney in a potential conflict of interest under California Rule of Professional Conduct 3-310(B) [now rule 1.7(b)]. Rule 4-210 [now rule 1.8.5], however, allows for this conflict of interest, but only where there is full consent by the client.” The State Bar opinion is not in conflict with this Committee’s conclusion because, under the facts of that opinion, the lien amounts were known and the recovery funds still remained in the lawyer’s trust account, thus making the rule 4-210(A)(1) [now rule 1.8.5(b)(1)] exception applicable. As noted, however, the indemnification clause contemplates open-ended personal liability for the lawyer regardless of the location of the recovered funds. Such an undertaking by a lawyer does not fit within the rule 1.8.5(b)(1) exception.

Of the ethics opinions the Committee has reviewed, only two have not relied on their jurisdiction’s rule 1.8.5 analogs, which are generally derived from ABA Model Rule 1.8(e). See N.C. State Bar Ethics Opn. RPC-228 (1996) and Vermont Advisory Ethics Opn. 96-05. The latter opinion was issued when Vermont still had lawyer conduct rules based on the ABA Code of Professional Responsibility. That opinion relied on EC [Ethical Consideration] 5-1, which provided: “The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.” The former opinion from North Carolina confusingly cited only “Rule 5.1(b) of the Rules of Professional Conduct” in support of its conclusion without further explanation. In the ABA Model Rules, rule 5.1 concerns the duties of managerial and supervisory lawyers. Although it might be surmised that the drafter of the opinion intended to cite EC 5-1, similar to Vermont, North Carolina adopted the Model Rules in 1985.

Rule 1.0.1(e) defines “informed consent” to mean “a person’s agreement to a proposed course of conduct.” The Committee observes that this duty previously was implicitly recognized in the former Rules, which required a lawyer to communicate to the client any offers of a proposed plea agreement in a criminal matter and any written offers of settlement in a civil matter. Former rule 3-510(A) [now rule 1.4.1(a)]. The requirements of that rule appear to have been intended to provide the client with sufficient information so that the client could make an informed decision about whether to accept the settlement offer. This view was supported by a California Supreme Court case that held: “[a]n attorney is not authorized . . . to ‘impair the client’s substantial rights or the cause of action itself,’” which include the decision to settle a matter. Blanton v. Womancare Inc. (1985) 38 Cal.3d 396 [212 Cal.Rptr. 131] (“the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation.”) The Committee observes that this duty previously was implicitly recognized in the former Rules, which required a lawyer to communicate to the client any offers of a proposed plea agreement in a criminal matter and any written offers of settlement in a civil matter. Former rule 3-510(A) [now rule 1.4.1(a)]. The requirements of that rule appear to have been intended to provide the client with sufficient information so that the client could make an informed decision about whether to accept the settlement offer. This view was supported by a California Supreme Court case that held: “[a]n attorney is not authorized . . . to ‘impair the client’s substantial rights or the cause of action itself,’” which include the decision to settle a matter. Blanton v. Womancare Inc. (1985) 38 Cal.3d 396 [212 Cal.Rptr. 131] (“the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation.”)
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Sentenced to the Chair? The Risk of Sitting Too Much

I HAD MADE THE COMMUTE from Orange County to Los Angeles. Sitting in the bucket seat was comfortable—until it wasn’t. Movement is restricted while trapped in a moving vehicle and that trek is longer than it used to be, closer to two hours than one. From the parking garage, I walked to the office suite, found my desk, and plopped down to catch the first round of morning e-mails and memos. The next thing I knew, two hours had passed, and I had not moved an inch. My back ached, and I was irritated.

That was 10 years ago. Around that time, I had seen obesity expert Dr. James Levine on a television newscast. He was showcasing his research on the perils of a sedentary lifestyle. Disgusted with his own 14-hour seated days, he had fashioned a regular treadmill with a drafting desk, creating a walking workstation. The results, he said, were astonishing: he worked more efficiently while moving and when he arrived home at the end of his day, he was buzzing with energy.1 I called out to the TV, “I need that!”

I kept up with the story. It was not long before office furniture maker Steelcase started manufacturing the prototype. I hesitated, however, to jump in and invest in that big contraption until I confirmed my desire. Instead, I bought a treadmill off the floor at Big 5 Sporting Goods and Googled making my own exercise space. A wooden shelf on top of the handles, a large-screen desktop computer, and I was set. Aside from a few upgrades as the industry kept pace, it is where I have been ever since. I am walking now.

Levine had been studying human movement and metabolism, concluding the U.S. obesity crisis was due, in large part, to our continued progression of inactivity: our daily movement, outside of scheduled exercise, has been dwindling so consistently over the years that our calorie burn has dropped by upwards of 1500-2000. While his initial research was geared toward weight, what Levine found, and subsequent studies conclude, is that this sedentary lifestyle wreaks havoc on our bodies in a host of other ways, including reduced brainpower.

How have we become sedentary? Thanks to technology, we can skim the news, Skype with a friend, book our next vacation, and play music without so much as standing up. In the office, we no longer head to the library to review cases or down the hall to discuss an issue with a colleague. All this can more easily be done while sitting online with Westlaw or Outlook e-mailing. Nearly anywhere everything can now be done with a machine, a phone, and a finger touch— all while sitting.

Our bodies were not built to sit; the human body was meant to move as evidenced by the way it is structured. Our bodies were not built to sit; the human body was meant to move as evidenced by the way it is structured. There are roughly 360 joints and about 700 skeletal muscles that enable easy, fluid motion, from running, jumping, and swimming to the simple finger tap. Our blood depends on body movement to circulate properly. Our nerve cells likewise benefit. Our skin is elastic, meaning it molds to our moves.2 Every part of our body is ready and waiting to move. So, what happens when we do not?

First, a common way of sitting is with a curved back and slumped shoulders, a position that puts uneven pressure on the spine.3 Over time, this causes wear and tear on the discs and overworks certain ligaments and joints. It also puts strain on muscles that stretch to accommodate the back’s curved position. This hunched shape also shrinks the chest cavity while you sit, meaning the lungs have less space to expand when you breath. That is a problem because it temporarily limits oxygen that fills the lungs and filters into your blood, which segues right to brainpower. Your brain needs oxygen to remain alert. Without it, concentration levels dip as brain activity slows. We can experience numbness and swelling. Around the skeleton are the muscles, nerves, arteries, and veins that form the body’s soft tissue layers. The very act of sitting squashes those delicate layers which limits nerve signaling and causes numbness. The compression also reduces blood flow in your limbs causing them to swell.

If the lack of calorie burn was not enough, sitting for long periods also temporarily deactivates a special enzyme in the walls of blood capillaries that breaks down fats in the blood. When you sit, you are not burning fat nearly as well as when you move around. This means even more pudge.

Recent studies have found that extended sitting may have more long-term effects: It is linked to some types of cancers, heart disease, and can contribute to diabetes, kidney, and liver problems.

What can we do? Move.4 If you are forced to a chair, get up every hour. Set a timer. Put a portable treadmill under your desk. Buy a standing desk. Stand when typing. Stand when phoning. Have walking meetings. Just get up and move.

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2 Murat Dalkilinc, Why Sitting Is Bad for You, TED Talks (Feb. 16, 2019).

Laurel Brauer is a divorce lawyer and California certified family law specialist practicing in Los Angeles and Orange counties.
11TH ANNUAL CHARITY
GOLF TOURNAMENT & NETWORKING DINNER
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EVENT SCHEDULE
9:00 AM  Registration, continental breakfast, putting contest, and all practice areas are open + tournament package sales.
11:00 AM  Shotgun start, lunch and on-course snacks.
4:30 PM  Networking dinner for golfers and guests.

SPONSORSHIP OPPORTUNITIES

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