

**Q&A with the Hon. Cormac J. Carney**  
by Lester J. Savit



On April 7, 2003, Cormac J. Carney's nomination for United States District Judge, Central District of California, Santa Ana Division, was confirmed by the United States Senate. Judge Carney had been a judge on the Orange County Superior Court since 2001. Jones Day partner Lester J. Savit interviewed Judge Carney in

his new chambers on December 5, 2003.

Savit: Your background as a highly successful athlete is somewhat unusual for a federal judge. What do you currently do to stay in shape?

Carney: I jog with my good friend and colleague Judge Carter two or three times a week at lunch if we are both

*-Continued on page 10-*

**-IN THIS ISSUE-**

- ◆ Q&A with Hon. Cormac J. Carney ..... Pg. 1
- ◆ Romo Decision Clarifies Due Process Limits on Punitive Damages..... Pg. 1
- ◆ President's Message ..... Pg. 2
- ◆ Rules & Strategies for a System to Calendar and Meet Litigation Deadlines..... Pg. 3
- ◆ A Word From Our Sponsor ..... Pg. 3
- ◆ How Well Do You Know Your Orange County Judges ..... Pg. 13
- ◆ Memo to CA Justices, Judges & Court Staff from Sen. Dunn Re: Budget ..... Pg. 14
- ◆ Memo to Pres. Judges & Exec. Officers of the CA Courts from Court Admin Re: Budget ..... Pg. 13

**Romo Decision Clarifies Due Process Limits On Punitive Damages**

by Theodore J. Boutrous, Jr. and Thomas H. Dupree, Jr.

The California Court of Appeal's recent decision in *Romo v. Ford Motor Company* has clarified the due process limits on punitive damage awards, and explained how those limits interact with California's punitive damages law. In cutting a \$290 million punitive damage award to \$23 million, the court rejected what it called the "broad view" of punitive damages in favor of a more traditional understanding that focuses on the defendant's conduct in the case at bar and the resulting harm to the individual plaintiff. *Romo* involved the largest punitive damage award ever affirmed in a personal injury case in U.S. history, and the largest such award ever upheld in any case by a California court.

The November 2003 decision from the Fifth Appellate District, reported at 113 Cal. App. 4th 738, is one of the first major cases involving the application of last year's Supreme Court ruling in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). In *State Farm*, the Supreme Court clarified and strengthened the constitutional limitations on punitive damage awards, making clear that such awards must be reasonable and proportionate to the harm suffered by the plaintiff—and emphasizing the important duty of appellate judges to review such awards closely and with rigor.



Theodore J. Boutrous, Jr.



Thomas H. Dupree, Jr.

*-Continued on page 4-*

**President's Message:**  
**Building a Better ABTL**  
by Dean J. Zipser



As our Orange County ABTL Chapter begins its eighth full year, and I am honored to begin my year as President of the Chapter, I thought it would be appropriate to take a quick look at who we are, what we do, and where we are going.

*Who we are.* The Association of Business Trial Lawyers was founded over 30 years ago in Los Angeles to fill a niche -- namely, an organization especially for business trial lawyers. The organization sought to provide a collegial forum for discussing business litigation issues, and has flourished ever since. We now have chapters also in Northern California, San Diego, San Joaquin Valley, and, of course, Orange County.

Our own chapter formally got off the ground in 1997, led by a group of attorneys and judges who saw the same need for an ABTL chapter here. It has been a pleasure to watch our chapter grow. We now have over 500 members, a vibrant Board of Governors, and the strong support and participation of our local bench.

*What we do.* We strive to promote and enhance communications between the bar and the bench, and provide education and forums on issues of interest and import to business trial lawyers. We have five evening programs each year, including our annual wine tasting fundraiser in June. This year, we intend to continue our practice of offering provocative and relevant programs on issues of interest to business litigators. In addition to the formal program, our meetings provide a great opportunity to meet informally with judges and attorneys. So, mark your calendars now: Our remaining programs for the year will be on April 7, June 2, September 22, and November 17, each starting with cocktails at 6:00 p.m., dinner at 7:00 p.m., and a strictly adhered-to adjournment no later than 9:00 p.m.

Statewide, once a year, members of all of the chapters are invited to get together for the annual seminar at a resort location, featuring presentations by top lawyers, scholars and judges from across the country. Once you attend one of these events, you will be coming back year after year. They are wonderful. And it's not too early  
*-Continued on page 6-*

ASSOCIATION OF BUSINESS TRIAL LAWYERS  
**abtl**  
ORANGE COUNTY

1800 S. Fairfax ave.  
Los Angeles, CA 90019  
Phone: 323.939.1999; Fax: 323.935.6622  
E-mail: [abtl@abtl.org](mailto:abtl@abtl.org)  
[www.abtl.org](http://www.abtl.org)

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## Rules and Strategies for a System to Calendar and Meet Litigation Deadlines by Dale J. Giali

Every now and then, the courts remind us of the importance of litigation calendaring. Two recent published opinions confirm an attorney's non-delegable role in litigation calendaring and the severe consequences that may result when inattention to small details leads to missing a filing deadline.

The first case involves Hall of Fame jockeys Laffit Pincay and Chris McCarron. In 1989, they sued their former investment advisors in the Central District of California. In 1992, Pincay and McCarron prevailed at trial and judgment was entered accordingly. In an initial appeal by defendants, the Ninth Circuit reversed certain aspects of the judgment. *Pincay v. Andrews*, 238 F.3d 1106 (9th Cir. 2001).

On July 3, 2002, the District Court entered a new judgment in Pincay and McCarron's favor consistent with the Ninth Circuit's decision. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that any notice of appeal of the July 3, 2002 judgment had to have been "filed with the district clerk within 30 days" of July 3. Shortly after receiving the judgment, defense counsel asked his firm's non-lawyer calendaring clerk how long he had to file a notice of appeal. The calendaring clerk erroneously responded that the period was 60 days, a mistake the Ninth Circuit described as "an unexplained aberration by a man experienced in court procedures." *Pincay v. Andrews*, 2003 U.S. App. LEXIS 24811, \*9 (9th Cir. 12/10/03). Defense counsel – who himself was unaware of the correct rule and relied exclusively on the calendar clerk for review and analysis of the rule – instructed the calendaring clerk to record August 29, 2002 on the firm's calendar as the last day to file the notice of appeal. August 29 was 27 days after the correct 30-day deadline.

When the 30-day period ran, plaintiffs commenced proceedings to enforce the judgment. Realizing their error, defendants filed a motion with the District Court for an extension of time to file their notice of appeal. Defendants asserted excusable neglect in relying on the mistaken



*-Continued on page 6-*

## A WORD FROM OUR SPONSOR

# MOSS-ADAMS LLP

## Fraud in a Company and Its Financial Statements

In the summer of 2002, the Sarbanes-Oxley bill was signed into law, which has brought with it dramatic changes for both the accounting and legal professions. The AICPA Accounting Standards Board issued SAS 99, Consideration of Fraud in a Financial Statement Audit. It was the first audit standard to be released since the passage of Sarbanes-Oxley. SAS No. 99 is effective for audits of financial statements for periods beginning on or after December 15, 2002.

SAS No. 99 has the potential to improve audit quality significantly, not just in detecting fraud, but also in detecting all material misstatements and improving the quality of the financial reporting process. It establishes standards and provides guidance in fulfilling the auditor's responsibility. There is an emphasis on considering clients' susceptibility to fraud and introduces new concepts and requirements. Our daily newspapers, television and radio stations are inundating us with reports of financial restatements, allegations and discovery of financial frauds, and an increasing number of business failures. The AICPA through SAS 99 should help to address the current lack of confidence in financial reporting.

SAS 99 provides a description for, and characteristics of, fraud. In short, fraud generally occurs in one of three different forms:

- Fraud from error
- Fraudulent reporting
- Misappropriation of assets

Fraud generally occurs when the following three conditions are present:

- Motive/incentive
- Opportunity
- Rationalization

The Statement discusses the need for auditors to exercise professional skepticism when considering the possibility that a material misstatement due to fraud could be

*-Continued on page 5-*

### I.

The *Romo* case arose from a car accident involving a 1978 Ford Bronco. The plaintiffs alleged that the Bronco's roof was defective, and a Stanislaus County jury found in their favor, imposing a \$290 million punitive damage award against Ford. Although the trial judge found the award tainted by juror misconduct and set it aside, the Court of Appeal reinstated the award in full and the state Supreme Court declined review.

Ford asked the United States Supreme Court to hear the case. While Ford's petition for certiorari was pending, the Court decided *State Farm*. The Court then granted Ford's petition, vacated the award, and remanded the case to the California Court of Appeal for reconsideration in light of the new *State Farm* standards.

### II.

The Court of Appeal's opinion on remand reflects the important impact of *State Farm* on state punitive damages law. The court began by recognizing that in *State Farm*, the Supreme Court "went beyond the 'guideposts'" it had established in its famous *BMW v. Gore* decision, and "articulated a constitutional due process limitation on both the goal and the measure of punitive damages." 113 Cal. App. 4th at 749. The result, the court concluded, "is a punitive damages analysis that focuses primarily on what the defendant did to the present plaintiff, rather than the defendant's wealth or general incorrigibility." *Id.*

In reaching this conclusion, the court noted that its initial opinion had applied "the broad standards for punitive damages"—namely, that the purpose of a punitive award could be "to actually deter a practice or course of conduct by depriving the wrongdoer of profit from the course of conduct or making such conduct so expensive it put the wrongdoer at a competitive disadvantage." *Id.* at 748-49. *State Farm*, the court explained, "impliedly disapproved of this broad view of the goal and measure of punitive damages" in favor of "the more limited, historically based view of punitive damages" that focuses on the harm to the particular plaintiff in the case at bar. *Id.* at 749.

The court determined that in two respects, "the jury was fundamentally misinstructed concerning the amount of punitive damages it could award." *Id.* at 753 (emphasis removed). First, it was erroneously instructed that it should consider the defendant's "financial

condition" in determining an appropriate award; such an instruction, the court explained, "fails to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs." *Id.* In so holding, the court recognized that evidence of the defendant's wealth, although often introduced at trial in an attempt to justify a multimillion-dollar punitive award, carries with it the potential to taint the resulting verdict and render it unconstitutional. Thus, even in circumstances where the introduction of wealth evidence is arguably permissible as a matter of *state* law, *Romo* makes clear the *federal constitutional* restrictions on its use. As the Supreme Court held in *State Farm*, a defendant's wealth "bear[s] no relation to the [punitive] award's reasonableness or proportionality," and therefore "cannot justify an otherwise unconstitutional punitive damages award." 123 S. Ct. at 1525.

Second, although the jury was given some guidance as to the threshold for the imposition of punitive damages, it was *not* told of the constitutional limitations on the amount it could award. The harm from this omission was exacerbated by the improper arguments of plaintiffs' counsel, who urged the jury to impose a punishment large enough to force Ford to recall all of its 1978 Broncos and "crush them to dust." 113 Cal. App. 4th at 753. Counsel further exhorted the jury to impose an award of such size that "the resulting publicity" would reach Bronco owners throughout the country. The court condemned this tactic, declaring that "[t]hese considerations are impermissible under *State Farm* and plaintiffs' argument served to magnify the impact of the misinstruction." *Id.* at 754.

The court then recognized a central holding of *State Farm*: that in all but the most extreme cases, a punitive damage award that is more than ten times the compensatory damage award violates due process, and that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 752 (quoting *State Farm*, 123 S. Ct. at 1524). The court also noted that *State Farm* "fundamentally altered" the relevance of criminal penalties in determining whether a punitive damage award is excessive, emphasizing the Supreme Court's observation that "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Id.* (quoting *State Farm*, 123 S. Ct. at 1526).

**-Romo: Continued from page 4-**

Applying these new standards, the court held that the \$290 million punitive award was excessive and unconstitutional. The court accordingly remitted the award to \$23.7 million, which it noted “is approximately five times the total compensatory damages award in this case.” *Id.* at 763. Such an amount, the court emphasized, is “near the top of the permissible range” allowed by the Constitution. *Id.* at 755.

Finally, in reducing the award, the court noted that with regard to the personal injury claims asserted by some of the plaintiffs, “a large portion of the compensatory damages award was for noneconomic damages,” primarily emotional distress. *Id.* at 762. The court reasoned that because noneconomic damages “likely involved considerations similar to the punitive damages award, a somewhat lesser multiplier is appropriate as to those damages.” *Id.* This insight tracks *State Farm*’s admonition that courts “must look at the *nature* of the compensatory damages award, with the result that a lower multiplier will be appropriate if the compensatory damages award for the particular tort already compensates for the ‘outrage and humiliation’ that punitive damages are primarily intended to condemn.” *Id.* at 752 (quoting *State Farm*, 123 S. Ct. at 1525).

### III.

Despite its overall conclusion, the court did not accept Ford’s argument that even a \$23 million award was far too large and unconstitutional. Ford had contended that *State Farm* compelled the elimination of the award altogether, or at most permitted a 1:1 ratio, but the court chose to allow an award that is approximately five times compensatory damages. In product liability cases where there are large compensatory damage awards, particularly those with a large noneconomic component, defendants have strong arguments that even a 1:1 ratio is excessive.

Although the long-term effect of the *Romo* decision remains to be seen, its immediate impact is clear: punitive damage awards, in the rare cases where they are appropriate, must be reasonable and proportionate to the actual harm caused to the plaintiff. They are not to be used to punish a defendant for alleged harm to other persons not before the court, or to force a defendant to make changes in its business practices on a national scale. Based on *Romo* and *State Farm*, defendants in future cases will no doubt seek to persuade courts to further rein in arbitrary and excessive awards.

► **Mr. Boutrous is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP, and is co-chair of the firm’s Appellate and Media Practice Groups. Mr. Dupree is an associate in the firm’s Washington, D.C. office. They were lead counsel for Ford Motor Company in the Supreme Court and appellate proceedings on remand in the Romo case.**

**-Sponsor: Continued from page 3-**

present. The new Standard requires the auditor to gather information necessary to identify risks of material misstatement due to fraud, by making inquiries of management and others within the entity about the risks of fraud.

Considering the results of the analytical procedures performed in planning the audit:

- Considering fraud risk factors.
- Considering certain other information.

SAS 99 requires the auditor to use the information gathered to identify risks that may result in a material misstatement due to fraud. The auditor must assess the identified risks after taking into account an evaluation of the entity’s programs and controls. The new Statement emphasizes that the auditor’s response to the risks of material misstatement due to fraud involves the application of professional skepticism when gathering and evaluating audit evidence.

The new Standard requires the auditor to assess the risks of material misstatement due to fraud throughout the audit. The auditor is required to evaluate at the completion of the audit whether the results of all the auditing procedures and observations affect the assessment. Further, the auditor is required to consider whether identified misstatements may be indicative of fraud and, if so, the auditor must evaluate their implications.

SAS 99 provides guidance on communicating about fraud to management, the audit committee, and others. It discusses how communications are to be made to the appropriate level of management, what to do when fraud involves senior management and disclosures to parties outside of the entity.

How does SAS 99 affect the auditors? In summary it:

**-Continued on page 12-**

**-President: Continued from page 2-**

to start planning ahead. This year the seminar will be at the Mauna Lani Bay Hotel on the Big Island of Hawaii from October 20-24.

*Where we are going (besides the Westin and Hawaii).* In seeking to continue our objective of facilitating a dialogue between the bench and the bar, we hope to kick off this year a “brown bag” lunch program. We are still working out the specifics, but we anticipate offering the opportunity for a group of our members to meet with a judge during lunch (bring your own), in chambers, or some other court location. We hope to offer a number of these lunch meetings throughout the year. Stay tuned for more details.

If you have not done so already, please check out our “new and improved” website, [www.abtl.org](http://www.abtl.org). The site contains information concerning the organization as a whole, as well as specific information about our chapter and the other individual chapters. We are continuing to develop the website and, to that end, we look forward to hearing from you with respect to any content or links you would like to see included.

Similarly, we would love to hear from you with any thoughts, ideas, or comments about our newsletter. (Would you like to get rid of the president’s column, for example?) Do you like the judicial interviews? Are there particular topics you would like covered? Even better, if you are interested in submitting an article or otherwise helping out on our quarterly report, we would love to hear from you.

As we continue to grow as a chapter, we appreciate and continue to look forward to your support and participation. Let us know what we can do to improve and make the ABTL even more helpful and relevant to you.

Thank you.

► **Dean Zipser is a partner in and head of the Litigation Department of, the Irvine office, of Morrison & Foerster.**

**-Calendar: Continued from page 3-**

calendar clerk. The District Court granted the motion and extended the time to file the appeal to August 27 (25 days after the deadline imposed by Rule 4(a)(1)). *Pincay v. Andrews*, 2002 U.S. Dist. LEXIS 26948 (C.D. Cal. 2002).

Defendants filed a notice of appeal within the extended date. Plaintiffs, on the other hand, appealed the District Court’s order extending the time to commence the appeal. In a 2-1 decision, the Ninth Circuit reversed the District Court, holding that the neglect was not excusable because “[h]ere there was ignorance of the rules, compounded by delegation of knowledge of the rules to a nonlawyer for whom responsibility was not accepted.” *Pincay v. Andrews*, 2003 U.S. App. LEXIS 24811, \*11 (9th Cir. 12/10/03). Among other things, the Ninth Circuit explained that defense “counsel did not show good cause for his failure to file on time, nor can his action be classified as excusable neglect. *What counsel did was to delegate a professional task to a nonprofessional to perform.*” *Id.* at \*4, \*5 (emphasis added). The court went on to state that defense counsel’s focus on his reliance on the “non-lawyer clerk . . . is wrong. The focus must be on the lawyer. Paralegals and other nonlawyers perform services in firms; many of the services involve knowledge of the law and were once performed by junior lawyers. The economy of such delegation is evident. But delegation cannot be made of responsibility for professional knowledge. When the lawyer delegates, he retains responsibility for knowing the law.” *Id.* at \*9. Because rules relating to deadlines and due dates are *legal* rules, the lawyer must maintain responsibility for knowing and applying them. In *Pincay*, the lawyer relied on the calendar clerk to know the rule.

With the 30-day period reinstated by the Ninth Circuit – and defendants having failed to file a notice of appeal within that timeframe – the July 3, 2002 judgment will become final and non-appealable unless the Ninth Circuit’s opinion is reversed. Defendants are apparently seeking to do just that. They filed a petition for rehearing or rehearing en banc on December 23, 2003. Plaintiffs’ response was due by February 4.

The second case, from the California Court of Appeal, reconfirms that severe penalties can result from missing a filing date and underscores how small mistakes can add up to very big problems when mixed with a firm filing deadline. In *Duran v. St. Luke’s Hospital*,  
**-Continued on page 7-**

**-Calendar: Continued from page 6-**

2003 Cal. App. LEXIS 1861 (12/16/03), plaintiff's counsel attempted to file a malpractice action by sending the complaint to the court by Federal Express two days prior to the statute of limitations expiring. The first mistake was to send something so time sensitive directly to the court by Federal Express, leaving no ability to monitor the filing in real-time. A far better practice under the circumstances (the attorney was in San Diego and was filing the case in San Francisco) would have been to Federal Express the package to a local messenger service and have the messenger service hand file the complaint. The messenger would have the ability to report back immediately if any problems arose and may have been able to resolve a discrepancy right then and there. The attorney's second mistake was to wait until so close to the last day to get the complaint on file, ensuring that even a minor problem would literally terminate the case.

Nevertheless, Federal Express delivered the package to the San Francisco Superior Court clerk on October 8 – one day after it was sent and one day before the last day to commence the action. The package contained the complaint and summons and a check that was \$3 short of the filing fee. The attorney's third (and, perhaps, most minor) mistake was to send the wrong filing fee. The clerk rejected the filing because of the \$3 shortfall. With certain limited exceptions (e.g., filing a notice of appeal), a California state court clerk can reject (though is not required to) a filing if the proper filing fee does not accompany it. By the time the attorney became aware of the problem, the statute of limitations had run.

The attorney's fourth mistake was to assume that everything was fine, and to do so during the very limited period in which something still could have been done to resolve any problems. The attorney should have closely monitored the filing to confirm that it was successfully delivered to *and filed by* the clerk prior to the limitations period running.

The complaint was filed late, but the trial court granted plaintiff's petition for an order *nunc pro tunc* deeming the complaint filed on October 8. It did so, however, subject to any subsequent timeliness challenge defendants may bring. When defendants challenged the filing, the court rescinded its *nunc pro tunc* order and dismissed the untimely case based on statute of limitations grounds. The Court of Appeal – based on a long line of authority supporting a clerk's ability to reject a filing not accompanied by the correct fee – upheld the

dismissal in a unanimous decision. The appeal docket does not reflect any subsequent activity on the matter and, unless action is taken by mid February, the Court of Appeal decision will be deemed final and nonreviewable.

Needless to say, *Pincay* and *Duran* underscore, in fairly striking terms, the need for a good system to both calendar and then meet litigation deadlines. An understanding of the basic rules governing litigation calendaring and filing – and application of some common sense strategies – are the cornerstones of such a system and can go a long way toward ensuring that the devastating results in *Pincay* and *Duran* are avoided.

***Have A Calendaring System.*** It is imperative to have a system for a given case to calculate the dates, record those dates and circulate them to the team and, as appropriate, the client. Someone needs to be responsible for reading the rules and calculating the dates and, as *Pincay* holds, the task of knowing and applying the legal rules is ultimately an attorney's non-delegable responsibility. That's not to say that non-lawyers may not or should not be involved in the process. Nothing in *Pincay* challenges the appropriateness of (let alone prohibits) having paralegals, clerks and secretaries take active roles in the calendaring process. Nor does *Pincay* address or prohibit the use of calendaring software.

Calendared dates have to be updated and amended on a regular basis. Most cases are constantly changing and the case calendar must itself be amended to reflect the changes. The calendar has to be consulted on a regular basis.

***Calendar "Everything."*** Whenever something happens on a case, it is useful to ask whether anything needs to be calendared as a result. It doesn't have to be a filing or service date to qualify as something to be calendared. For example, if a motion is served against your client, it makes sense to consider calendaring at least the following: deadline to file/serve opposition, deadline to file/serve reply, date to check court website for tentative ruling, hearing date, internal draft circulation deadline, litigation team meeting to prepare for hearing, etc. In *Duran*, given the impending limitations period deadlines, the attorney could have calendared October 8 as the day to monitor the filing to confirm that it was successfully completed. Start getting in the habit of "pre-calendaring," e.g., once you have calendared the last day to file a motion for summary judgment, put a note in the calendar a month prior and 2

**-Continued on page 8-**



**-Calendar: Continued from page 7-**

weeks prior, etc.

**More Than One Rule Can Address The Same Deadline and The Rules Can Be Contradictory.** There are many possible sources of applicable rules, e.g., statutes, rules of court, local rules, etc. It is dangerous to assume that only one rule will address a given deadline or that multiple rules addressing the same deadline are necessarily compatible. *Compare, e.g.,* Fed. R. Civ. Proc. 6(d) (motion shall be served not later than 5 days prior to hearing date) *with* C.D. Cal. Local Rule 6-1 (motion shall be served 21 days prior to hearing date); *compare also* Code Civ. Proc. § 170.6 (in single judge assignment case, motion to remove judge must be made within 10 days of appearance) *with* Government Code § 68616(i) and L.A. Sup. Court Local Rule 7.5(a) (in single judge assignment case, motion must be made within 15 days of first appearance).

**Rules Can Be Tricky.** There is no substitute for carefully reading the applicable rule to arrive at a correct due date. In *Pincay*, had the calendaring clerk or the attorney simply read the fairly unambiguous rule that applied, the mis-calendaring would not have occurred. Not all rules are as clear as the one at issue in *Pincay*, however. Many rules have subtleties that can be quite important for purposes of calendaring. For example, California Rule of Court 870(a)(1) provides three different possible due dates for a memorandum of costs. One of those options is “within 15 days after the date of mailing of the notice of entry . . . by the clerk.” (Emphasis added.) Because the deadline is tied to the “date of mailing” and not 15 days “after service,” no additional days under section 1013 of the Code of Civil Procedure for mailing should be added to the period. A careful reading of the rule makes clear that (if the clerk mailed notice of entry) the correct due date is 15 days after the date the clerk mailed the document. When in doubt about the interpretation of a rule, calendar the date for the earliest reasonable date (but jot down an explanation of the issue and why you arrived at the date you did so that you and/or your team will know that there may be a different possible due date).

**Of Course, You Don’t Have To Wait Until The Date Arrives To Do The Thing Calendared.** You rarely, if ever, are required to wait until the last day to do something, so if you don’t need to wait, don’t. For many things there is little problem with filing and/or serving prior to the deadline, e.g., discovery requests,

discovery responses, a demand for the exchange of expert information, a notice of appeal, etc. Even with the mis-calendaring that occurred in *Pincay* (57 days instead of 30) and the inadvertence in *Duran* (filing rejected for insufficient fee, though otherwise delivered timely), the errors would not have led to the devastating results if the notice of appeal had been filed shortly after the judgment was entered and if the complaint had been sent to the clerk a month prior to the statute of limitations running. Absolutely nothing prohibited the notice of appeal or complaint from being filed early. If you find yourself on the last day (or close to the last day) to file something, you can avoid the problem encountered in *Duran* by selecting a filing method or follow up monitoring that will provide immediate notification to you if a problem arises with the filing.

**Service v. Filing.** Service and filing are different acts and should be considered separately. If something needs to be filed and served, those two things typically happen on the same day and in many instances should happen on the same day, but there are lots of exceptions. For example, the initial complaint may be served days or weeks after it is filed; mail serving of a motion requires more notice to the parties, but does not affect the last day to file the motion (CD Local Rule 6-1 – notice and moving papers for motions in the Central District can be filed 20 days before the hearing, but must be served 21 or 24 days before the hearing). This can provide some benefit because you typically can properly serve something later in the day (as late as midnight if mail service) than you can file it because of the time the clerk’s office closes. What you file must, of course, be identical to what you serve, so you can’t change anything after it has been served.

**The General Rule of Counting Days.** As a threshold matter, you need to determine whether to count backwards or forwards. The particular rule at issue should answer this important question. For example, responses to interrogatories are due “[w]ithin 30 days after service” (Code Civ. Proc. § 2030(h); Fed. R. Civ. Proc. 33(b)(3) (emphasis added)), and, therefore, you count forward from the date of service of the interrogatories. On the other hand, briefing with respect to a motion is due a certain amount of days before the hearing (Code Civ. Proc. § 1005(b); CD Local Rules 6-1, 7-9, 7-10), and, therefore, you count backward from the hearing date. To count days – whether counting backward or forward – skip the day you are starting from and count the next day as the first day. When you hit the total number of days you are counting, the date that

**-Continued on page 9-**



**-Calendar: Continued from page 8-**

falls on the last counted day is the due date. Code Civ. Proc. § 12, Fed. R. Civ. Proc. 6(a).

With respect to whether a given time period should be counted in calendar days or court days, the answer depends on whether you are in California or federal court. In California the rules typically indicate which you are to use. *See, e.g.*, Code Civ. Proc. § 1005(b) (“21 calendar days”); § 1013(a) (“shall be extended five calendar days”); § 1013(c) (period to respond where service by “overnight delivery shall be extended by two court days”). If the rule simply says “days,” the strong presumption is that it is referring to calendar days. *See, e.g.*, Code Civ. Proc. § 437c(a) (“at least 75 days”).

In federal court, on the other hand, “[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.” Fed. R. Civ. Proc. 6(a). There are exceptions. *See, e.g.*, CD Local Rule 7-10 (reply due 7 *calendar* days prior to hearing).

***The Effect of Mail Service On Due Dates.*** Where something is served by mail *and where a response is tied to the service*, the period to respond increases 5 days in California courts (assuming both the sender and recipient reside in California) (Code Civ. Proc. §§ 1005(b), 1013), and increases 3 days in federal court (Fed. R. Civ. Proc. 6(e); Fed. R. App. Proc. 26(c)). Service by facsimile or overnight delivery may also increase the period of time to respond. Code Civ. Proc. § 1013(c) & (e). Moreover, for motion moving papers – even though no response is tied to *service* of the moving papers (response is tied to the *hearing date*) – you must add additional time to the minimum notice periods if you are serving by mail, i.e., 21 days plus 5 days in California and 21 days plus 3 days in Central District. Code Civ. Proc. § 1005(b); CD Local Rule 6-1.

This general rule does not apply to all things served or sent by mail or to situations in which a response is pegged from the *date* of service (as opposed to after service). *See* Code Civ. Proc. § 1013(a) (“extension shall not apply to extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment . . . , or notice of appeal”). For example, the due date for opposition and reply briefs is calendared from the motion *hearing date* regardless of the method of service of the moving papers (*see* Code Civ. Proc. § 1005(b)); the due date for a memorandum of costs is calendared from the *date of mailing* or the

*date* of service (not service) of the judgment and, therefore, no days should be added for mail service (Cal. R. Court 870(a)); the time to file a notice of intention to move for a new trial “shall not be extended . . . by the provisions of Section 1013” (Code Civ. Proc. § 659); and a respondent’s brief is due within 30 days of appellant *filing* its opening brief (Cal. R. Court 15(a)(2)).

***The Effect of Weekends and Holidays on Due Dates.*** If the due date – whether counting backwards or forwards – falls on a weekend or holiday, the period runs until the end of the next day, *moving in the same direction that you have been counting*, that is not one of the aforementioned days. Code Civ. Proc. §§ 12, 12a (generally); Fed. R. Civ. Proc. 6(a). So, if you must file something 5 days *before* a hearing and the 5th day falls on a weekend, the correct practice is to calendar the due date as Friday, not Monday. *See generally* <http://www.occourts.org/civil/LMSchd.asp>. Likewise, when you must serve a response within 30 days of receiving something and the 30th day thereafter falls on a weekend or holiday, you move forward to the next day that is not a weekend or holiday. Be careful here. You should add the extra days for mail service (discussed above), if any, *before* you apply this “bumping” rule, which will most likely effect whether the weekend/holiday rule is even applicable. California has a special rule regarding discovery due dates falling on weekends or holidays, providing that, whether you count backwards or forwards to arrive at the due date, the period is “*extended until the next day that is not a Saturday, Sunday or holiday.*” Code Civ. Proc. § 2024(g) (emphasis added).

Litigators must always be mindful of deadlines, especially when missing the date can lead to the types of devastating results that occurred in *Pincay* and *Duran*. Vigilant application of the rules and common sense strategies discussed above should go a long way towards eliminating calendaring miscues.

► **Mr. Giali is a commercial litigation partner in the Irvine office of Howrey Simon Arnold & White**

**-Interview: Continued from page 1-**

in town. I also try to jog a little bit on the weekend.

Savit: Do you engage in any competitive sports?

Carney: No. But I do enjoy following my kids' soccer and basketball games.

Savit: In private practice you were a litigator, which, obviously, can be intensely competitive. As a judge you oversee competing advocates without being mixed up in the fray yourself. Is there any aspect of being a judge that feels competitive to you?

Carney: I sense some competitiveness when I'm trying to make the right decision in a difficult case. My docket contains complex anti-trust, economic, trademark, copyright, and patent issues. Sometimes I have to press myself to gain an understanding of areas of law that are new to me, and apply the law in difficult cases. Sometimes it takes a good deal of work over time before I feel comfortable that I have figured it out. That challenge feels competitive to me.

Savit: In your view, what is the best part of being a judge?

Carney: Presiding over trial. I love the interaction with the jury and I love seeing good lawyers crossing swords. I love hearing stories and dealing with the human dynamic. There is nothing that I enjoy more than listening to and seeing a good cross-examination. The best trial lawyers can take whatever case they are given and put on one heck of a show.

Savit: You are also distinguished from the majority of your colleagues on the bench by your relatively young age. What advantage is your youth to fulfilling the duties of a Federal judge?

Carney: There are physical demands to the position. This job is a wonderful, wonderful job, but it can be intense and the work very demanding. Most weeks, I am in trial, handling the scheduled law and motion calendar, and also reading and deciding urgent TRO's and *ex partes*. To keep up with the work, I have to put in hours during the evenings and the weekends. Obviously, it helps if you are younger and in good physical condition to meet the physical demands of the job.

Savit: Are there disadvantages of being a young judge?

Carney: I can't come off being the grandfather or the godfather of the Federal courts. When you see gray hair, someone who's been on the bench for 20 years, that commands respect. It should command respect. I can't play that card. Sometimes the lawyers that appear before me are 20 years or more older than me and they're very experienced. Especially in Federal Court, they are pretty darn good. I realize that that could be an issue, but I've never had a problem with it so far, I'm pleased to say.

Savit: You can look forward to being on the bench for 20 years or more. Are there any particular goals you've set for yourself?

Carney: Being a judge has been a dream of mine since law school. It's turning out to be everything I thought it would be and more. My goal is to get better at it every day.

Savit: You were known for being a very hard working lawyer and state court judge. How do the time demands of private practice compare with the time demands of being a federal judge?

Carney: The stresses are different. The stress I have now is making sure I am making the right ruling or decision. But, it's on my own timetable. So, if I'm not ready to make a decision, I can wait until I am. Unlike private practice, there isn't a client calling at 7:00 o'clock in the morning or on weekends, and I don't have to be accountable to bill a certain number of hours, or for business development. Quite frankly, that's stressful.

Savit: I know one of the differences between the state and federal bench is that the federal judges tend to spend more time deciding written motions. Can you describe any particular things that you like to see in written advocacy?

Carney: A real sign of good brief writing is if the arguments are simplified - they get to the heart of the issue right up front. That sounds simple, but it's very difficult to clearly summarize an argument in a complex or difficult area of the law. There is nothing as unpersuasive as having to get to the third or fourth or fifth page to find out what the party wants and why that party thinks it should win.

Savit: When I work with new associates, I try to challenge them by asking: "Okay, you got 30 seconds of

**-Continued on page 11-**

*-Interview: Continued from page 10-*

the judge's time, what's the point?"

Carney: You got it, that's it. I am not talking about shooting from the hip or reducing all arguments to sound bites. The lawyer first has to write the long version, then take a step back before writing the introduction or deciding on a summary of the argument. The briefs need to be both concise and thorough. I think that's the challenge for lawyers - the best ones are able to take a voluminous amount of information and complex legal issues and then articulate a relatively short and understandable argument.

Savit: In your view, what is the best way to keep the jury's attention in a long and complex matter such as a patent infringement action?

Carney: It should be entertainment. It's serious stuff, but it should be entertainment. And, if you look at it as entertainment, then maybe you'll start to focus better on how I can make this entertainment. It can be sad, exciting, depressing, but it should be entertainment.

Savit: So, you just have to get to the decision-makers to really understand the emotional element?

Carney: Right. But, even in patent cases, you can make it exciting and fun because you're usually dealing with some pretty interesting technology.

Savit: In a time when lawyers appear before many different judges in different state and federal courts, they don't have much of an opportunity to develop credibility with any particular judge. Can you give our readers some insight about how you decide whether a lawyer is believable?

Carney: What's a big turn-off to me and ruins credibility is someone who is hostile and petty. I love zealous advocacy and watching a good cross-examination. I appreciate emotion and passion. What I don't like is unprofessionalism. Attorneys acting like young kids fighting over a lollipop in a sandbox. I dislike one lawyer calling another a cheater and a liar. It's not creative. It's not constructive.

Savit: You'd rather have an attorney acknowledge a case that goes against his or her position rather than just cite the favorable case?

Carney: Absolutely. I believe in allowing the attorney

to make creative arguments about the state of the law. But a lawyer loses credibility if he or she misstates the law or ignores an important case that is on point. I want to count on the integrity of the lawyer who appears before me.

Savit: Do you allow oral argument for a summary judgment motion prior to rendering a tentative decision?

Carney: No, because I try to issue a tentative decision before the hearing. But I do always have hearings on motions for summary judgment. I need to hear the lawyers challenge my tentative thoughts, my analysis, to make sure I get it right.

Savit: Do you have a hearing on every motion?

Carney: Yes. Maybe after doing this for several years, I will change that practice and just have arguments on dispositive motions which is, in my impression, the way most judges do. But, I really enjoy the interaction with the lawyers. So, I look forward to the hearings.

Savit: Do you issue a tentative decision before the oral argument?

Carney: Yes. I try to issue tentatives on all the motions. I try to post those tentatives the Friday before the Monday hearing. As I get busier or if I'm in trial, it's very difficult to do that. Quite frankly, I continue to need the weekends to make my decisions. And, then there are some motions, because of their complexity or their volume, where I want to hear argument, I want to work the issues through the hearing. In those circumstances, I won't have a tentative, but I'll have something that I can read or give to the lawyers to say, "Here are the questions I have - I don't want to interrupt or disrupt your presentation, but I would like you to focus on these issues."

Savit: How do you proceed with oral argument after a tentative has issued?

Carney: Usually, if the tentative reveals my inclination to grant the motion, I will ask the opposing party to tell me why that ruling is wrong. I don't restrict argument to points that are not discussed in the papers. If the attorney wants to re-address something that's in the papers, that's fine.

Savit: Do you have a particular strategy for settling

*-Continued on page 12-*

*-Interview: Continued from page 11-*

cases?

Carney: No. I don't feel comfortable getting involved in the parties' settlement negotiations. I'm worried if I get involved in settlement discussions, I'm going to lose my objectivity when it comes time to decide motions in limine or summary judgment motions or jury instructions. I also don't have the time, patience, or business skills to be a great settlement judge. I rely on the magistrate judges and terrific retired judges to settle my cases.

Savit: Before I finish, I do want to ask you about your law clerks. Did you bring your staff over here from state court?

Carney: I didn't have a law clerk over in state court. My court staff was terrific, but they had been with the state court so long that a move to federal court was not financially workable. I am very pleased with my current staff and I know they appreciate the importance of being professional and helpful to the lawyers and public who we serve.

Savit: How many law clerks do you have?

Carney: Two. I also have a judicial assistant, a court reporter and a courtroom deputy on my staff.

Savit: Where did your clerks come from, and how long is their term?

Carney: One's from UCLA, one's from Hastings. They both signed up for a 2-year stint with me.

Savit: Thank you very much for your time.

Carney: Thank you.

► Mr. Savit is a partner of Jones Day and head of its intellectual property practice in Irvine.

*-Sponsor: Continued from page 5-*

- Provides a change in auditor performance and improves the likelihood of detection of fraud.
- Changes the auditor's consideration of fraud.
- Requires discussion among all levels of the audit engagement team.
  - Expands inquiries of management and others within the entity being audited.
  - Improves the auditors' overall awareness of fraud.
  - Requires the planning of audit procedures to appropriately respond to fraud risk factors.
    - Increases the focus on professional skepticism.
    - Expands the current fraud risk assessment approach.
    - Expands guidance on revenue recognition as a likely risk factor.
      - Requires the evaluation of an entity's response to identified fraud risks.
      - Establishes linkage between risks and auditor's response.
      - Identifies responses to further address the risk of management override of controls.

How widespread is fraud?

The Association of Certified Fraud Examiners (ACFE) issued its 2002 report "Report to the Nation on Occupational Fraud and Abuse" This report is based on 663 occupational fraud cases reported by the CFEs who investigated them. The report shows that "occupational fraud" has increased by 50 percent since 1996. Occupational fraud is defined as:

"the use of one's occupation for personal en-

*-Continued on page 13-*

## **ABTL Annual Seminar 2004**

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*-Sponsor: Continued from page 12-*

richment through deliberate misuse or misapplication of the employing organization's resources or assets."

Some of the findings of the report are as follows:

- Average fraud scheme lasted 18 months prior to detection
- Typical perpetrator is a first time offender (93%) In 86% of the cases, victim deemed to have insufficient controls
- Caused over \$7 billion in losses
- Estimate annual losses of \$600 billion, \$4,500 per employee (\$200 billion increase from 1996)
- Over 80% involve asset misappropriations (cash 90% of the time)

These statistics are telling us that fraud is happening everywhere. One of the most interesting things to note in the report is the Methods of Detection:

- Tip from employee - 26.3%
- By accident - 18.8%
- Internal audit - 18.6%
- Internal controls - 15.4%
- External audit - 11.5%

If you combine some of the percentages, you will find that fraud is detected more than 45% of the time either by accident or from a tip from an employee. Internal and external audits only account for a little more than 30% of the detection of fraud. What is significant is that internal controls only account for 15% of the detection of fraud.

Fraudulent acts committed by management are three-and-a-half times more costly than fraud committed by employees. This makes sense because managers are in more trusted positions and have more access to assets. The real risk of significant to catastrophic loss lies with the managers. Only seven percent of fraud perpetrators have been convicted of a previous crime. This implies that trusted people end up committing the fraud.

About 33 percent of the reported frauds involved two or more individuals. In cases involving collusion, the median loss was six times greater. This means two or more people collaborated to take the money. The conspirators were either employees of the business or they were employees working with people outside the

*-Continued on page 24-*

## HOW WELL DO YOU KNOW YOUR ORANGE COUNTY JUDGES?

The first one to correctly match the columns will receive honorable mention at the next ABTL meeting. Send your guesses to [abtl@abtl.org](mailto:abtl@abtl.org).

### Name the Orange County judge who...

- 1.... once performed standup comedy on the same bill with TV weatherman Fritz Coleman?
- 2.... won thousands of dollars worth of prizes on the game show *Jokers Wild* in 1972?
- 3.... had a job selling suits to Pittsburgh steelworkers before becoming a Philadelphia lawyer?
- 4.... was the first baby born in Los Angeles County on July 4, 1942 (at 12:08 a.m.)?
- 5.... represented Cheryl Ladd, former *Charlie's Angel*, in a jury trial?
- 6.... hiked up and down Mount Whitney in one day?
- 7.... once worked as a logger in Oregon?
- 8.... is a co-author of a patent on grometed flexible circuitry interconnections?
- 9.... survived a plane crash in Africa after crash landing in dirt by the side of the Zambizi river in Zambia?
- 10.... wrote a musical called "Americans All"?

- a. Superior Court Judge Franz Miller
- b. Superior Court Judge Jim Gray
- c. Federal District Judge James Selna
- d. Superior Court Judge Pamela Isles
- e. Federal District Judge Arthur Nakazato
- f. Superior Court Commissioner Richard Vogl
- g. Superior Court Judge Fred Horn
- h. State appellate Justice William Bedsworth
- i. Superior Court Judge Elaine Streger
- j. Superior Court Judge David McEachen

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**TO: CALIFORNIA JUSTICES,  
JUDGES AND COURT STAFF**

**BUDGET CRISIS 2004-2005  
IS UPON US**

**Senator Joe Dunn, Chairman  
Senate Budget & Fiscal Review  
Subcommittee 4**

As chair of the Senate Budget Subcommittee that oversees the judicial branch budget, I would like to communicate with you directly on a periodic basis throughout this year about the courts' budget as we once again navigate the treacherous waters of the budget process. I welcome and encourage your direct feedback and ask that you share these communications with your colleagues. You may email your feedback or questions to senatorjoedunn@msn.com.

As we navigate through the budget process this year, we need to keep certain points in mind. As the third and co-equal branch of government, the court community must speak as a unified voice to maximize the chances of securing full funding for the courts. Complete and accurate data must be collected to support the judicial branch budget. The courts must work in partnership with all users of the justice system (including victims of domestic abuse, child protection services, civil litigants and numerous others), bench and bar associations, our local communities throughout the state and the Judicial Council to assure access to the courts.

Most of you have already received direct communication from the Judicial Council. This memorandum gives a basic backdrop to the budget process and sets forth a legislative insiders perspective to the courts budget. First, I set forth the broad backdrop of the governors total proposed state budget, some of the key assumptions underlying it and a number of the concerns, risks and uncertainties it contains. Second, I underscore some of the key concerns raised by the governors proposed cuts to the judicial branch budget, trying to avoid editorial comment, partisan or otherwise. However, I consider the proposed cuts devastating.

*If you would prefer to bypass the state budget background information and go straight to the discussion of the judicial branch budget and the Governors January proposed budget for the courts, please go to page 17.*

*The State Budget Calendar*

The annual "budget dance" consists of six major steps: 1) the introduction of the budget, 2) legislative hearings, 3) the "May Revise," 4) final hearings, 5) a final vote of both houses of the Legislature and 6) the governor's signature on the final state budget bill. Throughout the dance, negotiations between and among the stakeholders, the Senate, Assembly and the governor continue, with the intensity of the negotiations heating up in late May and early June.

The governor submitted the state budget to the Legislature on January 10, which is required by the Constitution. The Legislature will soon begin to hold budget committee hearings on the governors proposed budget, examining it line by line, and seeking input from all interested parties. *In fact, as chairman of Subcommittee 4, I plan to hold informational hearings in San Diego, Los Angeles, Orange, and Fresno counties as well as in the Bay Area to hear local testimony on the impact of the governor's budget cuts on both the judicial branch and transportation (details to follow).*

The governor revises the budget (May Revise) based upon more accurate revenue numbers obtained after April 15 and the work of the Legislature on the governor's January proposal. By statute, the governor submits the May Revise to the Legislature by May 14. Final legislative hearings and negotiations are supposed to be completed by June 15, the constitutional deadline for the Legislature to submit the budget to the governor. In considering the governor's proposed budget, the Legislature may augment, reduce, add, or eliminate any line item. July 1 is the constitutional deadline for the governor to sign the budget bill into law. The governor can veto the entire budget, and he may reduce or eliminate any line item in the budget (the governor's authority to "blue pencil" any budget item), but he may not increase any item or add any new items.

More often than not, particularly in difficult budget times such as these, the budget is not passed and sent to the governor until well beyond the deadlines. However, the short history of the relationship between Gov. Schwarzenegger and the Legislature suggests the budget might be passed and submitted to the governor close to on time.

*Nuts and Bolts of the State Budget*

Budget . . . 4 a: a statement of the financial position of  
*-Continued on page 15-*

*-Dunn: Continued from page 14-*

an administration for a definite period of time based on estimates of expenditures during the period and proposals for financing them b: a plan for the coordination of resources and expenditures c: the amount of money that is available for, required for, or assigned to a particular purpose

-- *Merriam-Webster's Collegiate Dictionary*

While the state budget is both complex and detailed, at its most basic level, it is based upon projected revenues and expenditures and is the annual law that funds the business of government and pays for the work the state is required to do by law. The monies to pay for the state's business comes from dozens of different taxes, user fees, fines and penalties collected at the state and local level from Californians and from the federal government.

By law, all revenues flow into either the state General Fund or one of a number of special funds. While General Fund dollars are in theory "general" or unrestricted – meaning they can be spent on anything – as you will see below, a number of state law requirements, federal mandates and constitutional provisions predetermine where most General Fund dollars will go in any given year. As the name suggests, special fund revenues may only be spent on the restricted purposes for which they were raised. And federal funds go to pay for federally established programs and services in which California participates.

An additional point to keep in mind in trying to digest the complexities of the state's budget is that many of the public services Californians receive are paid for and/or provided by all three levels of government, federal, state and local. For example, Medi-Cal – California's healthcare program for low income individuals and families – recipients receive health services from local public and private providers who are reimbursed by the state. The federal government in turn provides the state about half of the funding for the Medi-Cal program.

### *Revenues*

*General Fund.* The General Fund is fed by the state's largest sources of revenue, including personal income taxes, sales and use taxes, bank and corporation taxes and portions of some smaller taxes and revenue sources (e.g., estate taxes, alcoholic beverage taxes, cigarette and tobacco taxes).

*Special Funds.* Special funds' revenues derive from taxes, licenses, and fees that are dedicated, by the state Constitution or statute, to a particular use and are thus held in accounts separate from the General Fund. These funds go to pay for such things as transportation, law enforcement, capital outlay (highways, bridges and building construction), and to regulate businesses, professions and vocations. Some of the largest and best known sources of special funds are gasoline taxes, hunting and fishing licenses, vehicle license fees and vehicle registration fees.

*Federal Funds.* An important source of funds for the state is the federal government. Federal funds come with strings attached – they are designated to be used for specific federally mandated programs such as healthcare for low income individuals and families (Medi-Cal in California), special education and a number of other programs.

### *Expenditures*

The four major areas in which the state spends its money are: 1) kindergarten through 12th grade, 2) higher education (University of California, California State University and California Community Colleges systems), 3) health and welfare, and 4) corrections (prisons and parole). These four areas account for 91% of General Fund spending and close to 77% of all state spending. As outlined below, several of the largest expenditures in the state budget are locked into place by the state constitution, voter approved initiatives, court order, or federal matching fund requirements.

The balance of state spending goes for programs in business, transportation and housing, resources and environmental protection, general government agencies and departments, and the legislative, executive and judicial branches of government. The courts' budget accounts for about 2.7% of the state's total expenditures (which includes general and special funds and selected bond funds) and about 2.1% of General Fund expenditures.

### *Basic State Budget Structure*

The state's business is carried out by and through over 170 departments, agencies, boards, commissions and other administrative units (plus the legislative, executive and judicial branches). Because these departments (generic for administrative units of government) form the basic building blocks of California's state gov-

*-Continued on page 16-*



*-Dunn: Continued from page 15-*

ernment (and account for the bulk of state expenditures), the state budget is organized around them.

Within each department's total dollar allocation, the budget directs money for the various programs and purposes that department must carry out in individual allocations called "line items." The state budget includes over 1,000 line items and any one department may have dozens of line items.

One other aspect of the budget is important to an understanding of the budget process – Budget Change Proposals (BCPs). Often at some point in the budget process, department heads discover that they have not accurately predicted the necessary funding for a particular program or activity and they wish to revise (usually up) the funding for that particular program or activity (see below for a discussion of this issue as it relates to the courts). When this occurs, a written BCP is submitted to the administration's Department of Finance to document the request. BCPs are submitted for any of a number of reasons, including workload (population utilizing particular programs or services), cost (of particular programs or services), new technology needs, changes in federal law, or new state policy.

As we move through the budget process and as you hear from the administration, Judicial Council, others and me on the status of the budget, there are three budget terms of art to keep in mind. They are current year, budget year and budget year + 1. "Current year" refers to 2003-04, "budget year" to 2004-05 and "budget year + 1" to 2005-06. The state budget year runs from July 1 to June 30.

#### *Backdrop of Last Year and Setting the Stage for This Year*

California was faced with an unprecedented \$38 billion budget deficit for the current year 2003-04 (July 1, 2003, to June 30, 2004). Many Democrats struggled to save critical programs and services and Republicans responded with a refusal to consider any tax increases. As a result, the ultimate budget resolution was a convoluted mix of unwelcome cuts, extensive borrowing, deferred payments and short-term fixes. As you know, the courts already have weighed in against some of the current budget solutions. The Chief Justice has met with the governor and the Judicial Council, through its Administrative Office of the Courts (AOC), is engaged in ongoing discussions and negotiations with the ad-

ministration's Department of Finance. The budget also included a continuing \$8 billion structural deficit which means the states budget would spend \$8 billion more than revenue it takes in in 2004-05. Unless corrected by spending cuts or increased taxes, *this structural deficit threatens to continue even if the state's economy improves dramatically.*

Here is what we faced going into January 2004. Start with an average \$100 billion annual California state budget and the \$8 billion structural deficit, then:

√ Subtract \$29 billion in special funds and bonds from the \$100 billion that can only be used as earmarked. For example, voter-approved bonds to build schools cannot be diverted to balance the state budget. In other words, the governor and legislature cannot cut or divert these funds. This leaves \$71 billion of the original \$100 billion within which \$8 billion in savings must be found.

√ Subtract another \$30 billion from the \$71 billion for K-14 (kindergarten through community college) funding promised by Proposition 98, a 1988 addition to the state constitution that established a minimum funding guarantee for K-14. This leaves \$41 billion within which to find the \$8 billion in savings.

√ Subtract another \$13 billion from the \$41 billion in minimum funding levels allowed under federal law for health and welfare programs, such as Medi-Cal, Healthy Families and services for the aged, blind and disabled. For every dollar we cut in these programs, the state loses between \$2 and \$3 in federal matching funds, which would only make the deficit worse. This leaves \$28 billion within which to find the \$8 billion in savings.

√ Subtract another \$4.5 billion from the \$28 billion, which is mandated by court order or federal requirements for developmental disabilities and mental health services, including such things as in-home care for the elderly. This leaves \$23.5 billion within which to find the \$8 billion in savings.

√ Subtract another \$6 billion from the \$23.5 billion for corrections, law enforcement and fire protection. It is politically problematic for legislators to return to their districts having supported cuts to these services. This leaves \$17.5 billion that is not legally or politically obligated to be spent out of the \$100 billion state budget in which to find \$8 billion in savings.

*-Continued on page 17-*

*-Dunn: Continued from page 16-*

This \$17.5 billion is where the *judicial branch budget* comes from, along with many other state agencies, departments and functions. But \$17.5 billion is not the end of the story. Remember we are starting with an \$8 billion structural deficit.

√ Add \$4 billion to the \$8 billion deficit in lost revenue resulting from the governor's rescission of the vehicle license fee increase (also known as the car tax). This money goes to local governments to pay for police and fire protection, local services that are funded by state dollars. This raises the deficit to \$12 billion.

√ Add another \$2 billion pension obligation bond that the Legislature tried to borrow to pay the states pension payments obligation. A court ruled that the bond needs voter approval and voided the bond. This raises the deficit to \$14 billion.

√ Add from \$2 billion to \$11 billion in additional bonds to pay for last year's budget deficit that the courts may still hold invalid. This raises the *2004-2005 budget deficit to between \$16 and \$25 billion.*

Thus, going into January 2004, we had \$17.5 billion in discretionary funds, which includes the courts' and other budgets, in which to find \$16 to \$25 billion in cuts. Not a pretty picture.

#### *Budget Assumptions Underlying the Governors January Proposed State Budget*

The governors January budget proposal attempts to address the budget deficit problem through major and wide-ranging spending reductions, borrowing and a diversion of local property taxes to the state.

All California governors rely on a number of assumptions when crafting the state budget. Governor Schwarzenegger is no exception. The three principal areas in which he has made certain assumptions are: revenue projections, federal funds and the \$15 billion deficit bond that will be on the March 2004 ballot.

*Revenue projections.* The governors revenue forecast assumes revenues in 2004-05 will be \$1.8 billion more than they were in 2003-04. This projection assumes accelerating but moderate growth in the California economy, an assumption agreed upon by the Legislative Analyst's Office, a non-partisan office that provides fiscal and policy information and advice to the

Legislature (you can view LAO's reports on line at [www.lao.ca.gov](http://www.lao.ca.gov)). However, while consumer spending and business investment appears to be improving, the same is not true for the job market, another indicator of economic recovery. And this economy, as with all others, is subject to often-unpredictable fluctuations and unanticipated events.

Greater problems with the governors revenue projections arise from certain other policy-related assumptions underlying his proposed budget. For example, the governor assumes increased revenues from issuing pension obligation bonds and from Indian gambling revenues. A trial court has ruled the state may not issue pension obligation bonds, and the prior administration was unsuccessful in negotiating for increased tribal gambling revenues. Thus, the viability of obtaining projected revenues from these sources, as well as others that may not withstand legal or political scrutiny, is in serious question.

*Federal funds.* The governors budget assumes \$350 million in new federal funds. This influx of federal funds is far from certain, particularly in light of the Bush administration's current position that no significant federal monies are going to be flowing to the states (other than specifically for homeland security). Former Governor Wilson also expected the elder President Bush to infuse the state with federal money. It never happened.

*Fifteen billion-dollar deficit bond.* Perhaps the most problematic assumption the governors budget makes is that the \$15 billion budget deficit bond on the March 2004 ballot, Proposition 57, will be passed by the voters. This is a risky assumption. In addition to being on the same ballot as a \$12.3 billion school construction bond, recent opinion polls indicate only 33% public support for the budget deficit bond. And, Governor Davis deficit bond approved by the Legislature last year, a potential fall back for the governor, may not stand up to legal scrutiny.

Taken together, the governor's underlying budget assumptions, particularly the success of the \$15 billion budget deficit bond, raise red flags because, if some or all of the assumptions described above do not materialize, we face an even larger than projected budget shortfall.

*The Governors January State Budget Proposal*

*-Continued on page 18-*

*-Dunn: Continued from page 17-*

In addition to the assumed increased revenues outlined above, the governor is utilizing other means to close the budget deficit gap. The governor's January budget identifies an *accumulated \$26 billion* difference between revenues and expenditures for the *three-year period* ending on June 30, 2005, consisting of a \$9.2 billion short-fall for 2002-03, an additional shortfall of \$3 billion in 2003-04 and a shortfall of \$14 billion in 2004-05. To help eliminate this enormous deficit, the governor is relying on certain strategies, including the following:

Using \$12.3 billion in bond proceeds from the sale of deficit bonds, part of the \$15 billion budget deficit bond on the March 2004 ballot, provided for in the California Economic Recovery Bond Act of 2003. The \$12.3 billion includes \$9.242 billion to pay for the 2002-03 budget shortfall, \$1.881 billion to pay the state's employee retirement contributions in 2003-04 and another \$1.122 billion in various operating expenses for 2003-04 and 2004-05. This would cover almost 47% of the entire budget solution. If the \$15 billion bond measure fails, *47% of the solution fails.*

Saving \$1.1 billion by suspending Proposition 42, which allocates certain sales tax revenues to transportation projects. This means that rather than transferring gasoline tax revenues to the Transportation Investment Fund (exclusively for transportation projects such as badly needed traffic congestion relief), as provided in Prop. 42, \$1.1 billion in gasoline tax revenues would remain in the state General Fund. The soundness of this proposal is in serious question. Transportation dollars are an enormous boost to our economy. In addition to providing traffic congestion relief for commuters and businesses, more efficient goods movement and increased travel, according to the U.S. Department of Transportation, transportation projects are some of the most job-producing projects.

Saving \$1 billion by reducing the reimbursement rates paid to doctors through the Medi-Cal program. A federal court has already held that this is unlawful.

Saving \$930 million through a proposed sale of pension obligation bonds to cover the state's annual payment obligation to a retirement fund for state workers. Last year a court held that a similar proposal was unconstitutional.

Saving \$2 billion, through an agreement recently

reached with education interests, by funding kindergarten through community college \$2 billion below Proposition 98's (constitutional minimum funding guarantee for K-14) minimum funding guarantee. However, while the Constitution does not specify a timeline to make up this budget reduction to schools, it does require the state to restore these monies in future years. That means this proposal creates a \$2 billion hole in future state budgets until it is repaid.

Saving \$2.8 billion through various transfers between budget line items, shifts from one line item to another and loans. These transfers, shifts and loans may or may not hold up to legal or political scrutiny.

The Legislative Analyst, the non-partisan fiscal and policy analyst to the Legislature, believes that, even if *all* of the governor's savings and solutions proposals come to fruition, the state will be left with roughly a \$6 billion budget shortfall in 2005-06. The administration disagrees, citing a \$3 billion figure. At present, it is unclear what the explanation for this difference is. Welcome to Government Accounting 101: A billion here, a billion there and pretty soon we're talking about real money.

#### *Judicial Branch Funding Sources*

There are three major funds that comprise the funding for the trial courts. They are: 1) the Trial Court Trust Fund (TCTF), 2) the Trial Court Improvement Fund (Improvement Fund), and 3) the Judicial Administration Efficiency and Modernization Fund (Mod Fund).

The TCTF primarily receives revenues from the General Fund, court filing fees, fines and a capped Maintenance of Effort payment that includes revenue from fines and penalties and general fund support from counties. General Fund and TCTF funding goes to support the operating costs of the trial courts, including such things as salary and benefits for court employees and judges, court security contracts, and court interpreters. The Improvement Fund is supported by fines and forfeitures and a small percentage of the TCTF. The Improvement Fund goes towards such things as emergency funding for the trial courts, statewide projects (such as an automated record keeping system), and pilot projects (such as complex litigation programs and family law interpreter program). The Mod Fund is supported by the General Fund and was created with the intent that its funds "be expended to promote improved

*-Continued on page 19-*

*-Dunn: Continued from page 18-*

access, efficiency, and effectiveness in trial courts.” It supports various programs, including training for judicial officers and court staff, retaining experienced jurists, acquiring improved technology and improving legal research.

In addition, the Trial Court Facilities Act of 2002, which transferred responsibilities for trial court facilities from the counties to the state and created the State Court Facilities Construction Fund, is another source of trial court funding. The facilities construction fund receives revenues from a surcharge on civil filing fees and an additional penalty assessment on criminal fines.

Funding for the judiciary (Supreme Court, Courts of Appeal, Judicial Council and Habeas Corpus Resource Center) comes primarily from the General Fund. Other various special funds contribute to the support of the judiciary, including the Family Law Trust Fund, the Motor Vehicle Account and the Federal Trust Fund. Also included among these special funds is the Appellate Court Trust Fund created in the 2003 Budget Act to support the appellate courts through appellate filing fees.

#### *The Governors’ Proposed Cuts to the Judicial Branch*

As you have been advised, the governors January proposed budget includes deep cuts to both the trial courts and the judiciary (Supreme Court, Courts of Appeal, Judicial Council and Habeas Corpus Resource Center). Remember the courts suffered significant cuts in last years budget and new and increased fees were instituted to fill the gaps. The projected revenues from the new and increased fees have not lived up to estimates assumed in the 2003 Budget Act and may fall short by \$30 million in the current year (2003-04), and, if collections do not improve or estimates are not modified, by \$18 million in the budget year (2004-05).

Two of the most significant cuts in the governors proposed budget are a \$59 million unallocated reduction to the trial courts and a \$9.8 million unallocated reduction to the judiciary. Unlike last years one-time, belt-tightening cuts, these are *ongoing*, proposed to be permanent.

The 2003 Budget Act included an \$80 million loan from the State Court Facilities Construction Fund to the General Fund. Because of the way the loan was structured, the \$80 million was taken from the Trial Court

Trust Fund, to be replenished by projected facilities fund revenues. It appears that those revenue projections may have been overly optimistic and the Trial Court Trust Fund may have to absorb up to a \$10 million shortfall. The governors January proposals include another loan (\$30 million) from the facilities fund to the General Fund. This loan threatens to limit the courts ability to implement critically needed, to address security, health and safety issues, court construction and maintenance projects.

Last year funding for court security, which includes negotiated salaries, retirement, and other benefits for court security personnel and security equipment, was originally funded at about \$300 million, but was reduced by \$11 million. This \$11 million reduction (reached as part of budget negotiations last year) covered six months of the current budget year. The reduction covered six months in order to allow a working group on court security (established in the 2003 Budget Act) time to convene and formulate recommendations on reductions related to court security costs and to court security services.

As proposed in the governors budget, this reduction is an *ongoing* annual \$22 million reduction in court security funding. This ongoing reduction presents challenges to the courts. The working group has not yet made recommendations for reductions in court security costs, so courts may have to attempt to renegotiate their contracts with sheriffs' departments or absorb reductions within their general budgets.

Last year, the level of funding to support the Judges Retirement System (JSR I) was reduced in the budget based upon an overestimate of savings available in the fund. This funding reduction resulted in a current year (2003-04) shortfall of \$4.2 million in JSR I. The governor proposes to fund this shortfall through a transfer from the Trial Court Trust Fund to the retirement fund. This represents a major change in the policy of keeping funding for judges retirement separate from funding for the operations of the trial courts. The Judicial Council is in discussions with the administration on this issue.

Taken together, the decreased fee revenues, the loan shortfall described above (\$10 million) and the judges retirement system issue, are likely to result in a \$45 million deficiency that will fully deplete the Trial Court Trust Fund before the end of the 2003-04 budget year (before June 30, 2004).

The governor also proposes to transfer \$27.6 million

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from the Trial Court Trust Fund to the judges retirement system to cover funding deficiencies in the retirement system for 2004-05. This transfer would further deplete the already beleaguered Trial Court Trust Fund and would result in further reduced funding for the operations of the trial courts in 2004-05. As noted above, this directly contradicts the long-standing policy of keeping these funds separate.

There are a number of areas where the courts incur significant costs that are not proposed to be funded in the governor's January proposed budget for the courts. These include such things as workers' compensation costs for court employees, negotiated salary, retirement and benefit costs for employees and court security personnel, increased charges for county provided services, costs of homicide trials and pay parity due to the unification of the superior and municipal courts. Currently these unfunded costs exceed \$95 million. And, while Budget Change Proposals (see above) have been submitted to the administration's Department of Finance on these unfunded costs, the governor's January proposed budget does not include them.

The potential combined impact of all of the above on our justice system could exceed *\$200 million per year* beginning in the 2004-05 budget year. Again I say, the governor's proposed cuts to the judicial branch of government are devastating.

#### *Forging Ahead*

As chair of the budget Subcommittee 4 and as a member of the full Senate Budget and Fiscal Review Committee, I will do everything I can to ensure not just adequate but full funding for the judicial branch. I welcome and encourage your feedback and participation.

► **This memo reprinted with the approval of California Senator Joseph Dunn**

**Memo To:**  
**Presiding Judges of the Superior Courts**  
**Executive Officers of the Superior Courts**  
**From:**  
**William C. Vickrey, Administrative Director of the Courts**  
**Ronald G. Overholt, Chief Deputy Director**  
**Tina Hansen, Director, Finance Division**  
**Subject: Budget Update**  
**Date: January 12, 2004**

We are writing to you today to provide information regarding various important developments related to the judicial branch budget, including an update of ongoing issues in fiscal year (FY) 2003–2004, details of the Governor's Proposed Budget for FY 2004–2005, and the latest news on budget negotiations with the Administration. Each court should carefully assess its fiscal situation in light of the information provided in this memorandum.

As you are aware, the state fiscal crisis is now entering its fourth year, with the state continuing to face record deficits. The judicial branch, like all state agencies, departments and recipients of state funding (such as local governments), has experienced funding reductions. Due to the unique transition, the new Administration had little time to complete the details of its FY 2004–2005 budget. Relative to the courts' budget, the initial outline of the Governor's proposal was completed prior to consultation with the judicial branch regarding the most critical funding issues facing the courts. As a result, the Chief Justice met with the Governor in December to discuss implications and concerns related to the proposed budget. Following the meeting between the Chief Justice and the Governor, several additional meetings were held between the Administrative Office of the Courts' (AOC) Executive Team and staff from the Department of Finance (DOF) during which some areas of the judicial branch budget for current year and budget year were discussed. As it relates to the courts' budget, DOF has stated that no funding decisions have been finalized at this time. They have further stated that they are committed to working with us to achieve a final budget that preserves access to justice and continues critical court services.

*-Continued on page 21-*

**-Budget: Continued from page 20-**

We have established a schedule to address our outstanding budget issues and will continue to meet over the next few weeks. This memorandum will review open issues relating to the current year (FY 2003–2004), the Governor’s Proposed Budget for FY 2004–2005, as well as next steps.

*FY 2003—2004*

In the current year, some of the more immediate funding issues and concerns impacting the trial courts’ operating budgets include the following:

- A projected shortfall in fee revenue;
- A shortfall related to the loan from the State Court Facilities Construction Fund, which could affect the courts’ operational budgets;
- A transfer from court operational funds to address a funding deficiency in the Judges’ Retirement System (JRS I);
- Reductions which must be allocated to the courts (court security and consolidated administrative services); and
- Court utilization of the recent trial court budget augmentation.

*A projected shortfall in fee revenue:* Fee revenues for FY 2003–2004 are currently projected to be approximately \$30 million less than assumed in the Budget Act of 2003. Because fee revenue is currently a significant component in trial court funding, any amount collected below projections may have a direct impact on trial court allocations. For additional information about this issue, please refer to the related memorandum dated January 6, 2004 (which has been posted to the *Latest Budget News* section on the Finance home page of Serranus).

*A shortfall related to the loan from the State Court Facilities Construction Fund:* The Budget Act of 2003 included an \$80 million loan from the State Court Facilities Construction Fund to the state General Fund to temporarily fund other statewide obligations. Because of the way the loan was structured, however, the \$80 million was taken from the Trial Court Trust Fund, to be replenished by projected State Court Facilities Construction Fund revenues. Those revenues, though, are clearly going to come in below the levels projected last year by DOF. The result is that the Trial Court Trust Fund may have to absorb up to a \$10 million shortfall.

As it presently stands, the Governor’s Budget does

not provide relief for the fee or loan shortfalls. However, the AOC Executive Team is working with the Administration to obtain fiscal relief for all or a portion of the shortfalls. With the agreement of DOF, we are not taking steps at this time to reduce the courts’ budgets to resolve the shortfall in fee revenue. Our ability to obtain relief for the shortfall will significantly depend on our branch’s ability to document that we have fully implemented the fee legislation and have made every effort to effectively collect and efficiently remit the associated revenue.

*A transfer from court operational funds to address a funding deficiency in the Judges’ Retirement System (JRS I):* Last year, the Legislature reduced the level of funding to support JRS I based upon its overestimate of savings available in the fund. This funding reduction resulted in a current year shortfall totaling \$4.262 million. The DOF has now proposed funding this shortfall through a transfer from the Trial Court Trust Fund. This represents a major change from the historical policy of keeping the funding of the JRS separate from trial court operational funding. We are aggressively pursuing this issue and have requested that the action be reversed.

*Depletion of the Trial Court Trust Fund:* Based on the approximate \$45 million deficiency resulting from the fee and loan shortfalls as well as the JRS issue, the Trial Court Trust Fund will be fully depleted *before* the end of FY 2003–2004. As a result, most if not all of the fee and loan shortfalls would result in further reductions to the courts if fiscal relief is not provided. As indicated earlier, this issue is at the forefront of our ongoing discussions with the Administration.

*Unallocated reductions:* As you know, the trial courts have already taken an \$85 million unallocated reduction in the current year. The actual reduction to the trial courts’ operating budgets amounted to \$59.8 million as a result of available funding utilized from statewide funds such as the Assigned Judges Program and judicial salary savings. As you are aware, additional reductions contained in the Budget Act include \$11 million in the area of Court Security Flexibility and \$2.5 million in Consolidated Administrative Services. We are in the process of working to identify the fairest and the most equitable methodology for allocating these additional cuts. A tentative recommendation will be presented to the council’s Executive & Planning Committee later this month.

*Recent Trial Court Budget Augmentation:* On November 17, the Chief Justice announced that the trial courts FY 2003-2004 budget was being augmented with

**-Continued on page 22-**

**-Budget: Continued from page 21-**

\$22.1 million in new funding as a result of an agreement between the Director of the state Department of Finance, the Director of the state Department of Personnel Administration, and the Administrative Director of the Courts. As indicated, this new discretionary funding was provided in accordance with authority specified in the Budget Act of 2003 (Stats. 2003, ch. 157). The Budget Act provisional language provided that any funding provided was in order to meet the various needs of the trial courts. The Act noted that this includes the need to negotiate local memoranda of understanding with recognized bargaining agents and to meet other salary and benefit needs of the trial courts.

When evaluating how to best utilize the augmented funds, we recommend that each court carefully review both its applicable memoranda of understanding (MOUs) and its overall fiscal situation. Courts should take into account the new and potential reductions in both the current fiscal year and next year, and assess the ability to meet any additional salary and benefit obligations on an ongoing basis. A follow up memorandum detailing the legal considerations relating to this budget augmentation will be distributed shortly. In the interim, if you have any labor relations questions that pertain to this matter, please contact Linda Ashcraft of the AOC Human Resources Division and/or Scott Gardner of the AOC Office of the General Counsel for advice and guidance.

*FY 2004–2005*

As indicated in the discussion above, negotiations are ongoing with the Administration regarding budget planning and development for FY 2004–2005. Consequently, the items included in the Governor’s Budget (identified below) have not been finalized and are still subject to revision per our discussion. The following discussion does not reflect amendments that may be made.

*Budget Change Proposals (BCPs):* Two funding proposals totaling \$2.721 million were approved for inclusion in the Governor’s Budget (Court Interpreters – Salary Driven Benefits: \$165,000 and Prisoner Hearing Costs: \$2,556,000). All other budget proposals, including those for mandated costs, were not approved.

The chart on page 23 identifies the FY 2004–2005 BCPs submitted to DOF in September and the current status of each proposal.

Workers’ compensation costs for trial court employ-

ees and county employees (including security) were not funded due to the Governor’s reform efforts currently underway. Our ongoing discussions are focusing on the need to provide relief for various non-discretionary baseline cost increases such as retirement, security, county charges, costs of homicide trials, and pay parity due to unification. At this time, the courts’ unfunded mandates and increased costs that have not been recognized in the Governor’s Budget exceed \$95 million.

*Unallocated Reductions:* In each of the past three years, budget cuts have primarily been one-time in nature. The Governor’s Budget proposes an ongoing \$59 million unallocated reduction to the trial courts’ operating budgets. This reflects a reduced level of reduction from the amount originally considered by the Administration with the expectation that the trial courts absorb the following cost increases:

FY 2003–2004 Judicial Salary and Benefit	
Increase	\$ 8,118,000
Court Staff Retirement Costs	11,900,000
Court Security NSIs, Benefits, and Retirement	<u>19,400,000</u>
Total:	\$39,418,000

This is in addition to the security reduction of \$11 million in FY 2003–2004 that increases to \$22 million per year beginning in FY 2004–2005.

Some of the fiscal challenges that we are facing in the current fiscal year will carry over to next year as well, including:

- A continuing shortfall in fee revenue;
- An additional transfer from court operational funds to address a funding deficiency in the Judges’ Retirement System (JRS I); and
- An additional loan from the State Court Facilities Construction Fund that could impact trial court facility projects in the coming year.

*Continuing shortfall in fee revenue:* While it is still too early to make an accurate projection, current estimates indicate that fee revenues for FY 2004–2005 will be approximately \$18 million less than assumed in the Budget Act of 2003. Because of the potential impact on the trial courts’ operating budgets, it is imperative that each court ensures that appropriate fines and fees are consistently imposed, effectively collected, and remitted in a timely fashion.

**-Continued on page 23-**



TRIAL COURT BUDGET CHANGE PROPOSALS – GENERAL FUND		
Title	FY 2004–2005 Recommended Budget Re- quests	FY 2004–2005 Governor’s Budget
Court Staff Retirement	\$25,813,000	\$0
Workers’ Compensation	\$6,120,000	\$0
Security NSIs, Retirement, Other Benefits	\$22,848,000	\$0
Increased Charges — County Provided Services	\$14,818,000	\$0
Court Interpreters Workload Growth	\$4,568,000	\$0
Court Interpreters — Staffing	\$4,656,000	\$165,000
Prisoner Hearing Costs	\$3,761,000	\$2,556,000
Costs of Homicide Trials	\$666,000	\$0
Pay Parity — Unification	\$3,549,000	\$0
Pay Parity – Market Driven	\$10,776,000	\$0
Postage	\$827,000	\$0
Total BCPs – General Fund	\$98,403,000	\$2,721,000
Capital Outlay – State Court Facilities Construction Fund	\$31,000,000	Deferred until Spring

**-Budget: Continued from page 22-**

*Additional transfer from court operational funds to address a funding deficiency in the Judges’ Retirement System (JRS I):* We have been notified of an estimated \$27.62 million deficiency in the Judges’ Retirement System (JRS I) for similar reasons mentioned in the previous section of this document. The Administration is proposing to fund this shortfall through an equivalent transfer of funds from the Trial Court Trust Fund. Unless separately addressed by an augmentation, this transfer will result in an additional reduction to trial court allocations in FY 2004–2005. As previously indicated, we are aggressively seeking a resolution to this issue.

*The combined impact of the unallocated reduction, the projected shortfall in fee and fine revenues, and the transfer of funding to cover the JRS I deficiency could result in ongoing reductions to the trial courts of over \$100 million per year. Adding to these reductions the fact that no funding was provided for substantial non-discretionary baseline cost increases that will be experienced by the courts, the total operational impact to the courts could exceed \$210 million per year, beginning in FY 2004–2005. Again, however, all of these areas are part of the ongoing discussions with the Administration.*

In addition, another proposal included in the Governor’s Budget is an additional loan of \$30 million in projected reserves from the State Court Facilities Construc-

tion Fund to the state General Fund. Because this transfer could limit our ability to implement urgent and critically needed facilities projects through at least FY 2004–2005, the issue is also being discussed with the Administration.

*What can you do?*

Our biggest challenge in the current year remains the shortfall in fee revenues and the appropriate assessment, collection, and remittance of fees. We strongly encourage each of you to ensure that your court has established a policy for fee waivers, that all fees, fines, and surcharges are being collected to the maximum extent possible, and to remit all fees, fines, and surcharges as quickly as possible. Additionally, an assessment of each court’s fiscal situation is recommended in light of the latest budget information, while taking into account that the Governor’s proposal for trial court funding will continue to be negotiated and that a final agreement on the level of funding remains to be determined. Fiscal precautions, such as delaying expenditure commitments that are not mandatory for a few months until the fiscal situation for the remainder of the year and next year is more fully known, are strongly advisable.

Summary

This memorandum provides information about proposals contained in the Governor’s Budget regarding trial court

**-Continued on page 24-**

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***-Budget: Continued from page 23-***

funding, as well as information about ongoing negotiations. As you have read, there are many significant issues that remain to be resolved. Consequently, meetings with Executive Branch staff remain ongoing in effort to secure the best possible funding package for the courts in light of the State's fiscal problems.

It is unlikely that we will have significant new information until the Governor makes revisions to his budget proposal. We recognize that this uncertainty increases the problems each of you face when managing tight budgets that are complex and subject to demands beyond your control. We will keep you updated as new information becomes available. Thank you for your continued dedication, support, patience, and suggestions as we continue to face the challenges posed by the state budget crisis.

► **This memo reprinted with the approval of California Senator Joseph Dunn.**

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***-Sponsor: Continued from page 13-***

business.

In conclusion, the following is a list of effective anti-fraud measures that can proactively help prevent fraud:

- Strong internal controls
- Investigative Consumer Reports (background checks) on new employees
- Strong human resource policies
- Regular fraud audits
- Established fraud policies
- Willingness to prosecute

► **Len Lyons, JD, MBA, CFE, Cr.FA is a Senior Manager with Moss Adams LLP heading up their fraud practice. You can reach Len at [Len.Lyons@MossAdams.com](mailto:Len.Lyons@MossAdams.com) or (949) 221-4000.**

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ASSOCIATION OF BUSINESS TRIAL LAWYERS



1800 S. Fairfax Ave.  
Los Angeles, CA 90019