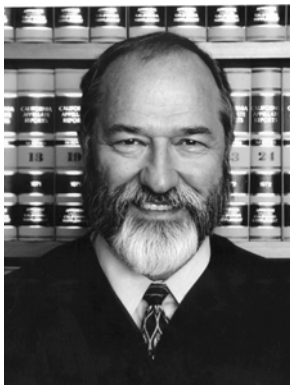


Q&A with the Hon. Frederick P. Horn
by Richard Grabowski



Editorial Note: We were fortunate to catch up with Presiding Judge Fred Horn for a comprehensive interview on a wide range of topics. Our ABTL chapter is proud to have Judge Horn on its Board of Governors.

Q: Can you give us an update on the state court funding issues and how you think they are going to play out in the coming budget year?

A: The person that comes to mind whenever I think about those issues is Senator Dunn. As you well know, he's spoken to the ABTL regarding these issues. Thank goodness for Senator Dunn and Senator Ackerman, who are in Sacramento dealing with these issues. They have really championed the cause of the courts in the funding crisis. I'm not sure where we would be without their

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California's Unfair Competition Law – Is It “Unfair”?

by Nanette Sanders, Christy Joseph and Blake Wettengel

How many laws are written to allow someone who has no connection to a business or transaction -- and thus has not been harmed in any way -- to file a claim? The answer is not many -- but, of course, one found its way onto the books in California. California's Unfair Competition Law ("UCL"), Business and Professions Code Sections 17200 through 17209 ("17200"), is California's most frequently used consumer protection statute. The number of cases filed with Section 17200 claims, by both private and public plaintiffs, has increased exponentially every year over the past decade and the Court of Appeal recently held that it was malpractice for attorneys in a class action not to have included a 17200 claim, notwithstanding that the attorneys recovered \$90 million for the class. *Janik v. Rudy, Exelrod & Zieff*, 119 Cal.App.4th 930, 14 Cal.Rptr.3d 751 (2004). Controversy surrounding the statute has grown at nearly the same rate. 17200 recently has been the subject of substantial criticism based on accusations of unscrupulous attorneys abusing the law to extort fees from small businesses, to drive up costs while increasing settlement values, and to generate attorneys' fees while failing to serve any public interest. Due to the unusually broad language of 17200, such activities are allowed to flourish. The UCL stands unmatched by any other state or federal regula-



Nanette Sanders



Christy Joseph

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President's Message: Hawaii Anyone? by Dean J. Zipser



Where can you get the highest quality continuing legal education, in a wonderful setting, and have the chance to make or renew acquaintances with judges and business trial lawyers throughout the state? If you have been to one of the ABTL's Annual Seminars, you already know the answer. If you have not attended one of them, you do not know what

you have been missing. I attended my first Annual Seminar many years ago (more than I can quickly recall). Like other attendees, I was hooked, and have been going regularly thereafter.

This year, our seminar will run from October 20-24. What makes it so great? Where do I begin? First, the programs are excellent and offer over 12 hours of MCLE credit. This year will be no exception. This year's program is entitled "Corporate America on Trial." Needless to say, given the Enron and Martha Stewart scandals (among others), it is incredibly timely. The list of speakers is a "who's who" among the bench and bar, headed by our keynote speaker, Justice Carlos Moreno. The esteemed "faculty" includes four judges and four lawyers from Orange County.

Second, attendance at the Annual Seminar allows you to get to know other business litigators, both here in Orange County and up and down the state, as well as state and federal judges. Indeed, the opportunity to do so is a key part of ABTL's mission. The Annual Seminar helps break down the walls that can develop through high-stakes litigation. Over the years of attending the seminar, I have met scores of individuals whom I might not otherwise have had the opportunity to meet -- much less been able to get to know well.

And, oh yes, did I happen to mention that this year's Annual Seminar is at the Mauna Lani Resort on the Big Island of Hawaii? This was the site of our 2002 Seminar and, because of the rave reviews from the members attending, we are returning again this year.

Take my word for it: You will not be disappointed. I hope to see many of you there. If you would like more

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Intersections Along the High Road

by Hon. Clay M. Smith



Our democracy is premised on the Rule of Law, the ideal that crucial decisions affecting the lives of our citizens are made on the basis of objective standards, rather than the dictates of a judicial or executive officer. Indeed, our first organic document, the Declaration of Independence, specifically proclaims that one of the causes of the American Revolution

was that the judges were “dependent on [the king’s] will alone” Consequently, our constitutional system was designed to ensure that judges and other governmental officers would be guided not by the will of the king or any other individual, but rather by accepted standards.

The crucial question, of course, is: what standards? In the context of the legal system, it seems that there is a confluence of potential standards which govern our actions and decisions. There are fairly bright-line legal standards such as the Code of Civil Procedure, Penal Code and others. There are equally binding, but often less-clear standards, such as judicial precedents. There are professional requirements, such as the Rules of Professional Conduct of the State Bar of California (the “CRPC”). And perhaps the most important standard of all, and the most challenging to apply, is the notion of ethics or our personal sense of what is right and wrong.

Sometimes the legal standard and the ethical standard are identical. Just as often, they are not, and there is tension between a legal requirement and our ethical principles. When that occurs, the circumstances may dictate whether it is appropriate to adhere to one’s ethical belief or follow the objective legal standard. Here is an illustration. Several years ago, I was selecting a jury in a driving under the influence trial. I asked the venire if any member would have difficulty being fair and objective in a case involving the use of alcohol. A prospective juror raised his hand and said, “Your honor, I have been a Baptist minister for 30 years and I believe in the total abstinence from alcohol.” In other words, he questioned his ability to apply the legal standard of not driving under the influence, rather than his personal standard of abstinence from alcohol. After an explanation of the jury’s role -- judging the defendant’s conduct

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The Mystery of the Unclean Hands Doctrine

by Ira G. Rivin

The doctrine of unclean hands -- pled as an affirmative defense in most business cases -- remains an under-used and amorphous concept. Though exceedingly fact-driven and therefore generally unavailable in pre-trial motions, the unclean hands defense permits the fact finder to decide -- without a great deal of guidance -- that the plaintiff is undeserving of the remedies being sought in the case. Yet defendants often fail to flush out facts supporting an unclean hands defense during discovery and usually do not assert it at trial -- even though, if applicable, it acts to bar claims at law as well as those in equity.

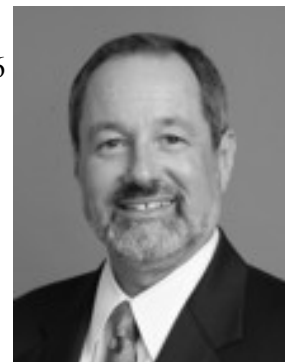
The unclean hands doctrine “is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.” (*Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.* (1945) 324 U.S. 806, 65 S. Ct. 993, 997.) This “presupposes a refusal on its part to be an abetter of inequity. While equity does not demand that its suitors shall have led blameless lives as to other matters, it does require that they have acted fairly and without fraud or deceit as to the controversy in issue.” (*Id.*)

In 1956, the California Supreme Court described the “settled” unclean hands rule in California to mean that:

[W]henever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf to acknowledge his right, or to afford him any remedy.

(*Lynn v. Duckel* (1956) 46 Cal.2d 845, 850.)

Particularly given the rather vague nature of the doctrine, courts often express concern about the possibility that a trial involving an unclean hands defense “might be distorted into a proceeding to try the general



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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.

Thank you to Hon. Eileen Moore, California Court of Appeal, for gathering the data for our quiz.

Name the Orange County judge who...

1. Played on a national championship high school football team in Pico Rivera, CA
2. Once represented Charles Schulz (Creator of the Peanuts comic strip)
3. Was in the Army's Criminal Investigation Division (CID) in Washington D.C.
4. Sailed the Severn River, which is along the shores of the Naval Academy in Annapolis Maryland
5. Went to law school with the person most widely believed to be "Deep Throat" of Watergate fame
6. Sold ice cream from a push cart at Disneyland
7. Sold hot dogs at the Rose Parade
8. Had a grandfather named David M. Roth, the World's Foremost Memory Expert
9. Has a hobby of studying the assassination of President Kennedy
10. Appeared as a contestant on "Wheel of Fortune" in 1975
 - a. State appellate Justice Kathleen O'Leary
 - b. Federal District Judge Gary Taylor
 - c. Superior Court Judge Marjorie Laird Carter
 - d. Superior Court Judge Ronald Kreber
 - e. United States Bankruptcy Judge John Ryan

- f. Superior Court Judge Fred Horn
 - g. Superior Court Judge Ronald Bauer
 - h. Federal District Judge Cormac Carney
 - i. Superior Court Judge Franz Miller
 - j. Superior Court Judge David McEachen
-
-

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information, please do not hesitate to call me or any of our Board members, or simply visit our website at www.abtl.org.

Aloha.

♦ *Dean J. Zipser is a partner of Morrison & Foerster LLP and head of its Orange County Litigation Department.*

-Q&A: Continued from page 1-

help. They can be counted on to support the courts. That's really a tremendous thing. One of the most significant things they are doing is trying to find a stable source of funding for the courts on an annual basis. One of the difficulties is this peculiar system that we have for funding the courts. The courts have to submit the budget through the Executive Branch and then it has to be approved by the Legislature. I am so thankful that they are making some progress in that regard. It's going to be a slow process to find a stable source of funding for the courts, but hopefully we'll get there. The immediate picture is not as bleak as it was several months ago, again thanks to Senators Dunn and Ackerman. I think by the time this interview is published we might have a budget. And, if so, we are going to get through this year okay. We still have severe cutbacks here in Orange County. The last figure that I saw for a vacancy rate due to our hiring freeze -- which will be two years this month -- is, I believe, 11.1 percent. We are starting to fill some positions on an emergency basis because it's beginning to hurt our operations. Once we get the funding that's in the budget for this year, we are going to get through the year okay, without any layoffs and without any closures.

Q: Will you continue to have reduced hours down in the clerk's office?

A: I don't think we'll be able to restore the eight-hour
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Brown Bag Lunch With The Honorable Eileen Moore by Marc L. Turman

Those who attended the July Bench/Bar Brown Bag Lunch with Justice Moore were treated to a memorable afternoon at the court of appeal. The afternoon began in Justice Moore's chambers, where we ate our lunches while Justice Moore and two of her clerks, Danie Spence and Lynn Loschin, fielded our questions. For over an hour, Justice Moore answered questions about the differences between appellate and trial work, the decision-making process on appeal, and what it is like to be an appellate court justice. Justice Moore's comments were full of helpful advice to young lawyers: be absolutely faithful to the record (your credibility depends on it); choose your arguments carefully on appeal; never criticize the trial judge in your appellate briefs; don't waive oral argument; and make sure the judgment or order appealed from is in fact appealable. Justice Moore also had questions for us. She wanted to know if anyone felt they had been treated unfairly by an appellate court, and she was interested in our opinions on California's selective publication rule.

After lunch, Justice Moore led us on a tour of the courthouse. We quickly understood why Justice Moore is not too excited about the plans to build a new courthouse. The building is truly extraordinary -- as anyone who has been there knows. It is unlike any other in the state because its design had to comply with the architectural guidelines of the homeowner's association to which it belongs. Justice Moore showed us each of the justices' chambers, with the exception of Justices Fybel and Aronson whose chambers are located off-site. The tour continued with a visit to the robing room, the courtroom (which we were able to view from the bench), and the clerk's office. Rachel Hahn, a deputy clerk, was kind enough to take time to explain the filing process to us. We ended our tour in the library, which we learned also serves as the gathering place for birthday parties and the occasional yoga class.

In all, we spent over two hours with Justice Moore at the courthouse. It was a rare privilege to be able to tour the courthouse with an appellate court justice, and to be able to get to know Justice Moore in an informal setting. Thank you Justice Moore for all your time.



And thank you Orange County ABTL for arranging these brown bag lunches.

♦ *Marc L. Turman is an Associate with the Appellate Group of Snell & Wilmer in its Orange County office.*

31st ANNUAL SEMINAR October 20-24, 2004 MAUNA LANI RESORT, HAWAII

CORPORATE AMERICA ON TRIAL 12.25 hours MCLE

Gone are the days when "irrational exuberance" filled the air and corporate chiefs were treated like rock stars. Now corporate scandals make business ethics and litigation the stuff of headlines and talk shows, while powerful corporations and the professionals who serve them face unprecedented scrutiny. The times are changing, and each of us must deal with these new realities.

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- Examination of witnesses facing changing bench and jury perceptions of executives and executive compensation
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- Handling a civil case when key witnesses are the subject of a parallel government investigation
- Balancing trade secret protection against the public's right to know
- Dealing with whistleblowers and employer retaliation
- How the expanding definitions of fiduciary duty will affect major business cases

Join ABTL for five days of study and fun at the world famous Mauna Lani Resort on Hawaii's beautiful Big Island while we explore how this new reality impacts the preparation and trial of every business case.

A WORD FROM OUR SPONSOR

Internal Controls – The New Battleground in the Fight Against Corporate Abuse

Recent events have made it clear that the establishment and maintenance of effective internal controls has become a new battleground not only in the fight against corporate abuse but also in corporate litigation spawned when insufficient diligence by corporate leaders results in harm to the enterprise or to its stakeholders.

by Jim Skorheim



Recently the names Enron, WorldCom, Adelphia and Global Crossing have become icons for the failures of corporate citizens to properly safeguard the interests of innocent shareholders, creditors, employees, retirees and other stakeholders.

In the aftermath of billions of dollars of losses suffered by these stakeholders, federal authorities, the NYSE and NASDAQ and even many state regulatory agencies have responded with an arguably overwhelming array of laws, rules and regulations aimed at combating these corporate abuses.

At the heart of these new requirements are the provisions relating to the independence of boards of directors and the establishment and maintenance of appropriate internal controls. The clear and unambiguous expectation is that independent monitoring of the activities and financial reporting of American business and industry will quell the rash of corporate abuse that has plagued our Nation over the past few years.

Section 404 -- the Centerpiece

Sarbanes-Oxley (the "Act") represents a sweeping piece of securities legislation passed into law in the Summer of 2002 in direct response to Enron, WorldCom and the like. The Act includes 3 major areas of concern: Corporate governance & financial reporting; regulation of the accounting profession; and, enhanced crimes and penalties for corporate abusers.

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A WORD FROM OUR CO-SPONSOR

Juggling the Worlds of Paper and Electronic Discovery

How can outside counsel make sure they are comprehensive in their search for information while minimizing costs?

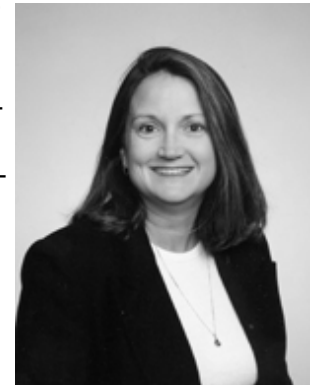
by Linda G. Sharp and Michele C.S. Lange

Introduction

It's 9 p.m. and you're set to gather up your files, undock your laptop, and head home after a long day drafting responses to the opposing party's discovery requests due the next day. For the past few weeks, you've peered through hundreds of boxes of documents and old computer equipment for information relevant to the plaintiff's requests, which seek "e-mail and other electronic communication, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, Internet usage files, and network access information."

All you really want to do at this point is go home and grab a late dinner when the president of the company you represent is on the line. "I just remembered we have a shed full of old 386 computers in a storage facility on the other end of town," she frantically tells you. "We got these computers when we first opened the business in the early 1980s."

You try to calm the company executive by telling her that certainly nothing relevant -- much less incriminating -- will be found. Surely, you tell her, the systems are too old to be searched for pertinent information. Besides, you mention that the company wanted to save money, and digging around in more places where old or irrelevant information may exist would certainly not achieve her goal.



Linda G. Sharp



Michele C.S. Lange

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public counters in the near future. That's one of the factors that's helped us address increased backlogs in the clerk's office and in the back rooms where files have to be moved -- just a tremendous amount of paperwork that the court has to deal with. The folks that work the counter are relieved early every day to assist with that process. So that's an assessment that will have to be made several months from now. It won't change in the very near future, but perhaps after the first of the year we could take another look at that.

Q: Once you are through the budgeting process, what is the next big issue on your plate in terms of Orange County courts?

A: We are looking at security for the courts overall in Orange County. The chair of the security committee, Judge Daniel McNearny, is currently heading up that task. Traditionally, the courts always had a sworn deputy or sworn officer, a police officer, as a bailiff in every courtroom. Over the past few years that has changed dramatically to, Court Special Officers, to Sheriff Special Officers and to non-sworn personnel in some instances. In some jurisdictions, like Los Angeles, for instance, they have courtroom attendants in the civil courtrooms -- non-uniformed personnel only. There have been some dramatic shifts. The reason for that primarily is money. It's all cost driven. The annual costs locally, I believe, for a sworn deputy in a courtroom with benefits runs over \$120,000 and it goes down from there to Sheriff Special Officers and Court Attendants. We made the decision here in the Central Justice Center for the civil panel back -- this was back in about 1994 or 5 - - to go from sworn deputies to court special officers in our civil courtrooms because they were cheaper. It was very controversial when that occurred. Now the discussion is to consider yet another move from Court Special Officers to Courtroom Attendants, similar to the system they have in Los Angeles -- again, because of the financial necessity of doing so. That's something we are looking at. That being said, we realized that we really have to look at our overall security needs in light of weapons screening at the entrances of the courthouses. We have it here in Central Justice Center and at the Lamoreaux Justice Center. By the end of this year, we are going to start implementing it and start putting it in place at the Harbor Justice Center. By next year it will be in at Harbor and hopefully it's on track for North Justice Center and West Justice Center. We are going to have weapons screening at all of our facilities. So, that being said, we need to look at the overall picture of what

our security needs are to see if there is some additional savings that we can obtain without affecting the level of security that we provide for the litigants, for the public going in and out, and for the employees that work in our facilities every day. We have thousands of people in and out of the court facilities on a yearly basis and in the Central Justice Center on a daily basis. So there is a tremendous need to have good security for everyone that is in the building, not just in the courtrooms or in the hallways or at the entrances.

Q: Will our new system be modeled after a system used by another county in the state?

A: They are all in a state of change right now, at various stages. We've looked at several. We had some judges go to Los Angeles and look at their system. We had some judges that looked at San Diego. We have had meetings with different judges throughout the state. We talked to Court Executive Officers of different counties in the state and they are just all over the place in how they are spending security budgets. Los Angeles actually went to the Court Attendant system in their civil courtrooms many years ago. But they have a different system than we have. It's hard -- it's like oranges and apples when you compare one court to the next. They have a courtroom attendant that does more than just security. They actually don't call them security officers, they are courtroom attendants. They assist with the phone calls, the filings, with paperwork. There is a mix of different approaches. We have looked at them and will continue to look at them. I'm not sure where we are going to end up.

Q: Do the attendants have any special training for dealing with a litigant who gets out of hand?

A: I don't know for sure what the training is in Los Angeles. I know what we've talked about here and if we do go to that model they wouldn't be called security officers. There would possibly be a security officer in the hallway available if a panic button was hit, or somebody nearby who would come to assist. The training that we would be giving court attendants would be for emergencies. If somebody has a health emergency . . . that sort of thing and issues about dealing with juries. Their duties would not include security.

Q: So, they would be a true attendant and would call for security if there were an issue?

A: That was the discussion, at least, at the last execu-

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tive committee meeting. But it remains to be seen what, if anything, we do here, what their duties would be and what the training would be. Of course, we'd give them any training we felt was necessary for the position we end up with. Part of this is driven by the state. They're doing some studies on security standards throughout the different counties regarding the level of security that they're going to fund for the various courts. So, it's wait and see at this point.

Q: You are known as one of the people who has really pushed to upgrade technology in the courts. Where are we at, and where do you see our courts going, with technology over the next five years?

A: We are currently developing the part of the case management system in the criminal area that's going to be the model, I believe, for the rest of the State. The State's been broken up into regions and the southern region, some two years ago, was given the task, with Orange County, Los Angeles, San Diego and Ventura Counties taking the lead, to meet and develop case management systems in the technology area for the entire range of functions that we do and Orange County, at that point, was out front, has been and continues to be, in case management technology. We would hope that 3-5 years out, we will have the civil case management system in place that is currently being developed, not at the same pace as the criminal system -- criminal is much further along. The civil system will also have cutting-edge technology for processing and for us to manage civil cases within the court system. We're already doing imaging of documents. Complex civil does online filings and we've been doing that in some of our other functions for quite some time. So, I would think that in 3-5 years we'll see some even more dramatic changes. Hopefully, by then we'll be doing online filings and more communication over the Internet with the courts and lawyers. As you know, we post tentatives -- most of the judges post tentatives -- on the internet. There will be more of that. Who knows what communication technology will bring us. We might be able to have videoconferencing in the courtrooms -- if funding is available, of course -- where we could actually have the parties appearing via videoconferencing, and have motions heard. We've seen some demonstration projects where different things have worked really well. No reason we shouldn't think about those kinds of approaches -- lawyers arguing motions from their offices. We do it now by conference call, making lawyers available for appearance by telephone. No reason we

couldn't get screens in the courtrooms -- use technology to do video appearances. I think that would be a good thing. Of course, everybody's going with internet filings. We talk about less paperwork, but that's not necessarily the goal. I think the goal is more efficient operations, reliable communication for the courts, and better access to the courts for everybody on a quick, easy, efficient system. That should be the approach. That's the goal I see, not reducing paper. I think, actually, the studies have found we generate more paper now than we ever have in the past. You get a lot of emails and other electronic communications and people just print them out to read.

Q: That sort of efficiency and more universal access has some byproducts: for instance, "their" concern about loss of privacy. Whereas somebody used to have to go down to the courthouse and physically pull a file to find out what went on in someone's family law matter, it now becomes, with online access, easy to access and then immediately distribute it to potentially millions of people. Is that something that would militate against this sort of change, or just an unstoppable wave of the future that people will get used to?

A: I come out on the privacy side. I'm a firm believer in that. It's a challenge to balance these interests. I understand that documents pertaining to an individual, once they're filed, are made part of the public record (unless the court seals it) and are available for inspection, as well they should be. We are a public facility, we are a public court -- those records should be available whenever possible. That being said, it's a different issue altogether when somebody can download an entire storage room of court files, involving a certain area of litigation, or a certain outcome, or a certain bench officer's rulings, so to speak, and then publish it in maybe a different format. Or put a different spin on it to suit a specific purpose. That troubles me a lot and I see potential abuse out there. That's not a good thing. I think we need to do all that we can to prevent that. I think the records need to be available, but for somebody just to be able to access all the family law records and discover something about somebody's personal life is problematic. For them to go to the court, I think, is a different process. In a physical file there are notices which might require return to the courtroom for review before certain information is released, re-examination perhaps, double-checking by the staff and/or the bench officer. For example, some issues about children, or some issues about some health concerns that shouldn't be disclosed. I think we do a terrific job in this area,
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but there are always items and files that should be double-checked and that will not happen if it's all of a sudden made available because it has been imaged and you can push a button and download it someplace offsite.

So, those are huge issues -- huge issues that we have to be aware of and deal with. That being said, I know the judicial council struggled with this issue. They studied it for a long time to come back with a proposal to make court records electronically available in some format. I think that approach is a good one. I think they did a good job. But I don't know of any court that permits massive downloading of data. So, that's where I come from. We should do everything we can to make the operation of the court efficient, to make it accessible to everybody that wants to come in and use the court, make it as easy as we can. It could be a litigant that wants to get a form to file something. If they don't have a lawyer, we should provide that form online if we can, or have kiosks to save people the trip down here if we possibly can, for the lawyers to file documents, to do what they can from their offices or from their car, or from home for that matter -- do all we can, as long as it benefits the litigants and the parties using the courts, so much the better. We've got to be careful about not opening up the entire storage facility.

Q: What other sort of long-range changes do you see happening to the Orange County judicial branch besides technology?

A: Other than technology, I don't see any massive changes. On a local level, I have tried to generate a little movement on the panel. Our civil panel is the largest group of judges that we have. The courts have been unified since 1998. We have become one court. New judges come on the bench and typically go to the limited jurisdiction areas and learn the business of judging. Then, after a few years, they want to do something different and, we have only so many places to move folks. That's a dramatic change from the way we used to be. Judges used to go to municipal courts and they stayed there until they went to the superior court. Once you were elevated there were different assignments. I'm concerned about people becoming stagnant in an assignment and not having movement or career challenges at the level and pace that one would normally expect to occur. That has not occurred yet, but looking down the road, I think it's healthy for our court to have some folks moving back and forth in some assignments. So we're experimenting with that a little bit. I'm not

proposing that to the Executive Committee as a policy change, but we're tinkering with that now to see how that works in a pilot program. For example, if somebody wants to go back to a justice center or go to another location, perhaps where they worked before, and do that again for a couple of years, then rotate back and forth, we're just seeing how that works. That would be a change if we did that on a regular basis, because traditionally people have gone to some of these assignments and they've just stayed there for the remainder of their career. Eventually a bench officer should be able to remain with an assignment indefinitely, but initially some movement is good.

The only other thing that I guess would be significant would be a new court facility. That would be in Laguna Niguel. What we do with that facility, what types of cases we would hear there would perhaps be civil, criminal and family law. All are a distinct possibility and there will be some rearranging of court calendars because we hope to end up with 14 courtrooms at the Crown Valley Parkway location in Laguna Niguel. That issue comes back before the Board of Supervisors probably in August or September. Hopefully they will approve it, then we'll have a design build phase for fast-tracking the structure. The Chairman of the Board of Supervisors, Tom Wilson, has been very supportive. It is long overdue. We have a population base in south Orange County that is equivalent to a city the size of San Francisco and only 4 courtrooms to accommodate it. We might have a new court there in 2-3 years. That would be a pretty dramatic change in the appearance of Orange County Superior Court, going from 4 courtrooms at that spot to a 14 -- courtroom facility.

Q: Has there been any discussion about a new facility for the Central Courthouse?

A: Not a new one, but last year we completed a strategic planning process that involved all of our court facilities. As you know, the plan is for the state to take over all court facilities within the next five years or so. That process has actually started. Part of that process was an analysis and a review of every court facility in the state, including Orange County. When we went through all our courts here, we looked at the Central Justice facility and we came up with a plan of what we would likely need ten to twenty years out. It didn't involve a new facility here, but it involved an addition. I believe the plan would place this addition on the corner of Flower and Civic Center Drive in the large parking lot. However, the plan does not call for a new facility here.

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Q: What would be housed in the addition?

A: It would depend on what the needs are at the time. As our case load changes, we try to accommodate the litigants. One of the challenging things to do -- I have discovered -- as a presiding judge, is to allocate resources to the case loads. As you can well imagine, each supervising judge says, "I want more judges," "I need more courts." That's especially true in criminal, civil and in family law. So it's making those determinations of where the growth is, where the need is, and what resources you devote to it. Down the road, it will be somebody else looking at the actual needs. The family law panel and the civil panel have actually grown in the last two or three years -- the family law panel significantly. I looked at their work load and it was very, very high. Those judges are really working hard with a lot of tough cases to deal with on a regular basis. Big calendars. So, I thought they needed some additional courts. We actually have 3 family law courtrooms at this facility now. I also looked at civil and felt the same. I talked to those judges and looked at the law and motion calendars. I noticed it was much higher than when I was doing civil, when I had a civil assignment, before I became the assistant presiding judge. It has gone up in some instances very dramatically. In talking with the judges they told me that sometimes the numbers haven't gone up but the matters themselves have become more complex, more challenging, and they take more time. It's not just a simple continuance request, discovery issue, or a fairly quick demurrer or something. There are many, many, many more motions for summary judgment that are complex and take more time. I thought okay, we'll see if we can't expand the civil panel somewhat, which we have done. We put more judges on civil actions. We have a couple of judges doing civil out in Westminster. We only have so much room here. Every courtroom in this building is utilized. We actually created another courtroom. You might not know it but over here on the second floor, right across the hallway, behind the criminal department 5, there is a courtroom that opened just last year. Criminal has been contained and we have become more efficient with limited jurisdiction matters. Criminal has been contained for a number of reasons. Those judges are doing lots of trials. They are working really hard and they pretty-well keep it contained. They haven't had to send any trials out. That's sort of our measure there: Are they able to do all their jury trials? Because, as you know, criminal trials get priority and if something gets backed up, we've got to find a home for that

case and try it -- which happens once in a while. It's just the nature of the business. When that occurs, they are able to send something to one of the justice centers to try. That has worked fairly well. It gives those folks a little something different to do once in a while.

Q: Now, let's maybe shift from Orange County to some of your roles on a state-wide level. I know you're presiding over the State's Presiding Judges. What does that role entail?

A: Well, it's not presiding over the presidings actually. The way it works is there are 58 presiding judges in the state and they are organized into an advisory committee to the Judicial Council. There is an executive committee of that group. Each year they submit three names to the Chief Justice, who then selects somebody to be the chair of the PJ's committee. I've been fortunate enough to be selected. This is my third year in that position. We meet several times per year. I meet every other month with the Judicial Council. In that capacity I have a seat on the Judicial Council, which meets every other month. So, that's sort of the structure. There are 18 presiding judges on the group's executive committee and we generally discuss rules and legislative issues at our meetings. All the large counties are members of the executive committee and a number of medium-sized counties and there are a handful of small counties. We have, I think, about 16 two-judge counties in the state. So, it's an interesting committee. You can't imagine what it's like to chair a group of 58 Presiding Judges! One of the most interesting things about the position that I have in the role of Judicial Council member is to visit various courts in the state. The Chief Justice started the visitation program and refers to them as site visits. A number of presiding judges go to the courts in selected counties and take a look to get feedback; to see what's happening there. Is the Judicial Council doing everything it can? Is there anything it could do differently or be of more assistance to the court? Are there any problems that you have that we can report back? That is the sort of thing we've been doing on the committee and it's been very, very interesting. I spent 3 days in Modoc, Lassen and Plumas counties. So it's just interesting to see that. The presiding judges have meetings where we discuss different court problems. One of the really interesting experiences I have had is to see how it all works together. We have presiding judges from Los Angeles and San Diego at a table with judges from Siskiyou and Alpine counties having similar problems and similar issues -- in some instances. Naturally there is a massive difference

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in scale, but to hear the ideas, to meet the personalities, and to see how we all come together and discuss these issues has been very, very rewarding just to be a part of that. I have enjoyed that a great deal. We also look at the rules of court. We have two subcommittees: a legislative subcommittee and a rules subcommittee. Any issues that affects the courts, especially presiding judges as far as their role and responsibilities are concerned, are discussed by the subcommittees. You might not know this, but there are a lot of rules, and some statutes that affect the responsibilities of presiding judges. If anything is going to be done that affects that, it will go to our rules committee and then the executive committee will meet and discuss it. We make recommendations to the Judicial Council and to the office of government affairs in Sacramento regarding our views. Sometimes we generate ideas ourselves, some legislation and/or rules that we think would be appropriate or helpful. That's the most significant thing that we do. We'll also meet in conjunction with the court executive officers. There is a Court Executive Officer for every county in the state. When we meet, we'll have separate meetings and then we'll have a session together and discuss common issues. We'll have some breakout sessions where we're discussing common issues throughout the state. It has been a tremendous vehicle and it has advanced the idea of court unification throughout the state. It's been a really interesting experience for me.

Q: How do you think court unification has worked out?

A: Well, it's still evolving. It has been very, very good, I think, in Orange County. It has been very, very good for a number of reasons. It has allowed more efficiency. It's allowed some of the movement I've talked about. Some of the expansion I've talked about has been a result of unification. We have had judges that have suggested that they can modify a certain operation in one area and save a bench officer there and free him up to go work someplace else. I know since unification, I think we've got about the same number of judges, but yet have been able to extend family law panel by 3 judges. I think the civil panel by at least 2, maybe 3. That comes from just changing the operation -- the way we do business. If Alan Slater were here, he could tell you there has been tremendous changes in the staffing and operation of courts. We are right in the midst of an organizational improvement. This is an effort being led by our Assistant Presiding Judge, Nancy Wieben Stock, that's looking at that whole area -- the structure of how

the court operates. Something we could not have done without unification. So it's been a good thing. We haven't seen any dollar savings yet, any actual money, but it's hard to assess that because of the way the costs have gone up. I think we have much better coordination between justice centers and all of our operations. We are much more efficient. It's been a terrific benefit to the bench officers. They have the flexibility to go from downtown here, in our main facility, and then go work in Fullerton for a couple of years. They can move around or do something different -- there are just more assignments available -- more interest in doing different things. That's a good thing.

Q: Is there some message you want to get out to the business litigators in the County that would be either helpful for you or a way to help the Court?

A: What I'd like to hear is more feedback. I like to get feedback as presiding judge. I go to functions, go to dinners, go to lunches and talk to lawyers. I like to ask them, how's the Court doing? What could we do differently? What could we do better? Do you see any areas where we could improve? Typically what happens when we go to a function, everybody wants to just chit-chat and talk about something social and friendly and what's happening, etc. They always want to chat it up with a bench officer. Rarely does anybody say to me, you know where you could really shape that court up? I understand that. It is human nature, especially between lawyers and bench officers. Give me some ideas about something we could do better -- something we could do differently. Call me or send me a note. Sometimes we fall into routines or develop some habits and we aren't aware of them. We don't go from courtroom to courtroom to take a look at each other, see how we're doing business or how we're operating, one from another. Sometimes it's helpful just to hear from lawyers that come and say, gosh you know, you've got this problem. Maybe it's weapons screening . . . you've got this problem on Wednesdays, I can never get in your door for half an hour or maybe it's the elevators or maybe it's just being stuck in the hallway. Maybe judge X has got a terrific approach or does something unique. It's important to hear what practitioners consider to be impediments to their work in the justice system as well as what they perceive as creative and helpful. Judge Thrasher's mediation program is a good example. I received some great feedback on that. Tell the folks, listen, when you get a chance to talk to a judge, don't just say gosh you're doing a great job. Nobody holds it against lawyers because they say some-

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thing negative. It would be helpful to hear candid feedback. And once that is said, always finish by reminding us we have the best bench in the state because that is true and our bench officers deserve to hear it more often.

♦ *Richard Grabowski is the managing partner of the Jones Day Irvine office.*

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against the legal standard rather than a personal standard -- he agreed that he could serve with fairness. He was able to set aside a personal, deeply held notion of right and wrong and apply the legal standard. The situation, jury service, allowed him to do so without compromising or being unfaithful to his personal ethics.

Unfortunately, there are many situations in which this tension is less easily resolved. Recently, a lawyer came into my court to obtain an order to show cause re contempt for a witness' failure to appear at his deposition pursuant to a subpoena. The lawyer's application was based on his declaration that the witness had been served with a subpoena and then failed to appear for the deposition; nothing more was stated. At the hearing, however, the witness and his attorney appeared and presented a much different picture. They explained that after having been served, the witness had obtained counsel, contacted the opposing lawyer and attempted to resolve the need for the deposition. Failing that, the witness' counsel sent a formal objection to the opposing lawyer. The lawyer seeking the OSC had given me a very incomplete picture of the actual situation. He had led me to conclude that the witness had flouted the subpoena when, in fact, he had reacted responsibly. I felt completely misled and so advised the lawyer. I also denied the relief he was requesting. Interestingly, the lawyer left the hearing absolutely unable to appreciate my concerns about his actions.

In that situation, it seemed to me that the legal requirement and the ethical imperative were the same. The legal standard is found in Rule 5-200 of the CRPC. "In presenting a matter to a tribunal, a member . . . (B) shall not seek to mislead the judge" The lawyer had given me only a small piece of the actual picture and the result was that I had, in fact, been badly misled. In this situation, the ethical principle intersects with the legal requirement. Certainly, we share an ethical notion of the need to be honest with others and an understand-

ing that a half-truth can be as deceptive as a lie.

Perhaps the sternest test for any lawyer or judge is presented by situations in which the legal standard and our personal ethos do not intersect and the conflict cannot be fairly resolved. Such a dilemma recently resulted in the professional self-destruction of Alabama Supreme Court Justice Roy Moore. His personal notion of right and wrong impelled him to refuse to comply with a lawful federal court order. Justice Moore elevated his personal beliefs over the clear dictates of the law. In simple terms, he would have substituted the rule of man (himself) for the rule of law.

Virtually every lawyer will ultimately face such a dilemma. For example, business trial lawyers are commonly asked to represent a client whose conduct has been inappropriate or downright reprehensible. No problem, so far. But the test comes when the client expects the lawyer to perpetuate a deception or to interpose a defense that is unsupported by facts. This can sometimes be done without a glaring violation of a legal standard, but it cannot be accomplished without a head-on collision along the high road of ethical living. In such cases, one cannot honestly and fairly set aside one's ethos for a short season like the minister-juror.

I perceived such a dilemma in a case recently in my courtroom. The plaintiff, a local church, had loaned a significant amount of money to a parishioner. An amateurish promissory note was prepared with a usurious interest rate, a defective personal guaranty, and other technical problems. The loan was not repaid, the church sued, and the debtor asserted every technical defect, first by demurrer and then by motion for summary judgment. There was no question that the money was borrowed and due. In short, the moral obligation was clear; the legal obligation was very much in doubt.

How does a lawyer deal with such a case? There does not seem to be one universally accepted answer. Clearly, some lawyers simply ignore the moral issue and just "do their job" by zealously asserting the client's legal rights. Others may take a conciliatory approach, using the unique facts to encourage all sides to reach a compromise that they can live with. Still others may simply decline to assist the client to avoid a just debt.

Fortunately, we do have some meaningful guidance. The American Bar Association's Model Rules of Professional Conduct recognize that a lawyer may take a

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holistic approach to such situations. In other words, the lawyer may refer to and urge the client to consider the ethical aspects of a legal problem. Specifically, Rule 2.1 provides that “a lawyer may refer not only to law but to other considerations such as moral . . . factors, that may be relevant to the client’s situation.” This principle is amplified in Comment 2, which confirms that it “is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”

One thing is clear: we as members of the bench and bar have taken an oath to uphold the laws of California and the United States (Bus. & Prof. Code § 6068) and we each have an ethos, a set of moral, guiding beliefs. In the infinite variety of situations that come before us, we must be sensitive to these dynamics. In other words, we have to find a way to adhere to the legal requirements, be faithful to our moral makeup, and accomplish our mission as advocate or judicial officer.

♦ *Hon. Clay M. Smith is a judicial officer of the Orange County Superior Court.*

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tion in its expansive breadth and uniquely liberal standing provisions.

Section 17200 defines “unfair competition” as including “any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” “The Legislature intended this ‘sweeping language’ to include ‘anything that can properly be called a business practice and that at the same time is forbidden by law.’” *Stop Youth Addiction v. Lucky Stores*, 17 Cal.4th 553, 556 (1998), quoting *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992) and *Barquis v. Merchants Collection Assn.*, 7 Cal.3d 113 (1972).

In determining who may file suit under section 17200, perhaps the more appropriate question is “who may not file suit under Section 17200?” Section 17204 provides that an action for relief under the statute may be prosecuted by any government attorney “or by any person acting for the interests of itself, its members *or the general public.*” The UCL can also be used as a

quasi-class action tool for plaintiffs’ attorneys seeking restitution on behalf of a large group without the complications and expenses of a class action. By not giving notice to proposed class members, or having to become certified by the court, plaintiffs avoid substantial costs in this cheaper alternative to a class action.

Recently, there has been heightened criticism of the UCL, intensified by businesses smarting from fresh wounds, courtesy of this uber-law. Stoking the fire has been the increasing number of perceived abuses of the law, led by the Trevor Law Group and their now legendary 17200 schemes. Not everyone agrees with the extent of the problems associated with the law, but all parties agree on this: the UCL does present some troubling issues that need attention. The most infamous acts of 17200 abuse were carried out by the Trevor Law Group in 2002. Attorney General Bill Lockyer, who investigated the charges, estimated that the law firm could have collected more than \$20 million through intimidating letters it sent to auto repair shops, restaurants and other small firms, demanding payments between \$6,000 and \$26,000 to drop the suits.

Blatant acts of malicious exploitation of 17200, like those of the Trevor Law Group, are only a part of the overall picture. The unusual breadth of the UCL has paved the way for numerous frivolous suits brought by lobbyists, special interests and even business competitors seeking only to harass opponents with whom they are afraid to compete in the marketplace. One such lawsuit was filed against the maker of a children’s oven whose promise that the product would bake cookies in 15 minutes did not take into account the time it took to make the dough and pre-heat the oven. Another suit attacked the maker of a squirt-gun, claiming the water did not shoot as far as the box indicated. Lawyers have victimized travel agents who haven’t posted their license number on their website or local auto dealers who use “APR” instead of “Annual Percentage Rate” in their ads.

This year, a group named “Californians to Stop Shakedown Lawsuits” is spearheading the campaign for a new proposition aimed at amending the UCL. This group, comprised of California businesses, tort reformers, and numerous elected officials, has qualified an initiative for the November ballot (Proposition 64).

Proponents of the proposition believe that it addresses the concerns of abuse related to 17200. The amendment contains four basic modifications:

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morals of the parties.” (See, e.g., *Boericke v. Weise* (1945) 68 Cal.App.2d 407, 419.) That is not the intended use of the defense. Nor is a plaintiff automatically barred from recovery merely because, at the time of the defendant’s wrongful conduct, the plaintiff was committing a tort or a crime. (*Blain v. Doctor’s Co.* (1990) 222 Cal.App.3d 1048, 1060, citing Restatement Torts, 2d, section 889.) How, then, is the fact finder to determine whether it should “shut the court’s doors to the plaintiff” based on the plaintiff’s unclean hands?

In *Blain v. Doctor’s Co.*, *supra*, the Third District Court of Appeal attempted to answer this question. Relying largely on its review of two 1949 University of Michigan Law Review articles by Professor Zechariah Chafee -- entitled *Coming Into Equity With Clean Hands* and *Coming Into Equity With Clean Hands: II* -- the court in *Blain* explained that “the doctrine of unclean hands is not one but a number of disparate doctrines, dependent for their substance upon the context of application.” (222 Cal.App.3d at 1059.) Attempting to formulate a consistent principle for application of the unclean hands defense, the court eventually concluded “that whether there is a bar depends upon the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries.” (222 Cal.App.3d at 1060.) So much for creating a clearly defined standard.

In *Blain*, the defendant was a lawyer who asserted the unclean hands defense in response to his former client’s legal malpractice action against him. The plaintiff in *Blain* (the defendant’s client in the underlying action) had alleged that the defendant negligently advised him to lie at his deposition in the prior action. According to the plaintiff, his decision to follow his lawyer’s advice led to a much worse outcome in the case, caused him emotional distress, and harmed his career. Because the complaint itself acknowledged the plaintiff’s perjury in the prior action, the defendant was able to assert the unclean hands defense by way of a demurrer -- which the trial court sustained without leave to amend.

Applying its three-pronged analysis to these facts, the court in *Blain* first reviewed two analogous “out-of-state legal malpractice cases involving injuries resulting from client perjury engaged in at the behest of counsel” -- but found those cases not squarely on point. The court then proceeded to examine both the plaintiff’s and the defendant’s conduct -- specifically in relation to

each type of loss claimed by the plaintiff. The court found the plaintiff’s perjury linked to those losses. The court also noted (1) the absence of any suggestion “that the defendant attorney gained any personal benefit from bringing about the alleged injury” to the plaintiff and (2) the availability of other remedies (besides facing a legal malpractice action) to deter a lawyer from urging a client to lie under oath. On balance, the court found that the pleaded facts supported the lower court’s unclean hands ruling.

The rather unstructured analysis articulated in *Blain* typically will not provide meaningful guidance to a fact finder having to decide whether the plaintiff’s misconduct justifies application of the unclean hands doctrine -- particularly if the issue is being decided by a jury. (See below.) A review of other California addressing this issue reveals that the only consistent constraint on the applicability the doctrine appears to be the necessity of showing a connection between the misconduct supporting the defense and the subject matter of the complaint. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 621.) Otherwise stated, the plaintiff’s misconduct must “infect the cause of action before the court” (*Carman v. Athearn* (1947) 77 Cal.App.2d 585, 598) or “relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants.” (*Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728.)

This requirement presumably prevents the unclean hands defense from being used to open the door to a wholesale examination of the plaintiff’s ethics and morality. But whether it creates a meaningful hurdle to application of the defense is doubtful. In most cases in which the plaintiff’s own misconduct is introduced, a fact finder sufficiently offended by the conduct can manage to link it to the plaintiff’s claims.

For example, in a case the author tried a few years ago (as co-counsel with Michael Sherman at Alschuler, Grossman, Stein & Kahan LLP), the court terminated a lengthy jury trial mid-stream due to the plaintiffs’ unclean hands. In that case, the plaintiffs -- a group of related companies in the business of selling recreational vehicle campground memberships -- claimed to have lost \$200 million as a result of the defendants’ purported interference with thousands of those memberships. During the first ten weeks of the trial, defense counsel cross-examined the plaintiffs’ witnesses with a

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procession of evidence showing why the plaintiffs were undeserving of relief -- including the plaintiffs' extensive history of abusing both their own members and the court system.

At the close of the plaintiffs' case the defendants moved for judgment based on the plaintiffs' unclean hands. Weighing the evidence as he was permitted to do, the judge granted the defendants' motion -- terminating the trial and awarding judgment to the defendants -- in the face of the plaintiffs' argument that the nexus between their claims and their alleged misconduct was tenuous at best. (The trial judge also found the plaintiffs' own misconduct responsible for the losses they sought to recover, resulting in a separate ruling that the plaintiffs had failed to establish the element of "causation" on any of their claims. This link between a plaintiff's misconduct and damages will often be found in cases where the unclean hands defense is available.)

In its actual application, the unclean hands defense is likely to be assessed through the fact finder's use of a "sliding scale" test similar to the one employed on preliminary injunction motion; i.e., the more outrageous the plaintiff's misconduct, the easier it will be to link the conduct to the plaintiff's claims and bar the relief sought.

As it has evolved over the years, the unclean hands doctrine has taken on increased importance. As reflected by the decision in *Blain*, the defense now applies to claims at law as well as those in equity -- even though the doctrine is equitable in nature. (See *Unilogic, Inc. v. Burroughs Corp.*, *supra*, 10 Cal. App.4th at 618-20, citing *Fibreboard*, *supra* [equitable defense of unclean hands is available in California as a defense to a legal action].)

In addition, the availability of the defense to bar claims at law means that in the appropriate case the issue may be decided by a jury rather than the judge -- even though equitable claims and defenses generally are tried to the court. (*Unilogic, Inc. v. Burroughs Corp.*, *supra*, 10 Cal. App.4th at 621-23.) Particularly where the gist of the plaintiff's action is legal -- so that the plaintiff is constitutionally entitled to a jury trial anyway -- the court retains the discretion to present the unclean hands defense to the jury. (*Ibid.*)

While the unclean hands defense obviously does not

belong in every business case, it remains a powerful weapon in a defendant's arsenal of available defenses -- one that probably can and should be used with greater frequency.

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- 1) Creates a harm requirement for private enforcement, allowing private litigants to sue only if that individual has been actually injured by, and suffered financial/property loss because of, an unfair business practice.
- 2) Requires private representative claims to comply with procedural requirements applicable to class action lawsuits.
- 3) Authorizes only the California Attorney General or local public officials to sue on behalf of the general public to enforce the UCL.
- 4) Requires penalties recovered by Attorney General or local prosecutors to be used only for enforcement of consumer protection laws.

Opponents of Proposition 64 argue that the amended standing provisions would violate central precepts that underpin section 17200: unlawful business practices, by their very nature, harm the marketplace and should be stopped regardless of any harm suffered by a particular plaintiff. Furthermore, they claim the modifications would stymie legitimate lawsuits by consumer and environmental advocacy groups against fraudulent and unfair business practices. A spokesperson for a consumer group said the measure would block the "vast majority of environmental suits."

While these criticisms are spawned by legitimate concerns for the public interest, it is unlikely that the proposition will have such devastating effects. Advocacy groups around the country have found ways to stop egregious practices without state laws as broad as California's. "None of the 16 other state jurisdictions with their own versions of California's Unfair Competition Act gives private attorney general status to any person without qualification. Rather, persons must be injured to obtain redress for themselves, and must undertake a variety of different steps if they are to represent

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others who are similarly situated.” Cal. L. Revision Comm’n Rep. at 248.

The problems associated with California Business and Professions Code Section 17200 could begin to be addressed with the amendments of Proposition 64. The modifications would trim back the extraordinary breadth of the law, thus curbing its abuse by fee-seeking attorneys, while at the same time leaving open its availability to legitimate uses. Given that legislative attempts to modify 17200 have been unsuccessful, and that the Supreme Court has done little to alleviate the tension in the situation, it would appear that this is the only practical resolution to the problem.

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While it’s easy to ignore “hard to deal with” media types, such as out-of-date backup tapes, antiquated PCs or hot-off-the-market personal digital assistants or electronic tablets, many times these media sources are where the smoking gun documents are located.

No longer is it appropriate to hide behind the technology, claiming that the systems are too antiquated, damaged or burdensome to be searched for responsive documents and emails. There are a vast number of experts that are well-equipped and professionally trained to assist you.

In fact, courts are now recognizing the ease in which relevant electronic data can be collected, reviewed and produced. Attorneys who have stayed clear of that CLE on e-discovery and made a point of not getting “up to speed” on the issue or who think that merely sending a preservation letter to their clients meets the burden may face unsympathetic judges in the halls of justice. Take, for instance, the stern instructions given to the defense lawyers by U.S. District Judge Shira Scheindlin in *Zubaluke V*: “Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” Indeed, attorneys have a duty to monitor preservation compliance -- or face penalty from the bench, including judicial sanc-

tions, ethical violations, and malpractice claims.

Now, more than ever, it’s important for outside counsel to identify all potential places for relevant evidence -- evidence that resides in both the paper and electronic worlds. But how can outside counsel make sure they are comprehensive in their search for information while minimizing costs? Remember, outside counsel are supposed to be the experts.

First, outside counsel need to make sure they are thorough in the collection of potentially discoverable material -- whether in paper or electronic form. Second, they should make sure their review of the combined universe of discoverable paper and electronic documents are conducted through a single discovery expert, minimizing the amount of time outside counsel would otherwise have to spend in “managing” a large-scale project and in keeping track of who has what documents -- and in what form (paper or electronic). Doing so, could potentially slash costs incurred by clients in half. Keep in mind that more than 90 percent of all documents are created in electronic form. Thus, those documents which are in paper form probably originated from an electronic source, thereby tremendously increasing the probability of duplicates between your paper and electronic collections. Last, as outside counsel, you must manage the production process, ensuring that the responsive documents are turned over to the opposing party in the agreed upon format and in the appropriate time frame.

Where’s the Evidence?

From both a substantive and an administrative standpoint, discovery -- especially the discovery of documents -- has always been a crucial part of any litigation. Document discovery represents one-half of the litigation costs in the average case and up to 90 percent of the costs in an “active” discovery case. Lawyers spend, on average, more time on discovery (16.7 percent of their time) than on conferring with clients, working on pleadings, negotiating settlements, or conducting legal research. Of the most frequently used discovery devices, document production outranks the use of depositions, interrogatories, and the like.

All discovery documents should be treated equally -- whether in paper or electronic form. To best understand the landscape of a case, attorneys need to see a comprehensive snapshot of all the evidence to start developing a theory of the case. Much the way individual

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puzzle pieces seem indistinct when disconnected from the whole puzzle, the true story of a lawsuit rings clear only when all of the evidence in a case comes together.

For example, if a company's president is involved in insider trading, emails between the president and a family member indicating that "all of our financial dreams will come true" and Web searches for lavish homes or vehicles might be relevant in building a case of wrongdoing. However, when accompanied by hardcopy receipts of actual stock sales, bank account records, and voicemails to the stock broker, the case against the company president becomes infinitely more formidable.

But, first, where should one look for the different kinds of evidence?

Paper Documents: Where to Look

The law office still isn't a paperless environment. Discovery teams still must focus their efforts on paper - paper in filing cabinets, paper in boxes, paper in warehouses, offshore paper, and even paper that blew off a table and slid behind a bookcase. In fact, failing to continue to recognize the importance of paper documents in an increasingly electronic environment will cause counsel to miss out on about a third of business documents as more than 90 percent of business documents are now being created electronically with only 30 percent of those documents ever being printed.

Thus, counsel needs intricate knowledge of all of the locations where paper evidence could be stored, or in some cases, hidden. This will often involve one or more sweeps of all physical locations containing potentially relevant documents.

Electronic Evidence: Where to Look

Contrary to the belief of some attorneys who hold out hope that they won't have to master the universe of issues relating to e-evidence, the simple reality today is that electronic documents are every bit as discoverable as paper documents. Although there is much unsettled law in the area of e-evidence, this is the one inescapable truth: e-evidence is discoverable and practitioners must be prepared to request it, respond to requests for it, and ultimately produce it.

Counsel facing discovery of electronic evidence must become well versed in the many places where data

resides -- desktops, laptops, servers, floppy disks, CD-ROMs, DVDs, and backup tapes, just to name a few of the common locations. The difficulty with electronic evidence is that the storage locations are virtually endless, and with the development of new technologies, e-evidence types are changing almost daily. It goes without saying that this complexity and sheer volume of information makes finding and retrieving electronic evidence a bit more challenging.

Take, for instance, the number of pages that can be easily stored on the following media:

Where Data Lives	Average Page Count
40-GB Backup tapes	Approx. 3.5 million pages
15-GB Hard Drive	Approx. 1.25 million pages
80-GB USB Drive	Approx. 2.5 million pages
4.7 GB DVD	Approx. 411,250 pages
625-MB CD	Approx. 55,000 pages

Yet, despite the incredible amount of potentially relevant information that could be located on these common storage devices, attorneys need to be aware of other likely places where discoverable information can exist and what kinds of electronic data should be located.

The depth and breadth of this category of electronic evidence sources runs the gambit of technology's latest and greatest developments -- personal digital assistants (PDAs) with and without email capabilities, cell phones with email, text messaging or other computing functions, BlackBerries, and instant messaging programs. These "outside of the box" technology gadgets should not be left behind when the hard drives and backup tapes are gathered for discovery.

Instant Messaging

Perhaps first widely used by teenagers wanting to quickly communicate with friends, instant messaging has now entered the workplace, leading to new discovery challenges as well as opportunities. Providing real-time convenience and conferencing capabilities, instant messaging, or IM, creates a written business record that may be subpoenaed and used as evidence in litigation or regulatory investigations.

According to the e-Policy Institute, up to 90 percent of businesses are already engaged in some form of IM, including 25 million employees who are using personal IM tools to communicate via public networks without
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management's knowledge, IT's approval, or written rules or policies in place to reduce liabilities.

With email usage expecting to decline by 40 percent by 2006 as a result of increased IM use, the impact of IMs on litigation will only become more significant. For example, in *State v. Voorheis*, 2004 WL 258178 (Vt. Feb 13, 2004), the appellate court affirmed the trial court's finding that "instant messaging" test was sufficient evidence to support the defendant's conviction of incitement and attempt of use of a child in a sexual performance. The State introduced evidence recovered from a computer forensic examination of the computer system and floppy disks taken from the child's home. The computer forensic expert recovered text from "instant messaging" conversations in which the defendant discussed with the child's mother a plan to have a lewd photo shoot. At trial, the expert noted that instant messaging is not usually saved on a computer and that saving it to floppy disks required "concentrated effort." Based on the instant messaging evidence, the jury found the defendant guilty. The defendant argued that the instant messaging text was "meager evidence" of guilt, since the text had allegedly been altered and edited. The court rejected this claim finding that the retrieved electronic conversations, together with witness testimony, offered ample evidence to support the jury's findings.

Employees who destroy instant messages and other evidence after they learn about a lawsuit or investigation put the organization and themselves at risk of civil and criminal penalties. Attorneys should make sure they inform their clients to hold onto instant messages that are related to a lawsuit or an investigation and that would otherwise normally be disposed of in the course of business.

Where are instant messages located? There are applications that capture and store IMs as they are transmitted and are typically part of the backup and retention protocol of the organization. It will be imperative to question the client's IT professional as well as the IT professional of the opposing party at the 30(B)(6) deposition to determine whether that information is in a harvestable media format and, if so, if it is being preserved.

Text Messages

No single case has brought more attention to text messages than perhaps the Kobe Bryant case.

In the sexual-assault case, the judge in June 2004 released to defense attorneys cell phone text messages among the accuser, her former boyfriend and an unidentified third person sent in the hours after her encounter with the basketball star. Calling these text messages "relevant," District Judge Terry Ruckriegle turned the text messages from AT&T Wireless over to prosecutors and the defense team.

Criminal cases in Europe and Asia have hinged on text message evidence, but the Kobe Bryant case appears to be among one of the first in the U.S. in which the material could play a pivotal role.

Typically, information about text messages -- such as the sender, recipient and location of sender -- is stored for billing purposes. The software used to store that information can also store content of those transmissions. In the case of Kobe Bryant, the text messages were likely retrieved from the phone company's archival storage system more than four months after the alleged incident.

BlackBerries and other PDAs

There are two types of BlackBerry devices: the Exchange Server Edition is meant for use in a corporate environment while the Internet Edition works with various POP email accounts. With the Exchange Server Edition, the email is transmitted to the device through the company's Exchange Server. Thus, any email traffic sent or received via this communication is passed through the Exchange box and captured on the company's Exchange Server. These emails presumably are backed up as part of the organization's retention policy.

The alternative device provides that a separate ISP or POP email account is established by one of the several providers that support the device. This communication may or may not be captured by a corporate server, such as Exchange, depending on how the device is configured.

BlackBerry devices share the same evidentiary value as any other PDA. A delete is by no means a total removal of data on the device. However, a BlackBerry's always-on, wireless push technology adds a unique evidentiary concern. Changing and updating data no longer requires desktop synchronization. In fact, a BlackBerry doesn't need a cradle or desktop connection

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to be useful. The more time a BlackBerry spends with its owner, the greater the chance that the data contained therein is different than what is contained on the user's synced hard drive. In this situation, an individual's BlackBerry could more accurately reflect and tell the story about that person's activities.

Personal Home Computers

The employees and executives of most corporate clients and those of the opposing side often check and review email from home. This is a great resource for electronic discovery. Within the corporate setting, email communications are typically set up on a backup retention schedule. The most frequently seen destruction schedule for email is generally 30 days. However, keep in mind that if an individual is using a laptop computer or a home computer to review emails, that system isn't part of the corporate retention policy and the data may still be ripe for harvesting. Courts in the past have not hesitated to order discovery of individuals home computers where relevant information is likely contained therein.

Former employees

In the years prior to computers, departing employees, especially secretaries, administrative assistants and executives who would leave an organization would load up a dolly full of boxes of their records. Some of these records consisted of forms that they had created over the years that they would merely use over and over again and may be helpful for their next position. These employees aren't necessarily "stealing" trade secret information. Rather, they are just taking their working papers so that they can use them at their next job so that they don't have to recreate the wheel. However, today, this information may be leaving the organization on a drive that is the size of a tube of lipstick, also known as a lipstick drive, pen drive, thumb drive, USB drive or flash disk. A flash disk today can support more than one gigabyte of data. This information, too, isn't part of a document retention policy and may be available if the document they kept as a "form" was the document that is needed to prove or disprove a particular claim.

Administrative Assistants

In the paper world, attorneys would ask for an individual executives "chron book," a binder that contained all of the written communications from an individual. Now keep in mind that this individual didn't necessarily

draft these documents themselves. Instead, an administrative assistant or secretary would type up all of the letters, contracts, memorandums, etc., and place a copy in the "chron book."

Things today have not totally changed. Many executives are still having administrative assistants and secretaries draft documents for them. But today it is in the form of an email communication. Attorneys frequently see situations where the secretary prints off the executive's emails, delivers them to the executive for review and response, and then types the response for the executive, much like in the paper world. However, if attorneys are looking to harvest information from an individual computer that typed the communication, it will most likely reside on the administrative assistant's or secretary's computer -- not necessarily that of the executive.

ISP

All email communications must pass through an Internet Service Provider. Every corporation or law firm that has email traffic has a contract with an ISP, even if it is just a Hotmail account. Internet Service Providers are potential locations for electronic communications. The problem that arises is that the life of this communication on the various ISP servers varies by ISP as they work diligently to reduce the amount of time that these communications are maintained on the system. There can be issues in collecting data from an ISP; if not properly done, sanctions and a potential suit for violation of privacy may arise.

Time of the collection

Attorneys have always looked at ways to avoid discovery or at a minimum put it off until later. When receiving a summons and complaint, attorneys contemplate whether they can demurrer to all or part of the causes of action, challenge the service, or, reluctantly prepare a general denial or answer where appropriate. In the electronic world, such conduct might lead to a spoliation sanction that range from monetary sanctions to an adverse inference instruction at the time of trial to a summary judgment. Most corporations have a very short retention policy with respect to electronic data. Essentially what this means is if you think that you have a cause of action against a company, attorneys should consider serving the company with a preservation letter directing that all electronic communications regarding a particular employee, subject, etc., is preserved even before taking the time to draft a summons and complaint.

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Now that all of this data has been collected, how do attorneys comprehensively review all of the electronic and paper documents given that a majority of the paper documents may be largely duplicative? After all, the paper documents probably originated in electronic form and reside in the electronic information that was also harvested.

Two Universes of Documents Don't Have to Mean Increased Expenses for the Clients

From a historical perspective, businesses and individuals today are in the midst of a palpable and inexorable communication revolution from hardcopy to electronic. We live in a world in which both hardcopy and electronic documents co-exist. As little as 20 years ago, paper documents largely (if not completely) made up the key documents exchanged by parties in discovery. Electronic documents and email were rare, and certainly not considered the best source of evidence in litigation. During this time, paper automation technology became more advanced, helping producing parties review the volumes of potentially discoverable paper documents more efficiently. As a consequence, nearly every litigation support professional has likely had the opportunity to work with a paper discovery expert for scanning, coding, and OCR services.

Move ahead 20 years into the future, and it is safe to say that electronic documents will make up most of the key material for discovery in any given case. However, in today's legal discovery climate, the fact remains that litigation teams must actively and simultaneously manage both paper document collections and e-document collections. Simply put, law firms must have effective solutions for both paper and electronic data. The advantages of an integrated and unified solution are certainly compelling, and they all point to one clear fact: attorneys can save their clients money by reviewing paper and electronic documents together.

Streamlined Administration

Among the more mundane but nonetheless important reasons to consider an expert that handles both the paper and electronic discovery work together is the reduction of administrative headaches. If a law firm selects a single, specialized expert who offers both e-discovery and paper discovery services, the law firm and its client will likely realize many administrative ad-

vantages.

First, the initial expert selection processes of interviewing outside experts and discussing project details will be cut in half with a unified vendor approach. The number of meetings, phone calls, demonstrations, conflict checks, and other non-billable tasks will be drastically reduced and will result in a potentially tremendous time -- and cost -- savings. Additionally, the "learning curve" to get both the litigation support department as well as the attorneys on the case up to speed and moving forward will take place in a more seamless manner using a unified discovery approach.

These benefits carry through to a second similar administrative advantage. Once an expert is selected, the logistics of commencing the engagement will be streamlined significantly. One set of contracts, one statement of work, one project scoping sheet, uniform milestone reports, and other standardized forms can be used. In addition, conference calls and on-site visits to the expert will be cut entirely in half.

A third advantage of using one expert for both paper and electronic productions is simply better coordination. Fewer "cooks in the kitchen" will promote smoother transitions in everything from the client's IT personnel (or whoever is doing the document collection), to the expert's final billing and invoicing work, and everything in between that is so crucial to a project's success. One could even argue that there is less risk for error given the more focused approach from the law firm, the client, and the expert.

Single Review Tool

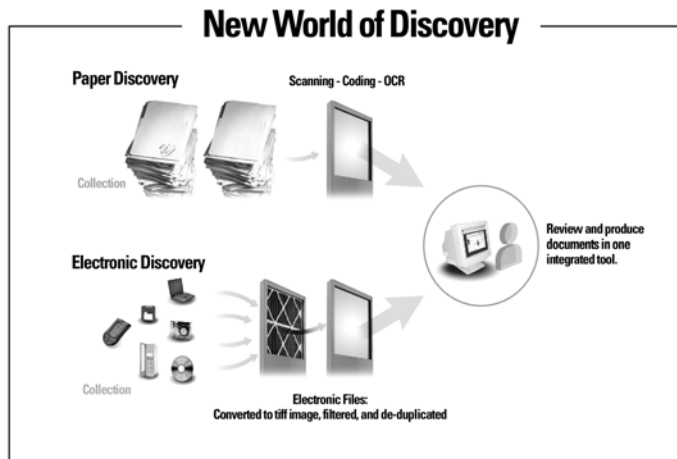
When the document review team gathers all of the documentary evidence -- whether paper or electronic -- in one location, the attorneys can develop the most solid theory of the case. Grasping a solid understanding of the evidence in the discovery phase of litigation will assist attorneys in every other step in the litigation. From motion practice to depositions and trial, lawyers will be better prepared if they have a full picture of all of the documentary evidence.

Paper and electronic documents alike need to be gathered and integrated together for document review and production. Let's face it -- paper and electronic documents are not created in a vacuum. As we peruse our email in the morning, we typically print off important messages and the corresponding attachments, scrib-

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ble a few notes, and add them to a file folder to take to a meeting. When reviewing this evidence, it makes sense to be able to review the email message and the paper file at the same time. Discovery experts are quickly developing such integrated document review systems that do just that -- allowing litigation teams the ability to seamlessly review, categorize, redact, and



produce paper and electronic documents at once.

Attorneys should capitalize on the advancements in the document discovery marketplace, including the use of electronic document review solutions. Most have already seen the benefit of electronic document review. Attorneys save time -- and their clients save money -- by searching, categorizing, and producing documents in an electronic format.

Using a document review tool that integrates all of the documentary evidence -- paper and electronic alike -- will not only help the litigation team see the big picture of the case more quickly, it will save clients time and money. By combining paper and electronic documents, counsel will be able to search the entire document set. Reviewers will also be able to concept search across the entire universe, allowing lawyers to compare the themes throughout a document set and find and compare similar documents. The litigation team will also be able to categorize, redact, and organize the document set for production in one process. In most cases, the timeframe for review is significantly abbreviated.

Cost Savings

If the litigation team chooses the alternative to an integrated paper and electronic document review database, counsel and the client will need to understand the

various implications. First, managing separate paper and electronic process platforms and review databases can be unwieldy from an administrative perspective. But perhaps even more important are the cost considerations. Law firms will deal with two sets of technology infrastructure that likely will not have overlapping hardware and software requirements. They will also have to deal with two vendors and eventually need them to work together should they decide to collate the data into one litigation support database. Lastly, counsel will likely expend more attorney review time and litigation support management time to handle separate data sets. Conversely, law firms and clients will likely save costs and reduce the potential for crisis by using one specialized discovery vendor for all of their document discovery needs.

Conclusion

The high-stakes and fast-paced world of litigation simply demands the very latest technology and the most proficient practices available. Lawyers and the litigation support professionals they oversee are judged by current and prospective clients on their ability to cost-effectively manage several different aspects of litigation. While skills in conducting a forceful cross-examination, drafting compelling legal memoranda, or persuading a jury are central to any case, counsel's ability to do so often hinges on their ability to orchestrate a comprehensive, efficient, and accurate review of hard-copy and electronic discovery documents.

1. For example, in a labor dispute case, *Metropolitan Opera Assoc., Inc. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003), the defendants failed to comply with discovery rules, specifically failing to search for, preserve, or produce electronic documents. The court found that defense counsel: (i) gave inadequate instructions to their clients about discovery obligations; (ii) disregarded that the defendant had no document retention system; (iii) delegated document production to a layperson, who was not instructed as to the scope and procedure of producing documents; and (iv) blatantly disregarded the courts' and plaintiff's repeated discovery requests by responding with baseless representations that all documents had been produced. The court granted severe sanctions, finding liability on the part of the defendants and ordering the defendants to pay plaintiff's attorneys' fees necessitated by the discovery abuse by defendants and their counsel. Other common law sanctions for improper handling of e-discovery have included: adverse inferences, dismissal or default judgment, restrictions on admissible evidence, assignment of costs, or monetary penalties. Administrative Office of the United States Courts, *Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls* <<http://>

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www.uscourts.gov/ttb/oct99ttb/october1999.html>

2. David M. Trubek et al, *The Costs of Ordinary Litigation* (<<http://polisci.wisc.edu/~kritzer/research/CLRP/clrp.htm>>

3. Crane, Kevin, *Designing a Document Strategy*, McGraw & McDaniel Group, Inc. (2000).

4. Hawkins, Dana, "Office Politics in the Electronic Age", *US News & World Report Online* (February 2000).

5. E-Policy Institute, *Thirty-Two Instant Messaging Rules: Best Practices to Keep You in Business and Out of Court* (available at <<http://www.epolicyinstitute.com/imr/32rules.pdf>>) (accessed August 4, 2004).

6. E-Policy Institute, *Thirty-Two Instant Messaging Rules: Best Practices to Keep You in Business and Out of Court* (available at <<http://www.epolicyinstitute.com/imr/32rules.pdf>>) (accessed August 4, 2004).

7. Associated Press, *Think Before You Text: Wireless Messages Show Up in Court* (available at <<http://www.cnn.com/2004/TECH/ptech/06/07/text.messaging.records.ap/>>) (accessed August 4, 2004).

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Chief among the financial reporting reforms is Section 404 of the Act which requires management to establish and maintain appropriate internal controls and periodically evaluate the effectiveness of those controls. Last year the US Securities and Exchange Commission promulgated tough and comprehensive new rules implementing the internal control requirements of the Act.

Internal controls are the systems, processes and procedures maintained by an enterprise to minimize the material risks to the operations of the business organization, the safety of its assets and resources, and the accuracy and credibility of its financial reporting and public disclosures.

Under Section 404 and its implementing rules, company management must establish internal controls over financial reporting which ensure the accuracy of the financial reports of the enterprise. The company's leadership must also maintain and periodically evaluate the effectiveness of its internal control structures. Finally, management and the company's independent auditors must attest to the effectiveness of internal controls or the existence of any material weakness in those controls.

Section 302

Section 302 of the Act reinforces this emphasis on internal controls in battling corporate crime. This provision and its operating rules make it clear that the CEO and the CFO of the enterprise (or equivalent executive officers) are responsible for establishing and maintaining appropriate internal controls over the public disclosures of the enterprise. These executive officers are required to sign a certification each year that the company has established, and follows, practices and procedures designed to ensure the accuracy of any and all public disclosures made by the enterprise which are required under federal securities laws.

This provision and the other related requirements of the Act once again place internal controls at the center of the federal authorities' fight against corporate crime and abuse. Once again the Act expands the responsibility of corporate leaders to detect and deter violations of law that can harm the enterprise or its stakeholders or abuse the public trust placed in our corporate leaders. However this emphasis on control and compliance mechanisms to protect the American public does not end here. Even our law enforcement agencies have weighed in on the issue.

Federal Prosecution of Business Organizations

Last year Deputy Attorney General Larry Thompson issued a memorandum to US attorneys' offices entitled Federal Prosecution of Business Organizations. This document summarized the current thinking of the US Department of Justice regarding criminal charging of business organizations. The memorandum underscores the importance of an effective corporate compliance program and that "the directors have established an information and reporting system in the organization reasonably designed to provide management and the board of directors with timely and accurate information suffi-

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cient to allow them to reach an informed decision regarding the organization's compliance with the law."

Such a compliance program which is well designed and reasonably effective will be taken into account in both charging and sentencing decisions under the memorandum and the US Sentencing Guidelines. These factors further emphasize the significance of appropriate internal control procedures designed to ensure compliance with all applicable laws and regulations and the detection of any potential violations thereof.

The Court Cases

Case law also underscores the need for corporate leaders to work diligently to detect and deter violations of law and internal corporate policies. In fact, a review of the relevant authorities suggest that the case law is evolving toward a greater exercise of care by directors in monitoring their corporation's activities and compliance with legal standards. In *Graham v Allis-Chalmers*, 188 A.2d. 125 (1963) the court limited the directors' duty when it stated that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing."

In *In Re Caremark Int'l. Derivative Litig.*, 698 A.2d. 959 (1996) the court, compelled by the then recent enactment of the federal organizational sentencing guidelines and the jurisprudence concerning corporate takeovers, stated:

"In light of these developments, it would, in my opinion, be a mistake to conclude that our Supreme Court's statement in *Graham* concerning "espionage" means that corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance."

Later, on the heels of Enron, WorldCom, and Adelphia, after the enactment of Sarbanes-Oxley and following the dissemination of draft rules by the NYSE, the court in *Guttman v Huang*, 823 A.2d. 492 (2003)

adopted an even more expansive view of the liability of boards of directors.

The *Guttman* court suggested that a board would violate its duty if it "lacked an audit committee, that the company had an audit committee that met only sporadically and devoted patently inadequate time to its work, or that the audit committee had clear notice of serious accounting irregularities and simply chose to ignore them or, even worse, to encourage their continuation."

It should be mentioned that the *Guttman* decision closely followed the imposition of the mandate for independent audit committees included in Sarbanes-Oxley and the draft rules of the NYSE.

These cases suggest that the requirements expected of directors and other leaders of American business and industry are expanding and becoming more onerous. The enhanced responsibilities of officers and directors under Sarbanes-Oxley, the Federal Sentencing Guidelines and the rules of our Nation's largest stock exchanges will likely impact the legal standards of fiduciary duty expected of our corporate leaders.

It is also likely that the existence and effectiveness of internal controls which are so much of the fabric of our current system of corporate governance will become the centerpiece for measuring the competency and care practiced by corporate leaders when deficiencies harm innocent stakeholders.

More than ever before, corporate leaders must take extra care to establish and maintain effective control mechanisms designed to ensure the accuracy and credibility of the company's financial reporting and public disclosures, the safe-guarding of corporate assets and resources and the company's compliance with all applicable laws, regulations and internal policies.

As discussed in the cases cited above, a corporate leader that fails in this effort may not only expose his company or its stakeholders to financial loss, but he or she may also become the subject of litigation to redress such losses.

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Thank You to the Lawyers of Southern California...

Moss Adams would like to thank the men and women who have made our litigation services practice so successful.

At Moss Adams we are proud and privileged to have had the opportunity to work with some of the best and brightest attorneys in Southern California. Through our collaboration with these leaders in the legal profession we have learned a great deal and have become better for the experience.

Thanks to the attorneys who have become our mentors, Jim Skorheim and his team of financial experts have become one of the most successful financial expert teams in Southern California.

Jim has been the prevailing financial expert in over 90% of his assignments including 10 straight successful appearances this past year. In total Jim and his staff have assisted their clients obtain verdicts and judgments *in excess of \$1.1 billion*.

Mr. Skorheim was the prevailing financial expert in the Beckman case last year which netted his client the *highest jury verdict in Orange County history*. He also served as the plaintiff's damages expert in the Global Crossing case recently that was settled moments before the jury was to return a verdict for his client amounting to *\$116 million*, according to a New York Times news report. Jim also assisted Quiksilver and The Cheesecake Factory obtain complete defense verdicts in federal and state cases recently.

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And... thanks again to the many talented lawyers and law firms that have contributed so mightily to our progress over the years.

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