ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

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Q&A with the Hon. Nancy Weiben Stock

By Dean J. Zipzer and Adina L. Witzling

[*Editor's Note: Our judicial interview this time is with Orange County Superior Court Presiding Judge Nancy Stock. Judge Stock was appointed to the Superior Court in 1990 by Governor George Deukmejian. Before becoming a judge, she was a federal prosecutor for 12 years, serving in the U.S. Attorney's Office for the Central District of California. In January 2004, she began serving as the Assistant Presiding Judge of the Orange County Superior Court. Judges of the Superior Court unanimously elected Judge Stock as Presiding Judge last year and she began her term in January of this year. In addition to her court activities, Judge Stock has been active in many organizations designed to improve the bench and bar and is in her second stint as a member of the ABTL Board of Governors.*]

Q: *How have you found the transition to Presiding Judge?*

A: Having spent two years as Assistant Presiding Judge preparing for it, the transition has been smooth.

Q: What are the responsibilities and duties of the Presiding Judge?

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Article for the Association of Business Trial Lawyers

By Hon. Mary M. Schroeder

A big thank you to the Business Trial Lawyers for this golden opportunity to preach to the choir. No members of the legal profession should understand more fully than your California members the folly of recent efforts to split the Ninth Circuit. The Federal Bar Association, its chapters in Orange County and Los Angeles, and elsewhere in California, have all expressed opposition, as has the American Bar Association.

A major problem with any restructuring proposal is that there is no sensible way to divide the Circuit because of the size of California. Currently pending are bills containing no fewer than five different configurations of new circuits, that would split the existing circuit into either two or three parts, at great cost to lawyers, clients and taxpayers.

There can be no equitable division of the case load of the circuit without division of California into different circuits, because California has more than 70% of the current case load. There has never been a regional circuit with fewer than three states (and 6 Senators). None of the other 8 states want to be to be left in a divided circuit with California. California certainly does not want to be left alone, and we owe a debt of thanks to California's member of the Senate Judiciary Committee, Senator Feinstein, for spearheading the opposition and providing thoughtful analysis.

Thoughtful consideration of the issue, however, is sometimes lacking. Last fall a bill was pushed through the House, as part of a budget reconcilia-

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President's Message
By Gary A. Waldron

My involvement in ABTL-OC started with excitement over the terrific programs the organization puts on, both here in our Chapter meetings and in the annual seminars. We have not only had the blessing of a series of excellent Presidents, but also continuity in administration from Rebecca ("Becky") Cien. Her title is Executive Director, but her function is to back up the Board of Directors in everything they do. She is also force that is keeping us on target as we aim for a wonderful Hawaii seminar starting October 18 in Maui.

Two recent events reinforced the timeliness of the topic of that meeting – "When Things Go Wrong."

I recently received the President's Report from our sister organization, ABOTA, in which the topic of discussion is the difficulty young lawyers have in obtaining enough jury trial experience to meet the organization's qualifying requirements. One point made there was that a case could be carried in a single briefcase and tried to conclusion in a day. Such cases still exist, but few are tried and fewer still are tried to juries.

Presentations by lawyers who have had the opportunity to try a number of jury trials (plus bench trials and arbitrations), with re-enactments of their experiences, may be the most valuable way we all have to prepare for that jury trial experience without doing it. What we hear and see is the "best practices" guide, the boiled down essence of what the lawyers, judges and experts have learned through their own experiences. But, a big but, they are leaving out a lot -- the things that didn't work the way they planned. And that may be the biggest omission in the presentations we attend; we value the instruction about how to do things right and will plan our trials accordingly, but what happens when the best laid plans go awry? Thinking on your feet and rolling with the punches are two nice concepts, but the real world experiences to be shared in Hawaii will help us all recognize those situations as they approach or come suddenly down around our shoulders.

The second event comes from my own, very recent, "When Things Go Wrong."

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New Federal Rules on E-Discovery
By Mark S. Adams

Changes to the Federal Rules of Civil Procedure which, absent an act of Congress, become effective December 1, 2006, will change the way that federal court litigators deal with electronic data and computer-related processes.

PURPOSE OF THE CHANGES

The technical revolution begat computers, cell phones, PDAs and the internet. They begat electronic data -- lots of it. About 99 percent of all information stored is stored electronically.[1] Electronic data is stored everywhere. It is a treasure trove of evidence awaiting discovery. Collecting and analyzing the data can be a daunting and expensive task for both the producing party and the requesting party. Recognizing this, the new rules require the attorneys to deal with the issue of electronic discovery throughout every aspect of the case.

RULE 26 EARLY CONFERENCE

Rule 26(f) continues with the requirement that the parties must confer "as soon as practicable" and no later than 21 days before the first scheduling conference to discuss the nature of their claims and defenses, possible settlement, a discovery plan and an arrangement for the required initial disclosures.

The new Rule 26(f) directs the parties to discuss electronically stored information and to include these topics in their report to the court. Under new Rule 16 (b) the court will, in turn, include these topics in its scheduling orders. Specific provisions in these new rules focus on three areas: the form of producing electronically stored information in discovery; preserving information for the litigation; and the assertion of privilege and work-product protection.

- **Electronically Stored Data and Its Production**

Rule 26(a)(1)(B) is amended to make clear that a

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1. Digital Paper Trails A Boon For Cartel Busters, Ann Crotty, Business Report, May 11, 2006.

The Seventh Annual Wine Tasting Fundraiser -- Truly *Significant*
By Adrianne Marshack

ABTL hosted its Seventh Annual Wine Tasting Fundraiser and Dinner Program to support Orange County's Public Law Center on June 7, 2006. Last year's event raised $17,500 for the Public Law Center -- the most in the history of the event. The final figures for this year are not yet in, but considering how well attended this year's event was, we are hopeful that a new record will be set. Without the consistent support of the various law firms, companies, and individuals who help the ABTL thrive, this event would not have been possible. We sincerely thank each of you.

This year's Dinner Program was entitled "Beyond Success to Significant," featuring Michael Josephson, a nationally recognized ethicist, from the Josephson School of Ethics. He commanded the attention of the room with amusing anecdotes and an engaging PowerPoint presentation. Among the many wise "truisms" he shared with the audience was the difference between being a *success* and being *significant.* Recognizing that many individuals strive to be "successful," which he defined in terms of accumulating material wealth, Mr. Josephson urged the attorneys and judges in the audience to strive to be "significant." Being "significant," Mr. Josephson said, is making a positive difference in the lives of others.

Mr. Josephson also discussed the difference between being *rational* and *rationalizing.* He said that one is rational when one considers the facts and consequences *before* making a decision. Rationalizing is justifying a decision *after* the fact. He commented that too often we rationalize our own unsavory conduct by saying we *needed* to do it -- we had no choice. He offered a quotation by German philosopher Friedrich Nietzsche: "*Necessity is an interpretation, not a fact.*" Mr. Josephson told the crowd to use what he called the "grandmother" test when making a decision to do (or *not* do) something: if you had to explain your actions to your grandmother, would she be disappointed in your behavior? He warned that if you would not feel comfortable telling your grandmother about something you

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A WORD FROM OUR SPONSOR

The Changing Jury Pool: Thoughts for Jury Selection

By Dan Gallipeau

Experience has shown that, with rare exceptions, most potential jurors want to be fair, and do not think of themselves as biased. Indeed, jury research consistently shows that the complex nature of the human psyche allows people simultaneously to hold attitudes that are beneficial and detrimental for each party in a lawsuit. The key is to identify which particular attitudes and biases will dominate for a specific case.

Add to the complexity of this situation the fact that the type of juror a party wants is partially dependent upon what facts of the case will be emphasized. Thus, changing the emphasis on a fact pattern can alter the profile of the optimal or most dangerous juror. For example, in a patent case, there may be strong monopoly undercurrents. A trial theme may be, "they are using litigation because they couldn't compete in the market". The juror who sees herself as a consumer and someone that wants competition may be good even if she is unlikely to have the background to understand a non-infringement argument.

Examining the Retired

One group of individuals that is readily available for longer trials is the retired. There are several issues that can arise with this group, including physical impediments. Many potential jurors, being no different from the rest of us, tend to underestimate any sight or hearing problems. This can be particularly troublesome if the screen being used to show documents is quite far away and many documents will be used. Having a sample of text to use as a reference point can assist in determining if sight is an issue. In one case, the name plate of the judge was used as the reference point and a juror admitted she could "sorta" read it if she focused. Clearly, over the course of the complex trial, with many diagrams, her ability to see was a concern.

Additionally, a more elderly juror may lack stamina and find it more difficult to follow what is going on as the day progresses. They may appear energetic in the morning when voir dire starts. If possible, find out when they do most of their thinking or detailed work. Everyone has a cycle or mental low point during the day. A potential juror may say that they are "out of it"

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A WORD FROM OUR SPONSOR

A Glance at Financial Statement Fraud

By Stephen M. Zamucen

The ***definition*** of financial statement fraud may vary across institutions, individual and relevant circumstances. The Association of Certified Fraud Examiners defines financial statement fraud as, "the intentional, deliberate, misstatement or omission of material facts, or accounting data which is misleading and, when considered with all the information made available, would cause the reader to change or alter his/her judgment or decision." [1] The Treadway Commission[2] defines it as, "intentional or reckless conduct, whether by act or omission, that results in material misleading financial statements." Financial statement fraud may be perpetrated through falsification, manipulation, omission and misrepresentation of financial data and supplemental information included in the financial statements of an enterprise. The perpetrators victims and motivation are numerous.

I. VICTIMS & COSTS OF FRAUD

The primary victims in a financial statement fraud scheme may include stakeholders from various spectrums. Management's engagement in illicit financial reporting practices may have consequences that extend beyond its immediate surroundings. Stakeholders who may be directly affected include: a) investors or stockholders, b) lenders or bondholders, c) suppliers who extend credit, d) customers with warranty claims and e) business partners. When investigations become public, parties most significantly injured often include: a) management and directors, b) employees with large blocks of company stock, c) employees whose retirement is primarily invested in a company's stock, d) employees who may experience guilt by association and e) employees used as scapegoats. Moreover, financial losses for these stakeholders may vary depending on how much money they have invested in a company. For bondholders such as large financial institutions, it may mean writing off their investment as bad debt.

Overall, it is difficult to quantify losses due to fraud schemes, but the Association of Certified Fraud Examiners (ACFE) estimates that about 6 percent of revenues

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1. Association of Certified Fraud Examiners Manual 2002.
2. Coso.org: The Committee of Sponsoring Organizations of the Treadway Commission 1985-2005.

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tion package, that would have left Hawaii and California in a circuit by themselves. The budget reconciliation bill was in essence an attempt by the then House Leadership and Chairman Sensenbrenner of the House Judiciary Committee to bypass the Senate Judiciary Committee. The provision was taken out in Conference, after both the Chairman and the Ranking Member of the Senate Judiciary jointly protested.

None of the proposals to divide the circuit has seriously considered dividing California since the Hruska Commission Report did so in the 1970s. It is not difficult to foresee the costs, stresses and potential delays that would result from having different Circuit law in San Francisco, Los Angeles or Orange County. Forum shopping and confusion in the interpretation of California state law are the dismal probablities that I need not elaborate on here.

Our judges don't want a division either. Only three of our 24 active judges have advocated any split, and recently 34 of our total of 47 active and senior judges, including all of our past, present and future chief judges, authored an article explaining why. Entitled "Federalism and Separation of Powers – a Court United," it responded to the arguments of split proponents, including the contentions that division is inevitable. Our Judges said that argument ignores "the ability of people and institutions to adapt to inevitable changes in a complex world." (The Article is published in Vol. 7, Issue 1 of Engage, at p. 63.)

The Ninth Circuit has indeed led the way in innovation and change. We pioneered the Bankruptcy Appellate Panel, now used in many circuits; we began a system of issue identification and key word searches before computers were widely available; we have the capacity to handle large volumes of cases by spotting key issues early, getting them decided with precedential decisions, and then quickly and efficiently handling all of the cases raising the same issue.

The most recent comprehensive study of circuit alignment, was the Commission on Structural Alternatives, commonly known as the White Commission, after its Chairman, the late Justice Byron White. Its 1998 report recommended against dividing the Ninth Circuit. It did propose dividing the court of appeals into a series of rotating divisions so complex that no one seriously wanted to adopt them. (I have always suspected that was the aim all along.)

So why, if there is no feasible, equitable way to divide it, and if the bar and the judges don't want a division, and the experts have recommended against it, do efforts to divide the circuit persist? I suggest there are three principal reasons, none of which is valid, and at least one of which is a threat to the essential Constitutional underpinning of an independent judiciary.
First and foremost, efforts to split the circuit have been driven by particular decisions of the court of appeals that were unpopular in some quarters. The nature of those controversial decisions has changed over the years, but there is a common thread. All have involved cutting-edge issues that came first to the Ninth Circuit. In the l960's and 70's these related to Native American rights and more specifically to fishing in the Pacific Northwest. In the 80's and 90's the unpopular cases related to the environment and the Endangered Species Act. More specifically, the spotted owl, and more recently, religion in the schools, specifically the Pledge of Allegiance. We don't make up these issues, but we do have to decide them. Every civil litigant who loses a case in the District Court has a right to appeal to the Ninth Circuit. In the more than 5 years that I have been Chief Judge, the Court of Appeals has decided more than 28,000 cases. Of these, approximately 6 have fueled the efforts for division.

It is ironic that the attacks on the decisions are all attacks on the Court of Appeals, yet the actual proposals for division would dismantle the entire circuit structure leaving at least one or possibly two orphan circuits with no staff or headquarters. It would leave the California Circuit with our super staff, perhaps, but without the available assistance we have now from dozens of district and circuit judges outside of California, familiar with the same circuit law, who can assist with the case load. As Chief Judge of the circuit responsible for the administration, this possibility presents an administrative nightmare.

As an Article III judge who has sworn an oath to support and uphold the Constitution, to me the threat of division as punishment for unpopular decisions carries an even deeper concern.

One of my heroes is the late, great Circuit Judge John Minor Wisdom of the Fifth Circuit. He opposed division of the Fifth Circuit. It eventually happened in the late 70's but it had its roots in congressional opposition to the Fifth Circuit's desegregation decisions in the 50's and 60's in which Judge Wisdom was a leading voice.

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He believed that circuits should be large, so that the circuit court of appeals could reflect diverse interests. He decried efforts to divide circuits in order to create smaller courts that reflected only local interests. In an article after division of the Fifth Circuit, entitled "Requiem for a Great Court," 26 Loyola Law Review, 788 (1980), Judge Wisdom said: "The federal courts rose to bring local policy in line with the Constitution and national policy. . . .The federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it will be difficult for such a court to overcome the influence of local prides and prejudices."

Those who have wanted to divide the Ninth Circuit in order to create a Pacific Northwest circuit that would be more friendly, for illustration, to timber or fishing interests, would deny the Ninth Circuit this federalizing role. That is a salient reason why the circuit should not be divided.

There can be little doubt that the current efforts to split the Ninth Circuit led by a number of Congressmen outside of the circuit is fueled by particular decisions, most notably the Pledge of Allegiance case, and most recently, immigration decisions.

There are some secondary reasons given for dividing the circuit, but they also serve to highlight important reasons why the Circuit should remain intact. There is, for example, the misguided notion that the circuits should all look alike; that the map of federal circuits west of the Mississippi should look like the map of Circuits on the east coast.

But the western states don't look like the eastern states. The Circuits in the East were formed from the original 13 colonies, while the west has its roots in the Louisiana Purchase. This pro-split argument is most frequently phrased as "its too big." But the truth is that any circuit with Alaska is going to be larger than any other circuit geographically, and any circuit with California is going to be larger than any other circuit in case load and population. As Shirley Hufstedler once said, "you can't legislate geography." And in the U.S.A. you can't legislate demographics either.

An argument related to size relates to our en banc process. For many years we operated quite happily with an en banc court of eleven, and recently began an experiment with fifteen judges on an en banc court. Congress by statute has authorized any court with more than 15 judges to use a limited en banc court, and we like it. We could adopt a rule that all of our active judges sit on each en banc court, but we haven't done so because we think the limited en banc is a better use of resources. We encourage other circuits to try it. If there were to be a circuit division additional judgeships would have to be created for California, and the California Circuit would use the limited en banc. Nothing would be gained by splitting except cost and confusion.

Finally, there is a lack of understanding of the real costs for lawyers and their clients inherent in circuit division. The fact is that while the ire of a few in Congress is focused on the decisions of our court of appeals, all of the proposals are to dismantle the entire circuit, including its staff, all of its district courts and the bankruptcy courts. The circuit law for California would be different from that of its neighbors. Yet California does a lot of business with its neighbors. Lawyers should not be forced to track new and different circuit law in bankruptcy or commercial litigation. The Ninth circuit has become the home of intellectual property and technology, with Microsoft, Intel and the Silicon Valley. Division makes the practice of law and litigation more complicated and more expensive, with no commensurate gain in administrative efficiency. As the United States looks toward the Pacific for increasing foreign trade, and our major law firms are opening offices in Asia daily, the nation can benefit from the Ninth Circuit as an unfragmented source of federal law. Sure, the East Coast has been fragmented from the l8th century, but why, in the 21st century should we set out to create a similar system.

Technology and communication have made the business of court administration easier, not more difficult. In fact Senior Circuit Judge J. Clifford Wallace of San Diego, who served with distinction as our Chief Judge a few years back, has outspokenly opposed division and has repeatedly suggested that the smaller circuits ought to think about merging. As our judges said resoundingly in their recent article: "yes, we are big and our territory is wide, but we have shown that we can function effectively and efficiently despite – indeed because of – our size. . . we have made size our friend rather than our enemy."

▪ *Hon. Mary M. Shroeder is the Chief Judge and Circuit Judge of the Ninth Circuit Court of Appeal.*

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party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The Advisory Committee suggests that "it may be important for the parties to discuss [the parties' information systems], and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems," and in appropriate cases the "identification of, and early discovery from, individuals with special knowledge of a party's computer systems…." The Advisory Committee further suggests that the parties may identify the various sources of information within a party's control that should be searched for electronically stored information; discuss whether the information is reasonably accessible to the party that has it; and the burden or cost of retrieving and reviewing the information.

Rule 26(b)(2) is amended to provide that the parties need not provide electronic discovery from sources identified as "not reasonably accessible" -- for burden or cost reasons -- unless the requesting party makes a showing of good cause. The rule sets up a two-tier system. The parties would search for sources that are reasonably accessible and likely to contain responsive, relevant information, with no need for a court order. The responding party must identify the sources of information that were not searched, clarifying and focusing the issue for the requesting party. In many instances, the information obtained from the accessible sources will be sufficient to meet the needs of the case. If not, the amendment allows the party to seek, perhaps with judicial intervention, additional information from the sources identified as not reasonably accessible. The Advisory Committee notes examples of difficult-to-access sources that may contain responsive information, but which because of the technology and evolution of electronic data storage, and the evolution of it, the information is not retrievable without substantial burden and cost. These include back-up tapes intended for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was "deleted" but remains in fragmented form, requiring a modern version of forensics to restore and retrieve; and databases that are designed to create very different kinds or forms of information.

Rule 26(f)(3) is amended to direct the parties to discuss at the early conference the form or forms in which electronically stored information might be produced.

- **Preservation of Electronic Data**

Rule 26(f) is also amended to direct the parties to discuss at the early conference any issues regarding preservation of discoverable information as they develop a discovery plan. Consideration must be given both to the volume of electronically stored information, and the dynamic nature of it, since the ordinary operation of computers involve the automatic creation and deletion or overwriting of information. The Advisory Committee notes that "the parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities" so as not to paralyze the parties' day to day operations. The overriding goal is for the parties to agree on reasonable preservation steps.

- **Privilege and Work Product**

Rule 26(f) is further amended to provide that the parties discuss issues relating to assertions of privilege or of protection as to trial-preparation materials. The Advisory Committee notes that given the volume of electronic data, the hidden content of it (such as metadata), and the informality that attends the use of e-mail, parties have found it necessary to spend large amounts of time and money reviewing materials requested through discovery to avoid waiving privilege. The Advisory Committee suggests that to avoid this, the parties may agree to certain protocols such as a "quick peek" protocol or "claw-back agreement."

Under a "quick peek" protocol, the responding party will provide certain requested materials for initial examination without waiving any privilege or protection. The requesting party then designates the documents it wishes to have actually produced, which would be the Rule 34 request. The responding party then responds by screening out only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A).

Under a "claw-back agreement," the production without the intent to waive privilege or protection is not a waiver so long as the responding party identifies the documents mistakenly produced and requests that such documents be returned.

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Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent waiver of privilege that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order.

RULE 16 SCHEDULING ORDER

The Rule 16(b)(5) amendment adds that the scheduling order may include, "provisions for disclosure or discovery of electronically stored information." The Rule 16(b)(6) amendment adds that the scheduling order may include "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production."

DISCOVERY

Rule 33(d) is amended to provide that where the answer to an interrogatory may be derived from electronically stored information, and the burden of deriving the answer is substantially the same for the responding party and the requesting party, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained. The requesting party would be provided reasonable opportunity to examine, audit or inspect such records of the responding party and make copies, compilations, abstracts or summaries. Also, depending on the circumstances, the responding party may be required to provide some combination of technical support, information on application software, or other assistance to enable the requesting party to derive or ascertain the answer from the electronically stored information as readily as the responding party.

Rule 34(a) and (b) are amended to provide that electronically stored information is a proper category subject to production, in addition to "documents." The default standard is production in "a form or forms in which [electronically stored information] is ordinarily maintained or in a form or forms that are reasonably usable." But the rule permits the party making the request to inspect, copy, test or sample electronically stored information – and assistance from the responding party, if necessary, to put the information into a reasonably usable form.

Rule 37 is amended to create a safe harbor that can protect a party from sanctions for failing to provide electronically stored information lost as a result of the routine, good faith operation of the party's computer system.

SUBPOENAS

Rule 45 is amended to provide that a subpoena may command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of, among other things, electronically stored information. In addition, a subpoena may specify the form or forms in which electronically stored information is to be produced. Under the amendment, subpoenas may be served to not only inspect materials but to copy, test or sample those materials.

START EARLY AND THINK BINARY

From the onset of the case, discuss with the client its electronic back-up and destruction protocol. Advise the client of its duty to preserve data and putting the destruction protocol on hold.

Since discovery is a two-way street, the types of electronic information that will be sought from your own client will likely be the same that you will seek from the other party. There may be differences between the sophistication of the parties and the complexity and volume of the data they utilize, but the primary areas of inquiry about the electronic information will be the same. As described below, inquiries will relate to the system profile used, the back-up and retention policies, the maintenance procedures, and the access protocol.

- **System Profile**

The system profile is the type of computer system, the data processing, and data storage devices used. How many and what kinds of servers, computers, laptops, PDAs and other devices are on the system? Where are they? What types of software are used? Is there a usage policy for the hardware and/or the software, and if so, what is it? Who is responsible for the ongoing operation, maintenance, expansion, back-up and upkeep of the system?

Two particularly evidence-rich sources are e-mail and databases. Special thought should be given to these. What e-mail programs are used; are the users' e-mail files stored locally on the user's desktop, on a server or other central location, or both; are "janitorial" programs run to purge e-mail; and who is responsible for administering the e-mail system? What kinds of da-

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tabases are used (such as financial, marketing, accounting, and contact management); what software programs are used; what fields of information are contained in the various databases; how is the information entered; and who is responsible for the management of the databases?

- **Back-up and Retention**

This is how electronic data is routinely taken off-line and stored and ultimately destroyed. What are the back-up procedures (such as incremental back-up, full back-up, volume back-up); what back-up software is used; what is the back-up tape destruction method; what happens to outdated back-up drives or software; what methods are used to delete files; is there a "purge" or "delete" schedule; and who is responsible for the management of the back-up and retention policies?

- **Maintenance**

This is how the computer system efficiently occupies it useable space. What utility programs or software are used on the computers (such as Norton Utilities, MacTools, network maintenance programs, etc.); have any files been "wiped" using utility programs or software; have any utility programs or software been used to defragment, optimize or compress drives; and who is responsible for managing system maintenance?

- **Access**

This is who had and has access to any part of the computer system. Who are or have been users; what part of the system did the users' have access to and when; are there records of access; are passwords or encrypted files used on any part of the computer system; and what files or programs are protected (such as e-mail, files, transmission of data, etc.)?

DIGITAL DARWINISM

In just a few short months, the new rules will take effect. By their first Rule 26 Early Conference following the effect date, then, litigators must have a good understanding of what electronic information is and how to deal with it. By then, the litigators should know what electronic information will likely be sought in the case, where it probably resides, how to preserve it, and how to go about getting it. Survival will depend on it. Litigators must also have a handle on what they will do with privileged and protected information. Overall, they must be mindful that the Rule 16 scheduling order that follows will obligate the parties to abide by what will likely be an expensive and time-consuming, but hopefully fruitful, electronic discovery process.

▪ *Mr. Adams is a litigation partner with the firm Samuels, Green, Steel & Adams, LLP in Irvine, California. www.sgsalaw.com mark.adams@sgsalaw.com Mr. Adams is a frequent lecturer on e-Discovery.*

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Our world is a far smaller place than the one we were brought up in. On a recent Thursday I received an email from my clients saying that they had completed a last minute visit with their family (occasioned by the illness of a family member) and were on their way back in plenty of time for jury selection in their trial starting the following Monday. Minutes later I looked at the news on CNN.com and feared that I might not ever see my clients again. They were traveling from Beirut, Lebanon and the airport there had just been bombed.

The next day I received an email from them, they were safe, but appeared to be trapped. They had tried to drive to Syria to obtain a flight, but first they heard that the road might be bombed (it was), then they were told that those holding U.S. passports were not welcome at the border. Back to their family home they went, secure at least that their immediate family should be safe, because the town they lived in, Tripoli, is in northern Lebanon -- far from the fighting. The next news was that Tripoli had been bombed because it is a port city.

The story ends well, the clients set off on a $600, middle of the night, cab ride to Damascus where they managed to catch a flight through Paris. Exhausted but safe, they arrived in Los Angeles on Monday evening and were in Court for the second day of jury selection the following morning. However, the jury is still out whether the limited information provided to the jury about this tie to events in Lebanon has a larger, lingering impact on the outcome of the trial. We not only cannot control everything; we often cannot know what the events will be that lie beyond our control. I look forward to the tips and tricks of the trade our speakers will share with all of us in Hawaii and urge you too to take advantage of this special event.

▪ *Gary Waldron is a partner in the Orange County firm of Waldron & Olson.*

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A: I suppose that depends on who is asking. To judges the most important role of Presiding Judge may be making the judicial assignments, but I think we all know that the job involves much more. A good presiding judge has a clear vision of what it takes to empower judges to be able to do their jobs and works tirelessly to provide that edge.

Q: *What do you like best about being Presiding Judge?*

A: Believe it or not is the opportunity to be an advocate. I liked being a trial lawyer more than you can imagine. Now, after so many years of remaining neutral and detached, I have the opportunity to do everything a good trial lawyer would do to size up the stakes, craft meaningful arguments that are persuasive, and deliver our message to legislators, justice partners and others whose influence can so adversely effect the Courts. I love the challenge inherent in making our case to them and to the public.

Q: *What is the current status of the new Justice Center in South County?*

A: It is on track. We are in uncharted waters here, inasmuch as state trial court funding and the impending transfer of trial court facilities from the counties to the trial courts have posed serious challenges. At least once we have had to seek statutory changes to allow our Court to finance and proceed with this project. However, this 18-courtroom facility, built on the footprint of the existing Laguna Niguel courthouse has given us the opportunity to plan for a state-of-the-art experience. Every day we are re-thinking how it is we will do business in the year 2010. Needless to say, it will involve less paper and many high-tech features, designed to reduce unnecessary trips to the courthouse and litigant confusion that can occur when people are deprived of the ability to use the web to conduct their court transactions.

Q: *What is the next big issue on your plate in terms of Orange County courts?*

A: Two years ago, I would have answered that the lack of a stable and predictable income stream was the biggest potential impediment to a quality court system. We have cleared that hurdle, thanks in part to the leadership of legislators who happen to also be lawyers, including Dick Ackerman and Joe Dunn. Now we are working on enhancing public access and enhancing the tools that judges have to perform the Court's business.

Q: *What long-range changes do you see happening to the Orange County Superior Court?*

A: I see a Court that has a bench stocked with talented high-morale judicial officers who approach their work with the heart of a servant, whose jobs will be facilitated by the use of instant electronic access to any form of data necessary to make a wise and informed decision and where the effects of that decision are transmitted electronically for immediate consumption by anyone who needs to know.

Q: *As a board member (in your second stint) of ABTL, what role, if any, do you feel ABTL can play in enhancing the court system.*

A: Because of the stature of the attorneys who associate with ABTL and the contacts they may have through clients and the community, ABTL lawyers can make a huge difference in relentlessly educating the public, our legislators, and any other key stakeholder in the value of an independent judiciary. In recent years, that independence had been threatened by severe under funding and a certain tendency toward attempts at micromanagement by well meaning, but ill-advised legislators.

Q: Do you miss trying your own cases?

A: Actually, yes. To the point that after retirement from the bench, I am not necessarily going to be lining up to do more judicial work. Free of the judicial constraints, I might just "take a walk on the wild side," and return to the role of an advocate.

Q: *What advice would you give young lawyers just starting out in business litigation (besides joining ABTL, of course)?*

A: I have always advised new lawyers to seek employment opportunities that will bring them top quality mentoring. Law school is only 3 years and so the real learning begins the first day on the job. It is also important to look for opportunities to give back as soon as possible, possibly through pro bono work. I am impressed with the big firm leadership that I am witnessing when it comes to supporting a pro bono culture by generously providing firm resources and endorsing relaxed billing requirements for younger associates.

Q: *What do you enjoy doing when you are not working?*

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A: I enjoy cycling, swimming, skiing, driving my sports car and reading non-fiction [but not at the same time]. At this stage in life my family is ever so precious. We are all adults now. I also thoroughly enjoy my judicial colleagues and staff, who really engage my sense of humor. After experiencing what we see on a daily basis in the courthouse, it really is true "You couldn't make this stuff up!"

Thank you Judge Stock for your time.

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did, then you probably should not be doing it.

Mr. Josephson concluded the program by reading a poem he wrote entitled, "What Will Matter." The poem ends: "Living a life that matters doesn't happen by accident. It's not a matter of circumstance but of choice. Choose a life that matters." The annual ABTL fundraiser benefiting the Public Law Center most certainly matters. Thanks again for your support.

▪ *Adrianne Marshack is a Summer Associate in Morrison & Foerster LLP's Irvine office.*

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or $600 billion were lost to occupational fraud in 2002. In its 2002 Report to the Nation, the ACFE found that financial statement fraud was the most costly, with an average of $4.25 million per scheme. In addition, it found that small businesses are most vulnerable to fraud. While the average scheme in a small company costs $127,500, the average scheme in large companies costs $97,000.[3]

If, on average, 6 percent of business revenues are lost to fraud, and an investment doubles in value approximately every 10 years,[4] we can illustrate how severely fraud may affect businesses. Imagine two closely held businesses, BCA Inc., a newer company with revenues of 10 million annually, and XYZ Corp., a mature company with annual revenues of 100 million. According to the first assumption, these companies are likely to lose $600,000 and 6 million respectively. If we take these two figures and apply the second assumption, the numbers become very significant. In 24 years, the $600,000 loss would be worth 2.4 million and the 6 million loss would be worth 24 million. In either case, this illustrates how these losses may make the difference between success and failure for a company.

II. PRESSURES & MOTIVATIONS

Individuals may engage in fraud for many reasons, which range from basic need to pure greed. Within organizations, however, ethical behavior generally starts with top management. In a closely held business setting, fewer layers of authority may lead to significant interaction between management and other personnel. In such an environment, the attitude of management towards unethical practices may be fundamental in inducing or deterring fraudulent behavior of lower-level employees. Given their positions of leadership and authority, management should avoid practices that may send the wrong message to other employees.

In the small business setting, where owners frequently become involved with management possibilities, a lack of segregation of responsibilities may arise. One or few individual(s) may gain complete control over the decision-making process and the execution of transactions. This may be a convenient setup to perpetrate fraud. If an individual decides to engage in fraudulent transactions, he may be in a position to execute the transactions and then conceal the evidence. Pressures and incentives to engage in fraudulent schemes and misstate financial information may be either to obtain personal benefits or for business purposes.

A) Business Pressures and Motivation

1. **Market Saturation:** In principle, businesses

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3. "2002 Report to the Nation Occupational Fraud and Abuse", Association of Certified Fraud Examiners.

4. Rule of 72: To determine how long it takes an investment to double in value, divide the average rate of return into 72. For example, 72/6 = 12. Thus, assuming a 6 percent rate of return, it would take 12 years for an investment to double its value.

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succeed because there is a market in which they can compete. Often they discover a market segment relatively unexploited where they thrive early on. However, competitors may gradually enter the market, which means overall prices of goods/services decline and profit margins become smaller. As profit margins decline, financial pressures may rise.

2. Product Obsolescence: Businesses also face pressures to remain at the edge of product innovation. Whatever markets they serve, there is a possibility that their goods/services become obsolete. Cheaper, more efficient substitute products may impair a business' ability to sell its products and maintain a steady cash flow.

3. Economic Conditions: In times of economic downturn, even competitive businesses face unexpected financial pressures. Recessions can increase consumers' hesitance to purchase their products, unless they are necessities.

4. Operating Losses: Particularly in early stages of the business cycle, businesses frequently experience operating losses as they attempt to establish a customer base and stabilize operations. These losses may threaten the survival of the business, which may place strong pressures on owner/managers.

5. Changes in Accounting Regulations: Pressures may also emerge due to changes in regulatory policies. Whatever the new regulations may be, they may affect the financial position of the business adversely. Consequently, they may create additional incentives for individuals to manipulate financial results.

6. Needs for Capital: Even when businesses are not in critical financial conditions, they may have other reasons to misrepresent financial information. When companies are doing well, they may aggressively expand, which may require external financing. In order to secure financing at the lowest possible costs, individuals may be motivated to manipulate financial data and present the numbers creditors expect.

7. Debt Obligations: When businesses have a highly leveraged capital structure, they may face serious pressures to generate income and meet debt payments in a timely manner. Inabilities to generate revenues may mean defaulting on debt and incurring penalties that may further worsen the business financial condition.

8. Mergers & Acquisitions: Successful businesses with valuable assets often become attractive acquisition targets for bigger market players. The potential to sell the business may give management major incentives to present strong financial results. They may be motivated to overstate any variables that will increase the value of the business.

9. Shareholder Disputes: Legal disputes where shareholders seek to recover economic damages may represent another source of motivations to engage in fraud.

B) Personal Pressures and Motivations

1. Performance-based Household Income: When managers do not have additional sources of income, they may be vulnerable to fluctuations in business performance. In volatile markets, managers may face needs to misappropriate business assets for personal use.

2. Family Financial Responsibilities: Marriage dissolutions and financial support issues may create incentives for individuals to manipulate financial results of a company.

3. Maintaining Personal Habits: In certain instances, maintaining habits such as drug addictions, gambling, and leading extravagant lives may also push individuals to engage in fraud.

4. Unexpected Large Expenses: This type of situation can stem from unexpected illnesses, accidents and other situations that result in large unexpected expenses.

5. Simple Greed: Finally, the greed factor cannot be ignored. Sometimes, people simply decide to live beyond their means. When income earned honestly does not suffice, they may succumb to temptation and engage in fraudulent behavior.

Two recent cases we have been retained on are illustrations of the above personal and/or business pressures and motivation.

1. $1 Million taken by the Bookkeeper

A construction company office manager embezzled approximately $1 million dollars. The office manager

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had left her position and deleted the majority of the accounting records from the computer. After reviewing the documents it was determined that there was a storage unit for which the company was paying rent. The owner was unaware of the storage unit. Records were retrieved from the storage unit including receipts, invoices, credit card statements and other accounting records for both the business and office manager personally. The following is a list of some of the ways in which the office manager was embezzling funds.

Payroll checks were issued for more hours than the time records indicated.

Payroll checks were voided but the payroll taxes were still paid.

Personal charges were on the business credit card and paid by the business and personal credit card charges were paid by the business.

Monthly auto allowance included in payroll provided a company car and gas.

Home remodel expenses were paid with the company credit card.

2. Controller Embezzlement

The defendant in this case had been the controller of the company for many years. The defendant used the company checkbook to pay for house payments at first. This eventually led to leasing cars, paying for vacations and funding a band. The controller perpetrated the fraud by writing company checks to herself but entering false descriptions in the company ledgers and financial statements. For example, a company check would be written to the defendant, but recorded as a company expense to Home Depot (example only). Before being caught, over $1.1 million had been stolen.

The following are often used analytical methods used to investigate potential fraud.

III. ANALYTICAL PROCEDURES

Fraud schemes may be discovered by accident or through tips from someone with prior knowledge of the scheme. However, instances of fraud may not be readily apparent and often go unreported or undetected. As mentioned before, when one individual controls the information flow and the execution of transactions, businesses may be highly susceptible to financial statement fraud. When companies suspect a situation of fraud, implementation of analytical procedures may help substantiate suspicions. These analytical procedures include the comparison of financial statements over several periods. Their primary purpose is to detect unusual trends in variables over time. Three techniques discussed are vertical, horizontal and ratio analysis.

A) VERTICAL ANALYSIS

Vertical Analysis is commonly known as the *common sizing* of financial statements. Application of this technique is reliant upon a major variable from the financial statements, also known as the base. After selecting a base, it captures the relationship between the remaining variables and the base. To display these relationships, common sizing presents every item as a percent of the base amount. For example, in the income statement, one may say that selling expenses represent 12 percent of the cost of sales, where net sales represent the base. Alternatively, on the balance sheet, one may say that receivables represent 35 percent of total assets, where total assets represent the base. To display increases and decreases in these items, vertical analysis uses common sized financial statements for more than one period in chronological sequence.

Given the trends in the composition of assets for a company, management may decide whether such trends are consistent with the company's operations. If they are not consistent, management may decide to investigate the causes for these trends.

B) HORIZONTAL ANALYSIS

Another commonly used technique is horizontal analysis. The purpose of this type of analysis is to evaluate percentage changes in financial data over time. It differs from vertical analysis by using a time-period as the base to estimate percentage changes. For example if cost of goods increased by 10% and a company's gross profit decreased correspondingly by 10%, management may want to investigate the percentage changes.

While vertical and horizontal analyses have strong capabilities to present changes in components of financial statements, they also have some limitations. For instance, calculated percentage changes alone are unable to stress the significance of these figures in dollar

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amounts. In other words, small percentage changes may be misleading as their significance depends on the size of the account. A four percent change in a 5 million account has a higher significance than the four percent change in a $50,000 account.

C) RATIO ANALYSIS

The third analytical technique is ratio analysis. This technique is commonly used to capture the relationship between different variables in the balance sheet and the income statement. Analysis is accomplished by comparing variables in proportion to each other. For example, one may say that a company's current ratio is 3. This means that for every dollar of liabilities due in the near future, the company has three dollars in assets that may be used to meet these liabilities; the ratio of short-term assets to liabilities is 3:1. By itself, however, a ratio may lack substantial meaning. Ratio analysis may provide greater insights when analyzed over several periods. Comparing a company's ratios to the competition and the industry averages may derive further insights. Trends over time and inter-company comparisons may point to financial areas that require further analysis. Ratio analysis may be divided into three basic categories: *liquidity, solvency and profitability*. ***Liquidity*** ratios measure the enterprise's short-term ability to meet its maturing obligations and other needs. ***Solvency*** ratios measure its ability to survive in the long run, and ***profitability*** ratios measure income creation or return on capital investments. These categories may be flexible with the inclusion of additional ratios depending on the analysis required.

Recent years have shown financial statement fraud to be rising within both public and private companies. Because of the complexity of financial statements and their related ledgers and journals, as well as the thousands of transactions and entries that typically comprise financial statements it is generally challenging to detect fraudulent activity. However, the professional industry, which includes CPA's and Fraud Examiners, has significantly increased efforts in the areas of detecting financial statement fraud.

On the other hand, financial statement fraud can be relatively easy to prevent. Employing the right mix of accounting procedures, checks and balances and employee oversight can assist in preventing many financial statement fraud schemes. In addition to these important factors, employing an outside accountant/CPA can be an important additional step in fraud prevention. Finally, if financial statement fraud is suspected, it becomes imperative to hire qualified professionals to investigate as early as possible.

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in the late afternoon.

Also, older jurors sometimes have very different sleep patterns, sometimes staying up extremely late and sleeping in the morning. In a recent case, a woman admitted, when questioned about her sleep habits that she was a night owl and never went to bed before 3 or 4 am. When questioned further, she said she would try to go to bed earlier so she would be fresh as a juror. However, when counsel asked her if she had ever been able to readjust her sleep habits in this significant a manner for a couple of days in a row, she admitted she had never been able to do it successfully for more than one night in the last twenty years. Clearly, the likelihood of her being awake and attentive for a six week trial had to be questioned.

In terms of predispositions, the retired can globally be divided into two groups: the "Happily Retired" and the "Unhappily Retired." The latter tend to be more plaintiff. The "Happily Retired" are more neutral. There are several characteristics one can look for when trying to identify each. The "Unhappily Retired" are:

a. Isolated from the community -- no hobbies or social/organization ties that keep them active in community. They "putter around the house" and often watch a lot of TV. They are less likely to see consequences to their actions and may feel lonely and disenchanted.

b. Financial and/or medical issues -- This included them and their spouse. The "golden years" are not what they expected. This situation may grow worse as more and more companies cut back on medical and pension benefits and healthcare costs continue to rise. This group is very sensitive to psychological stress and long term healthcare

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concerns. Also, beware of the adult caring for their elderly parents. More and more adults are having to care for parents or pay for care. This is extremely stress inducing emotionally and financially. In the last products case I handled, five potential jurors expressed this concern about parents or in-laws and admitted it might influence their feelings on the long term care issue raised by plaintiff.

c. Little family or other support network -- This can include no family or close friends living nearby.

d. Adapting to retirement -- The recently retired may not be adapting well since their work and work "friends" defined who they were to a large degree. This is especially true for men. Asking a juror if they miss working is often a very valuable question. If someone says, "I still drop by and visit the guys a couple times a week," there should be some concern by the defense in say an employment case involving a layoff.

The "Happily Retired" are:

a. Active and happy in retirement -- usually very engaged in community, friends, hobbies involving others.

b. Do not miss work. They have moved on mentally.

c. Beyond basic economic survival level, the wealth of an individual is not a good indicator of happiness in retirement.

A slightly different group of potential jurors which should be a focus in voir dire is the 50 to 60 year old "I was hoping to take early retirement group." This group is often educated, comes from a corporate and management background and wanted to retire early and go golfing. They fit the profile of a pro-defense juror. Unfortunately, their stocks dropped, their pensions and benefits are gone or at risk, and they may have underestimated what it really took to retire. They can feel betrayed by the system, angry and view themselves as corporate experts. They can be a very dangerous pro-plaintiff juror.

The Under 30 Juror

This group, especially the newly-minted college graduate, often have little real world experience. They tend to apply the "perfect" standard when evaluating safety issues and implementation of corporate policies. Alternatively, they can be very smug toward a plaintiff they view as having not acted appropriately. "They would not have acted that way." Thus the knowledge of the plaintiff is often a key issue for them.

This is an information-seeking group that in many cases gets its news and other information from the internet on a daily basis. This group is more active compared to older jurors who may be more passive information-receiving types. They take the news provided by TV or the newspapers.

This group also focuses less on benefits than on wages in cases involving an individual plaintiff. Retirement or health issues are decades away for them. Cash is their immediate lifestyle concern.

Focus On Skill Sets More Than Education

How jurors approach information at trial is significantly influenced by how they handle information in their everyday lives. A juror who deals with a great deal of documents daily in the workplace is not going to be as intimidated by a document heavy trial as a cab driver might be.

Someone who depends on data or input from other departments to perform their job is going to appreciate the effect that one party can have on another in a case involving, for example, non-performance of a contract. Counsel should think about what skill sets potential jurors might have that may make them relate to elements of the case.

If a case involves the theme that procedures were followed exactly, then perhaps the "technicians of the world" may be a good juror. These folks, such as a lab tech, follow procedures and believe procedures to be important. On the other hand, a salesperson may view procedures as impediments to closing a sale.

Identifying Punitive Jurors

Even in cases where there are no punitive damages, "punitiveness" is a mindset that effects all decisions at trial.

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Occupational Trauma. This category includes people who have been fired, whose spouse has been fired, is in fear of being fired, has been reassigned or forced to transfer. Things to look for include employment status, length of time at present job, and time in present city or home. Based on occupation and other information available, this information will let you draw an inference about their job stability.

The economy has forced tens of thousands of white-collar and engineering type individuals out of work. These are people who never thought they would be without a job, and are highly embarrassed and angered by it. They are, at least for now, a new type of punitive juror: articulate, credible and emotional.

Life Trauma. These are people who have had a death, chronic illness, divorce, or separation in their immediate family. A questionnaire can indicate marital status and also provides a private forum for jurors to express their views beyond the questions. Recently, in answering a questionnaire which asked, "How many children do you have under 16?" one juror wrote, "4, now 3, 1 died."

Open ended questions such as, "Is there any reason why you could not serve . . .," also can provide unexpected insights. For example: "I would be willing to serve since it is every citizen's duty, but I think you should know my son was in a horrible car accident last week. I don't think this would influence my decision, however."

Generalized Hostility. These individuals feel that "life is passing them by," or, "they played by the rules" and it is not paying off. Falling into this category are many of the new white collar unemployed or recent college graduates who cannot find what they consider to be rewarding jobs. Also, demeanor and vocal tone are some ways of inferring hostility.

Control Over One's Own Destiny. Jurors who feel like they have little control over their own lives love government regulation. They feel like they cannot protect themselves. Punishment is seen as a necessary means of modifying corporate behavior. Listen for qualifiers such as "just" and "only" in answers related to themselves, and references to "luck" or "fate." Look for fragmented educational and job histories. A useful question is "Where do you see yourself in five years?" Evaluate how realistic the juror's answer is in light of what you know.

High Empathy. Punitive jurors identify easily with a perceived victim. Look for training in the humanities or social sciences; occupations such as nursing, or social work; hobbies such as Big Brothers, or volunteering at the local food bank.

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