

Q&A with the Hon. Kimberly Dunning

By Linda A. Sampson



[Editor's Note: Our judicial interview this time is with Orange County Superior Court Assistant Presiding Judge Kim G. Dunning. Judge Dunning was appointed to the Superior Court in 1997 by Governor Pete Wilson. Prior to being appointed to the bench, Judge Dunning enjoyed several years in private practice and then was a research attorney for over 13 years with the Honorable Thomas F. Crosby Jr. on the 4th District Court of Appeal. Judge Dunning is also a member of the Judicial Advisory Counsel for the ABTL.]

Q: Why did you decide to become a Judge?

A: After all this time, you would think I would have a planned answer for this question, but I don't really know specifically why. I always thought I would make a better judge than advocate. As an attorney, although I thrived in the courtroom, I could usually see early in a case where it was likely to end up, and it seemed as though the "process" of litigating often got in the way of a more timely and more satisfactory resolution.

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Intellectual Property Crimes

By Frederick D. Friedman

The laws protecting intellectual property exist to nurture and protect the spirit of creativity and innovation that have helped to build the nation. Today, these laws are being violated on a massive, world-wide scale, in such forms as trafficking in counterfeit goods and products, music and movie piracy and theft of trade secrets. The Office of the United States Trade Representative estimates that the losses to American companies from intellectual property theft worldwide amount to \$250 billion annually.

In today's "information age," intellectual property is at a premium. The risks to such property -- especially in digital form -- are high because technology can be used to create limitless perfect copies and to make it available to millions of potential buyers via the Internet. Using other forms of technology, a company's computer system can be attacked, its operations paralyzed and the confidential information in its files stolen.

Civil remedies for these kinds of violations are often invoked but have often proven ineffective, a problem compounded in recent years by the speed with which violations can occur and the anonymity of the Internet. Governments at the federal, state and local levels are now aggressively pursuing criminal prosecutions of the more significant violators. Criminal IP laws long on the books have been strengthened, new statutes have been enacted targeted to the newer forms of IP crime and specialized prosecutorial and investigative units have been created to pursue the violators.

That the problem is now a high priority for the federal



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The President's Message

By James G. Bohm



As the Orange County Chapter of the Association of Business Trial Lawyers matures into its 10th year in existence, it is with great honor that I take over the reigns as this year's president. I want to begin my first President's Report by acknowledging and thanking my predecessors -- a group of some of the most respected business trial attorneys in the county and two

highly regarded currently sitting judges. I particularly want to thank the immediate Past President, Gary Waldron. Although he will be "a hard act to follow," I am very grateful for the example of high standards, professionalism, work ethic and exemplary legal skills he demonstrated as President last year and as he always exhibits. Not only did he lead the Orange County chapter last year and head up the planning committee on the most successful annual seminar ever, but he also spent more than half the year in a major business trial that resulted in obtaining a nearly \$20 million verdict for his client. Congratulations Gary and thank you for leaving the Orange County Chapter in such good shape.

This year is a year of change for the ABTL-OC. I guess it is only fitting to expect change after 10 years, however, I certainly never expected to lose the one person whom I have most depended upon for the day-to-day operations of the organization during my past six years on the Board. It is with sadness for the ABTL, but great excitement for her, that I report that our Executive Director Becky Cien will be leaving us to pursue exciting opportunities for her family in Dallas, Texas. We all wish Becky great success in her new endeavors and will sorely miss her. It is also with great excitement and expectation that I announce that we have hired Adrienne King to be Becky's successor. Adrienne is highly qualified and is excited to be part of our organization. Adrienne is going to be focusing on increasing our already significant membership and will be offering exciting suggestions to improve our programs and publications. We welcome her aboard. Another big change for the organization has been to try a new location. As many of you know, we had our first program of the year at the Fairmont. While we received favorable comments on the food, the parking situation created a major problem that would not work for

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How the ABTL Orange County Chapter Came About

By Donald L. Morrow

As the Orange County chapter of the Association of Business Trial Lawyers celebrates its tenth anniversary this year, it seems appropriate to look back in time and recall how the chapter was founded. The ABTL was created in Los Angeles in 1972. The plan was to form a group that would put on regular programs of interest to the business litigation bar. A hallmark of the group was the involvement of the judiciary, both at the dinner meetings and on the board of the association. The idea caught on, and ABTL chapters were formed in both San Francisco and San Diego in the early 1990's.



As often was the case, however, Orange County was neglected, and lawyers here were expected to travel to LA for ABTL meetings. That seldom happened, and we thus largely missed out on the educational and networking opportunities provided by becoming involved with the ABTL.

In 1996, the Board of the Los Angeles chapter finally decided to explore opening a chapter in Orange County. Former President Bob Fairbank was charged with the responsibility of forming a steering committee of Orange County lawyers and judges to see if there was sufficient interest. Bob took that responsibility seriously, and is really the one person most responsible for creating the Orange County Chapter of the ABTL. Bob enlisted for the OC steering committee federal judges Alicemarie Stotler and Gary Taylor, Justice Bill Rylaarsdam, and several Superior Court judges including Judge Bob Thomas and Judge Bill McDonald from the Complex Panel, Judge Nancy Stock, Judge Tom Thrasher, and Judge Stu Waldrip. That group then recruited some of the better known (*i.e.*, grey-haired) business trial lawyers, including Tom Malcolm, Howard Harrison, Don Martens, Wylie Aitken, Vern Hunt, Andy Guilford (now Judge Guilford), Bob Palmer, and me. We met several times to discuss the concept of starting an ABTL chapter in the OC. Some of us attended ABTL meetings in LA to see what it was all about, and came away enthused about the quality of the programs and the enthusiasm of the judges and lawyers

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We're More Than Just a Bunch of Business Trial Lawyers

By Dean J. Zipser

As I look back to the early days of our Chapter, I am so proud to see how we have grown and developed. I was a long-standing member of the Los Angeles Chapter, and quite happy when the movement began to start up our own Orange County Chapter.



Throughout my involvement with ABTL-OC -- and, at this point, I have held virtually every position in the organization including my current one, "has been" -- our mission and objectives have remained constant. As stated on our website, ABTL is "dedicated to promoting a dialogue between the California bench and bar on business litigation issues." In order to successfully accomplish that mission, we needed the support and participation of our judicial officers. And we have received it. And how. The support from our judges has been, quite frankly, overwhelming. It has been a key factor in moving the Chapter forward. I will highlight just a few examples.

First, there is our quarterly newsletter, the *ABTL Report*. Although I am proud to have been its first editor, the leading force behind getting it off the ground was not me, but Justice William Rylaarsdam. He helped form the direction of the publication, served on our first Editorial Board, and was instrumental in securing contributions from other judges.

Similarly, to further promote the dialogue between the bench and bar on business litigation issues, we included in each issue of the *Report*, an interview of a judicial officer. (I am happy to see that this feature has been continued to the present.) Each judge whom we have asked to interview has willingly participated and has provided valuable insights.

Second, judicial officers play a key role on our Board of Governors. Our Board, which we purposely have kept modest in size, has no "potted plants." All of our Board members -- lawyers and judges alike -- "roll up their sleeves" and actively participate in directing the Chapter, while serving on various subcommittees or task forces.

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Happy 10th Year Anniversary ABTL - Orange County



As you may know, the ABTL - Orange County Chapter is celebrating its 10th Anniversary. As part of our anniversary celebration, over the next year, we plan to publish articles from each of our past presidents. In this spring edition, we are delighted to bring you articles from two of our early founders -- Donald Morrow, the first president, and Dean Zipser -- the first

Editor of the *ABTL Report - Orange County* and the seventh President. Don shares with us his insights on, and recollection of, how the ABTL Orange County Chapter came into existence way back when. Dean speaks to the formulation of the *ABTL Report*, as well as some of the changes in the Chapter over the years.

Reading Don and Dean's articles got us thinking about all the other changes that have occurred around us in just the last 10 years. In 1997, Bill Clinton had just begun his second term as President. Gas was *only* \$1.33/gallon. Titanic won the Oscar for best movie. "The Practice" won the Emmy for Outstanding Drama Series, with "Frasier" winning for Outstanding Comedy Series. The Green Bay Packers won Super Bowl XXXI, the Florida Marlins won the World Series, and Arizona beat Kentucky in the NCAA finals.

Finally, looking back over the many editions of the *Report*, we are reminded of the terrific support that we have received and the many articles that have been published. So, also included in this special issue is an Index of all of the articles published in prior *ABTL Reports* since it was first published in March 1999. The Index will help you find previously published articles of interest.

We have certainly come a long way. Here's looking forward to the next 10!

▪ *Linda Sampson is Of Counsel in the litigation department of the Orange County office of Morrison & Foerster LLP.*

Big Brother Is Watching ... and Being Watched -- Evidence Obtained Through Employee Surveillance

By E. George Joseph



You're defending a claim by a terminated employee, and the client gleefully presents you with the ultimate piece of incriminating evidence: videotape of the employee engaging in the very act for which he was fired. As the initial euphoria wears off, you begin to ask yourself the inevitable nagging questions: Is there a problem with how

this video was obtained? Will it be admissible? Even worse, might the employee have a claim for invasion of privacy?

These are, of course, the right questions to ask. As employers use increasingly sophisticated methods to monitor the behavior of their employees, legislators and the courts are wrestling with the delicate balance between employee expectations of privacy and the need for employers to ensure that employees are adhering to company policies. If an audio or video recording has been obtained in a manner that may violate an employee's reasonable expectation of privacy, litigation counsel should think long and hard before using it.

Invasion of Privacy

An individual's right to privacy is guaranteed by Article I, section I of the California Constitution, and it applies to intrusions by those in the private sector, as well as the government. (*Hill v. National Collegiate Athletic Ass'n.* (1994) 7 Cal. 4th 1, 15-20.) In the context of employee surveillance, the tort of invasion of privacy has two essential elements: "(1) intrusion into a private place, conversation, or matter; and (2) in a manner highly offensive to a reasonable person." (*Shulman v. Group W. Productions, Inc.* (1998) 18 Cal.4th 200, 231.)

In determining whether there has been an actionable intrusion, the focus is on the employee's reasonable expectation of privacy. The courts have made clear that this does not necessarily mean "absolute or complete" privacy -- it is a relative concept. As one court observed,

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Brown Bag Lunch with the Hon. James V. Selna

By Corbett H. Williams



On Wednesday March 21, 2007, I had the honor of having lunch with the Honorable James V. Selna of the United States District Court, Central District of California, along with over a dozen other attorneys from the Orange County area. Judge Selna joined the federal bench in 2003, and served as a California Superior Court judge for four years prior to that. Before embark-

ing on his judicial career, Judge Selna was in private practice at O'Melveny & Myers for over 28 years, where he represented such clients as Exxon in complex civil litigation matters. The lunch was an ABTL sponsored event that provided everyone in attendance the opportunity to meet Judge Selna, and enjoy an engaging and informative conversation with him.

When we first arrived, Judge Selna was presiding over a jury trial, involving (as we later found out) RICO-murder charges against a member of the Myrtle Street Gang, whose turf is located only about two miles west of the courthouse. Following adjournment of the proceedings, we gathered around a long table in the courtroom to eat our "brown bag" lunches and enjoy conversation with Judge Selna.

The topics of conversation were wide ranging, as those in attendance inquired about Judge Selna's opinions and experience on a wide range of subjects, from his vast experience as a litigator to his opinions on topics such as cameras in the courtroom and possible reform of the patent litigation process. The judge also shared with us his personal pet peeves, and the process he employs in his chambers in ruling on motions. Judge Selna's gracious answers to our questions provided all in attendance with an insider's view of his court.

Judge Selna shared with us the importance of simplicity of presentation and brevity in good briefing, and explained that talking directly to jurors in a conversational manner is an effective way to communicate your case. Judge Selna also stressed the importance of courtesy in the courtroom and that gracious conduct around opposing counsel can translate into jurors' perception of your case as fair and equitable.

Judge Selna, like all other Central District judges, hears law and motion on Mondays, and it is his practice to issue tentative rulings on civil motions. He informed us that the purpose of the tentative ruling is to focus the parties' arguments, and that he appreciates advocates who make an effort to focus on the issues raised in the tentative ruling. Judge Selna remarked that he changes his tentative rulings about 10% of the time and encourages attorneys to correct the Court where they believe it is wrong. Among Judge Selna's pet peeves are unmeritorious motions brought under Fed. R. Civ. Proc. 12(b)(6), and he suggests that counsel carefully select the cases in which such motions are brought.

It was an honor to share lunch with Judge Selna in his courtroom. The experience was an enjoyable one and I came away with a richer understanding and appreciation of the litigation process in federal court. I want to thank Judge Selna for graciously inviting us into his court and taking time away from his busy schedule to have lunch with us.

▪ *Corbett Williams is an associate in the Irvine office of Jones Day.*

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"[t]he mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone." (*Sanders v. American Broadcasting Companies* (1999) 20 Cal.4th 907, 916.)

Whether an intrusion is "offensive" turns on a number of factors: "the degree of intrusion, the context, the conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." (*Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066, 1075-1076.)

It is also important to note that because publication is not an essential element of the tort, an employee does not need to show that the information gathered was published or used in any manner -- the fact of the intrusion is sufficient. The focus is on whether the employer "penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff, not whether the data was ever obtained or

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A WORD FROM OUR SPONSOR: ELECTRONIC EVIDENCE -- INITIAL CONSIDERATIONS

By Jaime C. Holmes

In your practice as a business trial lawyer, if your evidence consists only of hard-copy documents then you have, in all likelihood, discovered only the tip of the iceberg of relevant evidence. This article will touch on some useful resources for your bookshelves in the area of electronic discovery. In addition, this article will outline some important e-discovery issues. Finally, this article will discuss where electronic information is generally located and the practical considerations in developing a discovery plan.

The import of electronic evidence is a generally accepted concept but the cost and expertise required to obtain this discovery often creates barriers to the discovery of electronic data. The use of effective discovery techniques can assist in the evaluation of the potential merits of the electronic discovery and the potential cost.

The speed by which computers can process calculations, the capacity to store large amounts of data in a compact space, and the ability to transfer and manipulate the data, all are attributes which have allowed businesses to record and analyze more and more statistics concerning the operating entity, its plans and the competitive environment in which it operates. In essence, computers allow businesses to be more competitive. In a lawsuit involving a business, this data is potentially available for discovery. At this time, the importance of electronically prepared financial data is generally known. However, much discovery still involves only a hard copy of this electronic data. The hard-copy print-out of a company's general ledger may no longer be adequate discovery.

The balance of this article focuses from a top-down perspective on the resources, issues and practical considerations of gathering electronic evidence.

Resources

The freshness of the topic of electronic discovery has created a vacuum of resources on the topic. However, this vacuum is quickly being filled with treatises, lectures and newsletters on the topic. A few of these resources are listed below:

USCourts.gov is the website for the Administrative

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Q: Do you have any regrets about leaving the practice of law and becoming a judge?

A: Absolutely not. I am so fortunate to be on the bench. I began my legal career as an associate in an insurance defense firm and enjoyed a varied and demanding practice. Then I spent most of my attorney years as a research attorney for Justice Crosby at the Court of Appeal. In that capacity, I analyzed appellate records from a judge's, rather than an advocate's, perspective. After I left the Court of Appeal, I did some appellate work before my appointment to the bench. That was quiet work, but immensely satisfying. And then one day I was in a courtroom, fulltime, wearing a robe and talking up a storm. How great is that?

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

A: Fairly smooth. As you may know, in Orange County both the Presiding Judge and Assistant Presiding Judge are full-time administration positions; so I don't have an active caseload right now. In that regard, I do miss being in the courtroom. I am, however, really enjoying the change and think that when my stint is over, I will be an even better judge after playing an active role in behind-the-scenes matters. I am very fortunate to be working with Judge Nancy Wieben Stock, who is a terrific Presiding Judge.

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

A: The Presiding Judge has a tremendous number of responsibilities. Primarily, my job is to assist her in accomplishing them. Together, we carve out different projects. Right now, I am working on the Annual Judicial Education Conference, which takes place in Spring. Recently, I assisted with Grand Jury recruitment and chaired the effort to recruit and hire several Superior Court Commissioners. On occasion, I am able to meet with state legislators when they come to our court for "A Day on the Bench" or when we travel to Sacramento for Chief Justice Ronald George's State of the Judiciary address. On the state level, I am a member of the Court Technology Advisory Committee, which carries out technology-related assignments from, and provides recommendations to, the California Judicial Council.

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

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A: I really like the opportunity to learn more about the judicial branch of government. As Assistant Presiding Judge, I have been fortunate to meet with, and get to know, the Presiding Judges and other Assistant Presiding Judges up and down the state. We share valuable insights and ideas that we can then incorporate in our respective courthouses. Also there has been a growing emphasis on the judicial branch's important role as the third branch of government. I enjoy participating in these efforts.

Q: Is there anything new and exciting going on with the Orange County Courts?

A: Actually, there are a lot of exciting improvements coming down the not-so-distant road. We are really trying to advance the technological capabilities in our courtrooms. Right now, except in our Complex courtrooms, our courtrooms are not configured with evidence presentation equipment. Instead, we have to rely on attorneys to bring in their own Elmos and equipment. We expect that to change in the very near future. In fact, by this time next year we anticipate some courtrooms will have built-in projectors, screens, and other evidence presentation gadgetry. For those courtrooms that aren't in the first round for receiving this equipment, we hope, at a minimum, to offer evidence presentation equipment on mobile carts for easy accessibility to the various courtrooms.

In a similar vein, we are working very hard to make sure the public has greater and more convenient access to court documents. We are one of the lead courts in the state in the development of the web-based California Court Case Management System (CCMS). Although it is a couple of years off, we expect to offer online access to Court documents (including briefs, complaints, etc.) from an individual's computer. We have initiated this type of system in small claims court, but, at present, the documents can only be accessed on computers at the courthouse. Recently, we made criminal case calendar information available on our public website.

Q: Is the goal to have a completely paperless courthouse?

A: I hesitate to say we want a paperless courthouse. That would not be accurate. Actually, a better name is "Paper On Demand." Lawyers and individuals will be able to print documents from the website. In the long run, it will be cheaper to access and print a document, as needed, then to spend time looking for a file or to pay for the storage and retrieval of boxes full of paper. All civil case documents are now imaged. Now, I can read a motion in

chambers while my research attorney is drafting the work-up and an attorney is viewing the same paperwork at a counter. In a few years, that attorney, or a litigant or member of the public will be able to access the imaged document from a personal computer anywhere in the world. I can't tell you how much time and money we currently spend on storing older files off-site. Once we are completely on-line, files that used to take weeks or even months to locate and retrieve, should be located and reproduced in paper format in a matter of hours.

Q: Are there any other technological advances going on at the courts?

A: We now have set up videoconferencing to enable the judicial officers on the Orange County Superior Court to more easily communicate with one another. So, when we call a meeting, those in North Court or South Court may participate without having to drive to Santa Ana. Videoconferencing permits more of our bench to participate in court-wide meetings without impacting their calendars. Allow me to put in a good word for Judge Robert Moss at this point: He chairs our Court Technology Committee and is doing a fantastic job with these initiatives.

Q: You have presided over Juvenile Dependency Court, Juvenile Delinquency cases, criminal cases, civil cases and even sat on the Complex Panel in 2005. Is there one type of case that was particularly enjoyable to you?

A: I have liked the opportunity to move around and try different things. I think, however, I will always have a special place in my heart for Juvenile Dependency Court. It is very people-oriented and gives one the chance to make a difference in a child's life. That said, the assignment is emotionally taxing and, at some point, I needed a break from it. I hope someday to return to Juvenile Court.

Q: Why do you choose to be active in the ABTL?

A: The ABTL is a great organization. It has robust, educational programs and has really done a lot to bring the bench and bar together. You know, we are all (judges and attorneys) very fortunate to work in Orange County. I think we have a terrific group of people on the bench. Our judges are very active and work to develop relationships with the bar. Similarly, our attorneys are very dedicated and hard-working, often with very complicated cases. Our attorneys are also incredibly supportive of the bench, really working to bring these two legal groups together.

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Q: *Any tips for the younger lawyers?*

A: I would probably have two main tips for lawyers (younger or older). First, try to make it easy for the judge to rule in your favor. Make your briefs concise and well-organized. Give a little when you can -- instead of disagreeing with your opposing counsel for the sake of disagreeing -- and you will be amazed how those little acts of congeniality go a long way when you are asking for something in return. Second, and this is probably the most important piece of advice I could give and I cannot overstate its importance: protect your reputation, your integrity, and your credibility. It is a very small legal community. Others will remember working with you and it is hard to shake a bad reputation.

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

A: My husband, Steve, and I play golf and love golf trips. I read. I enjoy playing with our two Labradors.

Q: *If you could choose any job in the world other than a judge or lawyer, what job would you choose?*

A: I haven't really given it much thought, but I think I would enjoy being a professor at a university. I don't know what or where I would want to teach, but I think it would be very satisfying and challenging.

Thank you Judge Dunning for your time.

▪ *Linda A. Sampson is Of Counsel in the litigation department in the Orange County office of Morrison & Foerster LLP.*

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government was demonstrated by the creation by the Department of Justice (DOJ) of a Task Force on Intellectual Property in March 2004. In October 2004, the Task Force issued a Report that described the dimensions of the problem and referred to recent significant prosecutions running the gamut from counterfeit software, DVDs, and pesticides to the theft of trade secrets. The Report also noted that the DOJ had created Computer Hacking and Intellectual Property Units in several United States Attorney's Offices and a Computer Crime and Intellectual Property Section within the Criminal Division, staffed by 35 attorneys prosecuting IP cases and providing guidance and training to prosecutors in local Offices. With computer experts or "cyber squads" in every field

office, the FBI has also made cybercrime one of its top priorities.

Federal Statutes

The Economic Espionage Act, enacted in 1996, contains two provisions criminalizing the taking of trade secrets. 18 U.S.C. section 1831 focuses on the taking of a trade secret to benefit a foreign government or agent. That provision imposes felony penalties of up to 15 years in prison and a sizable fine for an individual and a fine of up to \$5 million for an organization. Section 1832 is broader and not linked to a benefit to a foreigner. Instead, it criminalizes the taking of a trade secret for private commercial advantage where there is a connection to interstate or foreign commerce. This provision imposes felony penalties of up to 10 years in prison and a sizable fine for an individual and a fine of up to \$5 million for an organization. Attempts or conspiracies to commit the substantive violations under these provisions are subject to the same penalties.

The Act contains a broad definition of "trade secret" and arguably covers more technological and intangible information than current civil laws. As long as the trade secret relates to a product that is related to or included in a product in interstate or foreign commerce -- and very few significant trade secrets will not qualify -- then any misappropriation of such a trade secret motivated by economic gain and undertaken in the knowledge that the owner of the secret will be damaged is a federal crime.

A recent prosecution under section 1832 is *United States v Zhang*, United States District Court, Northern District of California, Case No. CR 05-00812-RMW, filed on December 21, 2005. In that case, Zhang -- a former employee of Netgear -- was charged with stealing trade secrets related to the manufacture of semiconductor chips and disclosing the secret information when he began work at semiconductor producer Broadcom. Zhang has pled not guilty and is awaiting trial.

It is a separate crime to misappropriate information from a computer, whether or not such information qualifies as a trade secret or even as confidential or proprietary. 18 U.S.C. sections 1030(a)(1), (a)(2) and (a)(3) have provisions barring access to computers without authorization or exceeding authorized access with respect to specific kinds of information or data, such as classified national security data and financial institution records.

A broader provision in section 1030(a)(4) bars certain

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kinds of access to a “protected computer,” which section 1030(e)(2) defines broadly as a computer used in interstate or foreign commerce or communication or by the United States or a financial institution.

Section 1030(a)(4) imposes felony criminal penalties on anyone who with the intent to defraud accesses a protected computer without authorization (or exceeds authorized access) and obtains anything of value. The penalty is up to five years in prison for each violation and a fine, with more serious sanctions for repeat offenders. Section 1030 also includes a provision specifically aimed at “hackers.” Section 1030(a)(5) makes it a crime (assuming certain damages criteria are met) to knowingly transmit a program, information, code or command and thereby intentionally cause damage to a protected computer or to intentionally access a protected computer without authorization and thereby cause damage. This conduct is a crime only if it causes financial loss of at least \$5000; modification or impairment of a person’s medical care; physical injury to any person; a threat to public health or safety; or damage affecting a government computer relating to the administration of justice, national defense or national security. Section 1030(a)(6) also makes it illegal to traffic in any computer password if the trafficking affects interstate or foreign commerce or the computer is in use by or for the United States Government.

A notable recent prosecution under section 1030(a)(5) is *United States v Ancheta*, United States District Court, Central District of California, Case No. CR 05-01060-RGK, filed on November 2, 2005. The indictment in that case charged that Ancheta developed and used a computer worm to infect computers connected to the Internet and created and sold so-called “bots” to launch “distributed denial of service” (DDoS) attacks and send spam. Ancheta pled guilty and was sentenced in May 2006 to serve 57 months in prison.

Trademark violations are typically prosecuted under 18 U.S.C. section 2320. That section, among other things, imposes felony penalties on anyone who intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark in connection with such goods or services. Following a 2006 amendment, there is also now criminal liability for trafficking in counterfeit labels, stickers, wrappers, product documentation, and packaging, regardless of whether such materials are affixed to the goods themselves.

Under section 2320(e)(1)(A), a counterfeit mark is defined as a “spurious mark” that meets the following criteria: it is used in connection with trafficking in any goods or services; it is identical with, or substantially indistinguishable from, a mark registered with the Principal Register of the United States Patent and Trademark Office (USPTO) and in use, whether or not the defendant knew the mark was so registered; it is applied to or used in connection with the goods or services for which the mark is registered; and the use of the mark is likely to cause confusion, to cause mistake, or to deceive.

While perhaps primarily associated in the public mind with knockoff apparel, counterfeit trademark prosecutions now target a wide array of products and goods, including counterfeit auto parts, medicines, appliances, toys and software. It is also worth noting that criminal trademark violations (as well as criminal copyright violations) can be the basis for both Racketeer Influenced and Corrupt Organizations Act (RICO) and money laundering charges.

A notable prosecution under section 2320 is *United States v Mostafa*, United States District Court, Central District of California, Case No. CR 00-00058-AHS, filed on June 14, 2000. The indictment charged that Mostafa, the owner of a wholesale grocery business, manufactured and distributed counterfeit Similac infant formula throughout California. The matter was widely publicized in national and local media after the FDA and Similac’s manufacturer issued a warning about the counterfeit product. Mostafa was convicted and was sentenced in December 2002 to serve 44 months in prison.

The statutes criminalizing copyright offenses have evolved over the past few years, both to keep pace with emerging forms of copyright violations and to stiffen the penalties for all copyright violations. Willful infringement “for purposes of commercial advantage or private financial gain” is criminalized in 17 U.S.C. section 506 (a)(1)(A). Congress has also criminalized copyright infringement via the Internet in a “file-sharing” context where a commercial motive is often absent or difficult to prove. Section 506(a)(1)(B) makes illegal (*inter alia*) the reproduction or distribution of greater than a threshold number of copyrighted works (with a total retail value of more than \$1000) during any 180-day period, regardless of commercial or financial motive. Section 506(a)(1)(C) criminalizes (*inter alia*) the copying (often by camcorder) of motion pictures in theatrical release and the distribution of such bootleg copies to the public on the Internet before authorized DVDs of the film have been released.

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18 U.S.C. section 2319 provides a sliding scale of penalties for the violation of each of the three substantive prohibitions in 17 U.S.C. section 506(a)(1), keyed to the number of copies involved and their retail value.

The DOJ and the FBI are aggressively using 18 U.S.C. section 2319 (and other statutes) to pursue the organizers and promoters of so-called “warez” groups, which traffic in copyrighted product online. As an example, on June 30, 2005, the DOJ announced that, over the previous day, the FBI and its counterparts overseas had conducted over 90 searches worldwide as part of “Operation Site Down,” an operation targeted at groups that illegally make available on the Internet content such as copyrighted software, movies, music and games.

In 2004, Congress created another copyright-related offense to address an evolving problem involving computer software identification features (including holograms). 18 U.S.C. section 2318 now criminalizes as a felony the knowing trafficking in “counterfeit” or “illicit” labels or in counterfeit documentation or packaging for a range of works. A “counterfeit” label is one that appears to be genuine but is not. An “illicit” label is (*inter alia*) a genuine label component that is, without the authorization of the copyright owner, distributed or intended for distribution not in connection with the copy to which the copyright owner intended it to be affixed.

An additional new copyright-related offense is found in 18 U.S.C. section 2319B. While 17 U.S.C. section 506 (a)(1)(C) criminalizes the unauthorized distribution over the Internet of a film exhibited in theatres, 18 U.S.C. section 2319B was amended to criminalize conduct preparatory to such an offense -- knowingly using an audiovisual recording device without the copyright owner’s permission to transmit or make a copy of a copyrighted film from a performance of such a work in a theatre.

There are also provisions imposing criminal liability in the Digital Millennium Copyright Act, enacted in 1998. The most important of these provisions deals with the circumvention of technological measures barring or limiting access to copyrighted works.

Specifically, 17 U.S.C. section 1201(a)(1)(A) makes it illegal (*inter alia*) to circumvent technological measures such as scrambling or encryption that control access to a copyrighted work. Section 1201(a)(2)(A) also makes it illegal (*inter alia*) to manufacture or traffic in any technology that is primarily designed or produced to circum-

vent such measures.

These provisions are aimed at circumventing technology to obtain unauthorized *access* to a copyrighted work. Some technology permits access to authorized persons but bars the person so authorized from making further use of the material, such as copying. Section 1201(b)(1)(A), among other things, makes it illegal to manufacture or traffic in any technology primarily designed or produced to circumvent “protection afforded by a technological measure” that protects a copyright owner’s right in any work, such as the right to prevent copying.

Section 1204 makes it a felony to violate the prohibitions of section 1201 willfully, for commercial advantage or private financial gain.

California Statutes

California Penal Code section 350 criminalizes the willful manufacture, intentional sale or knowing possession for sale of any counterfeit of a mark registered in California or at the USPTO. The offense can be a misdemeanor or a felony depending on the number of articles involved and their fair market value. Where the conduct giving rise to the offense directly and foreseeably causes death or great bodily injury, enhanced maximum penalties are provided.

Penal Code section 499c(b) makes guilty of theft (*inter alia*) anyone who -- with intent to deprive or withhold the control of a trade secret from its owner -- steals a trade secret; uses it without authorization; fraudulently appropriates a trade secret entrusted to him; copies an article representing a trade secret without authority, having unlawfully obtained access to it; or makes a copy of an article representing a trade secret, having obtained access to it through a relationship of trust and confidence. It is a separate crime to bribe an employee or agent (or to accept such a bribe) in order to obtain an employer or principal’s trade secret. Penal Code § 499c(c).

Penal Code section 502(c) broadly criminalizes nine categories of unauthorized access to computers. A violation may be prosecuted as a misdemeanor or as a felony.

Practical Problems: Representing the Company as Victim

In a business context, companies are often (although by no means always) victimized in the IP area by employees or former employees. While company counsel

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may not be contacted until after the client has been victimized, there are measures many companies typically employ to minimize the risks of victimization by employees and to make it easier to pursue employees who commit violations.

Adequate screening of applicants for employment can help to minimize the risk of misconduct. The company can also insist on confidentiality agreements with employees who have access to sensitive corporate information. Access to sensitive information on the company's computer system can be limited. Company policy manuals should contain stringent provisions requiring that the confidentiality of sensitive information be maintained. When an employee leaves, he should be given an exit interview, reminded of his obligation to surrender all company files and to take no company materials with him and asked to sign a form making representations to that effect.

None of these measures can guarantee that an employee will not seek to do harm to the company by misappropriating its IP. After the fact, company counsel will need to undertake an internal investigation to determine what occurred. Ideally, outside counsel will be retained for that purpose, as this will help ensure that the investigation is protected by the attorney-client privilege. If the assistance of an accountant or other expert is needed in the investigation, the retainer letter should make it clear that the expert is providing input to counsel to assist in counsel's representation of the client. This will help to bring the expert's work within the ambit of the privilege.

Once counsel has a good understanding of what occurred, he or she must decide what action to take. Counsel may decide to pursue civil remedies, such as an action for injunctive relief and/or damages. Civil remedies are expensive and time-consuming. In addition, the wrongdoer may be unknown, hard to find, or judgment-proof. Counsel may therefore consider referring the matter to federal or local authorities. Of course, the client may want to both pursue civil remedies and make a criminal referral.

There are both benefits and possible risks in making a referral. The benefits are fairly obvious. The investigators (especially on the federal side) have tools not available to counsel. If the FBI becomes interested in the case, its agents can serve grand jury subpoenas and conduct interviews nationwide. Recalcitrant witnesses can be examined before the grand jury and the DOJ can seek

documents and testimony abroad. If the investigation ripens into a prosecution, the victim company will have the satisfaction of criminal charges being filed against the violator, with the possibility that he will serve time in custody. The publicity attendant to the prosecution will put the public on notice that the victim company takes such violations seriously. Upon a conviction, the court will probably order restitution to the victim (such restitution is non-dischargeable in bankruptcy).

If parallel civil litigation has been commenced by the company against the wrongdoer, there might be additional benefits for the victim. Given the pendency of a criminal investigation, the defendant in the civil case will have to decide whether to defend the case on the merits or invoke his Fifth Amendment privilege against self-incrimination. If he invokes his Fifth Amendment rights, this could well prejudice his defense of the case, as an inference can be drawn against a party in a civil case who declines to testify based on the privilege against self-incrimination.

There are also risks involved in making a successful criminal referral. The victim loses a certain amount of control over the case. Key decisions about which witnesses to interview and call and which documents to review are made by the investigator or the prosecutor. Further, if the case is charged and proceeds to trial, the victim company will often find itself the subject of a harsh attack by defense counsel. Typically, the defendant will argue that the intellectual property involved in the case was not worthy of protection. In a trade secret case, for instance, the defendant will argue that the information, formula or process involved does not meet the legal requirements of a trade secret. Note also that, in a trade secret theft prosecution, the prosecutor will probably have to make the trade secret available to the defense in discovery. Also, in the discretion of the court, a related civil case brought by the victim company may be stayed, conceivably for years, pending the outcome of the criminal litigation.

If counsel decides that there is some value to a referral, counsel will then have to determine to whom to refer the case. Because of the greater resources available and higher sentences imposed at the federal level, counsel's first preference may be to refer the case to the FBI or the CHIP unit in the local United States Attorney's Office. Of course, federal resources are limited and typically the federal authorities are interested only in the more significant violations. For misconduct that does not involve significant financial loss or other harm, counsel should

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contact the local authorities. The Los Angeles District Attorney's Office has a High Technology Crimes Unit whose prosecutors specialize in computer and IP crimes.

A referral could be as simple as a telephone call to an investigator or a prosecutor. However, the referral will probably be more persuasive if it involves a presentation in writing. This presentation should explain the importance of the case in terms of the general deterrent effect it is likely to have. Counsel should also try to lessen the burden on the investigators, and make them more receptive to the referral, by taking them through the evidence on a step-by-step basis, attaching relevant exhibits, and otherwise making it easy for them to pursue the case.

Practical Problems: Representing the Company as Target

Counsel will confront an entirely different set of problems if his or her client is a business (large or small) whose employees or agents have allegedly engaged in wrongdoing relating to IP. The most common scenario involves misconduct vis-à-vis a competitor, such as the misappropriation of the competitor's IP.

Misconduct may come to management's attention before the authorities have become aware of it or when investigators begin to interview company employees. Company management could also be taken completely by surprise by the execution of a search warrant on company premises.

When such misconduct comes to light, the company would be well-advised to retain outside counsel to conduct an investigation. Among the key issues to be determined is to what extent senior management was involved in or knew of the misconduct.

Whether or not the authorities undertake a criminal investigation, the company clearly needs to clean its own house. If employees committed misconduct, they must be disciplined. If they committed serious misconduct, they should be terminated. This could be a painful process if the employees involved have had long tenures at the company and/or if they are valuable to the business.

On the federal level, a formal written policy is in place setting forth guidelines that prosecutors should follow in deciding whether to file charges against a business. This policy is in the form of a Memorandum dated December 12, 2006 authored by Deputy Attorney General Paul J.

McNulty. The Memorandum is entitled "Principles of Federal Prosecution of Business Organizations" and is referred to as the McNulty Memorandum.

If a federal investigation is underway, counsel should carefully study the McNulty Memorandum, as it suggests the avenues that counsel may want to pursue in arguing that the company should be spared. Needless to say, in today's climate, the indictment of a company can be its death-knell, regardless of the outcome of a trial. An indictment can seriously complicate the company's relations with its customers and create a taint in the minds of the public. Company counsel will want to do everything in his or her power to forestall an indictment.

Among the factors that the McNulty Memorandum instructs prosecutors to consider is "the pervasiveness of wrongdoing within the corporation," including any complicity by management and the company's history of similar conduct. Factors such as these are not really in counsel's control. However, the Government and the company may have differing views on the extent of management's involvement. Defense counsel needs to marshal the facts in this area and, if warranted, make a forceful argument that there was no involvement by management.

Another important factor cited by the McNulty Memorandum is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents" In this connection, prosecutors are told that they may consider "the corporation's willingness . . . to identify the culprits within the corporation, including senior executives." Prosecutors are allowed to ask the company to waive the attorney-client privilege and/or the work product protection in certain circumstances and may consider the company's response to this request in determining whether the company has cooperated. The prosecutor may also consider "whether the corporation appears to be protecting its culpable employees and agents." In this area, the company needs to make some hard decisions. The more timely the company's disclosure is the greater its impact in persuading the prosecutor not to proceed.

Another factor cited by the McNulty Memorandum is the existence and adequacy of any pre-existing corporate compliance program. The Memorandum suggests that prosecutors examine the corporation's "remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or termi-

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-Intellectual: Continued from page 16-

nate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies....”

The company will need to take a hard look at its compliance program. Whether a program is already in place or established after the fact, the Government will want to assure itself that the program represents a genuine effort to discourage and detect misconduct and that management has allocated sufficient corporate resources to the program. If a company did not have an adequate compliance and ethics program in place, the prosecutor might still be swayed in the company’s favor if the company established an effective program upon learning of the misconduct. The Government will also take a hard look at whether those responsible have been adequately sanctioned. If the company forcefully dealt with any employees found to have committed misconduct, this is a factor that will militate against prosecution of the organization. Again, the company will face some difficult and painful decisions, and may have to sever ties with key employees and managers as the price for avoiding indictment and continuing in business.

▪ *Frederick D. Friedman is a litigation partner in Jones Day’s Los Angeles office.*

-President: Continued from page 2-

us on a long term basis. The Board has thus decided to go back to the Westin, where we have been for the last 10 years, for the next two programs. Although the Board has decided to go back to the Westin for the April and June programs, the Board will be evaluating whether to stay there on an ongoing basis or to try yet another location. Any feedback from our members will be greatly appreciated.

This year will be an exciting year for the Orange County Chapter of the ABTL. We have some great programs scheduled during the year. In June we will be doing our annual Public Law Center fundraiser. It is my personal goal to provide the PLC with the largest check to date from ABTL. This is going to require participation from the entire membership and the Board. Traditionally, Board members and their firms challenge each other to contribute directly to the PLC. This year, I will be challenging all Board members and firms to meet or exceed their last year’s contributions. In addition to direct contributions, proceeds from the dinner and wine tasting will also go to the PLC. Ken Babcock, the Executive Director of PLC, has stated that the ABTL is the single

largest contributor to the PLC. That is something that gives all of us a great deal of pride.

To celebrate our 10th year anniversary, we have a committee headed by Darren Aitken that will be planning an exciting celebratory event. The committee is keeping the details to themselves, but it promises to be a first-class, exciting evening. And this year’s annual seminar will be historical in that the Honorable Sandra Day O’Connor will be the lead speaker. This will be the first time a retired Associate Justice from the United States Supreme Court will speak at one of our events. As a retired Justice, she will have more latitude to speak freely on topics upon which a sitting Justice would be restricted from commenting.

I want to thank all of you for actively supporting the organization. I look forward to working with our highly qualified Board members and Judicial Advisory Board in making this another successful year for ABTL-OC. I am particularly fortunate to have such a highly regarded executive committee with which to work. Martha Gooding, Richard Grabowski and Sean O’Conner are all a pleasure to work with, both personally and professionally. Our chapter is also fortunate to have significant participation from the most highly respected jurists in our county. We have active participation from both the federal and state bench. That assures us that our mission statement -- *to promote competence, ethics, professionalism, and civility in the legal profession and to encourage and facilitate communication between members of the Orange County bar and the County’s federal and state judges on matters affecting business litigation and the civil justice system* -- is not only pursued, but fulfilled.

▪ *James G. Bohm is a partner at Bohm Matsen Kegel & Aguilera*

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involved. In February 1997, we officially voted to form a local chapter. We then elected our initial officers. Tom Malcolm was elected Vice President, Bob Palmer Treasurer, and Andy Guilford Secretary. I must have missed that meeting, and somehow was elected President. In addition to the judges and lawyers mentioned above, Rick Derevan, Bob Gooding, Rich Goodman, Andra Greene, Judge Glenda Saunders, Jeff Shields, Gary Waldron, Mike Yoder, and Dean Zipser formed our first board of governors.

Jeff Shields was our first program chair. We wanted

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our initial program to be a memorable one. The O.J. Simpson criminal trial had just finished, and high-profile criminal cases were on everyone's mind. So collectively we decided to recruit Vincent Bugliosi, who prosecuted probably the most notorious murderer in California history, Charles Manson, to speak at our first meeting. Planning for the meeting then started in earnest. We purposely scheduled the program for early June, so that firms with summer associates could have them attend as well. And we hired Becky Cien, who was the Executive Director of the LA chapter, to play the same role for our chapter. That was a propitious move, as Becky has capably served us for our entire history.

Our inaugural program was held on June 4, 1997. Mr. Bugliosi was very entertaining, speaking on the lessons business trial lawyers can learn from high-profile criminal cases. He provided a number of little known insights into the Manson prosecution, and also commented on his view of the O.J. case. (Not surprisingly, he was not overly impressed by the prosecutors there.) Over 200 lawyers and judges attended that first meeting. His talk went long, however, and that night we adopted the hard and fast rule that all dinner programs must end by 9:00 p.m.

We followed the first meeting with two more programs that first year. Justice Rylaarsdam, Stephen Neal, and my old law school classmate Tom Stolpman spoke on how to win your case before calling your first witness. Then well-known plaintiffs' lawyer Herb Hafif spoke in December 1997 on how to persuade juries in business cases.

The fall of 1997 also marked the first ABTL annual seminar to include the Orange County chapter. Many of us traveled to Rancho Mirage to hear Supreme Court Justice Janice Brown and legendary teacher of trial advocacy Jim McElhaney speak on selecting and persuading juries. Our own Judge Gary Taylor, Judge Stu Waldrip, and Wylie Aitken were also program speakers.

We then moved into our second year of operations. The officers and board remained the same, and Jeff Shields continued to line up excellent speakers for our programs. Among the highlights of our meetings that second year included hearing from Tom Girardi and Pierce O'Donnell on pursuing and resisting large damage verdicts; Jim Brosnahan on expert witnesses; Judge Gary Taylor, Justice Jack Trotter and Larry Feldman on whether to choose federal court, state court, or ADR; Don

Martens, Judge Tom Thrasher, Ted Millard and Judge Sheila Fell on handling the difficult case; and Judge Alicemarie Stotler, Joe Cotchett, and Max Blecher on judicial trends toward diminished discovery and timed trials. These speakers comprised a "who's who" of the most successful and well known trial lawyers and/or judges in California. All of these programs were very well attended. More importantly, all were stimulating and informative, with lots of practical advice to those of us in the business trial bar. The high caliber of the speakers demonstrated that the OC Chapter of the ABTL had really hit its stride.

In February 1999, I passed the President's gavel to Tom Malcolm, who capably took the organization forward, expanding our membership to over 500 members. During Tom's presidency, the ABTL Report -- with its candid interviews of Orange County jurists and in-depth articles about current topics of interest to business trial lawyers -- was first published. Justice Rylaarsdam was the impetus behind this newsletter and Dean Zipser served as its first editor. In subsequent years, Bob Palmer, Andy Guilford, Jeff Shields, Mike Yoder, Dean Zipser, Judge Sheila Fell, Gary Waldron, and now Jim Bohm ably served as Presidents of the Orange County ABTL.

Throughout the 10 years of our existence, our programs have remained consistently excellent. And our meetings have continued to be well attended by the judiciary, allowing for a true dialogue between bench and bar far beyond that afforded by any other law organization. All of us who have been members of the ABTL over these last ten years should justifiably be proud of what we have accomplished.

▪ *Donald L. Morrow is a litigation partner in the Orange County office of Paul, Hastings, Janofsky & Walker LLP.*

-Big Brother: Continued from page 5-

disclosed." (*Shulman, supra*, 18 Cal.4th at 232.) Thus, the mere presence of a video camera under circumstances that constitute an invasion of privacy can give rise to liability, even if the evidence obtained is never in fact used.

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Video and Audio Surveillance

It is quite clear that an employer can monitor employee activity using a video camera that is in plain sight in a common area, such as a lobby, hallway, entry or exit. This is particularly true in a setting in which security is a concern. (See, e.g., *Sacramento County Deputy Sheriffs' Ass'n. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1487 [Video surveillance in a non-private office in a county jail.]) It is equally settled that an employer cannot conduct video or audio surveillance of employees in areas in which the employees have a clear expectation of privacy, such as restrooms, locker rooms or other areas designated for changing clothes. (Labor Code § 435.) The issue is less clear, however, when an employer installs a secret video or audio monitoring device, particularly when it is placed in an area in which there may be some expectation of privacy.

In *Sanders v. American Broadcasting Companies* (1999) 20 Cal.4th 907, an undercover ABC television reporter obtained employment as a “telepsychic” with Psychic Marketing Group (“PMG”), and secretly videotaped a conversation with another individual who was employed as a telepsychic with PMG. When the employee sued for invasion of privacy, ABC argued that the employee had no reasonable expectation of privacy because the conversation occurred in a common area where the employee could be overheard by others. Rejecting this argument, the California Supreme Court held that the possibility of being overheard by co-workers does not render unreasonable an employee’s expectation that conduct and conversations in a nonpublic office will not be secretly recorded and transmitted to the public at large. (*Id.* at 923.)

Because it involved intrusion by a television reporter, the *Sanders* case will not necessarily apply with equal weight to situations in which an employer videotapes its employees. But the case is noteworthy for its observation that an employee can have a reasonable expectation of privacy in a setting that is not completely private.

The *Sanders* case also highlights the fact that audio recording raises greater concerns than mere video recording, because an audio recording is generally seen as more intrusive. It should also be noted that Penal Code section 632 prohibits the secret electronic recording of confidential communications, and such recordings are inadmissible under Penal Code section 631.

The *Sanders* decision was applied most recently in *Hernandez v. Hillsides, Inc.* (2006) 142 Cal.App.4th 1377 [review granted Jan. 3, 2007], a case involving video surveillance by an employer. In *Hernandez*, an employer discovered that employees were downloading internet pornography on various computers. The employer installed a hidden camera in an office that was shared by two employees whose computers had showed that kind of activity, in the hope of catching them in the act. The employees discovered the camera and sued for invasion of privacy. The court of appeal held that the employees could legitimately have an expectation of privacy in their office, even though it was shared, and people could readily walk in and out. Thus, they might have a claim for invasion of privacy under these circumstances. (*Id.* at 1390-91.)

While the court in *Hernandez* also seemed concerned that the employer had not made a showing as to why the camera needed to be on all the time, the key point is that the employees could have a reasonable expectation of privacy in a setting that was not completely private. It should be that since the California Supreme Court has granted review in this case, the matter is unresolved at this time. But *Hernandez* does not appear to be an unwarranted extension of *Sanders* and the cases on which it relies, and employers and their counsel would be wise to assume, at least for the time being, that *Hernandez* is the law.

Some Practical Advice

Since practitioners who defend employment claims are often involved in counseling employers during the pre-claim stage, there is an opportunity to help clients avoid some of these problems, and increase the likelihood that evidence gathered through surveillance will ultimately be admissible if there is subsequent litigation. If an employer is considering surveillance, the following guidelines should be considered:

- ◆ Articulate and document a strong business justification for the surveillance. If the surveillance is based on reasonable suspicion of wrongful activity, be sure there is a strong factual basis for the suspicion.
- ◆ Before installing a camera, carefully consider whether the location and setting is such that employees would have a reasonable expectation of privacy.

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- ◆ Ensure that the surveillance is no more extensive than is reasonably necessary to record the conduct at issue.
 - ◆ Consider advising employees in advance of the existence of the surveillance, preferably in writing. The surveillance may have a beneficial deterrent effect.
 - ◆ Avoid secret audio recording under all circumstances.
- *E. George Joseph is a litigation partner in the Irvine office of Nossaman Gunther Knox Elliott LLP.*
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-Bunch: Continued from page 3-

I have had the honor of serving on or leading the Chapter's Nominating Committee each year since its formation. (In fact, I found myself on the committee after I spoke up at a Board meeting suggesting that we form one.) It has been a tough job -- because we have fewer slots available on our Board than interested lawyers and judges to fill them. To accommodate and recognize the interest and role of our judiciary in ABTL, during my year as president we created our Judicial Advisory Council, through which we have six additional judges who attend our Board meetings and participate in Chapter business.

Finally, our judges have helped us reach out to our younger lawyers. From the outset, we have always strived to make the organization meaningful to all business litigators, not just the most experienced ones. To further this objective, our judges have opened their courtrooms and welcomed our newer lawyers by hosting our regular "brown bag lunches." These lunches are limited to lawyers practicing 10 years or less and enable these lawyers to get to know our judges and justices in a more informal and less threatening environment. By all accounts, they have been a huge success. Thus far, the following judges have welcomed groups of younger lawyers into their courtrooms and chambers: From the Federal Court, District Court Judges David Carter, James Selna, and Magistrate Judge Arthur Nakazato; and from the State Court, Court of Appeal Justices William Rylaarsdam, Eileen Moore, Kathleen O'Leary, Richard Fybel, Orange County Superior Court Presiding Judge Nancy Weiben Stock, and Superior Court Judges David Velasquez and Gail Andler. We thank all of you.

The ABTL is a strong, vibrant statewide organiza-

tion. Our Chapter started with a strong foundation, and is thriving now. I am so grateful that I have had a chance to play a part in its development, and I encourage all of you to get more involved in the organization.

▪ *Dean J. Zipser is the managing partner and head of the litigation group of the Irvine office of Morrison & Foerster LLP.*

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Office of the U.S. Courts. This website contains comments, testimony and complete transcripts of the hearing regarding the changes to the Federal Rules of Civil Procedure related to electronic discovery.

The Electronic Evidence and Discovery Handbook, Forms, Checklists and Guidelines, Nelson, Olson and Simek, Published by the ABA Law Practice Management Section. This book has approximately 70 pages of *Interrogatories, Requests for Production and Deposition questions*.

Electronic Evidence, Law and Practice, Rice, Published by the ABA Section of Litigation.

The Discovery Revolution, E-Discovery Amendments to the Federal Rules of Civil Procedure, Paul and Nearon, Published by the ABA.

Electronic Evidence and Discovery: What Every Lawyer Should Know, Lange and Nimsger, Published by the ABA Section of Science and Technology Law.

Issues

Virtual offices, as well as, portable and linked business operations allow for the transport, retrieval and transmission of data between business servers and desktops at the office or at home, as well as between business servers and laptops and a variety of hand held devices. This also means electronic information can be stored on the servers, desktops, laptops or hand held devices as well as back-up tapes, discs, CDs, DVDs, Zip discs, Memory cards and USB drives. The discoverable information may not be centrally located at the business office. It could be stored off-site. Therefore, discovery requests and inquiries should be directed to identifying what discoverable information is stored off-site and which devices contain the discoverable information.

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Deleted data is often retrievable. It is easy to destroy hard-copy information, but much more difficult to destroy electronic information. Electronic experts can assist in the retrieval of this data.

Electronic notes: The informality of the electronic medium may help explain why people will make statements or pose questions in e-mails which would not normally be memorialized in formal letters. Also the speed of communication and response seems to invite brevity and informality. These informal notes and correspondence are often very important evidence in litigation.

Metadata: This is information about the data itself. The metadata will provide useful information regarding the creation and modification of a document. Such information may include the date, time and person who created or modified a document. The information could also contain who sent or received a document or the name of a person who last accessed a document.

The accuracy and authenticity of electronic data can be at issue. Phantom financial transactions can be recorded and false documents can be created in electronic data systems. The integrity of these electronic systems should be probed and tested in order to gauge the reliability of information obtained.

Retention, Preservation and Spoliation:

Retention involves the business policies related to the systems employed to review, retain and destroy documents received or created by a business. The Association of Corporate Counsel, "acca.com" provides information for a Model Corporate Records Retention Plan. Electronic and hard-copy records can be deleted or destroyed so long as the records are maintained per statutory guidelines or for reasonable periods of time to maintain operations of the business or as a result of litigation or government investigation.

Preservation involves the issue of preserving documents related to litigation.

Spoliation involves the issues of destroying or deleting documents related to litigation. Spoliation may result in adverse jury instructions, issue sanctions, monetary sanctions and default judgments.

Cost of Electronic Discovery in terms of time and dol-

lars: The size and complexity of electronic data can be overwhelming and the ability to review and analyze all of the documents obtained in discovery may be constrained by time and budgetary restrictions. However, reviewing these same voluminous documents in a hard copy format is virtually impractical in many situations. The electronic version of the data allows for filtering and sorting techniques to be applied to the electronic alpha and numeric data which can facilitate the analysis. In addition, a step by step discovery plan will help minimize the information overload.

Where do you find E-Evidence?

Desktop and laptop hard drives: The most up to date information concerning the data generation of an individual will generally be maintained on these devices.

Networks and servers: Generally these devices have the core company information. This is information which is generally useful company wide rather than to a particular individual.

Back-up sources: Occasionally drafts and information deleted on the network and server or deleted from the hard drives of desktops and laptops will be saved on back-up tapes, discs, CDs, DVDs, Zip discs, Memory cards and USB drives. In litigation, the drafts and information deleted from the network, servers and hard drives may be invaluable.

Hand held devices: PDA (personal digital assistants), cell phones, blackberries, electronic tablets, and hand-held computers may have stored e-mails, text messages, saved voice messages, financial spreadsheets, statistical data, video recordings, audio recordings, pictures, and letters.

Discovery Plan

A plan for the discovery of electronic data is similar to traditional discovery. The plan begins in general and then becomes more refined as facts are discovered.

At the outset it is essential to gain an understanding as to the company's computer systems. Such as identification of the electronic devices which could potentially store electronic evidence, as well as, identification of the operating systems and custom software. In addition, a description of any networks operating at the company, along with the company backup processes and retention policies, policies regarding employee access both on and

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off-site to company electronic data, logs monitoring employee use, internet policies, e-mail mailbox management procedures and a description of off-site electronic devices used for company purposes.

Identify the key personnel with respect to electronic data and the related hardware, software and systems, including all current and former employees who have worked in this area.

Through the use of interrogatories the basic information surrounding the electronic records is obtained. The answers to the interrogatories will provide the opportunity to depose the key I.T. representatives on more focused issues.

The electronic evidence request for documents should be made at this time. In the event the software is customized it may be helpful to request an onsite inspection by a computer expert who can review, analyze and retrieve information from the electronic data system subject to court ordered protocols.

Upon review of the documents and information obtained during discovery it may be determined that the integrity of the data has been compromised or that the information contains false or misleading information or that information has been deleted, destroyed or not completely produced. The remedy is to seek additional discovery or bring motions to compel proper discovery.

Conclusion

The ever changing landscape of technology creates an environment in which practitioners are driven out of necessity to stay abreast of current innovations. In order to discover relevant evidence, inquiries must be made. These inquiries need to be broad enough to encompass not only technology currently known but also technology which may not yet be known by the practitioner.

▪ *Jaime C. Holmes, CPA, CVA, ABV, J.D. is a partner of the firm Zamucen, Curren, Holmes & Hanzich LLP. The firm specializes in Business Valuations and Forensic Accounting. Mr. Holmes graduated from the University of Redlands with a Bachelor of Science degree in Quantitative Decisions Analysis and he earned his J.D. from Western State University with emphasis in Taxation. He was associated with a "Big Eight" CPA firm, serving clients in the litigation support and audit departments, and has worked in business management positions.*

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Thank you ABTL!

By Rebecca L. Cien

My first introduction to the ABTL was in 1994 assisting with the planning of an ABTL Annual Seminar at the Four Seasons on Maui. It was a lot of work, but not a bad deal when you got to work in a sarong and flip flops.

Having worked at the LA County Bar for a short time, I was familiar with bar associations and meeting coordination. With my new experience planning a large scale event, I “hung out my shingle” and began my consulting services for bar groups. By 1996 I was representing the ABTL Los Angeles chapter providing service as their executive director.

When the ABTL-Orange County chapter was formed in 1997 it was natural for me to take on the same role for this organization.

I feel very fortunate to have worked with the ABTL for the past 11 years and the O.C. Chapter for 10 years. I have learned a great deal from all the officers and board members with whom I have been fortunate to work. I am very proud that my experience has helped the ABTL Orange County chapter do exceptional things, such as raising money for the Public Law Center. This is truly an exceptional organization made up of exceptional lawyers and judges. I am the one person in a crowd of people that doesn’t understand the bad lawyers jokes, because all the lawyers that I know and work with are the nicest people I have ever known and had the privilege to work with.

When the opportunity to relocate from California to Texas was presented to me, the decision to move wasn’t as hard as the reality that I would be saying good bye to ABTL. This organization has become an extended family to me and finally after all these years I know almost all the judges by sight and can have their name badge in hand before they reach the registration table!

Thank you ABTL and Happy 10th Anniversary !

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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