Determining Sentencing Laws after Cunningham
page 31

To the Fore
Gretchen M. Nelson is the Association’s 2007–08 president page 13

PLUS
Filming on the High Seas page 16
Lottery Rules and Online Promotions page 21
Medicare Fraud page 24
The Deepwater Port Act page 40
California Aon Attorneys’ Advantage Insurance Program
Building the Foundation for Lawyers’ Protection
ONE BLOCK AT A TIME

The Sponsored Program is Back...
And Better Than Ever
• A.M. Best “A” rated carrier
• Administered by Aon, a long-standing leader in professional liability
• Sponsored by the LACBA
• Preferred lawyers’ professional liability policy
• Secure online application to obtain a quick rate quote

Superior Features® Exclusive to LACBA Members
• Aggregate & loss only deductible options
• Free retiring “Tail” coverage to qualified attorneys
• Supplementary payments for defense and loss of earnings
• Claims Expense Outside the Limits (CEOL) option
• 1, 2, 3, 5, and 6 year and unlimited tail options
• 50% Deductible reduction for arbitration
** See policy for complete detail

Aon Insurance Solutions
A Wide Selection Of Business and Personal Products Available To LACBA Members
• Court Bonds Products
• Businessowners’ Insurance
• Employed Lawyer Coverage
• Employment Practices Liability
• Personal Umbrella Insurance
• Auto & Home Insurance
• Health Insurance

Aon Attorneys’ Advantage Benefits
• Local and regional offices
• Complimentary newsletter: The Quarter Hour
• Private access Risk Management Resources website
• Fax-On-Demand Solutions papers

You can now APPLY ONLINE for a quick and convenient no-obligation professional liability insurance rate quote. Simply visit the Aon Insurance Solutions website today. www.aonsolutions.com/lacba2

To speak with an Aon representative, call toll free 800-634-9134

Brought to you by: Aon

Sponsored By: LACBA

Some insurance products in this program may be underwritten by carriers not licensed in California.
CA Insurance License #: 0795465
State Bar members pay one low fee
20 hours MCLE credit including a complimentary 1-hour self-study program in the area of Prevention/Detection of Substance Abuse
206 CLE sessions with a 21-program Bench Bar track
Networking receptions
Entertaining special events for attendee and family
100+ legal vendors in the Annual Meeting Exhibit Hall

Save $100!
Register by August 27, 2007
Hotel Reservation Deadline August 27, 2007

Keynote Speakers

Thursday, September 27
State Bar Luncheon
James Bradley
California Women Lawyers Annual Dinner
Eleanor Clift

Friday, September 28
State Bar Breakfast
Charles Charnas
State Bar Luncheon & Morrison Address
Mayor Antonio R. Villaraigosa

Saturday, September 29
Bench Bar Luncheon
Dr. Jane Goodall, DBE, Founder,
Jane Goodall Institute, UN Messenger of Peace

www.calbar.ca.gov/annualmeeting or call for a brochure at 415.538.2210
Clients don’t care about ...almost... winning

The financial advisor you use can affect the ultimate result.

We deliver better results through:
- Investigative capabilities that discover otherwise-hidden evidence
- Experience-directed research and analysis that delivers right answers the first time
- Better-trained full-time personnel with focused, relevant experience
- Technology that provides responsive, cost-effective answers
- Persuasive visual presentations, by consistently following our proven methodology

Because of this, we have an unequalled track record in successful court testimonies and substantial client recoveries.

Call us when you need:
- Damage analysis & related testimony
- Economic & market studies
- Electronic discovery & computer forensics
- Fraud & other investigations
- Business & asset valuations
- Forensic accounting & audits

To avoid mistakes, follow the online advice at www.fulcruminquiry.com, or call us at 213-787-4100 to get a free no-obligation consultation.
FEAT URES

24 Doctored Claims
BY JOHN P. KRAVE AND MARC E. JACOBOWITZ
Healthcare providers need to adopt the highest ethical standards to avoid the labyrinth of whistleblower actions

31 Sentence Structure
BY NICOLE EILAND
California is still scrambling to adapt to the U.S. Supreme Court’s decision in Cunningham striking down the state’s Determinate Sentencing Law.

40 Port Authority
BY SHEILA D. JONES
In the approval of new deepwater ports, adjacent states no longer have permitting authority but may exercise veto power.

46 Special Section
2007 Guide to Investigative Services

DEPARTMENTS

13 President’s Page
Ensuring equal justice under law
BY GRETCHEN M. NELSON

15 Barristers Tips
The many benefits of Section 529 plans for education expenses
BY JEFFREY A. FIELD

16 Practice Tips
Navigating vessels used in filming through U.S. maritime laws
BY B. ALEXANDER MOGHADDAM

21 Practice Tips
Running an online contest without running afoul of the law
BY NATASHA SHABANI

60 By the Book
The Little Book of Plagiarism
REVIEWED BY MICHAEL A. GEIBELSON

64 Closing Argument
Taking tougher action against identity theft
BY KATHRYN KOLTS SHOWERS

10 Letters to the Editor

61 Classifieds

62 Index to Advertisers
Services for both simple and complicated dispute resolution

All types of disputes between individuals and companies

- Disputes between large corporations and small companies.
- Contract disputes of all kinds.
- Financial disputes of all types. Trade disputes.
- Homeowner Associations disputes and issues.
- Domestic and partnership relationship disputes including divorce.

ALL REAL ESTATE, INCLUDING: Evaluations + Contracts + Zoning + Development
- Construction + Secondary Marketing + Borrowers/Lenders + Residential Escrows
- Residential + Commercial + Apartments + Lending + Contracts

DAVID W. DRESNICK, PRESIDENT = ARBITRATOR/MEDIATOR
TEL (818) 790-1851 FAX (818) 790-7671 E-MAIL dave@mediationla.com
WEB SITE www.mediationla.com

Asset Protection Planning Now Can Insulate Your Clients’ Assets From Future Judgments

Yes, it’s true. By properly restructuring your clients’ estate plan, their assets and the assets they leave to their family will be protected from judgment creditors. Here are some of the situations in which our plan can help protect your clients’ assets:

- Judgments exceeding policy limits or exclusions from policy coverage.
- Judgments not covered by insurance.
- Children suing each other over your client’s estate.
- A current spouse and children from a prior marriage suing each other over your client’s estate.
- A child’s inheritance or the income from that inheritance being awarded to the child’s former spouse.

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 1/4 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

STEVEN L. GLEITMAN, ESQ.
310-553-5080
Biography available at lawyers.com or by request.

Los Angeles Lawyer

VISIT US ON THE INTERNET AT www.lacba.org/lalawyer
E-MAIL CAN BE SENT TO lalawyer@lacba.org

EDITORIAL BOARD

Chair
CHAD C. COOMBS

Articles Coordinator
ANGELA J. DAVIS
JERROLD ABELES
DANIEL L. ALEXANDER
HONEY KESSLER AMADO
ETHEL W. BENNETT
R. J. COMER
KERRY A. DOLAN
GORDON ENG
ERNESTINE FORREST
STUART R. FRANKEL
MICHAEL A. GIBBLESON
TED HANDEL
JEFFREY A. HARTWICK
STEVEN HECHT
LAWRENCE J. IMEL
MEROUDI KARASCH
JOHN P. LECRONE
KAREN LUONG
PAUL MARKS
DEAN A. MARTODIA
ELIZABETH MUNISOGLU
RICHARD H. NAMURA JR.
DENNIS PEREZ
GARY RASKIN
JACQUELINE M. REAL-SALAS
DAVID SCHNIDER
HEATHER STERN
GRETCHEN D. STOCKDALE
TIMOTHY M. STUART
KENNETH W. SWENSON
CARMELA TAN
BRUCE TEPPEE
PATRIC VERRONE

STAFF

Publisher and Editor
SAMUEL LIPSMAN

Senior Editor
LAUREN MILICOV

Senior Editor
ERIC HOWARD

Art Director
LES SECHLER

Director of Design and Production
PATRICE HUGHES

Advertising Director
LINDA LONERO

Account Executive
MARK NOCKELS

Marketing and Sales Coordinator
VICTORIA PUA

Advertising Coordinator
WILMA TRACY NADAU

Administrative Coordinator
MATTY ALLOWE BABY

LOS ANGELES LAWYER (ISSN 0162-2900) is published monthly, except for a combined issue in July/August and a special issue in the fall, by the Los Angeles County Bar Association, 261 S. Figueroa St., Suite 300, Los Angeles, CA 90012, (213) 896-6503. Periodicals postage paid at Los Angeles, CA and additional mailing offices. Annual subscription price of $14 included in the Association membership dues. Nonmember subscriptions: $28 annually; single copy price: $4 plus handling. Address changes must be submitted six weeks in advance of next issue date. POSTMASTER: ADDRESS SERVICE REQUESTED. Send address changes to Los Angeles Lawyer, P. O. Box 55020, Los Angeles CA 90055.

Copyright © 2007 by the Los Angeles County Bar Association. All rights reserved. Reproduction in whole or in part without permission is prohibited.


The opinions and positions stated in signed material are those of the authors and not by the fact of publication necessarily those of the Association or its members. All manuscripts are carefully considered by the Editorial Board. Letters to the editor are subject to editing.
Powerful Client Development resources …
Such as Martindale-Hubbell®, the #1 service for identifying expert counsel

exclusive Research Solutions …
Including Shepard’s® and The Wall Street Journal Online in association with LexisNexis®

customizable Practice Management tools …
Fully integrated services to drive productivity and profitability

the only NITA® endorsed Litigation Services …
Covering the litigation process in the way that litigators work

Where do you find them?

LexisNexis® Total Practice Solutions

lexisnexis.com/tps
**Elder Law & Nursing Home Abuse & Neglect**

Law Offices of Steven Peck is seeking association or referrals for:

1) Nursing Home Abuse & Neglect (Dehydration, Bedsores, Falls, Death)
2) Financial Abuse (Real Estate, Theft, Undue Influence)
3) Trust & Probate Litigation (Will Contests, Trusts, Beneficiaries)
4) Catastrophic Injury (Brain, Spinal Cord, Aviation, Auto, etc.)

26 years experience

TOLL FREE 866.999.9085 LOCAL 818.908.0509

www.californiaeldercarelaw.com • www.premierlegal.org • info@premierlegal.org

**WE PAY REFERRAL FEES PURSUANT TO THE RULES OF THE STATE BAR OF CALIFORNIA**

---

**There is no substitute for experience.**

- Over 1,200 Successful Mediations
- 13 years as a full-time mediator
- 92% of Cases Resolved
- Director, Pepperdine Law School’s “Mediating the Litigated Case” program

**LEE JAY BERMAN, Mediator**


---

**REMC VIRTUAL OFFICES**

**EVERYTHING AN OFFICE SHOULD BE...WITHOUT THE WALLS**

Available in 4 Prestigious Locations Designed for Companies and Home Office Professionals

- Established business presence
- Private phone number with professional telephone answering
- Mail services
- 24 hour accessible voice mail
- Reception service
- Access to a day office or conference room
- Full array of business services available

4 Los Angeles Locations

- >5959 Century Blvd.  >6033 Century Blvd.

Call 310-356-4600

Full time offices also available in 13 Southern California locations.

---

**AFFILIATED BAR ASSOCIATIONS**

BEVERLY HILLS BAR ASSOCIATION
BLACK WOMEN LAWYERS ASSOCIATION OF LOS ANGELES, INC.
CENTURY CITY BAR ASSOCIATION
CONSUMER ATTORNEYS ASSOCIATION OF LOS ANGELES
CULVER-MARINA BAR ASSOCIATION
EASTERN BAR ASSOCIATION
GLENDALE BAR ASSOCIATION
IRANIAN AMERICAN LAWYERS ASSOCIATION
ITALIAN AMERICAN LAWYERS ASSOCIATION
JAPANESE AMERICAN BAR ASSOCIATION OF GREATER LOS ANGELES
JOHN M. LANGSTON BAR ASSOCIATION
JUVENILE COURTS BAR ASSOCIATION
KOREAN AMERICAN BAR ASSOCIATION OF SOUTHERN CALIFORNIA
LAWYERS’ CLUB OF LOS ANGELES COUNTY
LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES
LONG BEACH BAR ASSOCIATION
MEXICAN AMERICAN BAR ASSOCIATION
PASADENA BAR ASSOCIATION
SAN FERNANDO VALLEY BAR ASSOCIATION
SAN GABRIEL VALLEY BAR ASSOCIATION
SANTA MONICA BAR ASSOCIATION
SOUTHERN CALIFORNIA CHINESE LAWYERS ASSOCIATION
SOUTHERN CALIFORNIA JAPANESE LAWYERS ASSOCIATION
WHITTIER BAR ASSOCIATION
WOMEN LAWYERS ASSOCIATION OF LOS ANGELES
Integrity . . .
Reliability . . .
Performance . . .

Lawyers’ Mutual Insurance Company
Professional Liability Insurance

1978 - Legal Malpractice Insurance Crisis
- LMIC born out of insurance crisis
1979 - First policy issued
1980 - Loss Prevention Programs launched
1983 - Bar Association Errors and Omissions Programs introduced
- Lawyer Referral Service Programs offered
1985 - LMIC provides a market for lawyers abandoned in another
Legal Malpractice Insurance Crisis
1990 - Preferred Policyholder and Longevity Credits inaugurated
1991 - New Admittee Program introduced
1998 - Return of Contribution to Surplus approved by Board of Directors
1999 - Criminal and Insurance Defense Programs introduced
2000 - Appellate, Immigration, Mediation and Arbitration Programs added
2001 - LMIC flourishes in spite of yet another Legal Malpractice Insurance Crisis
- Strong Start Program (formerly New Admittee) reintroduced
2003 - Online MCLE offered
2006 - 11th straight year of dividends
- over $30,000,000 paid to policyholders

2007 . . .

Lawyers’ Mutual Insurance Company
A.M. Best Rated “A” (Excellent)
California Admitted
3110 West Empire Avenue
Burbank, CA 91504

call 1.800.252.2045
or visit www.LMIC.com

“Integrity is what we do,
what we say,
and what we say we do.”
— Don Galer
Karen Natapoff

Divorce Mortgage Specialist

“It is a rare mortgage broker with the skill and ability to bring to the dissolution table the expertise of a mortgage broker in combination with an in-depth understanding of related family law matters.”

-Nancy A. Kearson
Certified Public Accountant

“She has my highest endorsement, and I would recommend her, without reservation, as a professional in her field.”

-Steven Knowles, Esq.
Trope and Trope

FROM THE CHAIR

Writing articles on topics that are near and dear to your heart can be one of the best creative outlets for lawyers. So much of our work involves finding solutions for specific issues, which has its own rewards. Sometimes, if we are fortunate, we can create legal precedent through our work. But the reality is that most of our efforts are limited to the task at hand, and the rewards can seem fleeting.

Like many lawyers, I wrote my first article while in law school. I wish I could say I was thrilled when I submitted it for publication. The fact is, I was terrified that I hadn’t thought through my subject fully enough, that I had missed a major issue or angle, or, worse yet, that there was a flaw in my reasoning. Once published, my gaffes would live forever. Thankfully, at least to my knowledge, my fears were not realized (and if I am wrong about this, please don’t tell me). I give much of the credit to the editors—typically volunteers—who took as much interest as I did in my topic and spent many diligent hours reviewing my work.

As I continued to write, I found that the rewards were far greater than I ever imagined—including being cited in other articles and even a court decision. Writing articles is a way for lawyers to contribute to the law without necessarily having a vested interest in the matter we address. We can honestly write what we truly believe. And writing is a way to make a contribution that will hopefully long survive us.

Being on the Los Angeles Lawyer Editorial Board has likewise given me a sense of fulfillment. The articles offer a blend of practical guidance and intellectual insight that make the magazine unique, and I take great pride each time I see in print one of the articles I edited. When Jacqueline Real-Salas, last year’s chair, asked me to become the articles coordinator and future chair, I pondered how I would manage the time commitment—but I knew my answer was inevitably affirmative. It was something I had to do. I share Jackie’s sense of joy and enthusiasm for the magazine.

Working over the past five years with my colleagues on the Editorial Board has given me a tremendous opportunity to discuss emerging legal issues with others outside my firm. My work with authors also has been incredibly rewarding. Editing articles is far from a dry and technical exercise. Instead, the process allows me to analyze complex legal matters with lawyers in other firms and practices as we strive together to reach a common goal.

For me, the July/August 2007 issue is special not only because it is the first issue published during my chairmanship but also because of a remarkable coincidence. It just so happens that this issue contains excellent pieces on Internal Revenue Code Section 529 plans and California identity theft legislation. In prior issues of Los Angeles Lawyer, I have written on these unrelated topics.

Section 529 plans introduced a whole new way to save for college. Congress, recognizing how expensive college has become, created plans to allow the tax-free accumulation of earnings on the money saved for college. My article about these plans was the first article I ever wrote for a magazine, and I was thrilled just to hear from other lawyers seeking information for their clients and themselves (something that never happened with law review articles). In contrast, my article on California identity theft statutes has been cited in a number of law review articles.

I am sure the authors of all the articles in this issue and throughout the year will share my sense of reward. I am also certain that the readers will benefit as well.
DEAN SKUPEN PAYS ATTENTION

At Stonefield Josephson, we see the big picture while never losing sight of the person sitting across the table—you.

Our full-service certified public accounting firm serves public and privately held clients throughout the United States and internationally. We promise our thoughtful attention to your needs—call us for a complimentary meeting to discuss your situation.

Assurance/accounting
Executive search
Public companies services
Tax services
Valuation, litigation support and forensic services

Business consulting
– Profit enhancement
– Finance sourcing
– Mergers and acquisitions
– Family-owned business issues
– Succession planning
– Executive incentive compensation
– Business plans and budgeting

STONEFIELD JOSEPHSON, Inc.
Certified Public Accountants
Business Advisors
www.sjaccounting.com
866-225-4511 toll free

Los Angeles  Orange County  San Francisco  East Bay  Silicon Valley  Hong Kong

©2007 Stonefield Josephson, Inc.
Photography ©2007 John Livsey
As the executive director of the AIR Commercial Real Estate Association, I am writing in response to “Items to Negotiate in the AIR Standard Lease Form,” Nadav Ravid’s article appearing in the January 2007 issue of Los Angeles Lawyer. Although I think Ravid’s article offers a few valid points regarding the language in the AIR’s forms, I take exception to its unfair and inaccurate characterization of the professional commercial real estate broker, as well as its underlying theme regarding the value (or lack thereof) of the forms.

Before discussing the specifics of the article, I think it’s important to mention that the AIR has been in existence for over 45 years and has been producing contract forms for over 40 years. The organization currently has a membership of close to 1,700 agents and brokers throughout Southern California.

These 1,700 professionals work for over 250 different commercial real estate brokerage firms, including the largest firms in the world; some of which may be clients of Ravid’s firm, Buchalter, Nemer. We count among our member-firms industry leaders such as CB Richard Ellis, Cushman & Wakefield, Colliers-Seeley, GVA Daum, Grubb & Ellis, Lee & Associates, and the Staubach Company, to name a few. Members of the AIR represent some of the largest national and international commercial real estate owners, developers, investors, property managers, and tenants. I point this out to make readers aware of the fact that the AIR is one of the most professional, experienced, and respected commercial real estate associations in the country. The same is true of our members.

The first paragraph of the article makes the following statements: 1) Many landlords and tenants—and more important their brokers—favor using these forms because they help get the deal done fast and cheap—concepts that deal makers may perceive to be anathema to attorneys; 2) Often, the parties simply fill in the blanks on the front cover of the lease form, draft a short addendum to address issues specific to their deal, perhaps scoff at the notion of needing attorneys, and then sign the last page; 3) The parties rarely revise the language in the lease. After all, it is the standard form.

The first statement implies that all brokers focus on is getting paid. That is certainly not what I have learned in my 25 years of dealing with brokers. My experience is that the vast majority of brokers (AIR members or not) want to make sure their clients are well represented. Brokers want to be sure that when the client signs a lease the client is signing a contract that is fair and beneficial. To suggest otherwise is irresponsible. Furthermore, many of today’s commercial real estate brokers work with the same clients over and over. There’s a good reason for that, and it’s not because the broker is concerned only about getting the “deal done fast and cheap.” Rather, it’s at least partly because the clients know they have an advocate fighting for them during lease negotiations—regardless of how long it takes to get the deal done.

The next statement—that it is common for the parties to simply fill in the blanks on the form, add a short addendum, and scoff at the need for attorneys—is completely off base. It is my experience on the landlord and tenant sides of a transaction that the broker makes it abundantly clear that the client needs to have all documents related to the transaction reviewed by a competent attorney. On top of that, every AIR lease form, immediately above the signature block, contains language (which is presented in all capital letters) urging the parties to have the documents reviewed by legal and advisory counsel.

The last statement, which says that the parties rarely revise the language in a lease, is simply false. In fact, since 1998 the AIR has offered the AIR Contract forms Review; a full-day seminar aimed at educating the AIR’s forms users on the proper use of the forms (Ravid is cordially invited to attend one of our seminars as my guest). Much of the seminar is spent discussing the paragraphs in the forms that should be deleted or modified depending on whether a broker is representing a buyer, landlord, or tenant. The AIR forms are not intended to be used without modification.

As I already pointed out, the AIR has been producing contract forms for close to 40 years. Every contract we’ve ever created was created by an attorney—sometimes by a group of attorneys. This is the exact opposite of the author’s statement: “The AIR lease form was drafted and paid for by brokers.”

As I mentioned at the beginning of this letter, the article makes a few good points, and those points will be discussed at our next committee meeting in May. However, Ravid didn’t do his homework regarding the purpose and intent of the forms, and his subtle broker-bashing is without merit.

Timothy Hayes
Executive Director
AIR Commercial Real Estate Association

Author’s reply: In your letter, you seem to object to my perceived underlying themes and characterizations. I am sorry and disappointed that you misinterpreted my article as an attack on the broker community or the AIR lease form. I listed 10 substantive changes and issues to consider. You at least agreed with a few of them. Your letter fails to object to any of the 10 substantive comments I made. Assuming you could guarantee my safety, I would be happy to participate in your May meeting to provide my comments in person.

“New Requirements for Home Improvement Contracts” by Marion T. Hack (Los Angeles Lawyer, January 2007) was good, but I think it is better suited for the general consumer. However the article is a good reminder for the overworked lawyer who thinks that by skipping steps he or she can save money.

A follow-up story may be done about recourse when advances are made and the primary contractor files for bankruptcy, as well as a story about how homeowners may pursue subcontractors.

Fred Safford

Having been one of the attorneys who represented the plaintiffs in the Faulkner case, I read with rapt attention Robert Lyon’s
Who’s on California’s most wanted list?

A: Elizabeth Cabraser, Patrick Cathcart, Joseph Cotchett, Dana James Dunwoody, and Richard Seabolt to name a few.

With an untold number of laws on the books, it helps to have California’s most knowledgeable legal authority as your second chair.

At LexisNexis®, we’ve made it our top priority to recruit the experts that provide the superior analysis and commentary on the complexities of California law. We start with the best and share their insights so that you can feel comfortable with the sources you rely upon.

The Matthew Bender® name has a long-standing tradition in California law. However, we’re not content to rely on the successes of the past. We are constantly at work developing new analysis and commentary to help you stay ahead of the topics that will drive your business in the months and years to come.

With that in mind, we maintain a healthy mix of today’s principal authorities and tomorrow’s leading practitioners. So the content you rely on next year will be as fresh and as timely as the information you accessed last week.

LexisNexis®
To see the difference the right kind of research makes, visit www.lexisnexis.com/carightsolution.
March 2007 article, “Divisibility of Copyrights in the Digital Age,” in *Los Angeles Lawyer.* Lyon’s succinct recitation of the history of the *Faulkner* and the *Greenberg* cases widely misses the mark in its conclusion. Rather than clarifying, the *Faulkner* decision is a confusion of law based upon judicial misinterpretation of the facts. *Faulkner* is bad law that should be overruled.

Instead of resolving the issues, the Second Circuit’s decision has created confusion in the understanding of the copyright law of compilations. The *Greenberg* decision by the Eleventh Circuit more accurately states the analysis: To wit, regardless of their casual similarity in appearance, the addition of significant elements to what would otherwise be considered a revision of a compilation is not a revision of the original compilation but rather is a new collective work, which requires consent of the authors of the underlying content.

The *Faulkner* facts are virtually identical to those in the *Greenberg* case, and most of the defendants were the same. The two cases were based on the same circumstances in which authors’ works were originally licensed for publication in *National Geographic* magazine. *The Complete National Geographic,* as the CD-ROM package is called, is more than a revision to an anthology. It is a new product with new features, including a search engine, the moving montage, the Kodak advertising, and a .jpg file for each page (not for every two pages as stated by the court). If instead of a new product, the National Geographic Society had created a digital copy of its collections of the magazine in PDF with a table of contents and an index without adding the search engine, arguably it could have been a permissible revision. However, the Society went to great lengths to create a grand new product with bells and whistles that were far in excess of anything ever contemplated by the parties to the original licensing agreements. For including their works in the new collective work, National Geographic should have compensated the authors for the new uses in the new product that exceeded the scope of most of the contracts.

Under 17 USC Section 201(c), absent a contractual restriction to the contrary, a publisher who is granted a license by the copyright owner to publish a contribution within a collective work has permission to republish the contribution, provided that the republication or revision of the collective work is faithful to the original collective work. Irrespective of the medium in which it is published, the publisher of the collective work may not subsequently alter the collective work to the point where it no longer resembles the original collective work. The subjective question of similarity is a matter to be resolved by the fact finder. The *Greenberg* case was heard by a jury. However, the *Faulkner* case, which was designated for a jury trial, was never presented to a jury. Instead, the trial court in deciding legal issues on the defendants’ summary judgment motion imposed his own interpretation of the facts to find a revision rather than a new collective work.

It is misleading to state that the *Faulkner* case was primarily concerned with the concept of media neutrality. While the potential for copyright abuse is endemic to digital publication, it was not the point of the case. Media neutrality was a red herring injected into the case by the defense to distract the court from considering the real issue—addition of the substantial new product elements.

As a result of the Second Circuit’s decision, there is a split between two circuits with no resolution of important issues in the digital age. This matter remains ripe for Supreme Court review. Unfortunately, the Supreme Court’s rejection of the petition for certiorari resulted in the authors’ denial of compensation for the unauthorized replications of their works. Simultaneously, the National Geographic Society is left with an unsatisfactory situation in which it may legally publish *The Complete National Geographic* in the Second Circuit territory but not in the Eleventh. Had *Faulkner* been brought in another jurisdiction friendlier toward content owners rather than publishers, conceivably the outcome would have been quite different. Until a subsequent case on this subject is accepted for review by the Supreme Court, American copyright law will be frozen in time with the confusion of two circuits in conflict and no resolution of the interpretation of an important Section 201(c) principle.

**William D. Gardner**

David F. Blaisdell’s Closing Argument, “Seeing Red in the Yellow Pages,” is a bit petulant or perhaps borne of jealousy. The *Los Angeles Lawyer* of April 2007 in which the article appeared was primarily advertising from lawyers and their experts. Some ads therein provide no information: We bring focus to your story, or We see the big picture. Many clients, particularly underserved clients needing legal help, turn to the yellow pages because they have always turned to the yellow pages for help. With over 175,000 lawyers plying their trade in an overcrowded sea, just because a lawyer has multipage ads does not mean that the lawyer does not offer quality services. We are sworn to uphold the law, and last time I checked, the First Amendment is one of the big ones. Will Blaisdell campaign against massive Web sites next? We don’t need him to give the State Bar unsound reasons to continue to overregulate our practice.

**Daniel Bernard Wolfberg**
Ensuring Equal Justice under Law

ETCHED IN THE ARCHITRAVE above the marble columns that front the main entrance to the U.S. Supreme Court are the familiar words Equal Justice Under Law. These four simple words form the heart of our system of justice. They drive us to recognize the importance of the rule of law and the need for checks and balances on those who govern. But more important, the phrase compels us to acknowledge that every person is entitled to an equal opportunity to be heard.

We speak often of the fact that equal justice is achieved by ensuring that everyone who enters the judicial system is entitled to a trial before a jury and to voice their grievances to a judge who will rule fairly and with respect. But all too often we forget the critical role that lawyers play in ensuring equal justice.

The first, and most obvious role, is representation. This year, when Justice Earl Johnson Jr. accepted the Los Angeles County Bar Association’s Outstanding Jurist award, he spoke eloquently about the importance of representation for all people, not just those charged criminally but also those seeking recourse or appearing in the civil courts. As Justice Johnson explained, equal justice is hard to come by when the battle is waged between a pro se litigant and an attorney.

Justice Johnson’s words echoed and expanded on a comment by Justice Hugo Black in Griffin v. Illinois: “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”1

Deborah Rhode, the director of the Stanford Center on Ethics and the Ernest W. McFarland Professor of Law at Stanford University, reports that “an estimated four-fifths of the legal needs of the poor, and the needs of two- to three-fifths of middle-income individuals, remain unmet.”2 She further writes that over the last two decades, and the needs of two- to three-fifths of middle-income individuals, national spending on legal aid has been cut by one-third and “legal services offices can handle less than a fifth of the needs of eligible clients.”

While there are many fine firms that have active pro bono programs, there remain many whose practices are driven by the demand for increased per-partner profits. Partners and associates in these firms are discouraged from spending time on pro bono projects and ultimately bend to the pressure of increasing their billable hours. Ironically, lawyers who spend time on pro bono work often report that those cases are ultimately far more satisfying than litigating a massive patent or antitrust case for a Fortune 500 company. This is not at all surprising to trial lawyers, who have long appreciated the joy of working long hours with no guarantee of financial return for individuals who have suffered severe injuries as a result of some negligent act or those who have suffered a financial loss from a fraudulent act. But in the end, the harsh reality is that there are far more indigent and middle-income individuals who are unable to obtain representation than there are lawyers willing to give time to assist them. We have the ability to change that. I urge all of you to accept Justice Johnson’s challenge and strive to ensure that everyone who enters the legal system has the benefit of legal assistance.

Second, we have an obligation to make certain that judges retain their independence and are not subject to unjustified economic pressures. Right now, U.S. district court judges are paid far less than many other federal employees. Many newly minted law school graduates—including some who have clerked for our federal judges—earn many thousands of dollars more than these judges. Please join the Bar’s efforts to correct this appalling fact by calling on your representatives in Congress to increase pay for federal judicial officers.

At the state court level, we must guard against untoward erosion in the conduct of judicial elections. No judge should ever have to mortgage a home to ensure reelection. And, none of our state courts should have to go begging for funding to fix courthouses that are seismically unsound or for simple necessities such as pencils and other supplies. We must also work hard to ensure that the Los Angeles Superior Court remains a strong and viable presence downtown. Recent efforts to develop the Grand Avenue corridor are to be applauded but not at the expense of the superior court. The seat of our local government is downtown. What message do we send to those who govern if they are able to walk blithely into their offices without ever having to pass by our courthouse? The old adage, “Out of sight, out of mind,” will no doubt result. Each of you must speak out to your legislators, county supervisors, and councilmembers and make clear that the superior court must continue to stand in its current position facing those who govern in City Hall and the county building.

Third, we bear a strong responsibility to ensure that judges do not abuse their positions. There are hundreds of highly competent and dedicated individuals who have been elected or appointed as judges to our state and federal courts. Each day they rule fairly, wisely, and with respect and civility. But there are some who do not. No lawyer expects to win every argument. But every lawyer expects to be treated with respect and civility. But there are some who do not. No lawyer expects to win every argument. But every lawyer expects to be treated with respect and civility.

Gretchen M. Nelson, a partner with Kreindler & Kreindler LLP in Los Angeles, is the 2007-08 president of the Association. She can be reached at gnelson@kreindler.com.
with respect when arguing. This Association—through the leadership of many, including Robin Meadow, John Collins, and Edith Matthai—has implemented ongoing programs and committees devoted to ensuring that those who judge do not abuse their power. But we cannot act alone. We need your input and insight into those who act improperly so that we can act to correct the problems.

Fourth, we must ensure that civil litigants retain the right to a jury trial. Every day, fewer and fewer cases go to trial. If we allow this to continue, we run the risk of decreased funding for civil jury trials and the potential demise of that right. Collateral damage also results from fewer jury trials, because that means that fewer lawyers are learning how to try a case. Although the system could not survive if every case went to trial, a balance must be struck. We must encourage our young attorneys to go to trial and not continually harp on settlement. If a client is prepared to go to trial and the settlement proposals simply are not in the ballpark, do not ever be afraid to try the case. If you find yourself fearful of an impending trial, think of this: Trials are like airplanes, they take off every day.

And, finally, we must never, ever give up. We have an obligation to stand strong for the principles to which we committed ourselves when we took that oath and became members of the bar. But more importantly, we each owe it to ourselves and to our community to remain a presence in the law. I was deeply disappointed to read the cover article of the February 2007 issue of *California Lawyer*. Titled “We Quit,” it confronted the increasing trend of women leaving law firms and the law. As only the ninth woman elected to run this 129-year-old Association, I simply cannot, and I will not, sit by and watch women check out of the practice of law. Moreover, this disturbing trend parallels the concerns of the legal community and the public over the general absence of diversity in the bar and the bench. Your Association, through the extraordinary efforts of a committee of amazing lawyers chaired by President-Elect Danette Meyers, recently sponsored a two-day summit aimed at promoting dialogue and commitment to action to increase diversity in the Los Angeles legal profession. That dialogue and the Association’s commitment to increasing diversity will continue. But, each of you must join with us because it is only through you that we will truly have equal justice under law.

The Many Benefits of Section 529 Plans for Education Expenses

MANY RECENT LAW SCHOOL GRADUATES have walked off the stage with a mountain of student loan debt to accompany their diplomas. For these new lawyers, the opportunity to take advantage of Section 529 of the Internal Revenue Code to deal with law school costs has long passed. However, they can avoid having their children suffer the same fate. A 529 plan can be an effective college planning tool for families or even useful in advanced estate planning situations.

A primary advantage for saving under Section 529 is the ability for the account to accumulate earnings tax-free and then permit tax-free distributions for qualified higher education expenses. Higher education includes most four-year accredited institutions (undergrad and graduate), two-year accredited institutions, or vocational training programs. Generally, qualified distributions include tuition, books, fees, supplies, and room and board (as long as the student is attending at least half-time).

Establishing a 529 plan normally will require an insignificant initial contribution. There is no tax deadline for setting up or contributing to a plan, as there is with IRAs or other qualified retirement plans. Unfortunately, contributions to a 529 plan are not tax deductible on the personal income tax returns of contributors. There is no income limitation that prevents or reduces the ability to contribute to a 529 plan. However, contributions cannot be more than what it would cost to provide for the qualified educational expenses of the beneficiary, and in California there is a contribution limit of $300,000 per beneficiary.

A 529 plan has some other limits that are similar to an IRA or qualified retirement plan. One is that the IRS will assess 10 percent additional tax for distributions that are for something other than qualified educational expenses. This is identical to the early withdrawal penalty for qualified retirement plans. Also, California assesses a 2.5 percent additional tax for nonqualified distributions. In addition to the total additional taxes of 12.5 percent, income tax will also be due on the nonqualified distribution. The income tax and additional tax are normally assessed at the designated beneficiary’s tax bracket, unless the participant (who is the account owner) closes the account and receives the nonqualified distribution. Exceptions to incurring the additional tax on distributions include the death or disability of the designated beneficiary and receipt by the designated beneficiary of a tax-free scholarship or tax-free educational assistance.

Another similarity to an IRA or qualified retirement plan is the ability to roll over a distribution. The rollover must be into another Section 529 plan and must be for the same designated beneficiary or a member of the beneficiary’s family. In addition to obvious family members, these include stepparents, stepsibling, or stepchild; brothers or sisters of parents; in-laws; and first cousins. Rollovers must be completed within 60 days of distribution and can only be performed once every 12 months for the same designated beneficiary.

A rollover may be particularly advantageous when a designated beneficiary completes college with a balance remaining in the 529 plan. Rather than incur taxes on a final distribution, the designated beneficiary can roll over or contribute the balance of the plan into another 529 plan for a family member. Another option is to instruct the trustee to change the designated beneficiary to a member of the prior beneficiary’s family.

Any U.S. resident who is 18 years or older can establish a 529 plan. When establishing the plan, the participant or account owner names a beneficiary. The beneficiary need not be a minor, and adults can open a plan for their own qualified higher education expenses. Distributions from the plan will be reported under the beneficiary’s social security number and not the participant’s tax identification.

Generally, a contribution to a 529 plan is considered a gift to the designated beneficiary and will not be included in the participant’s estate. However, the participant can still exercise control over the account in naming beneficiaries, rolling over the account, changing investment strategy, or closing the account and distributing the proceeds to the participant (subject to income tax and additional tax).

Consideration should be given to succession planning for the 529 plan. In California the participant can be an individual who has reached majority or an entity such as a trust, estate, partnership, corporation, or a custodian under the California Uniform Transfers to Minors Act. California permits a successor participant and contingent successor participants to assume control of the plan in the event of the untimely death of the original participant. The successor participants can be named at the time of establishing the account. Naming a successor participant in a will can also accomplish the same result as directly naming a successor participant, but delays may be inevitable under the probate process. Keep in mind that a successor participant will have the same control as the original participant. Alternatively, the contributor may be able to name a family trust or corporate trustee as the successor participant and possibly place limits on the control over the plan.

Section 529 plans may also be an effective estate planning technique for higher net worth individuals. A participant can accelerate the maximum annual estate tax-free gift into one lump-sum contribution. The current maximum annual estate tax-free gift a donor can make to an individual is $12,000. Utilizing a 529 plan, an individual may currently contribute up to $60,000 at one time—the equivalent of five times that maximum annual gift. (Married couples may double this amount.) A gift and generation-skipping transfer tax return (Form 709) must be filed during the tax year of the contribution. In the event the participant who made the accelerated gift dies within five years after making the contribution, that portion of the gift that represents the remaining calendar year gifts will be included in the participant’s estate for estate tax purposes.

More information on Section 529 plans can be obtained from www.irs.gov in Publication 970—Tax Benefits for Education. To learn more about California’s state-sponsored plan, visit www.scholarshare.com.

Jeffrey A. Field is a partner at Johnson & Field, LLP, in Los Angeles.
A FILM STUDIO OR PRODUCER needs a schooner to make a movie based on a Patrick O’Brian or C. S. Forester seafaring novel or, for that matter, on a Disneyland theme ride. Often, however, the perfect vessel for the role was built or is registered or owned overseas. Can it be used? This simple question gives rise to an armada of U.S. and foreign law issues through which the vessel must be safely navigated.

Two federal cabotage statutes—the Jones Act and the Passenger Vessel Services Act—bear on the question whether a foreign vessel can engage in coastwise trade; that is, transport merchandise or passengers within the territorial waters of the United States. These waters consist of the “belt, three…nautical miles wide, seaward of the territorial sea baseline, and to points located in internal waters, landward of the territorial sea baseline, in cases where the baseline and the coastline differ.”

The Jones Act generally prohibits the carriage of merchandise within such waters on any vessel that is foreign-built, foreign-registered, or foreign-owned. It provides:

No merchandise…shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise…between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States.

The term “merchandise” is broadly defined to mean “goods, wares, and chattels of every description.” The act prohibits the transportation of merchandise between any two points in the United States. These points need not be ports. The statute does not, however, prohibit the loading of merchandise onto a non-coastwise-qualified vessel, so long as the vessel does not discharge the merchandise at any place in the United States other than the place where the merchandise was loaded onto the vessel.

There are exceptions to the U.S.-built requirement. A vessel captured by a U.S. citizen in war and lawfully condemned as a prize or a vessel forfeited to the U.S. government and sold thereafter under applicable forfeiture statutes would qualify as U.S.-built. Likewise, a vessel wrecked in U.S. waters may qualify for coastwise trade if the repair costs exceed three times the salvage value of the vessel.

The Passenger Vessel Services Act concerns the transportation of passengers: “No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under penalty of $200 per passenger as transported and landed.” The term “passenger” is defined to mean “any person carried on a vessel who is not connected with the operation of the vessel, her navigation, ownership or business.” This act has been interpreted to prohibit any transportation of passengers exclusively within U.S. waters for any time. A violation of the statute does not require the disembarkation of passengers at a place other than where they boarded the vessel. Thus, a foreign vessel that takes passengers for a cruise entirely within the territorial seas of the United States violates the statute even if it returns its passengers to the same place where they boarded.

A narrowly defined exception to this prohibition exists. A vessel built or rebuilt outside the United States three or more years ago may be allowed to engage in coastwise trade if it qualifies as either a “small passenger vessel” or an “uninspected passenger vessel” and if the secretary of transportation, after public comment, determines that the employment of the vessel will not adversely affect either U.S. vessel builders or the business of anyone who employs U.S.-built vessels in the same trade. What constitutes a “small passenger vessel” or an “uninspected passenger vessel” is determined by a number of limiting factors, including tonnage and the number of passengers to be carried on board. These factors (and the unpredictable time it takes to apply for and receive a decision) make this exception an unlikely option for a studio or producer.

Actors, Film Crews, and Cameras

Within the Department of Homeland Security, the Customs and Border Protection Agency (formerly the U.S. Customs Service) is the

B. Alexander Moghaddam practices business, international, and maritime litigation in Santa Monica.
GUARANTEED SUBPOENA SERVICE, INC.

"If we don't serve it, you don't pay"

U.S.A. Only

(800) 672-1952 • Fax: (800) 236-2092
www.served.com/email: info@served.com

INTERNATIONAL
Call for cost • 1-800-PROCESS
WE SERVE ANYTHING-ANYWHERE!

Established 1965
agency responsible for enforcing U.S. coastwise laws. In several rulings, the Customs Service has addressed the question whether cast members, film crews, and film equipment fall within the definitions of “passengers” and “merchandise.”

A 1994 ruling in connection with the making of the film Waterworld is particularly instructive. King Kona Productions requested a ruling on whether it could use two 60-foot, French-built trimarans in the filming of Waterworld in U.S. waters off Hawaii. King Kona represented to U.S. Customs that “the boats will be sailed by Kevin Costner and other employees of King Kona solely for the purpose of being filmed by King Kona’s cinematographers.”

After reviewing the applicable coastwise laws, the Customs Service observed generally that the carriage of cast members and technicians on a vessel owned by the production company did not have a “sufficient nexus to the vessel’s operation, navigation, ownership or business to conclude they are other than passengers.” With respect to Costner and the Waterworld film crew, however, the Customs Service ruled that they would not be regarded as passengers if, as represented, they actually sailed the trimarans during the filming of the movie. In that event, Costner and the film crew would also be the vessel’s crew, and as such there would exist a sufficient nexus between them and the operation and navigation of the vessel to avoid a violation of the statute. As for the film equipment on the trimarans, the Customs Service ruled that they could be used, provided that they were loaded onto the vessel and unloaded from the vessel at the same place.

The prohibition against the use of a non-coastwise-qualified vessel in coastwise trade does not, however, bar all uses in U.S. waters. For example, unqualified vessels can be used in U.S. waters to carry passengers on “voyages to nowhere.” These consist of sailing the vessel beyond the three-mile territorial waters of the United States and then back to the point of departure. It bears emphasizing, however, that on these voyages to nowhere the vessel may not stop in U.S. waters either on its way out to the high seas or on its way back.

Similarly, a non-coastwise-qualified vessel may be sailed, with passengers and merchandise on board, from a point in U.S. waters to a point in foreign waters—from California to Mexico, for example—and then back to the point of departure in the United States. The vessel may also be used while in a stationary position in U.S. waters. A vessel moored, anchored, or docked may be used in the filming of a motion picture with actors and film crew aboard. Any other vessels used for transporting merchandise or passengers to the anchored,
moored, or docked vessels must be coastwise qualified.25

Foreign Flags

Generally, foreign vessels entering U.S. waters are registered either under U.S. law or under the laws of what are commonly referred to as flags of convenience. The U.S. Coast Guard, also now within the Department of Homeland Security, is the agency responsible for the documentation of vessels in the United States.26 Vessels of at least five net tons may be documented (or endorsed) for a variety of trades.27 Vessels of less than five net tons may be operated without documentation so long as they satisfy all other requirements for their use in any given trade.28 A registry endorsement permits a vessel to be used in foreign trade and probably is the only U.S. endorsement available to a foreign-built or foreign-documented vessel to be used in making a movie in U.S. waters.

A U.S. registry endorsement, however, like most U.S. endorsements, brings with it a host of requirements and restrictions. For example, the owner of a registry-endorsed vessel must be a U.S. citizen.29 A corporation owning a registry-endorsed vessel must meet several U.S. citizenship criteria to qualify for a registry endorsement.30 Among other things, a U.S. registry endorsement requires that the vessel have American crew members and imposes severe restrictions on the subsequent resale or lease of the vessel to non-U.S. citizens or the registration of the vessel under a foreign flag.31

Many ship owners and operators, therefore, turn to countries such as Panama and Liberia for flags of convenience. These countries typically do not impose any citizenship requirements on the owners or crews of vessels flying their flags, and they generally do not restrict the use of foreign-owned or foreign-built vessels in their national waters.

Subject to any applicable trade embargoes, the United States generally allows foreign-flagged commercial vessels to enter its waters for purposes of foreign trade, so long as the flag-country’s documentation criteria, as well as any applicable U.S. safety, customs, or environmental requirements are met. A vessel registered under Panamanian law for foreign trade, for example, is permitted to enter U.S. waters for that purpose. For purposes of its commercial activities, the vessel is treated in the same way as a vessel with a U.S. registry endorsement.

The penalties for violating U.S. laws can be severe. If a foreign-built vessel is employed in U.S. coastwise trade, a use for which it cannot be documented under U.S. or foreign law, the owner is subject to a civil penalty of up to $10,000 per day, and the vessel itself is subject to forfeiture to the U.S. government.32 The same penalties apply if the vessel owner
obtains a U.S. registry endorsement for the vessel but does not hire a U.S. citizen as its master.33 And any person who later knowingly sells or charters a U.S.-flagged vessel to a non-U.S. citizen faces possible imprisonment for up to five years.34

Foreign vessels, therefore, must be navigated carefully around the hazards that U.S. laws pose for their use in U.S. waters and their documentation. Studios and producers can avoid any Jones Act issues by ensuring that any merchandise, including film equipment, is not discharged from the vessel at any place other than where it was loaded onto the vessel. Alternatively, goods may be moved from the vessel used in the film to another vessel in foreign waters or board for voyages between a point in the territorial limit of the United States.

The prohibition against transporting passengers, including actors and film crews, in coastwise trade is more problematic. Studios and producers may be able to avoid this prohibition if they can qualify their cast and crew as part of the vessel’s crew and ensure that they participate in the operation or navigation of the vessel while in U.S. waters. Otherwise, they should only be allowed on board for voyages between a point in the United States and a point in foreign waters or a point beyond the territorial waters of the United States. During these voyages, filming is allowed, even while in U.S. waters, provided the vessel does not stop in U.S. waters. Filming is also permitted while the vessel is docked, anchored, or moored in U.S. waters.

With respect to the documentation of foreign vessels, a flag of convenience is probably the best option, because it permits the use of the vessel in U.S. waters in the same ways permitted by a U.S. registry endorsement but without the onerous restrictions that accompany U.S. documentation. It also allows the use of a foreign master and crew.

Finally, it also bears noting that the United States is not alone in imposing coastwise trade restrictions on foreign vessels. Many other countries have similar laws.

5 19 U.S.C. §1401(c).
7 See, e.g., HQ 116520; HQ 113935 (U.S. Cust. Serv. Dep’t Treas. May 9, 1997); HQ 112982 (U.S. Cust. Serv. Dep’t Treas. Jan. 12, 1994).
12 See, e.g., HQ 116520; HQ 113935 (U.S. Cust. Serv. Dep’t Treas. May 9, 1997) (citing T. D. 22275 (1900)); HQ 113483 (U.S. Cust. Serv. Dep’t Treas. July 27, 1995) (“Points embraced within the coastwise laws include all points within the territorial and navigable waters of the United States.”).
14 See 46 U.S.C. §§2101(35), 2101(42), 12112(b).
15 See 46 C.F.R. §67.3(c).
16 HQ 112982.
17 Id. See HQ 116520 (Film technicians are passengers under §289); HQ 113935 (Crew and crew are passengers.).
18 HQ 112982. See HQ 116520 (Persons commanding and crewing vessel are not passengers for coastwise purposes.).
19 HQ 112982. See HQ 116520 (Film equipment is merchandise under 46 U.S.C. App. §883.).
20 See, e.g., HQ 116520; HQ 113935; HQ 112982 (all citing 29 O.A.G. 318 (1912)).
21 See, e.g., HQ 113935.
22 Id.
23 HQ 113483.
24 Id.
25 Id.
26 46 C.F.R. §67.3(c).
33 Id.
34 46 U.S.C. App. §808(c).

WHY PAY MORE FOR LAWYER’S LIABILITY INSURANCE?
FILL OUT ONE APPLICATION AND YOU COULD SAVE UP TO 30% OFF YOUR CURRENT INSURANCE.

WHY PAY MORE?
Lawyer’s Liability Insurance is a necessary cost of doing business and you should not pay any more than you have to.

First Indemnity is the DIRECT underwriter for State National and First Mercury Insurance Companies. This insurance is not available through your local broker. By cutting out the broker, you cut out the red tape and in many cases increase your coverage.

By going directly to the source, you get the same great service, save money and generally increase your coverage.

CALL TODAY!

READY TO GET A QUOTE?
Call 800-982-1151 to find out how to you can save money and increase your coverage.

Go to www.firstindemnity.net and download an application.

© 2007 First Indemnity Insurance Services, Inc.

UNITED STATES. During these voyages, filming a point beyond the territorial waters of the United States and a point in foreign waters or board for voyages between a point in the Other, they should only be allowed on that they participate in the operation or navigation if they can qualify their cast and coastwise trade is more problematic. Studios and producers may be moved from the vessel used in the film to another vessel when in waters beyond the three-mile territorial limit of the United States.

The prohibition against transporting passengers, including actors and film crews, in coastwise trade is more problematic. Studios and producers may be able to avoid this prohibition if they can qualify their cast and crew as part of the vessel’s crew and ensure that they participate in the operation or navigation of the vessel while in U.S. waters. Otherwise, they should only be allowed on board for voyages between a point in the United States and a point in foreign waters or a point beyond the territorial waters of the United States. During these voyages, filming is allowed, even while in U.S. waters, provided the vessel does not stop in U.S. waters. Filming is also permitted while the vessel is docked, anchored, or moored in U.S. waters.

With respect to the documentation of foreign vessels, a flag of convenience is probably the best option, because it permits the use of the vessel in U.S. waters in the same ways permitted by a U.S. registry endorsement but without the onerous restrictions that accompany U.S. documentation. It also allows the use of a foreign master and crew.

Finally, it also bears noting that the United States is not alone in imposing coastwise trade restrictions on foreign vessels. Many other countries have similar laws.
Running an Online Contest without Running Afoul of the Law

INTERNET CONTESTS ARE INCREASINGLY POPULAR tools for companies to attract customers to their Web sites, sell products or services, or obtain personal information to be used for marketing. Consider the following hypothetical online contest: The Rutter Hobbs & Davidoff Web Site Refer-a-Friend Promotion. In this promotion, participants will be entered in a random drawing for an iPod once for every referred friend who subscribes to the company’s monthly legal e-newsletter. Online contests and promotions such as this are fraught with potential illegalities if the requisite precautions are not taken to ensure that the contest is structured properly. Companies sponsoring online contests must not only comply with the laws governing contests and sweepstakes in general but also address the many particular issues involved in marketing over the Internet.

The first concern when planning any sort of contest, promotion, or sweepstakes—whether conducted online or through traditional media—is to ensure that it does not constitute an illegal lottery. Lotteries may only be run by the 50 states, and non-state-operated lotteries are illegal under federal law and the laws of all 50 states. A lottery is defined as a contest or promotion that contains all three of the following elements: prize, chance, and consideration. In order to avoid conducting an illegal lottery, it is necessary to eliminate at least one of these three elements.

A prize is anything of value awarded to a winner of the contest. Since consumers likely would be uninterested in a contest that did not offer a prize, this element is difficult to eliminate. In the example contest, the prize is an iPod.

Consideration is something of value to the contest sponsor that the consumer provides as a prerequisite to participating in the contest. Consideration may be monetary (an entry fee or a purchase requirement) or nonmonetary (a significant amount of time or effort that the participant expends to the benefit of the sponsor). Common examples of nonmonetary consideration include filling out a lengthy registration form as a prerequisite to entering the contest providing the sponsor with personal information. Requiring a nominal degree of effort has generally been deemed not to constitute consideration (e.g., telephoning a toll-free number, completing a short survey, or visiting a store). In the example, getting friends to enroll on Rutter Hobbs & Davidoff’s Web site may constitute consideration, depending on the length of the registration form and the type of information the friends must provide.

Fortunately, it is relatively easy to remove consideration from a promotion, and sponsors often do so to avoid operating an illegal lottery. The most common way to eliminate consideration is to provide an alternate method of entry, or AMOE. This is usually manifested with “no purchase required” language. In the example, an AMOE could allow consumers to enter the drawing without referring their friends to the Rutter Hobbs Web site. This could be accomplished by mailing in a postcard or calling a toll-free number.

In general, AMOE entrants must have equal chances of winning as the purchasing entrants. They must also have equal deadlines and equal prizes. Additionally, the AMOE cannot itself rise to the level of consideration, and it must be clearly and conspicuously disclosed in all advertising materials for the contest. In short, the AMOE must not be seen as disadvantageous or burdensome with respect to the purchase entry method. For online contests, sponsors must be particularly careful to ensure that the AMOE provides the same opportunities to entrants as online entries. Thus games in which the first 100 people to respond win a prize could pose a problem, as the AMOE responders clearly would be at a disadvantage relative to Internet responders.

A question has arisen whether needing Internet access to enter an online contest constitutes consideration. Some state regulatory authorities previously answered this question in the affirmative, and contest sponsors had to provide mail-in methods of entry. However, this position has now been generally reversed. State regulatory authorities no longer consider the mere requirement of having Internet access as constituting consideration, for two reasons. First, the sponsor does not directly benefit from the consumer’s payment of fees for Internet access. Moreover, it is unlikely that the consumer was induced to purchase Internet access for the purpose of participating in the sponsor’s promotion. Thus, online contests that do not require any other consideration to enter generally do not require an AMOE. Requiring special software to be downloaded to the consumer’s computer in order to participate in the contest could, however, rise to the level of consideration, and an AMOE should be provided.

A common game of chance is a random drawing. Chance may be eliminated by awarding a prize to every entrant. In the example, chance could be eliminated by awarding an iPod to every person who gets at least one friend to register on Rutter Hobbs & Davidoff’s Web site. Alternatively, a sponsor may eliminate chance by conducting a game of skill in which winners are selected on the basis of some sort of ability, knowledge, creativity, judgment, or expertise. This eliminates the element of chance, allowing a sponsor to impose an entry fee or other consideration without creating an illegal lottery. Skill contests can involve photography, essay writing, athletics, cooking, or mathematics. Skill contests must have objective criteria upon which entries are judged, and the judges must have sufficient qualifications to apply such criteria.

Complying with State Laws

Once a company is confident that its promotion does not constitute an illegal lottery, it must still comply with the laws and restrictions of each state in which the promotion is conducted, bearing in mind that Internet contests are accessible in all 50 states and therefore must comply with the laws of all 50 states.

Unfortunately, state laws vary significantly and impose different procedural requirements. There are, however, a number of rules that have general applicability across the 50 states and should be included...

Natasha Shabani specializes in transactional intellectual property law at Rutter Hobbs & Davidoff in Century City.
in the official rules of all contests. These include entry instructions, the sponsor’s name and address, eligibility and geographical limitations, odds of winning, prize descriptions and their approximate retail value, contest duration and entry deadlines, how and when winners will be selected, limitation on the sponsor’s liability, and a disclaimer for lost, late, or damaged entries. A few states also require publication of the winners’ list and awarding of all prizes, so these elements should be included in nationwide promotions as well.

There are also several states that have special procedural requirements for certain types of contests. In Arizona, skill contests that require a purchase to enter must be registered with the state attorney general’s office. In Florida and New York, games of chance with prizes totaling over $5,000 must be registered and a bond must be posted, and Rhode Island requires registration of games of chance conducted through retail outlets with prizes in excess of $500. For many sponsors, it is simpler to exclude residents of these states from participating in their contest rather than comply with these extra, somewhat burdensome procedural requirements; hence the commonly seen limitation in many contest rules, “void where prohibited,” or more specifically, “void in Florida, New York, and Rhode Island.”

It is important to note that Internet contests, which are technically accessible worldwide, must comply with the laws of not only the 50 U.S. states but also each country in which someone could access the promotion. The laws and regulations of contests and sweepstakes vary widely from country to country. For instance, certain countries (Belgium, Malaysia, Norway) prohibit sweepstakes altogether, while other countries (including France and Spain) require registration and payment of fees. Even Canada has laws that differ greatly from those of the United States, particularly in Quebec, where foreign language requirements apply. International compliance would entail hiring local counsel in every country to provide an analysis of the proposed contest rules and confirmation that they do not violate particular local laws. This is not only prohibitively expensive but also too time-consuming to be a plausible option for most contest sponsors. Thus, U.S. sponsors of online contests are better off limiting participation to U.S. residents only, and perhaps a handful of select foreign countries in which they have checked the rules with local counsel. The key is to clearly and prominently disclose any geographic limitations to entry in the official rules and in other advertising materials.

**Intellectual Property Issues**

Although all sponsors of contests and promotions must exercise caution not to infringe upon the trademark, copyright, or patent rights of others when running their promotions, this is an issue of particular concern in the online arena. Promotions over the Internet generally are more high profile and involve greater exposure for the sponsor than more traditional media contests.

Contest sponsors must be careful about advertising prizes by using the brand name of the prize without consent from the trademark owner. Again relying on the example above, Rutter Hobbs & Davidoff could not name its contest the Rutter Hobbs & Davidoff iPod Giveaway. This would infringe upon Apple’s trademark and suggest a false association. Apple would most likely have to be a cosponsor of the promotion before it would agree to such use of its trademark in a contest name.

Rutter Hobbs & Davidoff would, however, be able to identify the iPod by name as a prize in the official rules. Contest sponsors may even be able to use brand names in promotional materials for their contests, so long as the trademarked brand is used in a factual manner (i.e., to identify the prize in the contest) rather than in furtherance of promoting the contest. A good general rule of thumb is to identify the trademarked term in a sentence in which all the words are of the same font and prominence and avoid use of the trademark in the name of the promotion or in any other prominent way.

Similarly, contest sponsors may not use trademarked event names, such as sporting events, in their promotion names. For instance, a promotion titled the Rutter Hobbs & Davidoff Super Bowl Sweepstakes would infringe on the National Football League’s trademark registration of “Super Bowl” because it suggests a false association between the contest sponsor, Rutter Hobbs & Davidoff, and the event organizer, the NFL.

Copyright laws protect original works of authorship fixed in a tangible medium of expression. Thus, copyright protection may be extended to creative materials embodied in contests and promotions such as music, audiovisual works, animation, graphic designs, illustrations, works of art, or written text. 

While nobody can copyright the underlying idea or concept of a contest or promotion, someone’s original expression of that contest may be copyrightable. In a 1995 case, the plaintiff ran a promotional radio contest, and the defendant subsequently ran a similar contest. The court found that the defendant had infringed the copyright in the printed brochure promoting the plaintiff’s contest, even though the underlying radio contest itself was not protected by copyright.

Finally, online contest sponsors should be aware of the growing number of business method patents being granted in connection with online games, particularly in the context of instant-win technology. Sponsors of online instant-win games should seek the advice of patent counsel to ensure that their game does not infringe upon a third party’s patent.

**Privacy**

Another area of law involved in online contests is privacy. The collection of personal information over the Internet implicates privacy laws. First, a hyperlink to the sponsor’s privacy policy should appear on the online entry form and on any page where personally identifiable information is collected.

In an effort to build e-mail databases, a common tool used by online contest sponsors is to require entrants to agree to accept future promotional spam as a condition to entering the contest. While, to date, no cases have been brought challenging this practice, Internet privacy concerns are on the rise, and regulatory scrutiny of this practice may soon occur. Similarly, the concept of viral marketing, in which contest entrants must provide the names and e-mail addresses of others in order to become eligible to enter (e.g., “Refer your friends by submitting their e-mail addresses, and be automatically entered into a drawing to win an iPod.”) also may raise concerns under privacy and spam laws.

Another area of concern for game sponsors related to privacy is COPPA, the Children’s Online Privacy Protection Act. This federal statute went into effect in April 2000 and addresses the collection of online personal information from children under the age of 13. The act requires a Web site operator to obtain verifiable parental consent before collecting personal information from children. Thus, a contest or sweepstakes that requires disclosure of entrants’ names, addresses, e-mail addresses, phone numbers, and any other information that would allow someone to contact or identify a child, must either exclude children under 13 from participating or else comply with the procedures set forth in COPPA. These procedures include requiring a clear and prominent link to the Web operator’s privacy policy, which must set forth the name and contact information of the entity collecting the child’s information, the kinds of personal information collected and how it is collected (e.g., directly from the child, or passively through cookies), how the Web operator uses the information (e.g., for marketing back to the child or for notifying contest winners only), whether the operator shares the child’s information with any third parties, and other required statements.

Before proceeding to collect, use, or disclose personal information from a child, an operator must obtain verifiable parental consent from the child’s parent. This means an
operator must make reasonable efforts (taking into consideration available technology) to ensure that before personal information is collected from a child, a parent of the child receives notice of the operator’s information practices and consents to those practices. Operators must use reasonable procedures to ensure they are dealing with the child’s parent. The particular mechanisms required are based on a sliding scale, depending on the manner in which the child’s information is to be used. If the Web site operator will be sharing the child’s information with third parties, it must use more stringent verification of parental consent, such as a signed form sent by postal mail or facsimile, an accepted and verified credit card number, a call from a parent on a toll-free telephone number staffed by trained personnel, an e-mail message accompanied by a digital signature, or an e-mail message accompanied by a PIN or password obtained through one of these verification methods. If the child’s information will only be used internally by the Web operator, then verifiable parental consent may be obtained using less stringent methods, such as e-mail from the parent plus sending either a confirmatory e-mail or confirmatory postal mail to the parent, or making a confirmatory telephone call to the parent.16

Because compliance with COPPA is fairly burdensome and requires several extra steps, many contest sponsors prefer simply to exclude children under 13 from participating in the contest, particularly in light of significant civil penalties that may be imposed for noncompliance. A recent occurrence in particular has caused Web operators, including online contest sponsors, to exercise extra caution with respect to children. On September 7, 2006, the Federal Trade Commission (FTC) smacked a social networking Web site, Xanga.com, with the largest-ever fine—$1 million—in connection with alleged violations of COPPA.17 In light of this, many online contest sponsors and other Web operators prefer not to undertake the risk of inadvertently violating COPPA and being slapped with a stiff fine. Unless the contest is geared specifically toward children, most online promotions limit eligibility to those 13 or over.

Other Concerns

Any material on the Internet is subject to malfunctions, errors, and viruses, not to mention hackers who may attempt to take advantage of contest offers by, for instance, inundating the contest Web site with entries and thereby preventing others from accessing the site. Accordingly, online promotions should always include a clause that disclaims liability for fraud, viruses, or other events that compromise the integrity of the contest and reserves the right to terminate or modify the contest in such a situation. Additionally, contest rules should limit entries to a particular number, such as one per day, per entrant.

The duration of the contest, and especially the deadline for entries, should be stated in terms of dates and precise times in a specific time zone.

Contest sponsors should ensure that the how-to-play instructions are clear and that any special technical requirements are set forth in the official rules. For instance, if an entrant’s browser must be set to accept cookies in order to effectively participate in the promotion, this should be set forth in the rules. In cases in which the game is relatively complex, entrants should have to indicate their acceptance of the official rules by clicking an I Accept button before being permitted to enter.

Steering clear of illegal lotteries, complying with myriad state (and possibly international) requirements, and respecting intellectual property and privacy laws are only a sampling of the issues facing online contest sponsors. There are various additional state and federal laws that come into play when running certain types of contests, such as instant-win games, contests offered in retail outlets, and direct mail promotions. Thus, sponsors of online contests should obtain proper legal counsel to ensure that they keep their promotions from running afoul of the law.

1 For the full text of the Xanga.com consent decree, see the FTC Web site at http://www.ftc.gov/os/caselist/0623073/xangaconsentdecree_image.pdf.
The success of WHISTLEBLOWER actions in medical fraud cases hinges largely on whether the government decides to intervene

THE FALSE CLAIMS ACT and its qui tam whistleblower provisions are an incentive for private parties to report previously undetected fraud by private contractors in federal government programs. Although the qui tam process applies to all federally funded programs, it has been especially potent in the detection and prosecution of healthcare fraud—but with unintended side effects that call into question the inherent fairness of the process.

For the government and for the whistleblower (also known as the qui tam relator), the law has been an enormous financial boon, returning billions to the treasury and offering a significant share for valued informants. If the government elects to intervene in a private false claims action, the Department of Justice (DOJ) will incur the time and expense of pursuing a recovery, while the relator—and counsel in most cases—will garner a percentage of the recovery. The federal government has very little to lose in the process, as it bears no financial responsibility to the whistleblower unless and until the government recovers proceeds from the alleged fraud.

Defendants—especially those who are innocent—will certainly differ with this positive picture of the law. The revised qui tam provisions may inadvertently encourage the leveraging of seemingly commonplace employment or business disputes into whistleblower actions intended to inflict maximum economic and often personal pain upon the accused provider. The relator often is a disgruntled employee or strategic competitor who is able to exact personal retribution on a scale difficult to achieve in more conventional litigation. If the federal government finds the allegations to be credible, it can dispatch investigators and counsel capable of paralyzing the defendant’s practice or business through a combination of protracted discovery and crippling attorney’s fees, handing a “victory” to the relator whether or not a trial ever occurs.

The civil False Claims Act had its origin in Congress’s intention in 1863 to stem the flood of fraudulent sales of inferior goods to the military. As the reach of the federal government has extended further into more aspects of American life, the application of the FCA has expanded accordingly. Given the dominant role played by the federal government in the healthcare delivery system, the use

by John P. Krave and Marc E. Jacobowitz
of the FCA as a principal enforcement tool in the prosecution of healthcare fraud is predictable.

The provisions of the FCA most relevant to healthcare investigations and prosecutions include:

- False claims
  - (a) Liability for Certain Acts—Any person who—
    (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
    (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
    (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;....
    (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
  - (b) Knowing and Knowingly Defined—For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information—
    (1) has actual knowledge of the information;
    (2) acts in deliberate ignorance of the truth or falsity of the information; or
    (3) acts in reckless disregard of the truth or falsity of the information, no proof of specific intent to defraud is required.

The initiator of FCA civil cases can be either the U.S. government, with prosecution by the DOJ, or the qui tam relator.

**FCA Violations**

Numerous courts have held that the term “person” under the FCA is subject to the broadest possible construction and encompasses individuals, corporations, partnerships, or other forms of association.

However, states and state agencies are not persons subject to FCA liability. Notwithstanding the exclusion of states and state agencies, in *Cook County v. United States ex rel. Chandler*, the U.S. Supreme Court ruled in 2003 that local governments and local governmental agencies are persons amenable to qui tam actions under the FCA. Accordingly, California hospital districts, which are organized pursuant to a division of the Health and Safety Code, may be subject to the FCA.

It is well established that the FCA extends to any person—including hospitals, physicians, or other providers—that submits a claim for payment to the Medicare or Medicaid contractor administering the applicable program. The decision in *United States v. Lorenzo* illustrates the distinction between the principal actor (in this case, Dr. Lorenzo), who directed the submission of the claim and knew of its falsity, and a corporate figurehead (Mrs. Lorenzo), who was unaware of the details of the scheme. The required knowledge standard may not be high, however, as mere participation in a scheme intended to result in the submission of false billings may be sufficient to trigger liability.

Further, merely instructing a third party in the submission of false claims is tantamount to causing their submission in vio-

---

**FCA Risk Management**

**HEALTHCARE PROVIDERS** can mitigate their risk of FCA liability by assessing their operations in the context of current government priorities and identifying and correcting deficiencies in legal compliance. Counsel should advise their healthcare clients to take a series of steps to reduce their vulnerability to FCA actions.

- Develop a compliance program. Providers should give strong consideration to the development of a corporate compliance program to mitigate the possibility of future legal violations and qui tam lawsuits. The Office of Inspector General (OIG) has encouraged adoption of such programs to the extent that they are a de facto requirement for institutional healthcare providers that wish to participate in government reimbursement programs, and their presence or absence may be a factor in determining the extent of penalties in the event of legal violations. In addition, the Delaware Court of Chancery has suggested that the adoption of an effective corporate compliance program may be essential to the satisfaction of the directors’ fiduciary duties to a corporation.

  The OIG has issued public guidance concerning the elements of an effective compliance program at its Web site and in the Federal Register to hospitals, individual physicians and medical groups, nursing homes, home health agencies, clinical laboratories, durable medical equipment suppliers, and other providers. In each instance, the OIG identifies issues of critical concern to the affected industry and encourages the following:

  1. The development of written standards of conduct, policies, and procedures.
  2. The designation of a chief compliance officer and other bodies as appropriate.
  3. The development and implementation of education and training programs.
  4. The organization of a process to receive complaints and a procedure to protect whistleblower anonymity and avoid retaliation against whistleblowers.
  5. The development of a system to respond to allegations of improper or illegal activities and the enforcement of appropriate disciplinary action.
  6. The conduct of audits and other evaluation techniques.
  7. The investigation and remediation of identified systemic problems and policies addressing the termination or retention of sanctioned individuals.

- Appoint a legal compliance committee. A provider’s board of directors should appoint a team of individuals to assess the level of legal compliance within the organization. Team members should include at least two members of the board of directors, legal counsel, and, as necessary, members of senior and midlevel management and specialty consultants. A director should act as chair of the committee. The CEO ordinarily should not be a committee member in order to avoid the conflict inherent in reviewing the organization he or she oversees.

- Select attorneys and other consultants to assist in the process. The selection of legal counsel and other outside
The FCA requires that the subject claim be objectively false or fraudulent. This most commonly occurs when the provider fails to perform the billed services or fails to satisfy all billing requirements. These cases are distinguishable from those in which the government’s billing standard is more subjective, and a claim is made that the care rendered was either unnecessary or not optimal. For example, in United States ex rel. Mathews v. HealthSouth Corporation, the court ruled that allegations made by the defendant’s former officer that the defendant failed to provide rehabilitation services for a sufficient number of hours per day did not support an FCA claim absent a statutory or regulatory definition of “intensive rehabilitative services.” Not surprisingly, a common defense to FCA cases is that the government regulation was ambiguous or that the claimant acted reasonably and was unaware of the government’s interpretation of the law.

A more difficult question arises in cases of alleged “false certification” of regulatory compliance. In essence, the relators allege that each time a provider submits a claim there is an implied certification not only that the services did not themselves violate other federal statutes or regulations. For example, a whistleblower might allege that the defendant obtained access to the patient by violating the federal prohibitions against kickbacks or self-referrals, and the defendant thus violated the FCA by submitting a claim with knowledge that he or she was not entitled to payment. While at least one court has agreed with the whistleblower’s claims on this point, the more common view is that the mere submission of a claim ordinarily does not amount to certification of the legality of the underlying service.

FCA violations occur only when the defendant has actual knowledge of the falsity of a claim or acts in deliberate ignorance or with reckless disregard of its truth or falsity. Courts may impute knowledge based on facts and circumstances. Reckless disregard for the truth of a claim may also be ascertainable from particular circumstances. An example is United States v. Krizek, which involved a defendant’s wife who submitted bills with little or no concern for their factual accuracy, and her psychiatrist husband, who failed to review her submissions.

Ordinary negligence, however, does not constitute reckless disregard under the FCA. For example, in Hindo v. University of Health Sciences/the Chicago Medical School, a medical school that sought federal reimbursement for work performed by radiology residents at a hospital did not violate the FCA even though the school was negligent in its failure to ascertain the approval of funding before billing the government. By similar reasoning, simple billing errors also may constitute negligence that is not actionable under the FCA if they are the product of clerical oversight and the billing provider has exercised reasonable controls over its financial operations. Nonetheless, as discussed by the court in Krizek, a prolonged series of billing errors, especially when coupled with the provider neglecting to review the bills for accuracy, may well cross the line into actionable reckless disregard.

The United States or a whistleblower need not allege actual damages in order to recover under the FCA. In many healthcare decisions, the government’s loss is equal to the amount it reimbursed the defendant for the false claims. However, under the FCA, the amount of damages calculated in accordance with the statutory formula is disproportionately to the amount of actual harm caused.

The Lorenzo case illustrates this point.  

advisers to assist the legal compliance committee should prevent internal politics and institutional biases from thwarting a thorough and candid assessment of legal risks. The selected attorneys and consultants should be expert in compliance issues and capable of objective and thorough analysis. The use of legal counsel to advise the committee also is helpful due to the availability of the attorney-client privilege to preserve confidentiality when necessary. Billing consultants and other specialized experts can work at the direction of legal counsel to keep their reports confidential as attorney work product. The investigating counsel should report to the board of directors, or a committee thereof, rather than to management, whose conduct will be subject to review.

• Review recent OIG Work Plans. The provider and its counsel should review recent OIG Work Plans to determine issues of particular interest to the OIG and the Department of Health and Human Services. Work plans are public documents available on the OIG Web site (http://www.oig.hhs.gov/fraud/exclusions.html) and CCH Web sites. Topics are arranged according to type of provider (such as hospitals, home health agencies, and the like) and payment program (for example, Medicare or Medi-Cal).

• Interview key personnel. Counsel or other consultants should interview critical members of the provider’s management team to determine areas of concern. Interviews of the CEO and CFO are crucial, but equally important are meetings with lower-ranking department managers, particular those integral to the billing process. The interviews should not be adversarial but should be firm and direct, with a paralegal or other person serving as an objective note taker. Midlevel managers are often sophisticated in issues of legal compliance and are generally willing to share their concerns.

• Review surveys. Counsel or consultants should review all recent surveys, audits, and inspections by government and private surveyors and accrediting agencies to determine previously identified deficiencies and the provider’s response to them. Healthcare providers should always develop a plan of correction in response to a survey or inspection to demonstrate their recognition of cited deficiencies and identify a strategy for remediation. Counsel or consultants should verify the provider’s progress in the implementation of the plan of correction.

• Review outside compliance materials. Journals, articles, and newsletters published by professional organizations with an interest in legal compliance issues (such as the American Health Lawyers Association and the Health Care Compliance Association) are generally available online and can provide a valuable educational baseline for committee members.

• Report to the board of directors. Upon completion of its review, the legal compliance committee should report its findings to the provider’s board of directors, including recommendations for remediation of compliance issues discovered by the committee. The committee may decide not to prepare a written report to avoid creating a road map for potential whistleblowers. The committee should consult legal counsel on an ongoing basis to ensure confidentiality of its activities and its findings to the maximum extent possible.

• Create an employee hotline. All compliance programs should include an employee hotline so that employees may anonymously report any perceived violations. —J.P.K & M.E.J.  

The defendant’s management company billed 3,683 separate claims to the Medicare program for oral cancer examinations. These procedures were part of routine physical examinations, for which reimbursement is unavailable by law. The Medicare program reimbursed the billing company for $130,719. The court calculated FCA damages as $130,719 trebled, or $392,157, plus $5,000 in civil penalties for each of the 3,683 individual claims, for an additional amount of $18,415,000.28 If the court had determined that the defendant’s conduct warranted more severe punishment, it could have increased the damages per claim to a maximum of $10,000, according to the express terms of the FCA.

The legislative history of the 1986 amendments to the FCA is explicit in stating Congress’s intent that the penalty of $5,000 per item act as a floor for damages, regardless of its relationship to the actual losses incurred by the federal government. Courts have been inconsistent in their application of congressional intent regarding this aspect of the act. The *Lorenzo* case resulted in a damage award and penalties equivalent to 140 times the government’s actual damages. By contrast, the court in *United States ex rel. Smith v. Gilbert Realty Company Inc.*29 concluded that FCA civil penalties that exceeded seven times the government’s actual loss would violate the Eighth Amendment prohibition against cruel and unusual punishment. In addition, there is at least some authority that the imposition of significant civil penalties following a criminal false claims conviction may violate the double jeopardy clause of the Constitution in some circumstances.27

**Whistleblower Actions**

The legal requirements for civil FCA actions, including whistleblower involvement, are contained in 31 USC Section 3730. Under Section 3730(a), the DOJ is authorized to prosecute healthcare fraud upon its own initiative and in the absence of a whistleblower. The U.S. attorney for the Central District of California has a longstanding health fraud task force that specializes in these matters. Section 3730(b) authorizes the commencement of actions by private whistleblowers and establishes the procedures and timing for such actions.

The whistleblower brings his or her action “in the name of the Government” and may dismiss the case “only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.” The whistleblower must serve the complaint on the federal government, which holds it under seal for an initial period of 60 days, during which time the government determines whether to intervene in the action. Due to a backlog of complaints, it is very likely that the government will seek and obtain court-approved extensions of the 60-day period, often for as long as two years. During this period, the defendant receives no formal notice of the proceeding, and neither the relator nor any other person may bring suit based on the underlying facts in the action under seal.

If the government intervenes, it has primary responsibility for prosecuting the claim and has the right to control the litigation, including taking measures to limit discovery or any type of participation by the whistleblower. It may dismiss the matter—but it must afford the whistleblower an opportunity to object—and may settle the matter subject to a court’s determination of fairness. If the government declines to proceed with the action, the whistleblower may proceed alone.

The qui tam relator’s award in a specific case will depend on whether the government elected to intervene and on the relator’s contribution to the case:

- Subsection (d) of 31 USC Section 3730 provides that in a case in which the government intervenes (an Intervention Case), the court will award the relator at least 15 percent but not more than 25 percent of the proceeds of the resulting judgment or settlement. However, the subsection limits the award to 10 percent when the action is based primarily on disclosures of specific information in a hearing, audit, investigation, or trial, or by the news media. In either case, the precise amount depends on the extent to which the relator actually contributed to the prosecution of the case, including the significance of the relator’s information. A relator receiving an award is also entitled to reimbursement for reasonable expenses, including attorney’s fees.
- In a case in which the government declines to intervene (a Nonintervention Case) and the relator brings the case to trial and prevails, the relator’s share of the recovery will be at least 25 percent but not more than 30 percent of the proceeds of the action or settlement. Again, the precise percentage depends on the extent of the relator’s contribution to the case. Also, a relator receiving an award is entitled to reimbursement for reasonable expenses, including attorney’s fees.
- The court may reduce the relator’s share to the extent that the relator “planned and initiated” the alleged FCA violation. A relator convicted of criminal conduct in connection with the FCA violation that led to the qui tam action is barred from recovering any share of the proceeds.

In a Nonintervention Case, according to Section 3730(d)(4), the court may award the defendant costs and attorney’s fees payable by the relator if the defendant prevails in the action and the court determines that the action was frivolous, vexatious, or brought primarily for purposes of harassment.

Section 3730(e)(3) provides that no person may bring a qui tam action based on allegations or transactions that are the subject of a civil suit or administrative proceeding in which the government is already a party. Under Section 3730(e)(3), if the defendant establishes that the relator’s action is based upon the “public disclosure” of allegations or transactions in “a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, or from the news media,” the relator may proceed with its action only if the relator establishes that he or she was an “original source” of the information. Section 3730(e)(4)(B) defines “original source” as meaning “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing the action.”

In order for an allegation or transaction to be “publicly disclosed” as required for purposes of the FCA’s jurisdictional bar, it must be publicly known through some affirmative act of disclosure as opposed to mere theoretical or potential public accessibility. For example, in *United States ex rel. Ramseys v. Century Healthcare Corporation,*30 the court held that a report accessible in response to a public records request but not affirmatively released to the public is not publicly disclosed for purposes of Section 3730(e)(4)(A). Last year, the Ninth Circuit ruled in *United States ex rel. Haight v. Catholic Healthcare West* that a response to a Freedom of Information Act request by a relator does not constitute a public disclosure suitable to invoke the jurisdictional bar in Section 3730(e)(4)(A).31

Under Section 3730(f), the government is not responsible for payment of expenses that a relator may incur in bringing a qui tam action. Also, Section 3730(h) prohibits retaliation against employees as a result of their actions in furtherance of a qui tam suit. The remedies may include reinstatement at equivalent seniority, double back pay, interest, and special damages.

Government statistics suggest that the DOJ’s decision whether or not to intervene in a qui tam filing is a sound indicator of the whistleblower’s likelihood of recovery.32 During the period covered by one government report, the government elected to intervene in only about 22 percent of all qui tam filings. Nonetheless, the Intervention Cases accounted for about 95 percent of all judgments or settlements among qui tam filings. Of the filings that reached resolution, 94 percent of the Intervention Cases resulted in judgment or settlement in favor of the relator, whereas only 6 percent concluded in a dismissal. Among the
The average judgment or settlement in all the Intervention Cases that have reached a resolution was $10,806,528, of which the relator’s average share was $1,781,080.32. In Nonintervention Cases, the average judgment or settlement was $145,037, of which the relator’s average share was $35,743. The much lower average judgment or settlement and corresponding relator’s share would seem largely attributable to the high percentage of Nonintervention Cases that are dismissed without an award.

Voluntary Disclosure

The voluntary self-disclosure of legal violations to the Office of Inspector General (OIG) offers a means by which a provider can potentially minimize exposure under the FCA. The OIG has stated that, regardless of the means of discovery, healthcare providers must be prepared to investigate fraudulent, abusive, and wasteful activities; assess the potential losses suffered by Medicare, Medicaid, or other federal programs; and make full disclosure to the appropriate authorities. Consistent with this principle, the OIG provides guidelines for self-disclosure.33

Many specialists in the defense of FCA proceedings believe it unlikely that the government will institute criminal prosecutions against a company as a result of its voluntary disclosure. The government apparently has not exercised its right to exclude a provider from participation in federal programs as a result of its voluntary disclosure. The FCA permits a court to assess double, rather than treble, damages upon the timely filing of a voluntary disclosure, and the DOJ will, on occasion, exercise its discretion to further limit a disclosing party’s financial exposure.

Voluntary disclosure has its risks, however. Most notably, despite its apparent track record to the contrary, the government offers no blanket assurances that it will refrain from civil, administrative, or criminal prosecution of a provider that has voluntarily disclosed past illegalities. Voluntary disclosure has the additional disadvantage of placing a provider directly within the range of the government’s regulatory radar, possibly causing the government to scrutinize the provider’s operations to a greater extent than it had previously. Finally, employees who participate in the provider’s internal investigation may file their own qui tam actions and seek to participate in the government’s recovery.

In short, voluntary disclosure requires a careful assessment of competing considerations. A provider and its legal counsel should make a careful preliminary assessment of the provider’s activities before considering voluntary disclosure. Moreover, they must manage the investigative process with an eye to mitigating the risks.

As a less intensive alternative to voluntary disclosure, a provider that reasonably does not believe itself guilty of healthcare fraud may elect simply to repay the amount of inadvertent overcharges to the government contractor that issued the overpayment. The provider should transmit the refund with a letter that explains why the erroneous claims were inadvertent rather than fraudulent and describes measures, such as education and discipline, that the provider has taken to prevent a recurrence of the errors.

The financial and emotional burdens that providers must bear in responding to an FCA investigation in which the federal government has intervened or is considering intervention cannot be overstated. The legal process can entail a series of broad and intrusive subpoenas spanning a series of years, often requiring thousands of hours of attorney time to generate thorough yet prudent responses and requiring employees to spend all their time sifting through documents instead of performing their normal tasks. Prosecutors are reluctant to remove criminal prosecution from consideration until the last possible moment and are understandably hesitant to provide advance comfort concerning the likely outcome of the matter, causing clients considerable concern for their future liberty or ability to earn a living.

Defendants believing themselves not guilty of the alleged offense often are unable to understand why their legal counsel consider it unwise to simply offer a compromise dollar amount to settle a complex case in which prosecutors are considering criminal penalties. This situation is especially difficult when legal fees are approaching or have exceeded the amount of the alleged fraud and the government, not surprisingly, is wholly unpersuasive. Because of these considerations, the best defense to FCA claims is to avoid them to the fullest extent possible through a program of disciplined ethical conduct and fair treatment of employees and other potential whistleblowers.

5. Hospitals submit Part A inpatient claims to their contracted Medicare intermediary. Physicians and hospitals submit Part B claims for professional and outpatient services to their contracted Medicare interme.
The Medi-Cal program also contracts with a “fiscal intermediary”—currently EDS.

United States v. Mackby, 261 F. 3d 821 (9th Cir. 2001).


Mackby, 261 F. 3d at 828.


United States v. Kieżek, 111 F. 3d 934 (D.C. Cir. 1997) (court reviewed time requirements for properly billing psychotherapy sessions).


42 U.S.C. §1320a-7(b).

The federal Anti-Kickback Law prohibits the payment or receipt of any form of remuneration as an inducement for the referral of goods or services reimbursed by a federal healthcare program. The self-referral prohibition (called the Stark Law after its principal author) prohibits a physician from referring certain designated services to a person or entity with which the physician has a financial relationship, except when the arrangement meets one of the structured exceptions to the law.


The Ninth Circuit has not ruled on this point regarding Medicare or Medi-Cal billing but did express skepticism concerning the viability of an “implied certification” in the analogous context of school district funding. United States ex rel. Hopper v. Anton, 91 F. 3d 1261 (9th Cir. 1996).

United States v. Larm, 824 F. 2d 780 (9th Cir. 1987) (in which the court, interpreting an analogous statute—now 42 U.S.C. §1320a-7b—imputed an allergist’s knowledge of particular billing codes).

United States v. Krizek, 111 F. 3d 934, 942 (D.C. Cir. 1997).

Hindo v. University of Health Sci./the Chi. Med. Sch., 65 F. 3d 608 (7th Cir. 1995).

Krizek, 111 F. 3d 934.


Id. at 1133.


United States ex rel. Haight v. Catholic Healthcare West, 445 F. 3d 1147 (9th Cir. 2006).


The total number of outcomes in qui tam filings do not add up to 100% because the government was “unsure” of the outcome of 29 filings, and 12 cases were regarded as “Inactive.”

The relator’s share of recovery was calculated on the portion of settlement or judgment attributable to his or her claims, which may not be the entire amount of the recovery. The government statistics did not indicate amounts actually recovered.

Los Angeles Lawyer July-August 2007
On January 22, 2007, the U.S. Supreme Court issued its decision in *Cunningham v. California*, galvanizing the California Legislature into action to enact urgency legislation to stabilize the state’s sentencing laws. Reiterating previous rulings on the issue, the Supreme Court held in *Cunningham* that California’s Determinate Sentencing Law (DSL) violate the Sixth and Fourteenth Amendments of the U.S. Constitution by permitting judges to impose longer terms based on aggravating factors not admitted by the defendant or found by a jury.

John Cunningham, a former police officer, was tried and convicted in Contra Costa County of continuous sexual abuse of a minor under the age of 14, the defendant’s 10-year-old son. Under the California Determinate Sentencing Law the offense was punishable by one of three precise terms of imprisonment: a low-term sentence of 6 years, a middle-term sentence of 12 years, or an upper-term sentence of 16 years. The judge could impose either the lower-, middle-, or upper-term sentence based on his findings on various aggravating and mitigating factors.

The judge found six aggravating factors, among them the vulnerability of the victim, the defendant’s violent and vicious conduct, the threat of bodily harm to the victim if he did not recant, and the defendant’s employment as a police officer. The court found one

Nicole Eiland is an associate with the law firm of Kaplan Marino in Beverly Hills. Her practice focuses exclusively on state and federal criminal defense.
SELECTING THE RIGHT NEU'
California's Foremost Mediator

The Academy is pleased to recognize over 70 neutrals.

Ann Anderson
(805) 563-6340

Armand Arabian
(818) 997-8900

Fred Ashley
(949) 852-0550

Eleanor Barr
(310) 201-0010

Michael Bayard
(213) 383-9399

Lee Jay Berman
(213) 383-0438

Tim Corcoran
(909) 798-4554

Lawrence Crispo
(213) 926-6665

Greg Derin
(310) 552-1062

Michael Diliberto
(310) 557-0043

Max Factor III
(310) 456-3500

Jack Fine
(310) 553-8533

Leonard Levy
(818) 981-4556

James Lingl
(805) 482-1903

Stefan Mason
(310) 286-7671

William McTaggart
(213) 810-4269

Steve Mehta
(310) 657-1001

Jeffrey Palmer
(626) 795-7916

At www.CaliforniaNeutrals.org you can search by subject matter expertise, location and preferred ADR service in just seconds. You can also determine availability by viewing many members' online calendars, finding the ideal neutral for your case in a way that saves both time and money.
The California Academy of Distinguished Neutrals is a statewide association of mediators and arbitrators who have substantial experience in the resolution of commercial and civil disputes and who have been recognized for their accomplishments through the Academy’s peer nomination and extensive review process. Membership is limited to individuals who devote substantially all of their professional efforts to service as a neutral, and is awarded regardless of provider affiliation.

TRIAL JUST BECAME EASIER
S & ARBITRATORS PROFILED ONLINE

Neutrals across Southern California, including...

Viggo Boserup  
(310) 829-0099

Christine Byrd  
(310) 203-7039

George Calkins  
(310) 277-4222

William Caplan  
(714) 641-3406

R.A. Carrington  
(805) 565-1487

Steven Cohen  
(310) 315-5404

Linda Fritz  
(619) 236-1848

Paul Fritz  
(805) 963-8789

Kenneth Gibbs  
(310) 309-6214

Matthew Guasco  
(805) 654-0911

Laurel Kaufer  
(818) 888-1840

Louise LaMothe  
(805) 563-2800

Deborah Rothman  
(310) 452-9891

Mark Rutherford  
(818) 889-2211

Myer Sankary  
(818) 325-8989

Ivan Stevenson  
(310) 540-2138

John Leo Wagner  
(714) 834-1340

Kenneth Weinman  
(310) 444-3030

To find the best neutral for your case, please visit our complete member roster at www.CaliforniaNeutrals.org
mitigating factor—the defendant’s lack of criminal history. The court imposed the upper-term sentence of 16 years. Cunningham appealed, asserting that his right to jury trial under the Sixth Amendment had been violated because the facts that increased his sentence were found by a judge using the lower preponderance-of-the-evidence standard, rather than by a jury of his peers using the beyond-a-reasonable-doubt standard.

In an unpublished decision, the California Court of Appeal upheld the conviction and sentence. Writing for the 2-to-1 majority on that issue, Justice Simons concluded simply that the 16-year upper term was the maximum statutorily authorized sentence “for committing a continuous sexual abuse.” A footnote acknowledged the Supreme Court’s ruling in United States v. Booker between the time of sentence and appeal but contended that the California determine sentencing structure complied with those directives, noting, “Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors.” Justice Jones dissented in part, finding the imposition of the upper-term sentence in violation of the Sixth Amendment and the Supreme Court’s ruling in Booker.

The California Supreme Court refused review. The U.S. Supreme Court accepted.

The Court’s Sixth Amendment Sentencing Crusade

In light of the Supreme Court’s line of sentencing decisions in Apprendi, Blakely, and Booker, the Cunningham ruling was not entirely unexpected. The Supreme Court’s disapproval of determinate or mandatory sentencing schemes began with the Court’s 2000 decision in Apprendi v. New Jersey. The Court held that any fact that is not found by a jury could not be used to increase a defendant’s sentence, lest it violate the defendant’s Sixth Amendment right to a jury trial.

That decision was followed in 2004 by Blakely v. Washington, in which the Court invalidated a Washington state sentencing law that permitted a judge to impose an exceptional sentence beyond the applicable statutory range if the judge found a substantial and compelling reason justifying the sentence. This case, according to Professor Frank Bowman, “plunged Sixth Amendment sentencing law deep down the rabbit hole.”

Two years later, in Booker, the Court applied this same reasoning to the Federal Sentencing Guidelines. In the first part of a two-part opinion, the court found that there was “no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [Blakely].” Both were “mandatory and impose[d] binding requirements on all sentencing judges that allowed judges rather than juries to find facts elevating a sentence.”

In the second part of the opinion, the Court remedied this constitutional error by making the Federal Guidelines merely “advisory” rather than mandatory. The remedial portion of the opinion penned by Justice Breyer, a longtime champion of the Federal Guidelines, acknowledges that the Federal Sentencing Guidelines’ carefully calibrated sentencing structure is constitutionally flawed but leaves the guidelines structurally intact. Federal judges must now “consider” or “take account” of the applicable guidelines but may exercise discretion to “depart” from or “vary” the sentence based on consideration of factors outlined in 18 USC Section 3553(a), such as “characteristics of the defendant,” “nature and circumstances of the offense,” and “need for treatment.”

In his dissent, Justice Scalia warned that Breyer’s remedial action would “wreak havoc” in federal district and appeals courts. Recognizing that authority to speak “the last word” resides in Congress, the Booker court said, “The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.” Despite the high court’s attempt to lob the Apprendi-Blakely problem onto the legislature’s court, Congress has yet to take up legislation to remedy the guidelines, leaving the Court’s “advisory” fix in place.

The Court’s fractured opinion has led to somewhat schizophrenic results throughout the circuits, drawing more questions regarding the “reasonableness” of a given sentence than it answers. The Booker ruling also left state courts with little guidance inremedying their own constitutionally offensive sentencing laws.

The California Supreme Court attempted to defend its sentencing laws in People v. Black. The court distinguished California’s practice from the invalidated Federal Sentencing Guidelines by reasoning that in the Booker decision, the U.S. Supreme Court reiterated that the decision in Blakely was to avoid the government’s practice of taking facts that could be, or once used to be, elements of crimes decided by juries, and giving them to judges to decide. That practice, the California court explained, was not implicated in the Black case, as none of the aggravating factors that a judge could use to justify picking the highest term involved facts traditionally charged to juries as elements of the crime.

However, a majority of the justices on the U.S. Supreme Court did not agree with the state supreme court’s hair-splitting distinction, finding that “in all material respects, California’s DSL resembles the sentencing systems invalidated in Blakely and Booker. Following the reasoning in those cases, the middle term prescribed under California law, not the upper term, is the relevant statutory maximum. Because aggravating facts that authorize the upper term are found by the judge, and need only be established by a preponderance of the evidence, the DSL violates the rule of Apprendi.”

Justice Alito’s dissenting opinion, joined by Justices Kennedy and Breyer, found California’s sentencing law to be indistinguishable in any constitutionally significant respect from the advisory guidelines scheme that the Court approved in Booker. Alito reasoned that because both systems subject the exercise of that discretion to appellate review for “reasonableness,” and because both California law explicitly, and the federal scheme implicitly, require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury’s verdict, there was no constitutional difference between California’s determinate sentencing and the advisory remedy under Booker.

The apparent dichotomy between the Apprendi-Blakely rule and the Booker remedy was highlighted by Justice Alito’s dissenting opinion. While the majority agrees that judicial discretion is proper, judicial fact finding is unacceptable. This ruling effectively gives sentencing courts full discretion in fashioning sentences. However, at the same time it encourages judges not to make specific and articulated findings of fact on the record, making the sentences handed down under these constitutional “indeterminate” and “advisory” remedial sentencing systems virtually unreviewable on appeal. This result seems to fly in the face of an important principle underlying the legislative intent of these various sentencing structures: to avoid disparity in sentencing between similarly situated defendants.

As with past Supreme Court sentencing decisions, the Cunningham majority was an odd alliance of traditionally antagonistic justices. Joining the liberal Justice Ginsburg were the usual suspects—Justices Stevens and Souter—but also joining were conservative Justices Scalia, Thomas, and new Chief Justice Roberts, who favor a traditional reading of the Sixth and Fourteenth amendments. Justices Kennedy, Breyer, and Alito dissented, echoing their continued disagreement with the entire line of cases beginning with Apprendi in 2000.

Temporary Remedies

In her opinion for the Court in Cunningham, Justice Ginsburg said that it is the state’s
1. In Cunningham v. California, the U.S. Supreme Court held that California’s determinate sentencing scheme violated the Sixth Amendment.
   True. False.

2. In Cunningham, the defendant was sentenced to 16 years—the upper-term sentence for the crime of continual sexual abuse of a minor under the age of 14.
   True. False.

3. California’s Determinate Sentencing Law under Penal Code Section 1170 prescribed a single mandatory sentence for a given offense and allowed for no judicial fact-finding.
   True. False.

4. The California Supreme Court upheld Cunningham’s sentencing in a 4-3 decision.
   True. False.

5. Justice Anthony Kennedy was the lone dissenting opinion in Cunningham.
   True. False.

6. After the U.S. Supreme Court’s decision in Cunningham, the California Legislature in March 2007 passed Senate Bill 40, which was urgent remedial legislation to temporarily stabilize California’s sentencing law.
   True. False.

7. According to Frank Bowman, the decision in Blakely v. Washington first plunged sentencing law “down the rabbit hole.”
   True. False.

8. In United States v. Booker, the Supreme Court remedied the constitutional error inherent in the Federal Sentencing Guidelines by making them mandatory rather than merely advisory.
   True. False.

9. All sentences issued under the now invalidated California determinate sentencing scheme have been overturned.
   True. False.

10. The remedial portion of the Booker opinion requires federal trial courts to consider factors under 18 USC Section 3553(a), such as the “nature and characteristics of the defendant” as well as other “discouraged” factors under the Federal Sentencing Guidelines.
    True. False.

11. The Los Angeles District Attorney’s Office has instituted the practice of bifurcating all trials and impaneling sentencing juries to hear aggravating factors as a way of complying with Cunningham.
    True. False.

12. Statistical evidence provided by the Federal Sentencing Commission suggests that under the post-Booker advisory system, federal judges are more likely to deviate from the Federal Sentencing Guidelines by ordering below-guidelines sentences.
    True. False.

13. Mario Claiborne received a much longer sentence than Victor Rita for committing the same crime.
    True. False.

14. Currently, 7 of the 12 federal appellate courts have held that a sentence within the Federal Sentencing Guidelines must be accorded a presumption of reasonableness or at least be given greater weight among the other sentencing factors.
    True. False.

15. Under Supreme Court Rule 35, a personal representative has been appointed to represent Mario Claiborne after his death on May 30, 2007, to avoid his appeal becoming moot.
    True. False.

16. Since Booker, Congress has passed several bills addressing the application of the Federal Sentencing Guidelines.
    True. False.

17. U.S. Solicitor General Paul Clement advised the Court in a memorandum not to grant certiorari for Beal v. United States because the case “squarely raises the same legal issue that this Court granted certiorari to decide in Claiborne.”
    True. False.

18. Los Angeles County handles 40 percent of California’s criminal cases.
    True. False.

19. The issue before the Court in Rita is how much weight judges should give to the guidelines now that they are only advisory.
    True. False.

20. The majority in Booker found “no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [Blockely].”
    True. False.
choice how it will bring its system into constitutional compliance. Several states, she noted, have modified their systems by calling on the jury to find any fact necessary for the imposition of an elevated sentence.

California’s Determinate Sentencing Law became operative on July 1, 1977, replacing the prior system under which most offenses carried an indeterminate sentence range from which judges had the option of choosing a term at any point along that range. As the California Legislature explained, “[E]limination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion”—that is, three choices rather than a nearly infinite number along a range.

A week after the Cunningham ruling, California State Senator and Democratic Majority Leader Gloria Romero proposed SB 40, an amended version of Penal Code Section 1170, in an effort to temporarily stabilize California’s sentencing system. This bill was given “urgency status” and was passed into law on March 28, 2007, with little opposition in either the Senate or Assembly. The bill, which took effect immediately, permits the judge in each case to choose between the lower, middle, or upper term provided by law for the particular crime without making certain findings of fact. This fix essentially reverts sentencing law back to California’s pre-1977 indeterminate sentencing days.

While the California Public Defenders Association remained neutral on the bill, some public defenders, such as San Francisco’s Jeff Adachi, lobbied against the remedy, favoring a “plead and prove” approach that would allow prosecutors to include aggravating sentencing factors in charging documents and bifurcated trials to consider those aggravating factors. In an opinion piece, Adachi voiced concerns that SB 40 would make it easier for judges to increase sentences and thereby increase the burden on the already overcrowded California prison system.

Currently California has 172,000 inmates crammed into facilities built to house about 100,000. Because of the uncertain impact on prison populations and the threat of a federally imposed inmate cap, SB 40 includes a two-year sunset provision based on the expected timeline for the establishment of a formal state sentencing commission. Perhaps anticipating the U.S. Supreme Court’s ruling in Cunningham, on January 18, 2007, Senator Romero had also proposed SB 110, which would create “a nonpartisan, independently staffed sentencing commission charged with the responsibility of collecting and analyzing sentencing and corrections data, developing statewide sentencing and corrections policies, and achieving uniformity and consistency in our sentencing practices.”

Other lawmakers question whether SB 40 actually solves the problem identified by the High Court. The bill allows judges more latitude in imposing sentences but does not provide for jury fact finding. Some legal experts, as well as State Senator Tom McClintock, argued that the bill should have provided for bifurcated sentencing proceedings in order to ensure its constitutionality.

California is also faced with the expensive task of resentencing cases in which a Blakely issue was raised on appeal and that are not yet final, with some predicting that as many as 10,000 previously sentenced inmates could be affected. The California Supreme Court has granted review in a number of those cases. Until the California Supreme Court provides guidance, it is unclear how Blakely-Cunningham errors will be resolved. For now, the Court’s ruling limits application to cases in which the upper-term sentence was imposed.

Some guidance as to allowable procedural mechanisms for remedying the Cunningham error came on March 28, 2007, from the Third Appellate District of the California Appellate Court. In its decision in Barragan v. Superior Court,22 the court allowed prosecutors to allege aggravating factors by amendment to the charging document and judges to hold a bifurcated trial on those allegations. In Barragan, the defendant, Alejandro Barragan, was accused of attempted murder and other crimes, the jury was impaneled, and the prosecution presented the first witness on January 23, 2007, before the prosecutor had learned of the Supreme Court’s ruling in Cunningham. The previous day, the prosecutor immediately moved to amend the information to charge a number of aggravating facts. The defense objected to this unconventional procedural tactic and filed a demurer to the amended information alleging that this procedure did not conform with governing statutes.

On appeal, the court upheld the trial court’s decision to overrule the demurer and bifurcate the trial so that the aggravating facts would be submitted to the jury only if it found the defendant guilty of one or more of the charged crimes. The court found that the statutory scheme does not require the prosecution to plead and prove aggravating facts at the preliminary examination. By providing prosecutors with a way to retroactively amend informations to include aggravating factors, the Third Appellate District seems to be encouraging the “plead and prove” remedy to California’s constitutional errors.

The Second Appellate District weighed in with People v. Diaz. In Diaz, a Los Angeles Superior Court judge imposed an upper-term sentence, finding four factors in aggravation. The appellate court overturned this sentence, finding that this was “precisely the type of judicial fact finding that is prohibited by Apprendi, Blakely, and Cunningham.”23 Once again, it was the remedy that proved to be the more difficult task. The court was unwilling to reverse the sentence and require the trial court to impanel a sentencing jury to weigh aggravating factors beyond a reasonable doubt, noting that California currently had no statutory system in place for selecting noncapital sentencing juries and, as such, had no procedural or evidentiary rules to govern such a sentencing “trial.” Therefore, acknowledging these real-life impossibilities, the appellate court imposed the midterm sentence on the defendant, referencing both the Barragan decision and the newly enacted sentencing legislation.

While awaiting a definitive answer from the California Supreme Court, California prosecutors have improvised ways to work within the ruling in Cunningham. Los Angeles County is the most heavily affected by Cunningham, as the county handles 40 percent of the state’s criminal cases. The Los Angeles County District Attorney’s Office issued a memorandum on February 16, 2007, directing its attorneys to give notice of aggravating circumstances in informations, and to seek jury findings on them at trial. There are few procedural mechanisms for such findings, however, leaving judges to decide questions of notice, discovery, and jury instructions.24 A majority of cases in the county are resolved by plea agreement. Prosecutors in Los Angeles County have received instructions to ensure that all plea bargains avoid any Cunningham issues by obtaining the appropriate waivers and admissions from defendants.

The Booker ruling has given federal district courts more leeway in fashioning sentences, allowing jurists to account for sentencing factors under 18 USC Section 3553(a), such as “nature and characteristics of the defendant” as well as other “discouraged” factors. To complicate matters, the ever-elusive “reasonableness” standard has been established to review out-of-guidelines sentences. Federal circuits have spent the last year wrestling with the reasonableness of various sentences handed down by district court judges.

Statistical evidence gathered by the Federal Sentencing Commission in the year since the Booker decision shows that sentences that dipped below the recommended guideline range have doubled from 6 percent pre-Booker to 12.2 percent post-Booker. Upward departures or variances have also increased from 0.78 percent before Booker to 1.4 per-
cent, suggesting that given more discretion, federal judges are more likely to be lenient. However, even with all of the increased discretion allotted to sentencing courts, 61 percent of cases still fell within the recommended guideline range and 25.4 percent fell outside of the guideline range only on a motion by the government recognizing the defendant’s “sub-\text{tencing formulas. The rather than tether them to mechanized sen-\text{tencing court imposed a 15-month sentence representing a 60 percent variance from the advisory guideline sentence.}"

On review, the Eighth Circuit found that this sentence represented an unreasonable departure, reasoning that such an extraordinary variance required equally extraordinary circumstances that were not present.

Prior to federal courts of appeal have adopted the lines. At issue was how much weight judges should give to the guidelines now that they are advisory. The Eighth Circuit decisions have not offered any helpful guidance on the issue of reasonableness, stating merely that a sentence is reasonable “[s]o long as the judge offers appropriate justification under the factors specified in 18 U.S.C. §3553(a),” and that a “range of reasonableness” is within the court’s discretion.28

Victor Rita is a decorated Vietnam combat veteran who was convicted by a North Carolina jury of making two false statements to federal agents about a parts kit he had purchased for a vintage battle rifle. As with Claiborne, Rita had no prior criminal history and there were no aggravating circumstances related to his background. However, the pre-sentence report prepared by the probation department after his conviction classified Rita as “an accessory after the fact” to alleged importation violations by the company that sold him the parts kit. This classification doubled his guideline sentence from 15 months to 33 months. The judge sentenced Rita to 33 months in prison in accordance with the recommended guideline range. Rita appealed to the Fourth Circuit, claiming that the judge gave too much deference to the guidelines and without explanation as to why other factors that would mitigate his advisory sentence were rejected. In upholding the sentence of 33 months, the Fourth Circuit found “that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory.” Thus, the sentence imposed was effectively double the sentence that would be contemplated solely under the facts found by a jury beyond a reasonable doubt.

In oral argument before the Supreme Court, lawyers for Claiborne and Rita argued

Under Supreme Court Rule 35, when a party to a case has died, a personal representative may be named if the legal interests would survive death. Obviously, this is not possible in a case involving a convicted individual who has sole legal interest in the outcome.

Finding a Bright Line

On February 22, 2007, the U.S. Supreme Court heard oral argument in Claiborne v. United States and Rita v. United States—opening the next chapter in the Apprendi-Blakely-Booker saga. Many observers had presumed that these cases would generate some bright line rule defining “reasonableness” under the now “advisory” federal guidelines. At issue was how much weight judges should give to the guidelines now that they are only advisory. Currently, seven of the twelve federal courts of appeal have adopted the stance that a sentence within the guidelines must be accorded a presumption of reasonableness or at least be given greater weight among the other sentencing factors. The other five circuits argue that sentencing judges should be free to adopt or reject the guidelines and allow judges to use reasoned judgment rather than tether them to mechanized sentencing formulas. The Rita and Claiborne cases sought to harmonize the definition of reasonableness among the circuits.

Mario Claiborne pled guilty to two counts of possessing and distributing 5.03 grams of cocaine base in violation of 21 USC §§841(a)(1) and 844(a). The district court determined Claiborne’s advisory guidelines sentencing range to be 37 to 46 months in prison. He provided evidence of a stable home life, that he had no prior criminal history, and there was no violence or threat of violence during the commission of the crime. Based on these mitigating factors, the sen-

Many different amici also jumped into the fray. In an amicus brief penned by Solicitor General Paul Clement, the Bush Administration urged the Court to declare that the guidelines are entitled to a presumption of reasonableness, hoping to set definite limits to judicial discretion. “The Guidelines are written and revised by an expert agency, with an intent to integrate all other sentencing factors with input from Congress and sentencing judges across the country.” The Justice Department as well as three U.S. senators—Edward Kennedy of Massachusetts, Dianne Feinstein of California, and Orrin Hatch of Utah—joined in a brief in the Claiborne case in defense of the Sentencing Commission and the guideline regime.

The National Association of Criminal Defense Lawyers (NACDL) argued in its amicus submission that both a presumption of reasonableness and an added burden of extraordinary justification for below-guideline sentences perpetrate the same constitutional violations supposedly remedied by the Booker ruling. By awarding the guidelines presumptive reasonableness and requiring judges to find extraordinary facts needed to justify significant guideline departures, the NACDL argues that the guidelines retain the same effect they did before the Court’s ruling in Booker, making the promised Sixth Amendment protections mere dicta. “Because judges continue to make the factual findings that determine the guideline range (or that permit deviation from it), the range must be no more than one factor among many that the judge should consider.”

Adding to the drama in this line of cases, Mario Claiborne was killed on May 30, 2007,
in an attempted car theft. On June 4, the Supreme Court declared the Claiborne portion of the case moot. Under Supreme Court Rule 35, when a party to a case has died, a personal representative may be named if the legal interests would survive the death. Obviously, this is not possible in a case involving a convicted and sentenced individual who has the sole legal interest in the outcome. While the companion case in Rita will still be decided, a decision in that case is not likely to provide a resolution to the specific issue of the reasonableness of a below-guidelines sentence.

In a somewhat impassioned supplemental memorandum, Solicitor General Clement implored the Court to take up Beal v. United States. The case, also out of the Eighth Circuit, “squarely raises the same legal issue that this Court granted certiorari to decide in Claiborne. If granted, Clement has asked that the case be placed on an expedited briefing schedule and oral arguments heard in early October so that a decision could be made this term. In his filing, Clement drew the Court’s attention to the mounting backlog of appellate court dockets awaiting clarification on this issue, stating, “The federal criminal justice system has a great need for this Court’s guidance concerning the nature and scope of review of out-of-guidelines sentences under Booker.”

Thus, it does not appear that the sentencing confusion caused by Booker will be resolved as soon as it once seemed, and criminal defense practitioners and clients will continue down the “rabbit hole.” Lamenting this uncomfortable descent after the Court’s ruling in Blakely, Bowman, paraphrasing the sentencing blogger Douglas Berman, wrote that Cunningham makes clear that at least six justices have “bought tickets to Blakely-land, so the most the rest of us can do is offer constructive suggestions about how to best order the affairs of that particular region.” Perhaps this latest sentencing hiccup will call the legislature to action, as it certainly seems California is in need of some kind of sheriff to bring order to Blakely-Land.

---

6 Apprendi, 530 U.S. 466.
7 Blakely, 542 U.S. 296.
10 Id. at 259.
11 Id. at 265.
tion of the facts that the judge deems relevant.”)

We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range....For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”.

PEN. CODE §1170.


Press Release, Sen. Gloria Romero (Jan. 18, 2007), available at http://dist24 casing.govoffice.com/index.asp?Type=B_PR&SEC={979D94F0-3BE-4FFA-90D1-71C93E3C084A}&DE={979D94F0-3BE-4FFA-90D1-71C93E3C084A}. Versions of the bill have passed both houses of the legislature, and proponents believe that it will not be difficult to work out the differences. Governor Schwarzenegger has given no indication that he would veto the bill.


United States v. Clai borne, 439 F. 3d 479, 480 (8th Cir. 2006).

United States v. Johnson, 427 F. 3d 423, 426-27 (7th Cir. 2005).

United States v. Saenz, 428 F. 3d 1159, 1165 (8th Cir. 2006).


Id. at 2.


Bowman, supra, note 8.
THE ENERGY COMPONENTS required to meet the needs of the United States over the next several years, if not longer, certainly include natural gas. For example, California has found, as it moves away from coal, that natural gas is part of its future. Most natural gas reserves are not located in the United States, and until recently, market economics have not favored the importation of foreign natural gas. This situation has changed, and Congress, in an effort to encourage transactions involving natural gas, has altered the regulatory regime applicable to that energy resource.

In 1996, Congress amended the Deepwater Port Act of 1974 to promote the construction and operation of deepwater ports as a means of importing oil into the United States and transferring oil from the Outer Continental Shelf. By 2002, the focus changed to include natural gas as well as oil. Once again, Congress amended the act. This time, Congress identified the purposes of the act to include promoting the construction and operation of deepwater ports for the importation of natural gas to the U.S. mainland as well as for transporting natural gas extracted from the Outer Continental Shelf. Conforming changes were made throughout the act to accomplish this congressional goal.

The Deepwater Port Act applies only to liquefied natural gas (LNG) ports and terminals that are sited beyond the seaward boundary of a state and all related structures and equipment, such as pipelines and buoys, to the extent they are located seaward of the high water mark. LNG terminals and ports located onshore and within state waters are regulated separately under the Natural Gas Act.

The Federal Energy Regulatory Commission (FERC) is authorized under the Natural Gas Act to determine whether a project proponent may own, site, construct, and operate facilities used to transport natural gas in interstate commerce and in the importation of natural gas when the proposed LNG facility will be located onshore or within state waters. In 2005, Congress amended the Natural Gas Act to, among other things, streamline the approval process for LNG facilities that are regulated under the act.

Sheila D. Jones is a partner in the Washington, D.C., office of Akin Gump Strauss Hauer & Feld, LLP. Her practice includes representing clients in environmental compliance matters and advising clients undertaking energy, infrastructure, and mixed use developments.
As amended, Section 3 of the Natural Gas Act grants FERC “exclusive authority” to approve or deny an application to site, construct, expand, or operate an LNG terminal.8 However, other federal agencies, such as the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service, still have authority to issue permits and grant approvals under their traditional statutory and regulatory authorities. Similarly, states with delegated programs under the Clean Water Act and the Clean Air Act also play a role in the approval of LNG facilities subject to FERC’s jurisdiction. In addition, all states with approved coastal zone management plans under the Coastal Zone Management Act participate in the approval of coastal and offshore LNG facilities subject to the jurisdiction of the Natural Gas Act.

In the amended Deepwater Port Act and the amended Natural Gas Act, Congress had similar goals: 1) to make the approval process, for the most part, a federal process, and 2) to streamline the review of applications. The jury is still out on whether the Deepwater Port Act will accomplish these goals.

**The Role of the USCG and MARAD**

A deepwater port, for the purposes of the Deepwater Port Act, is any fixed or floating manmade structure or group of structures, except a vessel, located beyond the seaward boundary of a state, that is or will be used as a port or terminal for the storage, handling, or transportation of oil or natural gas to any state.9 For liquefied natural gas facilities, the deepwater port includes all components and equipment that will be part of the port or terminal, such as pipelines, pumping or compressor stations, service platforms, buoys, and mooring lines to the extent they are located seaward of the high water mark.10 The act authorizes licensing of deepwater ports in the Exclusive Economic Zone along all maritime coasts of the United States.

No person may “transport or otherwise transfer” oil or natural gas between a deepwater port and the United States unless the deepwater port has a Deepwater Port Act license.11 In addition, no person may own, construct, or operate a deepwater port except in accordance with a Deepwater Port Act license.12

The Deepwater Port Act authorizes the secretary of transportation to issue a Deepwater Port Act license for LNG deepwater ports.13 As a result of agency reorganization, that authority has been delegated to the U.S. Coast Guard (USCG) and the Maritime Administration (MARAD) of the U.S. Department of Transportation. The duties of the USCG include:

- Managing the environmental review of deepwater port projects, including the National Environmental Policy Act (NEPA) review.14
- Coordinating interagency review of deepwater port license applications.
- Organizing public comment on license applications.
- Developing guidance for the oversight of postlicensing activities such as design and construction and the development and implementation of risk assessment and safety and security plans.
- Promulgating the deepwater port regulations.15
- Designating the nearest adjacent coastal state16 and other adjacent coastal state or states.17
- Overseeing all matters related to navigation safety, engineering and safety standards, and facility inspections under the Deepwater Port Act.

MARAD issues, amends, suspends, revokes, transfers, and enforces Deepwater Port Act licenses. In addition, MARAD prepares the Record of Decision for the license application and processes the license application in conjunction with the USCG. Finally, MARAD determines the financial capability and citizenship of license applicants.

For the most part, all other power and obligations assigned to the secretary of transportation under the Deepwater Port Act are shared by the USCG and MARAD. Therefore, unlike most other federal permitting schemes, there are two lead agencies under the act—and the agencies are located in different departments, which means two separate bureaucracies to navigate. That is the bad news. The good news is that the USCG and MARAD coordinate their activities with one another.

The act establishes a 330-day period during which the USCG and MARAD must review the application, complete their respective statutory obligations under the act, and either approve or deny the license application.18 Nevertheless, not every application is processed in 330 days, because the USCG and MARAD may stop the clock if other actions that must take place before an application can be approved or denied will not be completed within 330 days. For example, if the NEPA environmental review process will not be completed, the agencies may stop the running of the 330-day statutory mandate. If this action is taken, they are protecting license applicants who are not the cause of the delays from being penalized.

President Bush has directed federal agencies to expedite the reviews of projects that will increase the production, transmission, or conservation of energy while maintaining safety, public health, and the environment.19 However, while the number of license submissions has increased significantly over the past several years, agency staffing has not. Therefore, the issuance of a decision within 330 days of the Federal Register notice is not always a viable option. Still, the 330-day mandate puts pressure on the USCG and MARAD to move expeditiously.

**Jurisdiction of Other Federal Agencies**

Other federal agencies play a role in the review of a Deepwater Port Act application. The act states that an application “shall constitute an application for all Federal authorizations required for ownership, construction, and operation of a deepwater port.”20 MARAD issues licenses, but other federal agencies participate in the approval process.

The secretary of transportation must forward a copy of each application for review and comment to the federal agencies that have jurisdiction over any aspect of the ownership, construction, or operation of the deepwater port. Each agency receiving a copy of the license application has 45 days from the date of the last public hearing on the application to recommend approval or disapproval21 of the application.

During the same 45-day period, the U.S. Environmental Protection Agency (USEPA) has the opportunity to review the application to determine if the deepwater port will “conform with all applicable provisions” of the Clean Water Act, the Clean Air Act, and the Marine Protection, Research and Sanctuaries Act. After doing so, the USEPA must inform the secretary of its views.

Each agency with jurisdiction over the siting, construction, or operation of the deepwater port participates, as appropriate, in the Deepwater Port Act NEPA process as a cooperating agency. A participating agency assists in the preparation of the environmental review document to ensure that the document can be used by that agency to meet its NEPA obligation for any permitting, licensing, or other related decisions it must make.

Section 1518(a)(1) of the Deepwater Port Act declares that federal law applies to a deepwater port, and the act does not exempt a project proponent from any applicable federal law, regulation, or treaty.22 The USCG and MARAD have interpreted these provisions to mean a project proponent must include in its Deepwater Port Act application information and data for all other federal approvals and permits it will need to construct or operate the facility.23 The agencies with authority to issue those permits and approvals, not the USCG or MARAD, determine whether to grant them. For example, if the project will need a Section 404 permit, the U.S. Army Corps of Engineers issues the permit. Similarly, although the USCG and MARAD approve license applications, the Deepwater Port Act does not empower them to grant leases, ease-
ments, or rights-of-way within the waters of the United States. The Minerals Management Service (MMS) of the U.S. Department of Interior has that responsibility for Deepwater Port Act license applicants.

MARAD may approve an application if, among other things, it “determines that the applicant can and will comply with applicable laws, regulations and license conditions.” The USCG and MARAD rely on the other federal agencies to tell them if the applicant can comply with other federal laws. The statute puts the burden on the project proponent to submit information and data necessary for all approvals and permits in the Deepwater Port Act application and to resolve any issues with the relevant agency in an expeditious manner. While that is the goal of the act, in practice, issues often are not resolved promptly—one reason why the statutory clock is stopped.

Congress amended the Deepwater Port Act in 2002 with the purpose of streamlining the approval process. To that end, Congress prescribes deadlines for certain actions. However, it did not eliminate any federal agencies from the project approval process. Deepwater port projects still must obtain permits or approvals from the relevant federal agencies charged with protecting and preserving the nation’s oceans, coastal areas, marine resources, and air quality.

Role of the States

Since deepwater ports by definition are not located in states, some may assume that the states are not particularly important when seeking regulatory approval of deepwater ports—but this is not so. According to the Deepwater Port Act, a license application cannot be approved unless the governor (or governors) of the adjacent coastal state (or states) approves, or is presumed to approve, the issuance of the license. The federal government designates the adjacent coastal state or states in the Federal Register notice announcing that a complete application has been submitted. In addition, a coastal state may request to be designated as an adjacent coastal state.

Section 1508 does not grant the governor of a designated state the authority to “permit” the deepwater port, but if the governor disapproves the port, the project probably is dead—at least temporarily. In addition, if the governor announces that the project, if modified, would be consistent with state programs addressing environmental protection, land and water use, or coastal zone management, the application can be approved—but only if the license is conditioned in a manner that makes it consistent with the relevant state program. Congress has eliminated the role of states as permitting agencies, but it has given veto power to adjacent coastal states.

Nevertheless, the Deepwater Port Act does not establish any administrative process for the governor’s decision, except to require that the decision be made within 45 days of issued and subsequent enactments and revisions apply to the deepwater port. However, the states do not administer or enforce their laws and regulations. The federal agencies and courts administer and enforce “applicable” state laws. Two caveats are worth noting.

First, state law applies so long as it is not inconsistent with the Deepwater Port Act or the regulations promulgated thereunder or any other federal laws or regulations extant during the construction or operation of the deepwater port. Second, state law applies only “to the extent applicable.” Which entity, the federal government or the state government, decides whether a particular statute or regulation is “applicable” and whether a particular state law or regulation is not inconsistent with federal law? The answer seemingly provided by the Deepwater Port Act is: the federal government. If the federal agencies “administer” and “enforce” the state laws, presumably the federal agencies have authority to determine whether a given provision is applicable.
A deepwater port licensed under the act is located within an area of exclusive federal jurisdiction. Federal law—constitutional, statutory, and treaty law—applies. But all applicable state law applies to the deepwater port to the extent it is not inconsistent with federal law. Applicable state law is administered and enforced by the federal government. Therefore, the federal government issues the relevant permits, including in states with delegated programs.

The role of state regulatory agencies is not necessarily limited to advising the governor whether to approve a particular Deepwater Port Act license. Several of the USEPA regions have consulted with the relevant states when necessary to determine how they would administer the program. For example, the USEPA’s position is that the State Implementation Plan presumably is an applicable state law for purposes of air permitting. Deciding how to apply the plan to a facility located tens or hundreds of miles offshore is a process that often involves dialogue between the USEPA and the state air program staff.

The states have one other venue in which they can assert some control over the approval of facilities seeking licenses under the Deepwater Port Act. According to the requirements of the Coastal Zone Management Act, an applicant for a federal license or permit to conduct an activity “affecting any land or water use or natural resource of the coastal zone” of a state must provide the state and the federal licensing or permitting agency with a certification regarding the proposed activity. The applicant must certify that the activity 1) complies with the enforceable policies of the state’s approved coastal zone management program and 2) will be conducted in a manner consistent with the program.

The state has six months from receipt of the certification to concur or object to it. If the state does not object within the six-month period, it is presumed to concur. If the state does object, the federal license or permit cannot be issued unless the secretary of commerce concludes, after comments from the federal licensing or permitting agency and the project proponent, that the proposed activity is consistent with the objective of the Coastal Zone Management Act or “is otherwise necessary in the interest of national security.” This review by the secretary of commerce may be initiated by the secretary, or the project proponent may appeal to the secretary for a review. In either event, the secretary of commerce must issue a final decision within a prescribed period, and that final decision is reviewable in federal court.

The Deepwater Port Act is an old statute made new by recent events and amendments. Originally enacted in 1974, its focus was exploration and development of oil in the Outer Continental Shelf. Most of that activity has been in the Gulf of Mexico. Now that there is renewed attention and interest in bringing natural gas to energy users, states such as California, Massachusetts, and New York as well as federal regional offices and districts find themselves participating in a permitting process that is new to them.

Federal Coordination

An attempt has been made to coordinate the various federal efforts. Consistent with Executive Order 13212 regarding President Bush’s energy policy, and under the auspices of the White House Task Force on Energy Project Streamlining, a Memorandum of Understanding (MOU) was negotiated and signed in early 2004. The federal departments and agencies with jurisdiction over some aspect of the construction or operation of a deepwater port or any component of a deepwater port participated. The signatories include the Departments of Defense, Commerce, Energy, Homeland Security, Interior, State, and Transportation, the USEPA, FERC, and the Council on Environmental Quality. The MOU describes the roles and responsibilities of each of the signatories. The stated purpose of the MOU is to establish a process to facilitate timely processing of deepwater port applications.

In the MOU, the agencies have agreed to:

• Work together with applicants and other shareholders.
• Identify and resolve any issues as quickly as possible.
• Attempt to build consensus among governmental agencies.
• Expedite the environmental review required for licensing decisions associated with deepwater ports.

Consistent with Executive Order 13212, the signatories have committed themselves to early involvement in the licensing process. Each agency will:

• Assess its potential role in the environmental review of licenses as soon as possible.
• Conduct an early initial review of applications for completeness and accuracy and provide the USCG and MARAD with their comments in a timely fashion.
• Confer with the USCG and MARAD as schedules are developed.
• Commit to share data on an interagency basis.
• Commit to communicate informally.
• Resolve disputes expeditiously, and if necessary use the process set forth in the MOU as a last resort.

The MOU’s goal is to provide a framework that enables the agencies to expedite the
licensing process. Future developments will reveal if this goal has been achieved.

4 33 U.S.C. §1502(9).
11 Id.
12 Id.
15 See 33 C.F.R. subch. NN.
16 33 U.S.C. §1508(a)(2). The term “nearest adjacent coastal state” is defined as the state whose seaward boundaries, if extended beyond three miles, would encompass the site of the deepwater port. 33 U.S.C. §1518(b).
17 “Adjacent coastal state” is defined as any coastal state that (i) would be directly connected by pipeline to the deepwater port, (ii) would be located within 15 miles of the proposed port, or (iii) is designated as an adjacent coastal state under 33 U.S.C. §1508(a)(2).
18 The period commences on the date of the Federal Register notice announcing that a complete license application has been submitted. See 33 C.F.R. §148.276 (2006).
21 If the agency recommends disapproval, it must state why the application does not comply with the relevant statute or regulation and how the application can be amended to bring it into compliance. 33 U.S.C. §1504(e)(2).
22 The Constitution, treaties, and federal statutes apply to deepwater ports and “to activities connected, associated or potentially interfering with the use or operation of [a deepwater port as though the port were located within] an area of exclusive Federal jurisdiction within a State.” 33 U.S.C. §1518(a)(1). However, deepwater ports do not possess the status of islands and have no territorial seas of their own. 33 U.S.C. §1518(a)(1).
23 33 C.F.R. §148.105(z),(bb).
27 See supra note 17.
28 See 33 U.S.C. §1508(b)(1) (“The Secretary shall not issue a license without approval of the Governor of each adjacent coastal state.”).
29 33 U.S.C. §1508(b)(1).
30 See supra note 16.
31 33 U.S.C. §1518(b).
32 Id.
33 The USEPA has a similar view of delegated state programs under the Clean Water Act and the Resource Conservation and Recovery Act.
35 Id.
36 Id.
37 Id.

G.L. Howard, C.P.A.
Established 1986

“We analyze, verify, quantify.”

Contact: Gary L. Howard, CPA
10417 Los Alamitos Blvd.
Los Alamitos, CA 90720
Ph. (562) 431-9844 x11
Fax (562) 431-8302
www.glhowardcpa.com
gary@glhowardcpa.com

COMMERCE ESCROW COMPANY
A Team That Knows the Business

Phil Graf and Mark Minsky lead teams of people with long and successful experience in all aspects of the escrow business. Often, a thorough understanding of the tangled web of real property complexities may be a decisive factor in a successful transaction.

Commerce Escrow teams command an intimate understanding of the figures, interpretations, inclusions, contracts and financial, civic, state, city and county codes that permeate escrow and title transactions. These include commercial, industrial, developer site acquisitions, single and multi-family, business opportunity, and stock transfer escrows.

Before beginning Commerce Escrow in 1980, Graf and Minsky were executives at Title Insurance and Trust Company. Graf, and later Minsky, served as Vice President and Manager of Escrow Operations in Los Angeles County. Since its founding, Commerce Escrow continues to grow with its client base expanding throughout California and beyond.

Commerce Escrow Company
1545 Wilshire Blvd. / Suite 600 / Los Angeles, CA 90017
213-484-0855 • 310-284-5700 • 888-732-6723
http://www.commerceescrow.com
ACCIDENT ANALYSIS/RECONSTRUCTION

RIMKUS CONSULTING GROUP, INC.
2677 North Main Street, Suite 300, Santa Ana, CA 92705, (714) 954-1912, fax (714) 954-1952, e-mail: cjy@rimkus.com. Web site: www.rimkus.com. Contact Curt Yoworski. Rimkus Consulting Group is a full-service forensic consulting firm. Since 1983, we have provided reliable investigations, reports, and expert witness testimony around the world. Our engineers and consultants analyze the facts from origin and cause through extent of loss. Services: construction defect and dispute analysis, vehicle accident reconstruction, fire cause and origin, property evaluation, mold evaluations, indoor air quality assessments, biomechanical analysis, product failure analysis, foundation investigations, industrial accidents and explosions, water intrusion analysis, geotechnical evaluations, construction accidents, construction disputes, financial analysis and assessments, forensic accounting, HVAC analysis, electrical failure analysis, and video/graphics computer animation. See display ad on page 53.

ACCOUNTING INVESTIGATIONS

ARNO LD L. STENGEL & COMPANY
2320 Cotner Avenue, Los Angeles, CA 90064, (310) 479-7777, fax (310) 479-0985. Contact Arnold L. Stengel. Expert witness services, litigation support services, representation before taxing agencies, fiduciary accounting, accounting services for law and healthcare, business, dairy/farming operations, financial advisory and personal financial planning, estate and gift tax planning and tax return preparation, preparation of tax returns for individuals, partnerships, LLCs, fiduciaries, and corporations.

BALLINGER CLEVELAND & ISSA, LLC
10990 Wilshire Boulevard, 16th Floor, Los Angeles, CA 90024, (310) 875-1717, fax (310) 875-6600. Contact Bruce W. Ballenger, CPA, managing director, bankruptcy examiner, designated bankruptcy trustee. Comprehensive search, examination, and analysis of records to determine true revenues, profits, net worth, shareholders’ equity, depreciation, amortization, etc. Expert witness for complicated accounting, financial, and business valuation matters, feasibility of reorganization plans, fraudulent conveyances, bankruptcies, fairness of interest rates, stock options, management misfeasance/malfeasance, purchasing, and mergers and acquisitions. More than 100 open-court testimonies: federal, state, civil, criminal. See display ad on page 52.

JONATHAN E. COHEN, AN ACCOUNTANCY CORPORATION
5150 Canoga Avenue, Suite 200, Woodland Hills, CA 91367, (818) 340-9272, fax (818) 883-8126, e-mail: jecpa@pacbell.net. Contact Jonathan E. Cohen. Analysis and calculation of damages and lost profits (arising from personal injury, business interruption, disability and wrongful death and termination), expert witness testimony and reports, assistance with discovery, depositions and development of case strategy, and accounting and financial statement analysis. Join Cohen has 34 years in public practice as a CPA, including 25 in litigation support, and holds an MBA.

SMITH DICKSON, AN ACCOUNTANCY CORPORATION
18401 Von Kainen Avenue, Suite 430, Irvine, CA 92612, (949) 553-1020, fax (949) 553-0249, e-mail: debbie.dickson@smithdickson.com. Web site: www.smithdickson.com. Contact Deborah Dickson, CPA. CPA 20+ years, testifying 12+ years, audits, reviews, evaluations, of companies, financial statement and business profitability analysis, document review; reconstruction of accounting records; asset, note, capital, expense, cash flow tracing, lost revenues, lost profits, economic damages, business dissolution, business valuations, IRS, FTB, EDD, and SBE tax controversy/negotiations. Industries include service, professional, medical, manufacturing, distribution, real estate, construction, escrow, and title.

FULCRUM FINANCIAL INQUIRY
1000 Wilshire Boulevard, Suite 1550, Los Angeles, CA 90017, (213) 787-4100, fax (213) 787-4141, e-mail: dnole@fulcruminquiry.com. Web site: www.fulcruminquiry.com. Contact David Nolte. Our professionals are experienced CPAs, MBAs, ASAs, CFAs, affiliated professionals, and industry specialists. Our analysis and research, combined with unique presentation techniques, have resulted in an unequalled record of successful court cases and client recoveries. Our expertise encompasses damages analysis, lost profits study, business and intangible asset valuations, appraisals, fraud investigations, statistics, forensic economic analysis, royalty audits, strategic and market assessments, computer forensics, electronic discovery, and analysis of computerized data. Degrees/licenses: CPAs, CFAs, ASAs, PhDs and MBAs in accounting, finance, economics, and related subjects. See display ad on page 2.

GLENN M. GELMAN & ASSOCIATES, CERTIFIED PUBLIC ACCOUNTANTS AND BUSINESS CONSULTANTS

HAYNIE & COMPANY, CPAS
4910 Campus Drive, Newport Beach, CA 92660, (949) 724-1880, fax (949) 724-1889, e-mail: sgabrielson@haynecpa.com. Web site: www.haynecpa.com. Contact Steven C. Gabrielson. Alter ego, consulting and expert witness testimony in a variety of practice areas: commercial damages, ownership disputes, economic analysis, business valuation, lost profits analysis, fraud/forensic investigations, taxation, personal injury, wrongful termination, professional liability, and expert cross examination. Extensive public speaking background assists in courtroom presentations.

KRYCLER, ERVIN, TAUBMAN, & WALHEIM
15303 Ventura Boulevard, Suite 1040, Sherman Oaks, CA 91403, (818) 995-1040, fax (818) 995-1424, Web site: www.info@ktww.com. Contact Michael J. Krycler. Litigation support, including forensic accounting, business appraisals, family law accounting, business and professional valuations, damages, fraud investigations, and lost earnings. Krycler, Ervin, Taubman and Walheim is a full-service accounting firm serving the legal community for more than 20 years. See display ad on page 56.

STONEFIELD JOSEPHSON, INC.
2049 Century Park East, Suite 400, Los Angeles, CA 90067, (310) 455-9400, fax (310) 453-1187, Web site: www.ssjaccounting.com. Contact Jeff Sumpter, director of litigation support and forensic services or Len Lyons, director of valuation, litigation, and forensic evidence. We are a California-based forensic accounting firm founded in 1975. The full-service firm serves public and privately held clients throughout the United States and internationally from four California locations: Los Angeles, Orange County, San Francisco, East Bay, as well as Hong Kong. See display ad on page 9.

VICENTI, LLOYD & STUTZMAN LLP
2210 East Route 66, Suite 100, Glendora, CA 91740, (626) 857-7300, fax (626) 857-7302, e-mail: kdavies@vlsw.com. Web site: www.vlsw.com. Contact Linda Saddleire, CPA, CFE, partner. VLS Fraud Solutions uses a proven process to deliver a thorough investigation, while protecting a positive work environment. This team—CPAs, Certified Fraud Examiners, and former FBI law enforcement—are seasoned leaders, expe- rience in the investigative community. We work with attorneys concerning the investigation and findings, and assist you in preparing for litigation. We respond quickly to your clients’ concerns and manage crisis situations that can arise during fraud investigations. We communicate often and effectively with you regarding important investiga- tive results. For more information or to schedule a free consultation, contact VLS Fraud Solutions Advisors in complete confidence. Service Area: (Geographic): Southern California (primary), Central & Northern California (secondary).

WHITE, ZUCKERMAN, WARSAVSKY, LUNA, WOLF & HUNT
Accounting and tax planning/preparation services. Excellent communicators with extensive testimony experience. See display ad on page 49.

ZIVETZ, SCHWARTZ & SALTSMAN, CPAs

ACOUSTICS/NOISE
HERSH ACOUSTICAL ENGINEERING, INC.
2305 Caimloch Street, Calabasas, CA 91302, (818) 224-4699, fax (818) 224-4639, e-mail: ha@charter.net. Contact Dr. Alan S. Hersh, Ph.D., PE. Full-service consulting firm with extensive experience in noise litigation, HVAC, CNEL and STC state-of-the-art acoustic measurement equipment, community noise code compliance, architectural, industrial, and HVAC acoustics.

ARCHITECTURE
ARCHITECT AND GENERAL CONTRACTOR RICHARD N. RICE, AIA, NCARB, ARCHITECT & ASSOCIATES, INC.

ARCHITECTURAL FORENSICS
RIMKUS CONSULTING GROUP, INC.
2677 North Main Street, Suite 300, Santa Ana, CA 92705, (714) 954-1912, fax (714) 954-1952, e-mail: cjyaworski@rimkus.com. Web site: www.rimkus.com. Contact Curt Yaworski. Rimkus Consulting Group is a full-service forensic consulting firm. Since 1983, we have provided reliable investigations, reports, and expert witness testimony around the world. Our engineers and consultants analyze the facts from origin and cause through extent of loss. Services: construction defect and dispute analysis, vehicle accident reconstruction, fire cause and origin, property evaluation, mold evaluations, indoor air quality assessments, biomechanical analysis, product failure analysis, foundation investigations, industrial accidents and explosions, water intrusion analysis, geotechnical evaluations, construction accidents, construction disputes, financial analysis and assessments, forensic accounting, HVAC analysis, electrical failure analysis, and video/graphics computer animation. See display ad on page 53.

SCHWARTZ / ROBERT & ASSOCIATES, INC.

URY TRIMARCO & ASSOCIATES
POLYGRAPH/INVESTIGATIONS, INC.
9454 Wilshire Blvd.
Sixth Floor
Beverly Hills, CA 90212
(310) 247-2637 TEL
(310) 306-2720 FAX
email: jtrimarco@aol.com
www.jacktrimarco.com

Jack Trimarco - President
Former Polygraph Unit Chief
CA. P.I. *20970
Member Society of Former Special Agents
Federal Bureau of Investigation

URS is the nation’s largest engineering, consulting and construction services firm. URS specializes in the resolution of construction disputes.

Dispute Resolution & Forensic Analysis
Design/Construction Claims
Environmental Claims
Bid/Cost/Damage Analysis
Construction Defect Analysis
Delay/Acceleration/Disruption Analysis
Expert Witness Testimony
Insurance/Bond Claims

Technical Expertise
Architecture
Engineering
Scheduling
Construction Management
Cost Estimating & Auditing
Environmental
Geotechnical

When you want to impress someone with the truth...
We are experts in damages, accounting and valuation.

Don’t settle for less.

Expert witnesses and litigation consultants for complex litigation involving analyses of lost profits, lost earnings and lost value of business, forensic accounting and fraud investigation

Other areas include marital dissolution, accounting and tax

Excellent communicators with extensive testimony experience

Offices in Los Angeles and Orange County

Call us today. With our litigation consulting, extensive experience and expert testimony, you can focus your efforts where they are needed most.
lent communicators with extensive testimony experience. See display ad on page 49.

CIVIL INVESTIGATION

FULCROM FINANCIAL INQUIRY

1000 Wilshire Boulevard, Suite 1650, Los Angeles, CA 90017, (213) 787-4100, fax (213) 787-4114, e-mail: dnoite@fulcrominquiry.com. Web site: www.fulcrominquiry.com. Contact David Nolte. Our professionals are experienced CPAs, MBAs, ASAs, CFAs, affiliated professors, and industry specialists. Our analysis and research, combined with unique presentation techniques, have resulted in an unequalled record of successful court cases and client recoveries. Our expertise encompasses damages analysis, lost profit studies, business and intangible asset valuations, appraisals, fraud investigations, statistics, forensic economic analysis, royalty audits, strategic and market assessments, computer forensics, electronic discovery, and analysis of computerized data. Degrees/licenses: CPAs, CFAs, ASAs, PhDs and MBAs in accounting, finance, economics, and related subjects. See display ad on page 2.

PROMETHEUS GROUP, INC. PRIVATE INVESTIGATION & SECURITY SERVICES


COMPUTER FORENSICS

FULCROM FINANCIAL INQUIRY

1000 Wilshire Boulevard, Suite 1650, Los Angeles, CA 90017, (213) 787-4100, fax (213) 787-4114, e-mail: dnoite@fulcrominquiry.com. Web site: www.fulcrominquiry.com. Contact David Nolte. Our professionals are experienced CPAs, MBAs, ASAs, CFAs, affiliated professors, and industry specialists. Our analysis and research, combined with unique presentation techniques, have resulted in an unequalled record of successful court cases and client recoveries. Our expertise encompasses damages analysis, lost profit studies, business and intangible asset valuations, appraisals, fraud investigations, statistics, forensic economic analysis, royalty audits, strategic and market assessments, computer forensics, electronic discovery, and analysis of computerized data. Degrees/licenses: CPAs, CFAs, ASAs, PhDs and MBAs in accounting, finance, economics, and related subjects. See display ad on page 2.

SAFIRROSETTI

The premiere investigation consulting firm. 10990 Wilshire Boulevard, Suite 1025, Los Angeles, CA 90024, (310) 882-1111, e-mail: tpkor@safirrosetti.com. Web site: www.safirrosetti.com. Contact Tom Pikor.

SETEC INVESTIGATIONS

8391 Beverly Boulevard, Suite 167, Los Angeles, CA 90048, (800) 748-5440, fax (523) 935-5481, e-mail: info@setecinvestigations.com. Web site: www.setecinvestigations.com. Contact Todd Stefan. Setec Investigations offers unparalleled expertise in computer forensics and enterprise investigations providing personalized, case-specific forensic analysis and litigation support services for law firms and corporations. Setec Investigations possesses necessary combination of technical expertise, understanding of the legal system, and specialized tools and processes enabling the discovery, collection, investigation, and production of electronic information for investigating and handling computer-related crimes or misuse of computer forensics, electronic discovery, litigation support, and expert witness testimony. Service area: nationwide.

CONSTRUCTION INVESTIGATIONS

ARCHITECT AND GENERAL CONTRACTOR RICHARD N RICE, AIA, NCARB

ARCHITECT RICE & ASSOCIATES


COOK CONSTRUCTION

7131 Owensmouth Avenue, Canoga Park, CA 91303, (818) 435-4555, fax (818) 555-0028, e-mail: scook16121@j.com. Contact Stephen Cook. Forty years of construction experience. Specialties: law suit preparation/residential/construction, single and multi-family, hillside, foundations, concrete floors, retaining walls, waterproofing, wet magnitude, carpentry/rough framing, tile, stone, materials/costs, and building codes. Civil experience: construction defect cases for insurance companies and attorneys since 1992. See display ad on page 38.

FORENSISGROUP

5452 East Foothill Boulevard, Suite 1160, Pasadena, CA 91107, (800) 555-5422, (626) 795-0000, fax (626) 795-1950, e-mail: experience@forensisgroup.com. Web site: www.forensisgroup.com. Contact Gregory Steenwyk. Thousands of our clients have gained the technical advantage and the competitive edge in their cases from our resource group of high-quality experts in construction, medical, engineering, product liability, safety, environmental, accident reconstruction, automotive, failure analysis, fires, explosions, slip and fall, real estate, economics, appraisal, employment, computers, and other technical and scientific disciplines. We provide you with a select group of high-quality experts as expeditiously as possible. Unsurpassed recruitment standards. Excellent client service. See display ad on page 47.

PACIFIC CONSTRUCTION CONSULTANTS, INC.

3083 Cold Canal Drive, Suite 100, Rancho Cordova, CA 95608, (555) 655-7224, (916) 638-4848, fax (916) 638-5124. Contact Marketing Director. Since 1983, PCC’s professionals have been helping attorneys and their clients resolve construction disputes with such successes as complex claims analysis, contract/design review, convincing courtroom graphics, document discovery, CPM scheduling, database management, litigation support, arbitration services, negotiation assistance, impact/delay analysis, change order evaluation, damage assessment, and expert testimony. Please see ad on display page 52.

RIMKUS CONSULTING GROUP, INC.

2677 North Main Street, Suite 101, Santa Ana, CA 92705, (714) 594-1912, fax (714) 594-1952, e-mail: cjyvorski@rimkus.com. Web site: www.rimkus.com. Contact Curt Yaworski. Rimkus Consulting Group is a full-service forensic consulting firm. Since 1983, we have provided reliable investigations, reports, and expert witness testimony around the world. Our engineers and consultants analyze the facts from origin and cause through extent of loss. Services: construction defect and dispute analysis, vehicle accident reconstruction, fire cause and origin, property evaluation, mold evaluations, indoor air quality assessments, biomechanical analysis, product failure analysis, foundation investigations, industrial accidents and explosions, water intrusion analysis, geotechnical evaluations, construction accidents, construction disputes, financial analysis and assessments, forensic accounting, HVAC analysis, electrical failure analysis, and video/graphics computer animation. See display ad on page 53.

SCHWARTZ / ROBERT & ASSOCIATES, INC.


URS

935 Wilshire Boulevard, Suite 1800, Los Angeles, CA 90017, (213) 996-2549, fax (213) 996-2521, e-mail: mathew-lankenaus@urscorp.com. Expert witness for entitlement, causation damages on design, construction, and geotechnical environmental disputes. Experienced in all types of construction projects. See display ad on page 47.

CORPORATE INVESTIGATIONS

BENCHMARK INVESTIGATIONS


DIVERSIFIED RISK MANAGEMENT INC.


FULCROM FINANCIAL INQUIRY

1000 Wilshire Boulevard, Suite 1650, Los Angeles, CA 90017, (213) 787-4100, fax (213) 787-4114, e-mail: dnoite@fulcrominquiry.com. Web site: www.fulcrominquiry.com. Contact David Nolte. Our professionals are experienced CPAs, MBAs, ASAs, CFAs, affiliated professors, and industry specialists. Our analysis and research, combined with unique presentation techniques, have resulted in a
unequaled record of successful court cases and client recoveries. Our expertise encompasses damage analysis, lost profit studies, business and intangible asset valuations, appraisals, fraud investigations, statistics, forensic economic analysis, royalty audits, strategic and market assessments, computer forensics, electronic discovery, and analysis of computerized data. Degrees/licenses: CPAs, CFA, ASAs, PhDs and MBAs in accounting, finance, economics, and related subjects. See display ad on page 2.

CORROSION
KARS ADVANCED MATERIALS, INC.
Testing and Research Labs, 2528 West Woodland Drive, Anaheim, CA 92801-2636, (714) 527-7100, fax (714) 527-7169, e-mail: kar@karlab.com. Web site: www.karlab.com. Contact Des. Ramesh J. Kar or Naresh J. Kar. Southern California’s premier materials/mechanical/metallurgical/structural/forensics laboratory. Registered professional engineers with 20-plus years in metallurgical/forensic/structural failure analysis. Experienced with automotive, bicycles, tires, fire, paint, plumbing, corrosion, and structural failures. We work on both plaintiff and defendant cases. Complete in-house capabilities for tests. Extensive deposition and courtroom experience (civil and criminal investigations). Principals are fellows of American Society for Metals and board-certified diplomates, American Board of Forensic Examiners. See display ad on page 57.

CRIMINAL
SPARTAN DETECTIVE AGENCY (GUARANTEED SUBPOENA)
2009-2013 Morris Avenue, Box 1414, Union, NJ 07083, (908) 964-3190, (800) 672-1952, fax (908) 688-0885, e-mail: info@served.com. Web site: www.served.com. Contact Philip Geron. All investigative services. Specializing in skip tracing, if we don’t find ‘em you don’t pay. Criminal, automobile, airplane, workers’ compensation, and matrimonial with retainer for investigation. Established 1965. See display ad on page 17.

DENTISTRY
PARVIZ AZAR-MEHR, DMD
Prosthodontist, Professor of Clinical Dentistry, USC

ECONOMIC DAMAGES
BALLenger CLEVELand & IssA, LLc
10990 Wilshire Boulevard, 16th Floor, Los Angeles, CA 90024, (310) 875-1717, fax (310) 875-6600. Contact Bruce W. Ballenger, CPA, managing director, bankruptcy examiner, designated bankruptcy trustee. Comprehensive search, examination, and analysis of records to determine true revenues, profits; net worth, shareholders’ equity, depreciation, amortization, etc. Expert witness for complicated accounting, financial, and business valuation matters, feasibility of reorganization plans, fraudulent conveyances, bankruptcies, fairness of interest rates, stock options, management misfeasance/malfeasance, purchasing, and mergers and acquisitions. More than 100 open-court testimonies: federal, state, civil, criminal. See display ad on page 52.

COHEN MISKEI & MOWREY LLP
15303 Ventura Boulevard, Suite 1150, Sherman Oaks, CA 91403, (818) 986-5070, fax (818) 986-5034, e-mail: cmm@cmmpas.com. Web site: www.cmmpas.com. Consultants who provide extensive experience, litigation

ZivetZ, Schwartz & Saltmans CPA’s
With more than thirty years of experience as expert witnesses in testimony, pre-trial preparation, settlement negotiations, consultations and court appointed special master.

Some of our specialties consist of:

- Forensic Accounting • Marital Dissolutions
- Business Valuation and Appraisal • Lost Profits
- Economic Damages • Accounting Malpractice
- Employee Benefit Plans • Entertainment Entities
- Financial and Economic Analysis • Shareholder Disputes
- Wrongful Termination

Tel: (310) 826-1040
Fax: (310) 826-1065
E-mail: les@zss.com
www.zsscpa.com
11900 W. Olympic Blvd.
Suite 650
Los Angeles, CA 90064-1199

Lester J. Schwartz, CPA, DABFA, DABFE
Michael D. Saltman, CPA, MBA
David L. Bassey, CPA
Dave Dichter, CPA, ABV, CIA
Sandy Green, CPA
Barry A. Snell, CPA, MST
Dmitry Pinus, CPA

Los Angeles Lawyer July-August 2007
 support and expert testimony regarding forensic accounting, fraud investigations, economic damages, business valuation, family law, and bankruptcy and reorganization. Degrees/license: CPAs, CFEs, and MBAs. See display ad on page 23.

FULLCRUM FINANCIAL INQUIRY
1000 Wilshire Boulevard, Suite 1650, Los Angeles, CA 90017, (213) 787-4100, fax (213) 787-4141, e-mail: dndolle@fulcruminquiry.com. Web site: www.fulcruminquiry.com. Contact David Nolle. Our professionals are experienced CPAs, MBAs, ASAs, CFAs, affiliated professors, and industry specialists. Our analysis and research, combined with unique presentation techniques, have resulted in an unequaled record of successful court cases and client recoveries. Our expertise encompasses damages analysis, lost profit studies, business and intangible asset valuations, appraisals, fraud investigations, statistics, forensic economic analysis, royalty audits, strategic and market assessments, computer forensics, electronic discovery, and analysis of computerized data. Degrees/licenses: CPAs, CFAs, ASAs, PhDs and MBAs in accounting, finance, economics, and related subjects. See display ad on page 2.

ELECTRONIC EVIDENCE/DATA RECOVERY
FULLCRUM FINANCIAL INQUIRY
1000 Wilshire Boulevard, Suite 1650, Los Angeles, CA 90017, (213) 787-4100, fax (213) 787-4141, e-mail: dndolle@fulcruminquiry.com. Web site: www.fulcruminquiry.com. Contact David Nolle. Our professionals are experienced CPAs, MBAs, ASAs, CFAs, affiliated professors, and industry specialists. Our analysis and research, combined with unique presentation techniques, have resulted in an unequaled record of successful court cases and client recoveries. Our expertise encompasses damages analysis, lost profit studies, business and intangible asset valuations, appraisals, fraud investigations, statistics, forensic economic analysis, royalty audits, strategic and market assessments, computer forensics, electronic discovery, and analysis of computerized data. Degrees/licenses: CPAs, CFAs, ASAs, PhDs and MBAs in accounting, finance, economics, and related subjects. See display ad on page 2.

GOLDFARB AND ASSOCIATES
1101 Fremont Avenue, Suite 103, South Pasadena, CA 91030, (626) 441-9687, fax (626) 799-8736, e-mail: goldfarbassociates@yahoo.com. Contact Howard Goldfarb. Vocational rehabilitation consultant providing expert witness testimony on employability and wage loss in personal injury, marriage dissolution, ERISA, age discrimination, and sexual harassment.

EMPLOYMENT/WAGE EARNING CAPACITY
GOLDFARB AND ASSOCIATES
1101 Fremont Avenue, Suite 103, South Pasadena, CA 91030, (626) 441-9687, fax (626) 799-8736, e-mail: goldfarbassociates@yahoo.com. Contact Howard Goldfarb. Vocational rehabilitation consultant providing expert witness testimony on employability and wage loss in personal injury, marriage dissolution, ERISA, age discrimination, and sexual harassment.

ENGINEERING
FALLBROOK ENGINEERING
28000 Va Osco, Valley Center, CA 92082, (760) 751-1200, fax (760) 751-1201, e-mail: renee@fallbrook-eng.com. Web site: www.fallbrook-eng.com. Contact Richard P. Meyst. Fallbrook Engineering provides expert witness services in the areas of P (patent infringement, invalidity, claim construction and trade dress), personal injury, product liability, and product failure analysis. Our professionals have represented both plaintiff and defendant. We have done analysis, prepared declarations, been deposed and testified in court. We have years of design and development experience making us effective expert witnesses in all matters involving medical devices. Visit our website at www.fallbrook-eng.com.
FORENSISGROUP
3452 East Foothill Boulevard, Suite 1160, Pasadena, CA 91107, (800) 555-5422, (626) 795-5000, fax (626) 795-1950, e-mail: experts@forensisgroup.com. Web site: www.forensisgroup.com. Contact Mercy Steenwyk. Thousands of our clients have gained the technical advantage and the competitive edge in their cases from our resource group of high-quality experts in construction, medical, engineering, product liability, safety, environmental, accident reconstruction, automotive, failure analysis, fires, explosions, slip and fall, real estate, economics, appraisal, employment, computers, and other technical and scientific disciplines. We provide you with a select group of high-quality experts as expeditiously as possible. Unsurpassed recruitment standards. Excellent client service. See display ad on page 47.

GUNZLER & ASSOCIATES
P.O. Box 25929, Los Angeles, CA 90002-25, (310) 396-3450. Contact Thomas Gunzler, PE. Engineering consulting office provides extensive consulting experience, individual case review, in-depth research and advice for both plaintiff and defendant in the following areas: safety engineering, traffic accident reconstruction, pedestrian safety and premises liability, product failure analysis, workplace accidents, fire cause analysis, chemical hazards, mechanical design, patent validity and infringement, laboratory examinations, and field inspections. Principal consultant has more than 40 years of experience in mechanical and safety engineering. CVs of principal and associate consultants available on request.

EUGENE M. KOVACH CONSULTING
CIVIL ENGINEER
4109 Larwin Avenue, Cypress, CA 90630, (714) 827-3613, e-mail: eug Kovach@dbglobal.net. Contact Eugene Kovach. Specializing in sewers. Twenty-eight years of experience in the design, construction and operation of sewers. Consulting expert witness services since 1999: claims, accidents, and sewer overflows/bakups. Defense and plaintiff work. A very large personal injury suit was settled following my deposition. Before becoming an expert witness employed by the Sanitation Districts of Los Angeles County, knowledge of governmental agency practices, design and infrastructure. See listing in LACBA’s Directory of Experts and Consultants. See display ad on page 18.

ENGINEERING/GEOTECHNICAL
COTTON, SHIRES AND ASSOCIATES, INC.
330 Village Lane, Los Gatos, CA 95030-7218, (408) 354-5542, fax (408) 354-1852, e-mail: pshires @cottoshires.com. Web site: www.cottoshires.com. Contact Patrick O. Shires. Full-service geotechnical engineering consulting firm specializing in investigation, design, arbitration, and expert witness testimony with offices in Los Gatos and San Andreas, California. Earth movement (settlement, soil creep, landslides, tunneling and expansive soil), foundation distress (movement and cracking of structures) drainage and grading (seeping slabs and ponding water in crawlspace), pavement and slabs (cracking and separating), retaining walls (movement, cracking and failures), pipelines, flooding and hydrology, design and construction deficiencies, expert testimony at over 70 trials (municipal, superior and federal); 100+ depositions; 200+ settlement conferences in southern and northern California and Hawaii.

EXPERT REFERRAL SERVICE
FORENSIC EXPERT WITNESS ASSOCIATION
2402 Vista Nobleza, Newport Beach, CA 92660, (949) 640-9903, fax (949) 640-9911, e-mail: info@forensic .org. Web site: www.forensic.org. Contact Norma S. Fox, executive director. Nonprofit professional association. Education through meetings, workshops, and annual conference. Referral service. Five chapters throughout California and Dallas, TX fall ‘07. See display ad on page 58.

Rimkus Consulting Group, Inc. is a company providing forensic engineering services to law firms, insurance companies and corporations. We offer an independent and objective analysis using the highest standards of professionalism.

SERVICES INCLUDE:
- Mold Evaluations
- Vehicle Accident Reconstruction
- Biomechanical Analysis
- Product Failure Analysis
- Fire Cause and Origin
- Property Evaluations
- Foundation Investigations
- Industrial Accidents and Explosions
- Construction Accidents
- Construction Defect Analysis
- Construction Disputes
- Business Interruptions and Valuations
- Video/Graphics/Computer Animation
- Oilfield Accidents

AREAS OF SPECIALTY:
- Accounting
- Architecture
- Architectural Engineering
- Biomechanics
- Business Analysis
- Chemical Engineering
- Chemistry
- Civil Engineering
- Construction Economics
- Electrical Engineering
- Environmental Engineering
- Explosions
- Fire Investigation
- Geology
- Hydrogeology
- Hydrology
- Industrial Hygiene
- Materials Engineering
- Mechanical Engineering
- Metallurgy
- Petroleum Engineering
- Safety Engineering
- Structural Engineering
- Toxicology
- Computer Animation

Please Call Us For More Information Toll Free: (877) 978-2044
www.rimkus.com

Los Angeles Lawyer July-August 2007 53
EXPERT WITNESS

AMFS, INC. (AMERICAN MEDICAL FORENSIC SPECIALIST)
2640 Telegraph Avenue, Berkeley, CA 94704, (800) 279-3003, (510) 549-1693, fax (510) 486-1255, e-mail: medicalexperts@amfs.com; Web page: www.medicalexperts.com. Contact Barry Gustin, MD, MPH, FACEP. AMFS’s attorney and physician-managed company that provides initial in-house case screenings by 72 multidisciplinary physician partners and testing medical experts. Medical experts are matched to meet case requirements by MF Physician Partners from our panel of over 2500 carefully prescreened board-certified practicing specialists in California’s recognized medical specialties. Plaintiff and defense. Fast, thorough, objective, and cost-effective. Medical negligence, personal injury, product liability, and toxic torts. “A 92 percent win record” —California Lawyer magazine. See display ad on page 58.

FAILURE ANALYSIS

KARS ADVANCED MATERIALS, INC.
Testing and Research Labs, 2528 West Woodland Drive, Anaheim, CA 92802-2636, (714) 527-7100, fax (714) 527-7169, e-mail: kars@karslab.com; Web site: www.karslab.com. Contact Drs. Ramesh J. Kar or Naresh J. Kar. Sandblasting and fillers/materials/mechanical/ metallurgical/structural/forensics laboratory. Registered professional engineers with 20-plus years in metallurgical/forensic/structural failure analysis. Experienced with automotive, bicycles, tires, fire, paint, plumbing, corrosion, and structural failure work on both plaintiff and defendant cases. Complete in-house capabilities for tests. Extensive deposition and courtroom experience (civil and criminal investigations). Principals are fellows of American Society for Metals and board-certified diplomates, American Board of Forensic Examiners. See display ad on page 57.

FAMILY LAW

DOUGLAS BALDWIN & ASSOCIATES, INC.
P.O. Box 1249, La Canada-Flintcliff, CA 91012, (800) 392-3950, (818) 952-4433, fax (818) 790-4622, e-mail: db@dbaldwin.net; Web site: www.dbaldwin.com. Contact Douglas Baldwin. 20th year anniversary offering free consulting which includes free basic locate and background data and analysis of possibilities. Twenty-five years of experience with nationwide asset location, insurance fraud, optimization of alimony, andChildren’s issues that separate MD&D from other accounting firms. Geographic service area: Central/Southern California.

FIRE/EXPLOSION INVESTIGATIONS

RIMKUS CONSULTING GROUP, INC.
2677 North Main Street, Suite 300, Santa Ana, CA 92705, (714) 954-5491, fax (714) 954-1874, Web site: www.rimkus.com. Contact Curt Yaworski. Rimkus Consulting Group is a full-service forensic consulting firm. Since 1985, we have provided reliable investigations, reports, and expert witness testimony around the world. Our engineers and consultants analyze the facts from origin and cause through extent of loss. Services: construction defect and dispute analysis, vehicle accident reconstruction, fire cause and origin, property evaluation, mold evaluations, indoor air quality assessments, biomechanical failure analysis, forensic investigation, foundational investigations, industrial accidents and explosions, water intrusion analysis, geotechnical evaluations, construction accidents, construction disputes, financial analysis and assessments, forensic accounting, HVAC analysis, electrical failure analysis, and video/graphic computer animation. See display ad on page 53.

FORENSIC ACCOUNTING

FULCRO FINANCIAL INQUIRY
1000 Wilshire Boulevard, Suite 1650, Los Angeles, CA 90017, (213) 787-4100, fax (213) 787-4141, e-mail: info@fulcroinquiry.com, Web site: www.fulcroinquiry.com. Contact David Nolte. Our professionals are experienced CPAs, MBAs, ASAs, CFAs, affiliated professors, and industry specialists. Our analysis and research, combined with unique presentation techniques, have resulted in an unequalled record of successful court cases and client recoveries. Our expertise encompasses VATSPLA analysis, lost profit studies, business and intangible asset valuations, appraisals, fraud investigations, statistics, forensic economic analysis, royalty audits, strategic and market assessments, computer forensics, electronic discovery, and analysis of computerized data. Degrees/licenses: CPAs, CFAs, ASAs, PhDs and MBAs in accounting, finance, economics, and related subjects. See display ad on page 2.

LEWIS, JOFFE & CO, LLP
10880 Wilshire Boulevard, Suite 520, Los Angeles, CA 90024, (310) 475-5676, fax (310) 475-5268. Contact Brian Lewis, CPA, CVA. Forensic accounting, business valuations, cash spendable reports, estate, and trust and income tax services.

MATSON, DRISCOLL & DAMICO
707 Wilshire Boulevard, Suite 3675, Los Angeles, CA 90017, (213) 624-7118, fax (213) 624-7120, e-mail: dmatson@mdn.net; Web site: www.mdn.net. Contact Daniel G. Markowitz. Matson, Driscoll and Damico is an international forensic and investigative accounting firm with a specialty in insurance claims accounting, litigation services, damage calculations, business valuation, and fraud examinations. There are currently 30 MD&D offices across the world. Commitment to a thorough analysis, verification of the facts and user-friendly communication of findings pave the way for prompt and reasonable resolution of claims. Expertise, dedication and the high standards results in this specialized area of accounting are the characteristics that separate MD&D from other accounting firms. Geographic service area: Central/Southern California.

SQUAR & ASSOCIATES
2064 Palphere Court, Costa Mesa, CA 92626, (714) 825-0300, fax (866) 810-9223, e-mail: gsquar@squarassociates.com; Web site: www.squarassociates.com. Contact Richard Squar. Litigation support services and expert witness testimony, business valuation, customized business consulting, planning for high net worth individuals, tax planning and preparation and accounting services. See display ad on page 55.

VICENTI, LLOYD & STUTZMANN LLP
2210 East Route 66, Suite 100, Glendora, CA 91740, (256) 857-7300, fax (262) 857-7302, e-mail: vicente@vicente.com; Web site: www.vicente.com. Contact Linda Sodalmire, CPA, CFE, partner. VLS Fraud Solutions uses a proven process to deliver a thorough investigation, while protecting a positive work environment. This team—CPAs, Certified Fraud Examiners, and forensic accountants—has a unique skill set and expertise in the investigative community. We work with attorneys concerning the investigation and findings, and assist you in preparing for litigation. We respond quickly to your clients’ concerns and manage crisis situations that arise. We communicate often and effectively with you regarding important investigatory results. For more information or to schedule a free consultation, contact VLS Fraud Solutions Advisors in complete confidence. Service Areas: (Geographic): Southern California (primary), Central & Northern California (secondary).

WHITE, ZUCKERMAN, WARSAVSKY, LUNA, WOLF & HUNT
14455 Ventura Blvd, Suite 300, Sherman Oaks, CA 91423, 363 San Miguel Drive, Suite 130, Newport Beach, CA 92660, (818) 981-4226, (949) 219-9316, fax: (949) 981-4278, (949) 219-9095, e-mail: expertwitness@rimkus.com, Web site: www.rimkus.com. Contact: Barbara Luna, Drew Hunt, Paul White, Fred Warsavsky, Jack Zuckerman, Bill Wolf, Cindy Holdorf, David Turner, Venita McMorris, Dean Atkinson, Emily Reich, David Semus, Warren Sacks, Jack White, Patrick Greene or Gary Weiss. Expert witnesses and litigation consultants for complex litigation involving analyses of lost profits, lost earnings and lost value of business, forensic accounting and fraud investiga-
tion. Types of cases include: breach of contract, business interruption, intellectual property-patent, trademark and copyright infringement, and trade secrets, unfair competition, business dissolution, construction defects, delays and cost overruns, professional malpractice, fraud, personal injury, wrongful termination, and taxes. Marital dissolution forensic accounting involves cash flows, tracing, support issues, separate/community property, and valuations. Accounting and tax planning/preparation services. Excellent communicators with extensive testimony experience. See display ad on page 49.

FRAUD INVESTIGATIONS
FULCRUM FINANCIAL INQUIRY
1000 Wilshire Boulevard, Suite 1650, Los Angeles, CA 90017, (213) 787-4100, fax (213) 787-4141, e-mail: dnolte@fulcruminquiry.com. Web site: www.fulcruminquiry.com. Contact David Nolte. Our professionals are experienced CPAs, MBAs, ASAs, CFAs, affiliated professors, and industry specialists. Our analysis and research, combined with unique presentation techniques, have resulted in an unequaled record of successful court cases and client recoveries. Our expertise encompasses damages analysis, lost profit studies, business and intangible asset valuations, appraisals, fraud investigations, statistics, forensic economic analysis, royalty audits, strategic and market assessments, computer forensics, electronic discovery, and analysis of computerized data. Degrees/licenses: CPAs, CFAs, ASAs, PhDs and MBAs in accounting, finance, economics, and related subjects. See display ad on page 2.

MARTINO CONSULTING & INVESTIGATIVE SERVICES, INC.
P.O. Box 950428, Mission Hills, CA 91345, (818) 472-0374, fax (818) 920-1367, e-mail: dannmartino@verizon.net. Web site: www.dannelmartino.com. Contact Daniel M. Martino, president. Daniel Martino is a former FBI supervisory special agent with 34 years experience with an emphasis on white collar criminal and civil investigations. During 1996-2005, Mr. Martino managed the FBI Health Care Fraud Program in Southern California. Mr. Martino is nationally recognized in the health care fraud arena. Areas of practice include due diligence, background health care, financial and insurance fraud investigations. Additional litigation support services available.

STONEFIELD JOSEPHSON, INC.
2049 Century Park East, Suite 400, Los Angeles, CA 90067, (310) 453-9400, fax (310) 453-1187, Web site: www.sjaccounting.com. Contact Jeff Sumpter, director of litigation support and forensic services or Len Lyons, director of valuation, litigation, and forensic group. We are a California-based public accounting firm founded in 1975. The full-service firm serves public and privately held clients throughout the United States and internationally from four California locations: Los Angeles, Orange County, San Francisco, East Bay, as well as Hong Kong. See display ad on page 9.

VICENTI, LLOYD & STUTZMAN LLP
2210 East Route 66, Suite 100, Glendora, CA 91740, (626) 857-7300, fax (626) 857-7302, e-mail: lsaddlemire@vlsllp.com. Web site: www.VLSLLP.com. Contact Linda Saddlemire, CPA, CFE, partner. VLS Fraud Solutions uses a proven process to deliver a thorough investigation, while protecting a positive work environment. This team—CPAs, Certified Fraud Examiners, and former FBI law enforcement—are seasoned leaders, experienced in the investigative community. We work with attorneys concerning the investigation and findings, and assist you in preparing for litigation. We respond quickly to your clients’ concerns and manage crisis situations that can arise during fraud investigations. We communicate often and effectively with you regarding important investigative results. For more information or to schedule a free consultation, contact VLS Fraud Solutions Advisors in complete confidence. Service Area: (Geographic): Southern California (primary), Central & Northern California (secondary).
WHITON, ZUCKERMAN, WARSAVSKY, LUNA, WOLF & HUNT

HUMAN FACTORS
HAYNE & COMPANY, CPAS
4910 Campus Drive, Newport Beach, CA 92660, (949) 724-1880, fax (949) 724-1889, e-mail: sgabrielson@hayneiap.com. Web site: www.hayneiap.com. Contact Steven C. Gabrielson. After ego, consulting and expert witness testimony in a variety of practice areas: commercial damages, ownership disputes, economic analysis, business valuation, lost profits analysis, fraud/forensic investigations, taxation, personal injury, wrongful termination, professional liability, and expert cross examination. Extensive public speaking background assists in courtroom presentations.

INSURANCE
E.L. EVANS ASSOCIATES
3310 Airport Avenue, Box # 2, Santa Monica, CA 90405, (310) 559-4005, fax (310) 390-9669, e-mail: elevans66@yahoo.com. Contact Gene Evans. Good faith/bad faith. Over 45 years’ experience—claims adjuster. Standards and practices in the industry, litigation support, claims consultation, case review and evaluation, property/casualty claims, construction claims, uninsured/underinsured motorist claims, general liability, fire/water/mold claims, damage assessment, professional liability claims, appraisal under policy, arbitration, duty to defend, advertising claims, coverage applications, and suspected fraud claims. CV available on request. See display ad on page 38.

SHARP & ASSOCIATES
21520 Yorba Linda Boulevard, Suite G #257, Yorba Linda, CA 92887, (213) 407-9957, e-mail: rsharp1959@aol.com. Web site: www.sharpandassociates.org. Contact Robert J. Sharp. After serving 32 years in the insurance industry, the multiple management positions, including vice president of claims and president and CEO, he is now offering his services as an expert witness for both defendant and plaintiff for insurance related matters including bad faith. Mr. Sharp can educate you on all aspects of insurance related matters. Mr. Sharp has testified in numerous cases in both state and federal court.

INTELLUCTUAL PROPERTY INVESTIGATIONS
WHITE, ZUCKERMAN, WARSAVSKY, LUNA, WOLF & HUNT

INVESTIGATIVE SERVICES
PROMETHEUS GROUP, INC.
PRIVATE INVESTIGATION & SECURITY SERVICES

LEGAL SUPPORT-INVESTIGATIONS
USA EXPRESS LEGAL INVESTIGATIVE SERVICES, INC.
20300 Ventura Boulevard, Suite 290, Woodland Hills, CA 91364, (818) 887-6620, fax (800) 861-5311, e-mail: harry@usaexpressinc.com. Web site: www.usaexpressinc.com. Contact Harry Kazakian. Attorney service providing document filings and process service, full-scale investigations, including asset search, background investigation, skip trace nationwide, DMV records, mobile copier services. Will prepare and issue subpoenas to obtain records. Eighteen years of experience investigating personal injury claims. See display ad on page 58.

LITIGATION
BALLENGER CLEVELAND & ISSA, LLC
10990 Wilshire Boulevard, 16th Floor, Los Angeles, CA 90024, (310) 873-1717, fax (310) 873-4600. Contact Bruce W. Ballenger, CPA, managing director, bankruptcy examiner, designated bankruptcy trustee. Comprehensive search, examination, and analysis of records to determine true revenues, profits, net worth, shareholders’ equity, depreciation, amortization, etc. Expert witness for complicated accounting, financial, and business valuation matters, feasibility of reorganization plans, fraudulent conveyances, bankruptcies, fairness of interest rates, stock options, management misfeasance/malfeasance, purchasing, and mergers and acquisitions. More than 100 open-court testimonies: federal, state, civil, criminal. See display ad on page 52.

HIGGINS, MURRIS & LOVETT, INC.
800 South Figueroa Street, Suite 710, Los Angeles, CA 90017, (213) 617-7775, fax (213) 617-8372, e-mail: mhiggins@hmlinc.com. Web site: www.hmlinc.com. Contact Mark C. Higgins, ASA, president. The firm has over 25 years of litigation support and expert testimony experience in matters involving personal injury, economic damages, intellectual property, loss of business goodwill, and lost profits. Areas of practice include business disputes, eminent domain, bankruptcy, and corporate and marital dissolution. See display ad on page 57.
Confidence At The Courthouse.

Business litigation is increasingly complex. That is why we believe valuation issues must be addressed with the same meticulous care as legal issues. Analysis must be clear. Opinions must be defensible. Expert testimony must be thorough and articulate. HML has extensive trial experience and can provide legal counsel with a powerful resource for expert testimony and litigation support.

For More Information Call 213-617-7775
Or visit us on the web at www.hmlinc.com

BUSINESS VALUATION • LOSS OF GOODWILL • ECONOMIC DAMAGES • LOST PROFITS

THE BEST LEGAL MINDS IN THE COUNTRY TALK TO US

- Metallurgical Failures
- Corrosion & Welding Failures
- Glass & Ceramic Failures
- Chains / Ladders / Tires
- Automobile/Aerospace/ Accidents
- Bio-Medical/Orthopedic Implants
- Plumbing/Piping/ABS Failures
- Complete In-House Laboratory Testing & Analysis Facilities
- Expert Witnesses/Jury Verdicts
- Licensed Professional Engineers

Contact: Dr. Naresh Kar, Fellow ASM, Fellow ACFE
Dr. Ramesh Kar, Fellow ASM, Fellow ACFE

KARSLAB
ADVANCED MATERIALS, INC.
Testing & Research Labs
2528 W. Woodland Drive
Anaheim, CA 92801
TEL: (714)527-7100
FAX: (714)527-7169
www.karslab.com
email: kars@karslab.com

special investigative staff consists of former law enforcement personnel, attorneys, accountants, journalists, computer technicians, and experienced research specialists.

MEDICAL

AMFS, INC. (AMERICAN MEDICAL FORENSIC SPECIALIST)
2640 Telegraph Avenue, Berkeley, CA 94704, (800) 275-8903, (510) 549-1693, fax (510) 486-1255, e-mail: medicalExperts@amfs.com, Web page: www.medicalExperts.com. Contact Barry Gustin, MD, MPH, FACEP. AMFS an attorney and physician-managed company that provides initial in-house case screenings by 72 multidisciplinary physician partners and testifying medical experts. Medical experts are matched to meet case requirements by MFS Physician Partners from our panel of over 2,500 carefully pre-screened board-certified practicing specialists in California. All recognized medical specialties. Plaintiff and defense. Fast, thorough, objective, and cost-effective. Medical negligence, personal injury, product liability, and toxic torts. "A 92 percent win record" — California Lawyer magazine. See display ad on page 56.

MEDICAL MALPRACTICE

J. CARLOS MAGGI, MD
Memorial/Miller Children’s Hospital. 2801 Atlantic Avenue, Long Beach, CA 90815, (562) 933-8743, fax (562) 933-0764, e-mail: cmaggi@memorialcare.org. Contact Evelyn Rosas. Pediatric Pulmonary, Pediatric Critical Care, Pediatric Hospital Care, Pediatric Emergencies and Resuscitation, Pediatric Trauma and Burns, and Intoxications.

MEDICAL/UROLOGY

DUDLEY SETH DANOFF, MD, FACU
Cedars-Sinai Medical Center, 8635 West 3rd Street, Suite One West, Los Angeles, CA 90048, (310) 854-8988, fax (310) 854-0267, e-mail: danoff@aol.com. Web site: www.towerurology.com. Contact Dudley Seth Danoff, MD, FACU. Experience in urologic case review and testimony for plaintiff and defense, court experience, and strategies. Extensive expertise in prostate, bladder, and kidney cancers; kidney transplantation; pelvic trauma; sexual dysfunction; perire implant; incontinence; infections; and stone disease. Publishing experience in scientific journals, books, lectures, training seminars, and course directorships. Princeton University, Summa Cum Laude; Yale Medical School; Columbia University urologic training; Major, U.S. Air Force; Who’s Who in America; Academic appointment. Detailed CV available.

METALLURGY

KARS ADVANCED MATERIALS, INC.
Testing and Research Labs, 2528 West Woodland Drive, Anaheim, CA 92801-2636, (714) 527-7100, fax (714) 527-7169, e-mail: kars@karslab.com. Web site: www.karslab.com. Contact Drs. Ramesh J. Kar or Naresh J. Kar. Southern California’s premier materials/mechanical/metallurgical/structural/forensics laboratory. Registered professional engineers with 20-plus years in metallurgical/cal/forensic/structural failure analysis. Experienced with automotive, bicycles, tires, fire, paint, plumbing, corrosion, and structural failures. We work on both plaintiff and defendant cases. Complete in-house capabilities for tests. Extensive deposition and courtroom experience (civil and criminal investigations). Principals are fellows of American Society for Metals and board-certified diplomats, American Board of Forensic Examiners. See display ad on page 57.

PERSONAL INJURY

WHITE, ZUCKERMAN, WARSAVSKY, LUNA, WOLF & HUNT

PLASTIC AND COSMETIC RECONSTRUCTIVE SURGERY

KARL N. STEIN, MD
24548 Via Arcade, Valencia, CA 91355, (661) 255-5451, e-mail: KarlNSteinMD@aol.com. Contact Karl N. Stein, MD. Specialties: burn specialist, Sherman Oaks Hospital and burn center, American Burn Assn. Also plastic and reconstructive surgery specialist, 20+ years experience as surgeon, expert witness, including court appearances. Degrees/license: MD FACS, Board Certified in Plastic and Reconstructive Surgery.

JEFFREY L. ROSENBERG MD

POLYGRAPH/LIE DETECTION/ INVESTIGATION

JACK TRIMARCO & ASSOCIATES
5945 Wilshire Boulevard, 6th Floor, Beverly Hills, CA 90212, (310) 247-2637, fax (760) 777-1836, e-mail: jtrimarco@aol.com. Contact Jack Trimarco. I have reviewed polygraph from many perspectives…as an inspector examiner, as a trainer, and as program manager of the FBIs Polygraph Program in Los Angeles. I am the former Inspector General for the Department of Energy Polygraph Program. This unique background allows me to bring the highest levels of integrity, service, and expertise to any polygraph situation. Service area: national. See display ad on page 47.

PRIVATE INVESTIGATION

BENCHMARK INVESTIGATIONS

HODSON AND ASSOCIATES
P.O. Box 505, Fullerton, CA 92836, (714) 773-5345 ,fax (714) 494-8013, e-mail: customerservice@investigatorforyou.com. Web site: www.investigatorforyou.com. Contact Justin Hodson. We are a professional, full service investigative agency that offers a wide range of services from surveillance, back- ground, locate investigations, witness interviews, court records research, process of legal service and more. Our experienced investigators are available to assist you 24/7. Hodson and Associates is licensed by the state of California to perform investigations and are members of the Cali-
fornia Association of Licensed Investigators and the National Association of Investigative Specialists. See display ad on page 53.

PARRENT SMITH INVESTIGATIONS
10158 Hollow Glen Circle, Los Angeles, CA 90077, (310) 275-8619, (949) 715-9583, fax (310) 274-0503, or (949) 715-9583, e-mail: joanne@psinvestigates.com, or ncsmith@psinvestigates.com. Web site: www.psinvestigates.com. Contact Joanne Parrent or Nic Smith. PSI is a full-service investigative firm. Nic Smith, CPP, has 34 years in the field conducting investigations for attorneys in thousands of civil and criminal cases. A court-qualified expert in security and investigative standards, he specializes in corporate fraud, environmental litigation, and difficult locations. Joanne Parrent, formerly an author and journalist, uses her investigative research background in complex litigation investigations, deep backgrounds, witness interviews, and in-depth computer and historical research. Offices in Los Angeles and Orange counties. Services throughout the state.

PROMETHEUS GROUP, INC.
PRIVATE INVESTIGATION & SECURITY SERVICES

SAFIRROSETTI
The premiere investigative consulting firm. 10990 Wilshire Boulevard, Suite 1025, Los Angeles, CA 90024, (310) 882-1111, e-mail: tpikor@safirrossetti.com. Web site: www.safirrossetti.com. Contact Tom Pikor. Safir-Rosetti’s team of skilled professionals provides a broad range of security, intelligence, and investigative consulting services throughout North America and worldwide. Our investigative unit specializes in corporate fraud, theft of trade secrets, litigation support, and due diligence investigations. Our technology group conducts computer forensic and Internet investigations, and our financial group directs asset tracing and forensic accounting inquiries. Our professional investigative staff consists of former law enforcement personnel, attorneys, accountants, journalists, computer technicians, and experienced research specialists.

T. T. WILLIAMS, JR. INVESTIGATIONS, INC.
445 South Figueroa Street, Suite 2700, Los Angeles, CA 90071, (213) 489-6831, fax (213) 426-2151, e-mail: ttwp@aol.com. Web site: www.ttwilliamspi.com. Contact Timothy T. Williams, Jr. Expert witness in criminal investigations and police procedures. We specialize in conducting criminal, civil, background and discrimination investigations. T.T. Williams, Jr. Investigations, Inc. has over 200 years of investigative experience from Los Angeles to New York. Retired L.A.P.D. as a senior detective supervisor, from the elite Robbery-Homicide Division. Over 29 years of active law enforcement experience, of which 26 years as a detective conducting and supervising a variety of investigations including but not limited to homicide, robbery, domestic violence, child abuse, assault, sexual assault, rape, burglary, auto theft, juvenile and narcotics investigation. Degrees/Licenses: Graduate P.O.S.T. Supervisory Leadership Institute; Graduate West Point Leadership Program; Interpol International; Advanced and Supervisory P.O.S.T. Certificates; PI 23399; PPO 14771. Service area: Los Angeles, San Bernardino, Ventura, Orange, and Riverside counties.

PROCESS SERVICE
BENCHMARK INVESTIGATIONS

PSYCHIATRY
CLARK E. SMITH, MD, FORENSIC & ADDICTION PSYCHIATRY
9750 Miramar Road, Suite 214, San Diego, CA 92126, (858) 530-9112, ext 4, fax (858) 435-4363, e-mail: doctclare@aol.com. Contact Maggie Hundleby. Forensic and Addiction Psychiatry, Hospital Medical Director. Specialties: employment, discrimination, harassment, wrongful termination, IME, personality disorder, malpractice, gross negligence, causation, disability, accident, trauma, wrongful death, suicide, dementia, capacity, psychopharmacology, PTSD, ADHD, depression, anxiety, panic, schizophrenia, bipolar disorder, psychosis, pain, drug addiction, detoxification, alcohol, sedatives, sleeping pills, amphetamines, methamphetamine, cocaine, heroin. Criminal: diminished capacity, imperfect self defense, unconsciousness, insanity, death penalty, wrongfulness, malinger, memory, witness perception, delirium and intoxication. Over 100 trials.

ROOFING AND WATERPROOFING INVESTIGATION
COOK CONSTRUCTION COMPANY
7131 Owensmouth Avenue, Canoga Park, CA 91303, (818) 438-4535, fax (818) 599-0028, e-mail: scokie16121@aol.com. Contact Stephen Cook. Forty years of construction experience. Specializes in law suit preparation/mandatory construction, single and multi-family, hillside, foundations, concrete floors, retaining walls, waterproofing, water damages, roofing, carpentry/rough framing, tile, stone, materials/costs, and building codes. Civil experience: construction defect cases for insurance companies and attorneys since 1992. See display ad on page 38.

RIMKUS CONSULTING GROUP, INC.
2677 North East Street, Suite 300, Santa Ana, CA 92705, (714) 954-1912, fax (714) 954-1952, e-mail: cjvajosrki@rimkus.com. Web site: www.rimkus.com. Contact Curt Yaworski. Rimkus Consulting Group is a full-service forensic consulting firm. Since 1983, we have provided reliable investigations, reports, and expert witness testimony around the world. Our engineers and consultants analyze the facts from origin and cause through extent of loss. Services: construction defect and dispute analysis, vehicle accident reconstruction, fire cause and origin, property evaluation, mold evaluations, indoor air quality assessments, biomechanical analysis, product failure analysis, foundation investigations, industrial accidents and explosions, water intrusion analysis, geotechnical evaluations, construction disputes, financial analysis and assessments, forensic accounting, HVAC analysis, electrical failure analysis, and video/graphics computer animation. See display ad on page 53.


SKIP TRACING
SPARTAN DETECTIVE AGENCY (GUARANTEED SUBPOENA)
2009-2013 Morris Avenue, Box 1414, Union, NJ 07083, (908) 964-3190, (800) 672-1952, fax (908) 689-0885, e-mail: info@servced.com. Web site: www.served.com. Contact Philip Geron. All investigative services. Specializing in skip tracing, if we don’t find’em you don’t pay. Criminal, automobile, airplane, workers’ compensation, and matrimonial with retainer for investigation. Established 1965. See display ad on page 17.

SURVEILLANCE
DOUGLAS BALDWIN & ASSOCIATES, INC.
P.O. Box 1249, La Canada Flintridge, CA 91012, (800) 392-3950, (818) 952-4433, fax (818) 790-4622, e-mail: dba@pacbell.net. Web site: www.baldwinpi.com. Contact Douglas Baldwin. 20th year anniversary offering full time service which includes free trial, and background and data analysis of possibilities. Twenty-five years of experience with nationwide asset location, insurance litigation, product liability defense, large scale construction defects, business backgrounds, intellectual property research, genealogy, wills and estates, white-collar fraud, premises liability, and employer defense. Full field work including extensive witness interviews, jury surveys, full equip serious subrosa, and process serving. Please visit our website. See display ad on page 51.

PROMETHEUS GROUP, INC.
PRIVATE INVESTIGATION & SECURITY SERVICES

WORKERS’ COMPENSATION
SPARTAN DETECTIVE AGENCY (GUARANTEED SUBPOENA)
2009-2013 Morris Avenue, Box 1414, Union, NJ 07083, (908) 964-3190, (800) 672-1952, fax (908) 689-0885, e-mail: info@servced.com. Web site: www.served.com. Contact Philip Geron. All investigative services. Specializing in skip tracing, if we don’t find’em you don’t pay. Criminal, automobile, airplane, workers’ compensation, and matrimonial with retainer for investigation. Established 1965. See display ad on page 17.
The Little Book of Plagiarism

By Richard Posner
Pantheon, 2007
$10.95, 128 pages

Ironically, the book itself is a test on plagiarism. For example, *The Little Book of Plagiarism* explores a number of ways to avoid plagiarism. Some it follows; others it ignores. Quotation marks appear beside references to other works of literature, art, and music. Allusions are judged for their obviousness. The book’s acknowledgements provide full citations, when appropriate, “to the secondary works mentioned in the text,” thus abiding by a principle that Posner advocates in the book. And lest anyone accuse him of typographical plagiarism, he concludes with “A Note on The Type”—literally, a history of the typeface used in the book.

Posner also reviews types of literature that avoid plagiarism and those that are prone to it. Parody, for instance, quotes extensively and copies distinctive features, usually without mentioning the parodied work. “The parodist will plant clues so numerous and unmistakable that the reader will recognize the copying.” Otherwise, it will not be recognized as parody. He comments that allusion is a milder form of this usage, in which “the reader is expected to recognize the allusion.” But even without acknowledgement, he notes, copying is harmless if the reader is indifferent or the deception has no consequence. This is the case with, for example, a textbook, in which the original sources of the ideas discussed are very rarely stated, and no one expects otherwise.

Posner’s views on originality appear to have been jaded by his work on the bench. He notes “the low regard in which the legal profession holds originality.” This comment is ironic and poignant, given his robust publication of articles and books. He is almost apologetic for the law’s reliance upon cases decided long ago to justify fresh results. Reflecting on the copying that is emblematic of sound judicial opinion, he writes: “Little value is ascribed to judicial originality….J udges do not brag about the number of cases they have overruled, the doctrines they have created. They would rather be regarded as sound than as original, as apologists of the law rather than inventors of it. Judges find it politic to pretend that they are the slaves of the law, never its masters and the competitors of legislators.”

Posner also notes that originality is not prized by the publishing industry either because “the desire to be original and the desire to be successful are not wholly compatible….Publishers are looking for the new thing that’s enough like the old thing to be able to gain early acceptance by the market, yet enough unlike it to satisfy the public’s taste for variety. The creation of such works would be stymied by equating imitation to plagiarism. Creative imitation is…a modern market imperative.”

**Plagiarism in Academia**

As for the world of education, Posner suggests that clever teachers can make it difficult for students to plagiarize by creating assignments unlikely to have been addressed before. He stakes controversial ground in praising the copying of work to refine it and make it better. In this tiny book, he explores whether copying one’s own letters, for example, could amount to plagiarism. Quoting another essayist, Posner agrees: “Immature poets imitate; mature poets steal; bad poets deface what they take; good poets make it into something better, or at least something different. The good poet welds his theft into a whole of feeling which is unique, utterly different from that from which it was torn; the bad poet throws it into something which has no cohesion. A good poet will usually borrow from authors remote in time, or alien in language or diverse in interest.” Perhaps part of the goodness Posner ascribes to some poets, then, is based upon their ability to avoid detection.

Posner’s book on plagiarism at times rises to defend plagiarism that remains undetected or is meant to be detected. Writers have reasons to avoid the awkwardness of acknowledging the source of a title, for instance, on the cover of a book (e.g., *The Sun Also Rises, The Sound and the Fury,* and so on). He also excuses authors whose allusions are obvious enough to make explicit acknowledgement unnecessary or whose anticipated audience cannot be expected to notice or care about uncredited copying.

This is not to say that Posner excuses plagiarism. He repeatedly considers the moral blameworthiness of various forms of plagiarism. In one passage, he seems almost gleeful when characterizing “tony colleges” such as Harvard as naive for not subscribing to plagiarism detection software services and preferring instead to “preach to their students about the evils of plagiarism.” This remark is made more critical when viewed in the context of the book’s introduction concerning, and perhaps unnecessarily frequent references to, a Harvard sophomore who was found to have plagiarized extensively from novels. In all, Posner’s short book is a wonderfully intelligent summary of his interesting and important perspective on the complexities of plagiarism.

Michael A. Geibelson is a partner in the Los Angeles office of Robins, Kaplan, Miller & Ciresi LLP, where he practices business tort litigation.
**Appraisals and Valuations**
COMMERCIAL, INDUSTRIAL, OFFICE, RESIDENTIAL, estate homes, apartments, land, eminent domain, special-use, easements, fractional interests, and expert witness. Twenty-five years of experience. All of Southern California with emphasis in Los Angeles County and Orange County areas. First Metro Appraisals, Lee Walker, MAI, (714) 744-1074. Also see Web page: www.firstmetroappraisals.com.

**NEED AN EXPERT WITNESS**, legal consultant, arbitrator, mediator, private judge, attorney who outsources, investigator, or evidence specialist? Make your job easier by visiting www.expert4law.org. Sponsored by the Los Angeles County Bar Association, expert4law—the Legal Marketplace is a comprehensive online service for you to find exactly the experts you need.

**The 2008 Directory of Experts & Consultants** is now open for registration. The directory contains more than 2,000 listings and display ads in over 500 categories for expert witnesses & consultants who provide medical, technical, forensic, scientific and legal expertise. There are also special sections for Dispute Resolution Professionals; Lawyer-to-Lawyer (L2L) Referrals; and Litigation/Legal Services. The Directory enjoys the largest distribution of any legal resource in the region. Registration Deadline: October 1. For registration forms: call (213) 896-6504, email: forensics@lacba.org or download forms at www.lacba.org/directories. Published by the Los Angeles County Bar Association.

**Consultants and Experts**
MED-MAL? Strong medical cases can be big winners for you. Do not bet your time until you know how strong your case is. Let Dr. Prasanna review your case. Cost-effective litigation support, including questions for experts (deposition, cross). Dr. Prasanna, 38 Corporate Park, Irvine, CA 92606. www.drprasanna.com. (949) 553-9775.

**Lawyer Referral**
CERTIFIED CRIMINAL LAW SPECIALIST IN BEVERLY HILLS. Jay Jaffe is an AV rated attorney who has been practicing criminal law for 34 years and is recognized by his peers as one of the truly outstanding attorneys in Southern California. He handles all criminal cases, misdemeanors and felonies, including DUI. (310) 275-2333, jayjaffe@earthlink.net, http://www.attorneyjayjaffe.com.

**Vacation Rentals**
VACATION RENTALS: ITALY/FRANCE. Eighteenth century Tuscan villa only six miles from Florence. Four bedrooms (sleeps 10), three baths, air-conditioned, sauna, professional-level kitchen, 1,500 to 1,900 euros, weekly. Please contact Ken Lawson, 20 years representing owners of historic properties (from studios to castles); Voice: 206 632-1085; Web site: www.lawofficeofkenlawson.com, e-mail: kelaw@lawofficeofkenlawson.com.

---

**NORIEGA CHIROPRACTIC CLINICS**
Clinica Para Los Latinos • Serving the Latin Community for 30 years

901 W. Whittier Boulevard
Montebello, CA 90640

1.800.624.2866
(323) 728-8268

NORIEGA BAIL BONDS 323.263.2663
INDEX TO ADVERTISERS

Aon Direct Administrators/LACBA Prof. Liability, Inside Front Cvr
Tel. 800-634-3927 www.attorneys-advantage.com

AMFS, Inc. (American Medical Forensic Specialists, Inc.), p. 56
Tel. 800-275-8903 www.amfs.com

Arbitration and Mediation Group, p. 4
Tel. 818-790-1850 www.mediationla.com

Ballenger, Cleveland & Issa LLC, p. 57
Tel. 310-873-1217

Lee Jay Berman, p. 6
Tel. 213-385-0438 www.leejayberman.com

The California Academy of Distinguished Neutrals, p. 32, 33
Tel. 310-341-3879 www.CaliforniaNeutrals.org

California Minority Counsel Program, p. 12
Tel. 415-782-1900 www.cmcp.org

Cook Construction, p. 38
Tel. 818-438-3749 www.mickeykessler.com

Cohen Miskei & Mowrey, p. 23
Tel. 818-762-7676 www.equilaw.com

Coldwell Banker, p. 4
Tel. 818-986-5070 e-mail: cmmcpas@aol.com

Commerce Escrow Company, p. 45
Tel. 213-484-0855 www.comescrow.com

Convergence Graphics, Inc., p. 39
Tel. 877-994-2487 e-mail: info@convergencegraphics.com

Law Offices of Rock O. Kendall, p. 30
Tel. 949-365-5844 www.dmv-law.com

Krycler, Ervin, Taubman & Walheim, p. 56
Tel. 800-995-0100 www.law.com

Laguna Beach Visitor & Conference Bureau, p. 63
www.lagunabeachinfo.com

Lawyers’ Mutual Insurance Co., p. 7
Tel. 800-252-2045 www.lawyersmutual.com

Lexis Publishing, p. 5, 11
www.lexis.com

MCLELawyers.com, p. 39
Tel. 800-552-5382 www.mclelawyers.com

Mersini Law Group, p. 8, 29, 44
Tel. 310-826-6300 e-mail: info@mersini.com

Metrocities Mortgage Inc., p. 8
Tel. 800-464-2484 www.metroclti.com

Noriega Clinics, p. 61
Tel. 323-728-8268

Pacific Construction Consultants, Inc. (PCCO), p. 52
Tel. 310-553-2488 www.pccolaw.com

Premier Business Centers, p. 29
Tel. 1-877-MYSUITE (1-877-697-8483) www.pbcenters.com

Premier Legal, p. 6
Tel. 866-999-9085 www.premierlegal.org

Steven R. Sauer APC, p. 19
Tel. 626-795-5000 www.forensisgroup.com

Stonefield Josephson, Inc., p. 9
Tel. 866-235-2311 www.southernlawyers.com

Tenrec, Inc., p. 19
Tel. 800-320-8000 e-mail: sales@tenrec.com

UngerLaw, P.C., p. 19
Tel. 310-772-7700 www.ungерlaw.com

URS, p. 47
Tel. 213-996-2555 www.urscorp.com

USA Express Legal & Investigative Services, p. 58
Tel. 877-872-3977 www.usaexpressinc.com

Vision Sciences Research Corporation, p. 38
Tel. 934-934-2083 www.contrastsensitivity.net

West Group, Back Cover
Tel. 800-762-2572 www.westgroup.com

White, Zuckerman, Warsavsky, Luna, Wolf & Hunt, p. 49
Tel. 818-981-4226 www.whitezuckerman.com

Wolfsdorf Immigration Law Group, p. 4
Tel. 310-570-4088 www.wolfsdorf.com

Zivetz, Schwartz & Saltsman, p. 51
Tel. 310-826-1040 www.zsscpa.com
laguna beach

A RESORT FOR ALL SEASONS

Get away for your next meeting to this quaint, artistic, seaside village with spectacular ocean views and seven miles of bubbles to tickle your senses. Check out our endless galleries and restaurants dotting the coastline. Check into your own special hideaway from spa resorts to charming bed & breakfasts overlooking the sparkling blue Pacific. Kayaking, hiking, biking and painting are among the choices for team building activities. It’s simple and spectacular. For your official Visitors Guide, contact the Laguna Beach Visitors & Conference Bureau. Laguna Beach – disappear for awhile.

www.lagunabeachinfo.org | 800.877.1115 | lbvb@lagunabeachinfo.org
Taking Tougher Action against Identity Theft

LAST YEAR, LOCAL LAW ENFORCEMENT AGENCIES—including the Southern California High Technology Task Force Identity Theft Team, the Los Angeles Police Department’s Computer Crime Unit, and the Los Angeles County Sheriff’s Commercial Crimes Bureau—investigated more than 30,836 reports of identity theft. However, Federal Trade Commission studies indicate that only 40 percent of victims report identity theft. This means that it is likely that more than 77,000 instances of identity theft occurred in Los Angeles County in 2006.

The impact of these crimes is staggering. In a recent Los Angeles County identity theft case, the defendant stole the personal information of more than 7,402 victims by running credit queries through ChoicePoint, a financial data aggregator. The losses of the victims reached at least $11.4 million.

The unlawful use of personal identifying information can destroy a victim’s reputation and credit, cause significant financial loss, and inflict emotional harm. Identity theft cost legitimate businesses in Los Angeles County more than $300 million in lost profits during 2005. In extreme cases, victims may even be charged with crimes when thieves use the victims’ identities as part of a fraudulent scheme.

California law, set forth in Penal Code Sections 530.5 and 530.55, defines “identity theft” as the use of another individual’s personal information without consent for any unlawful purpose. The suspect need not appropriate the entire identity of a person. The unauthorized and unlawful use of any one of several categories of personal identifying information—such as name, address, credit card number, or Social Security number—is sufficient.

Violations of Penal Code Section 530.5 may be prosecuted as misdemeanors or felonies, depending on the specific nature of the violation. Certain identity theft offenses are known as wobblers, which may be charged as either a misdemeanor or felony. These include 1) acquiring the personal identifying information of another for unlawful use in obtaining goods, services, real property, or medical information without consent, 2) having a prior identity theft conviction and acquiring or retaining possession of personal identifying information with the intent to defraud, or 3) obtaining the personal identifying information of 10 or more individuals. Sanctions for wobblers range from a fine to a fine plus incarceration in county jail for up to one year or a fine and commitment to state prison for up to three years.

Individuals who sell, transfer, or convey personal financial information with intent to defraud the victim or with actual knowledge that the information will be used to unlawfully obtain goods, services, real property, or medical information, may be charged with either misdemeanors or felonies. If convicted, a defendant faces consequences that range from a fine to a commitment to state prison for up to three years. When an identity theft victim suffers a loss in excess of $50,000, and the amount of loss is charged and proven in addition to the crime, a defendant may be sentenced to additional time in custody.

In the nine years since Penal Code Section 530.5 was enacted, the basic provisions of California’s identity theft statute have remained the same. However, the definition of “person” in the statute has expanded from a living person or corporation to include many different legal entities and deceased persons. Similarly, the definition of “personal identifying information” also has broadened to include medical information, biometric data, and confidential telecommunication and financial codes.

Proposals for Change

In an effort to address the unique multijurisdictional issues that accompany identity theft, and to provide appropriate sentences for recidivist defendants and those who steal and traffic in large amounts of personal identifying information, prosecutors from the Los Angeles District Attorney’s Office, Santa Clara District Attorney’s Office, the California District Attorney’s Association, and others from the banking and financial sector have proposed a number of amendments to the Penal Code. The proposals include:

• Amending Penal Code Section 786 to include the victim’s county of residence as a proper basis for jurisdiction in crimes involving the theft, forgery, or use of fraudulent access cards.
• Amending Penal Code Section 186.22, the criminal street gang statute, to add forgery, the fraudulent use of access card or account information, identity theft, and DMV document fraud to the list of crimes demonstrating a pattern of criminal gang activity.
• Amending Penal Code Section 530.5 to systematically increase the sentences for persons who acquire, sell, transfer, or retain the personal identifying information of others, based on the number of persons whose information is used.
• Amending Penal Code Section 667.5 to provide for a separate and consecutive term of imprisonment in state prison for two years for each prior felony violation of Penal Code Sections 484e, 484f, 484g, 484i, 487, 496, 529, 530.5, or 532—including a conviction for conspiracy to violate those sections.
• Amending Penal Code Section 530.5 to provide an additional year of commitment to state prison if the victim is a person under the age of 18, elderly, or a dependent adult.

Other proposals include one that would make “phishing,” as defined by Business and Professions Code Section 22948.2, a public offense prosecutable as a misdemeanor or felony. Another would require a defendant convicted of access card fraud, identity theft, or false impersonation to pay a “forensic computer laboratory analysis fee” of $250 in addition to any other fine or restitution imposed.

Penal Code Section 530.5 is an important tool for prosecutors. However, the growing participation of gangs in identity theft as well as the absence of a systematic sentencing scheme for those who steal, sell, and utilize the personal information of others mandates further action. The law must be amended to ensure that those who engage in identity theft receive punishment commensurate to their crime.

Kathryn Kolts Showers is the head deputy district attorney in the High Technology Crimes Division of the Los Angeles County District Attorney’s Office.
History of the Red Mass

The Red Mass was first celebrated in Paris in 1245 and began in England about 1310 during the reign of Edward I. The entire Bench and Bar would attend the Red Mass together at the opening of each term of Court. The priest and the judges of the High Court wore red robes, thus the Eucharistic celebration became popularly known as the Red Mass.

The tradition of the Red Mass has continued in the United States. Each year in Washington, D.C. the members of the United States Supreme Court join the President, and members of Congress in the celebration of the Red Mass at the National Shrine of the Immaculate Conception. Los Angeles has celebrated a Red Mass for a quarter of a century. The Mass is attended by government officials, judges, members of the legal profession and their supporters and is open to all faiths.
West Regulations Suite™. Now on Westlaw®.
All state and federal regulations for a topic. All together.

West Regulations Suite for employment, insurance and securities is your one-stop source for consolidated state and federal regulatory information. Find what you need on a topic and complete your regulatory research in one convenient location without having to search multiple sources.

Get the complete picture with state and federal regulations, integrated with state agency materials and decisions, statutes and caselaw.

West Regulations Suite. The comprehensive source you’ve been thirsting for.

Learn more at west.thomson.com/westlaw/regulationssuite or call 1-800-762-5272 today.