# MR. PUBLIC DEFENDER

## California's only elected PD is not afraid to speak his mind about oppressive caseloads.

BY DASHKA SLATER

ONE MORNING LAST OCTOBER, SAN FRANCISCO Public Defender Jeff Adachi walked the white marble corridors of San Francisco City Hall, his black shoes clicking like the keys of a typewriter. He carried a manila envelope filled with copies of a piece of legislation he had written, one that would give him the funding to fill two attorney and three paralegal positions in his office that had been vacant for months. As he walked, he surveyed the names on one door after another, gauging the friendliness of the city and county supervisor therein. When he determined that he might find a receptive ear inside, he opened the door, buttonholed whatever legislative aide he encountered, and launched into his pitch.

"As you know, we're pretty severely underfunded, which has left us with a $1.7 million budget gap," he began. "The mayor's office has not allowed us to fill our vacant positions. They have their foot on our neck. And the only thing I can do is refuse cases. Which I've had to do. We've refused over 300 cases in the past couple of months."

That can get expensive, he adds, because a case that gets refused must be referred to a private lawyer, who usually charges more per hour than lawyers in his office. "I believe strongly that the city shouldn't waste resources," says Adachi. "It doesn't make sense to cut public defender spending. We're charged with the responsibility of providing the best representation in the most cost-efficient way."

Adachi was hoping to find sponsors for his proposal who might

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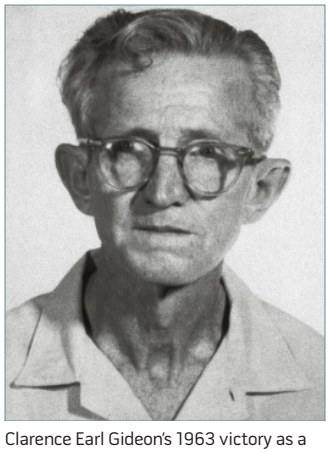
PHOTO BY JEFF CHIU/AP PHOTO

Jeff Adachi in his San Francisco office

persuade San Francisco Mayor Gavin Newsom to lift the hiring freeze. But it had been only three months since Adachi's last budget battle with the mayor, a headline-grabbing affair that one of the local papers dubbed "budget chicken." Grappling with a deficit of nearly $500 million, Newsom had asked for a budget cut of 25 percent from every department head; only Adachi refused, arguing that because the right to counsel is enshrined in the Sixth Amendment of the U.S. Constitution, he could not ethically make cuts that would result in substandard representation by his attorneys. When the mayor remained adamant, Adachi took his argument to the streets, turning out hundreds of supporters for the budget hearings and managing to get some—although not all—of his funding restored. Now, with the memory of that summer budget battle still fresh, even Adachi's friends on the Board of Supervisors seemed to think it was a bit soon to return to the trenches. By midmorning, Adachi had tucked his manila envelope away and headed back to his office.

Adachi, San Francisco's public defender since 2002, has spent virtually his entire career in the office, starting as a deputy public defender just after graduating from law school. He is California's only elected public defender and one of only a handful of elected defenders nationwide, and he firmly believes that the freedom given to him by the electorate both allows and requires him to speak up on behalf of his chief constituency—poor people accused of crimes. Appointed public defenders who decline cases or refuse to make budget cuts are risking their careers. Most, according to Indiana University School of Law Professor Norman Lefstein, "tend to accept the proposition that they have got to do what is thrust upon them in terms of caseload." By refusing to do so, Adachi has garnered a reputation as one of the nation's most outspoken advocates for indigent defense.



Clarence Earl Gideon's 1963 victory as a petitioner to the U.S. Supreme Court set the precedent that criminal defendants have a constitutional right to counsel.

"There aren't many defenders in the country that would take the steps [he's] taken," says Bennett Brummer, who retired last year as public defender for Miami-Dade County in Florida. "It's a thankless task."

IN 1961, A BARELY LITERATE DRIFTER NAMED Clarence Earl Gideon was accused of breaking into a pool hall in Panama City, Florida, and stealing $5 and a few bottles of beer and soda. Gideon was too poor to afford a lawyer. He asked for a lawyer to be appointed by the state, but the trial judge told him that he could appoint lawyers only for defendants charged with capital crimes. Gideon represented himself and was convicted. While serving his five-year sentence in the state penitentiary, he wrote his own appeal, arguing that the judge had violated his Sixth Amendment right to counsel. Two years after Gideon's conviction, the U.S. Supreme Court agreed with his central point in a unanimous holding that the assistance of counsel is a fundamental right and essential for a fair trial (*Gideon v. Wainwright,* 372 U.S. 335 (1963)).

But nearly five decades after the *Gideon* decision, effective representation for the indigent accused is more a misty ideal than an accomplished fact. Public defender offices across the country report caseloads so high that they effectively have to triage their cases, giving the bulk of their attention to the most serious charges and encouraging the rest of their clients to accept whatever plea bargain is offered. Last year, a Florida judge ruled that the public defender's office in Miami-Dade County could decline noncapital felony cases after a $2.48 million budget cut resulted in felony caseloads approaching 500 per attorney, more than three times the American Bar Association's recommendation of 150. But the decision was reversed by the Third District Court of Appeal, which ruled that the issue of excessive caseloads was one for the legislature, not the courts. The Miami-Dade office has appealed to the Florida Supreme Court (*State v. Public Defender,* 12 So. 3d 798 (Fla. Ct. App. 2009), appeal docketed as No. 09-1181 (filed July 6, 2009)).

Earlier this year the high courts in New York and Michigan heard oral arguments in class actions filed on behalf of indigent defendants claiming that their respective states failed to provide them with adequate defense services because of insufficient resources. (*Hurrell-Harring v. State of New York,* 866 N.Y.S. 2d 92 (Sup. Ct. denial of motion to dismiss May 16, 2008), rev'd, 883 N.Y.S. 2d 349 (App. Div. 2009), pending as No. 66 (N.Y. Ct. App. argued March 23, 2010); and *Duncan v. State of Michigan,* 774 N.W. 2d 89 (Mich. Ct. App. 2009), pending as Nos. 139345, 13946 & 13947 (Mich. Sup. Ct. argued April 14, 2010).)

"They tell you to absorb it, but the number of cases you can 'absorb' just gets bigger and bigger," says Brummer.

Other states are struggling with similar issues, among them Kentucky, Maryland, Minnesota, Missouri, and Tennessee. In July, Missouri governor Jay Nixon vetoed a bill that would have established maximum caseloads, despite studies finding the public defender's office there "on the brink of collapse." In Kentucky, where the Department of Public Advocacy's trial division spends a paltry $225.70 per case, Commissioner Ed Monahan bragged that the representation provided by his office is "one of the best bargains in the state," a notion that is probably cold comfort to indigent defendants.

"The reality is that we provide criminal defense for

Bettmann/Corbis

poor people that is vastly inferior to what rich people can afford," says Indiana University's Lefstein, who has written extensively on the issue of indigent defense.

California is considered a leader in indigent defense. It was here that Clara Foltz, the state's first female attorney, led the effort to establish the nation's first public defender office in 1914, and today just over half of California's 58 counties have public defender offices to provide criminal defense counsel to the poor. (The others rely on county-compensated private attorneys.) But California has also led the nation in tax cuts and prison expansion, and the resultant fiscal stress—combined with law-and-order politics—has had dire consequences for public defender budgets. Though both the ABA and the National Advisory Commission on Criminal Justice Standards and Goals recommend that individual attorneys should have annual caseloads of no more than 150 non-capital felonies or 400 non-traffic misdemeanors, 59 percent of California's public defender offices exceed the felony caseload recommendation and 75 percent exceed the misdemeanor recommendation. San Francisco's is one of them. Attorney caseloads in Adachi's office are currently 50 percent heavier than the ABA recommendation: Each felony attorney handles about 230 cases per year, while those handling misdemeanors carry 650 apiece. (By way of contrast, felony attorneys in nearby Santa Clara County handle about 200 cases a year, and misdemeanor attorneys average an astonishing 1,200.)

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**—NORMAN LEFSTEIN**

With such high caseloads, Adachi says, he is ethically required to refuse cases. Although there is no limit to the number of cases he could decline, Adachi says he decides whether to refuse cases based on the workload of his attorneys and staff. "I have made the determination that my office will declare unavailability on a certain number of cases in order to control our caseloads," he says.

The ABA addressed this very issue in 2006 with Formal Opinion 06-441, "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation." It states, in part: "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation."

The opinion also mentions Ethics Opinion 03-01 of the American Council of Chief Defenders: "When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."

Moreover, cases can be reversed because an overburdened public defender provided ineffective assistance—and the attorney in question can face discipline. Last year, Justice J. Anthony Kline of California's First District Court of Appeal mentioned the ABA's Formal Opinion 06-441 in his ruling in a juvenile case and concluded that a Mendocino public defender's performance was deficient and prejudicial to his client because he "failed to investigate potentially exculpatory evidence" and "failed to move for a substitution of counsel knowing he was unable to devote the time and resources necessary to properly defend appellant." (*In Re Edward S.*, 173 Cal. App. 4th 387, 407 (2009).)

Though district attorney and police budgets also have suffered cuts, public defenders have suffered more, according to a study of the state's public defender system published in the Spring 2009 issue of the *California Western Law Review.* For every dollar spent around the state on prosecution, a mere 53 cents is spent on indigent defense, even though more than eight of ten felony defendants are indigent. (In San Francisco, indigent defense receives 59 cents for every dollar that goes to the district attorney's office.) And the gap is growing. In the three fiscal years ending in June 2007, the disparity between the funding for defense and for prosecution in California widened by more than 20 percent.

In this context, Adachi sees himself as a defender not just of the poor, but of liberty itself. "Standing up for the public defender's office is something I take very seriously," he says. "If a person is placed in a position where the entire weight of the government is against them, they should at least have the right to an advocate to speak on their behalf."

ADACHI DIDN'T START OUT PLANNING TO defend poor people. In fact, his goal was to be rich. (Whether he succeeded depends on your point of view; his salary is budgeted at $200,000, but last fall he took a voluntary $10,000 pay cut.) Growing up in Sacramento, the son of an auto mechanic and a lab technician, Adachi watched his parents struggle with the bills and was determined that he himself would have a different kind of life. He was admitted to City College of San Francisco and a year later transferred to UC Berkeley, where he eventually wound up in Asian-American Studies.

But shortly after he started school at Berkeley, Adachi read a newspaper article about a Korean-American man named Chol Soo Lee, who in 1974 was convicted of a gangland killing in San Francisco's Chinatown. Lee was serving a life sentence, but now he faced the death penalty after killing another inmate in a fight on the prison yard (Lee claimed it was self-defense). The article indicated that

the police had suppressed evidence from a witness who said that Lee was not the killer. Intrigued, Adachi drove to Sacramento to meet with the reporter and ended up spending the next six years working on the case—first as a community organizer and fund-raiser, and later as a kind of paralegal. Lee was eventually retried and acquitted in the first murder, and freed after being sentenced in the second murder to the ten years he'd already served.

"I was in court when the jury acquitted him" in the gang killing, Adachi says now. "I can still remember what it felt like to hear the words 'not guilty.' That really cemented my determination to be a lawyer and also to be a lawyer for the people—a public defender. It sort of brought home to me that justice was something that had to be fought for—it wasn't something that you would be served on a silver platter."

Adachi went to law school at UC Hastings, then started at the San Francisco Public Defender's Office in February 1986. Despite having virtually no idea how criminal cases were conducted, he found himself saddled with 250 to 300 misdemeanor cases at a time.

"Sometimes you'd represent up to a hundred people in the morning," he recalls. "Then you'd have trials in the afternoon. And then when court was over, you would come back to the office and there would be 15 new cases in your box—people who were in jail and you needed to see that night. And so you'd go to the jail and interview people and then you'd come back to the office and get ready for court the next day. What drove you was fear. Because you didn't want to look like an idiot by not being prepared in court."

Adachi logged 28 misdemeanor jury trials in his first 18 months and then began working felonies. His approach was always the same—he just tried to work harder than anyone else. "I realized early on that I wasn't the smartest person in the room and I had to really work hard to stand a chance at winning," he explains. But he was also pugnacious.

"I used to get into arguments with the district attorneys," he recalls. "I didn't know how to settle a case. I would always push too hard. That's something that's still with me now."

By 1998, Adachi had become chief attorney in the office and the heir-apparent to longtime Public Defender Geoffrey F. Brown. Then in January 2001, Brown surprised everyone by resigning to take a lucrative post on the California Public Utilities Commission. Within days Mayor Willie Brown (no relation) appointed Kimiko Burton-Cruz, the daughter of then-Senate President Pro Tem John Burton, as the new public defender. One of Burton-Cruz's first official actions was to fire Jeff Adachi.

In the spring 2002 election, Adachi ran an outsider campaign against Burton-Cruz, taking advantage of the anti-machine mood that was sweeping a city weary of well-connected politicians like Willie Brown. In the end, he won by nearly 12,000 votes, despite raising one-fifth the amount of cash that his opponent did.

As soon as Adachi took office, he began working to reduce his staff's workload. Felony attorneys who usually carried 70 to 100 cases at a time saw their caseloads drop to between 50 and 70. Misdemeanor caseloads dropped from 200 to 300 per attorney to between 100 and 150.

At the same time, Adachi resurrected a focus on trials that he had brought to the office as chief assistant public defender. He calls it "the trial mind," and it's reflected in a series of bronze sculptures he commissioned for his office: figures of celebrated litigators such as Johnnie Cochran, Clarence Darrow, Clara Foltz, and Earl Rogers.

"Earl Rogers used to talk about 'the trial mind,' " Adachi explains. "You approach every case as if it's going to trial, so that if it does go to trial you've explored every possible defense."

Adachi set about trying to increase the number of cases his attorneys tried, celebrating both victories and losses, offering frequent courtroom training sessions, and holding brown-bag lunches where staff attorneys could talk about successful trial strategies. To this day public defenders who win at trial receive a lion-shaped trophy they can keep until the next winner comes along. Under Adachi's watch, the annual total of misdemeanor trials has doubled, from 60 to more than 120. Felony trials have nearly tripled, from 30 a year to 80. But even though only a tiny fraction of the 29,000 cases handled by the public defender's office go to trial, some superior court judges have charged that Adachi's aggressive approach to trials does a disservice to clients.

Adachi disagrees, claiming that his office wins acquittals in 35 percent of felonies and 45 percent of misdemeanors, with partial acquittals or hung juries in even more. More important, he says, public defenders who are ready to try cases get better plea offers for their clients.

The office's success rate is about to go up, too, as San Francisco grapples with a scandal in its police crime laboratory that has put hundreds—perhaps thousands—of drug prosecutions in jeopardy. After a lab technician was accused of pilfering drugs she was supposed to be testing, Adachi's office leaped into action, filing dismissal motions, demanding to know how long police and prosecutors had known that evidence might be compromised, and calling for the creation of an independent crime lab. By late April, the district attorney's office had dismissed several hundred narcotics cases affected by the scandal, including many that were handled by the public defender's office (some are expected to be refiled). Adachi's staff is now reviewing thousands of convictions that may have been based on tainted evidence—and, of course, he has asked the mayor's office for funding to bolster the effort by hiring more people.

Adachi himself is a prodigious trial attorney, who has lost only one first-degree murder case in his entire career—his first. He still tries cases. "It's like being an athlete," he says of his insistence on returning to the courtroom periodically. "You always have to be in training. If you're out of trial for even a couple of years, you become rusty. Plus—I enjoy it."

In court Adachi isn't particularly theatrical or gregarious, nor is he a compelling raconteur. His usual manner is reserved, almost sleepy, and when he speaks he makes eye contact only sporadically, often casting his eyes downward as if his thoughts were printed out on a page on the table.

"Jeff is cool, he's quiet," says San Francisco Supervisor Ross Mirkarimi, one of Adachi's strongest supporters. "He definitely holds his cards extremely close. And he's quite a tactician." But all reserve disappears when Adachi comes before the Board of Supervisor to plead for his budget. "It can be rather dramatic," Mirkarimi says. "He has people absolutely dazed."

ROUGHLY ONE-THIRD OF SAN FRANCISCO'S indigent defense cases already are handled by the private bar, through the Indigent Defense Administration (IDA), a division of the San Francisco Bar Association. The IDA exists to handle cases in which the public defender's office has a conflict of interest because it represents another defendant or witness in the case. Attorneys on the IDA's conflicts panel are paid between $66 and $106 per hour, depending on the type of case. (Public defenders earn $45 to $80 an hour.) But in addition to salaries, San Francisco also pays benefits and overhead for the public defender's office, which led the county controller to conclude that hiring IDA attorneys costs about the same as using public defenders on felony cases, and only a little more on misdemeanors. On the other hand, if, as Adachi expects, he has to decline 90 felony and 10 misdemeanor cases each month, that IDA representation will cost $1,339,920 in public funds for the year—compared with just $618,893 to fill the vacant positions in his office.

Image from a poster distributed during last year's budget battle

"He's right, it does cost the city more," says Supervisor Sean Elsbernd, who requested an audit of Adachi's office in February. Elsbernd, who has said that Adachi is "horrible" at managing a budget, still plans to endorse Adachi for reelection to a third term in November. But he argues that Adachi needs to cut the non-constitutionally mandated parts of his budget, like the office's social workers and community-based social programs, rather than continually asking for more funds. "He wouldn't have to send cases to the private bar if he just focused on his mission," Elsbernd contends.

Doing more with less has always been the lot of public defenders. But this year San Francisco's office was one of four in California facing severe budget cuts. Adachi said the $1.9 million cut sought last June from his $23.4 million budget would have resulted in the loss of 12 to 15 attorneys, forcing him to decline 6,000 cases.

Across the Bay, Alameda County Public Defender Diane Bellas began declining cases in August, after being told she would have to lay off 14 attorneys. (At the last minute, money was found to save all but 3 of those positions.) Adachi, seasoned by a career of winning seemingly unwinnable cases, wasn't ready to sit back and accept his fate. After negotiations succeeded in restoring only $300,000 of the slashed funds, he took his case to the streets. It was an unusual tactic; politicians typically conclude that indigent defense is a cause for which there is no constituency. Indeed, Adachi pointed out that most of his constituency is at the county jail, wearing orange jumpsuits. But he also knew that people who have been accused of crimes have friends and family. So he plastered the city with posters that featured a painting of Adachi wearing a San Francisco 49ers jersey emblazoned with "6th" (for the Sixth Amendment) and used money from his campaign fund to print 65,000 postcards that supporters could mail to City Hall.

On the day of the final budget hearing in July, more than 300 supporters of the public defender's office packed the board chambers and two overflow rooms. Adachi, called up to answer a technical question, launched into a fiery speech that was more like a closing argument than anything you'd normally hear in the tedious budget process. Always a fan of demonstrative evidence, Adachi gestured to a stack of cardboard file boxes around him and explained that they represented the cases that one felony attorney handles in a year. Then he held up a large, mounted photograph of a 20-year-old African-American man named DeAndre Barney, a resident of San Francisco's Western Addition who in 2008 had faced a ten-year prison sentence after being charged with armed robbery. But when public defender Randall Martin investigated the case, he found that the surveillance video that was supposed to prove that Barney's car was the getaway vehicle in fact showed the robbers fleeing in a different vehicle. Barney simply had the misfortune of driving by in a similar-looking car.

"He's a hell of an advocate," Elsbernd marveled later. "It was like watching Perry Mason make his closing argument."

And Adachi was somewhat successful. The Board of Supervisors voted to restore $650,000 in funding to the public defender's office, which, when combined with the $300,000 that had been awarded a month earlier, reduced the proposed budget cut by half. The local papers portrayed

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Doug Minkler/Aram De-Bug

locate replacement counsel.

In December 2006 the court ordered a case management conference, which required counsel to file case management statements. Ross failed to file the statement and failed to appear for the conference. The court issued an order to show cause (OSC) why sanctions of $150 should not be imposed against Ross. She failed to respond to the OSC and did not appear for the hearing.

In February 2007 the court dismissed the client's probate case due to Ross's nonappearances. Ross failed to notify the client about the dismissal. In September 2007 the client and Ross met to discuss the case; Ross informed the client at that time about the dismissal and promised to have the case reopened, but she failed to follow through.

Between October 2007 and January 2008 the client made numerous unsuccessful attempts to communicate with Ross. In January 2008 the client consulted with another attorney, who wrote to the State Bar about Ross's failure to perform services for the client. In October and November 2008 a State Bar investigator wrote to Ross regarding the client's complaint, but the letters were returned as undeliverable. Ross failed to maintain a current address with the State Bar.

In aggravation, the misconduct involved multiple acts of wrongdoing. In mitigation, Ross had no record of prior discipline since being admitted to the bar in 1993. When Ross became aware of the State Bar letters, she cooperated with the investigation. During the period of misconduct, Ross suffered severe financial and family problems. The order took effect September 29, 2009.

**ROSE SLOAN,** State Bar # 97918, Calabasas (October 29). Sloan, 58, received a public reproval for engaging in the unauthorized practice of law.

In February 2009 Sloan requested that the State Bar place her on inactive status. About two weeks later, she prepared and signed a request on behalf of her father to stop elder abuse, designating herself has her father's attorney. In March 2009 she asked to be reinstated to active status.

In mitigation, Sloan had no record of prior discipline since being admitted to the bar in 1981. She became concerned for the welfare of her elderly father, and acted to protect him from possible financial exploitation by his deceased wife's former caregiver, whom he had married. No clients were harmed by the misconduct, and she demonstrated remorse for her actions. The order took effect November 19, 2009.

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the decision as a big win for Adachi, but he didn't see it that way; his office was still understaffed. Adachi's request to the board in October, Elsbernd later pointed out, "would not only restore cuts ... but would take his budget to a *higher* level than it was last year. He's never done. It's always more, more, more."

Even so, in March Elsbernd joined the rest of the Board of Supervisors in authorizing Adachi's staffing request—the pay-off for the lobbying effort that began five months earlier. Adachi had made his case in his usual fashion, combining persistence with a carefully constructed evidentiary record: He worked with the city controller to develop caseload standards for the office, and once those standards were in place, it was easy to prove that he was understaffed.

LAST FALL AT A BROWN-BAG lunch at UC Berkeley's Boalt Hall, Adachi spoke to a group of young law students for over an hour without notes, stepping down from the lectern to pace up and down a row of desks, his eyes downcast in his characteristic combination of reserve and intensity. He talked about the drama of trying cases, about his own life history, his belief that there's always a way to defend a case. But mostly he talked about the importance of doing what he does in the first place.

"Most people don't think about their constitutional rights," he said, tracing his fingers lightly along the surface of the desk in front of him. "You don't think about it until you've been deprived of them, when a police officer says, 'Come here, empty out your pockets, stand against the wall.' "

He looked up for a moment and surveyed the room. "Who is going to make sure that the police don't violate your Fourth Amendment rights? There's only one agency—that's the public defender's office. We are defending a principle that you can't taste or see or even experience, but something that you notice when it's taken away."

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Indeed, the rule is affected by other HIPAA requirements specifically governing the disclosure of PHI in litigation. In such cases, disclosures by a lawyer may be permissible or not, depending on whether the disclosures are affirmative, responsive, or pursuant to a court order or subpoena. (Compare 45 C.F.R. § 164.506 with 45 C.F.R. § 164.512(e).) Depending on the circumstances, a litigator may have to redact PHI supplied during discovery, strip it of information that identifies a specific patient, or seek a protective order.

## STAYING CURRENT

Since the enactment of HITECH in 2009, HHS has issued two major regulatory issuances that affect attorney business associates: the April 17, 2009, guidance mentioned above, and the Breach Notice Rule. Many more are on the way. This trend marks a major shift, for HHS issued no security guidances during the first ten years under HIPAA (from 1996 to 2006). Because of constant regulatory developments in privacy, attorneys must monitor changes both in HIPAA and in state privacy laws. Fortunately, each HHS regional office has a privacy advisor to guide and educate covered entities, business associates, and individuals. (Information on California's is available at www.cms.hhs.gov/RegionalOffices/Downloads/SanFranciscoRegionalOffice.pdf.)

## CAUTION AND VIGILANCE

HITECH vastly expands HIPAA's potency and requires intensive and ongoing compliance efforts by covered entities and their business associates. Law firms handling patient information maintained by clients should institute a formalized HIPAA compliance program with detailed written policies, training programs, dedicated personnel, and management oversight. Although such programs are time-consuming and burdensome, they are a must for anyone who desires to mitigate (and hopefully avoid altogether) the extensive liability risks posed by HIPAA and HITECH.