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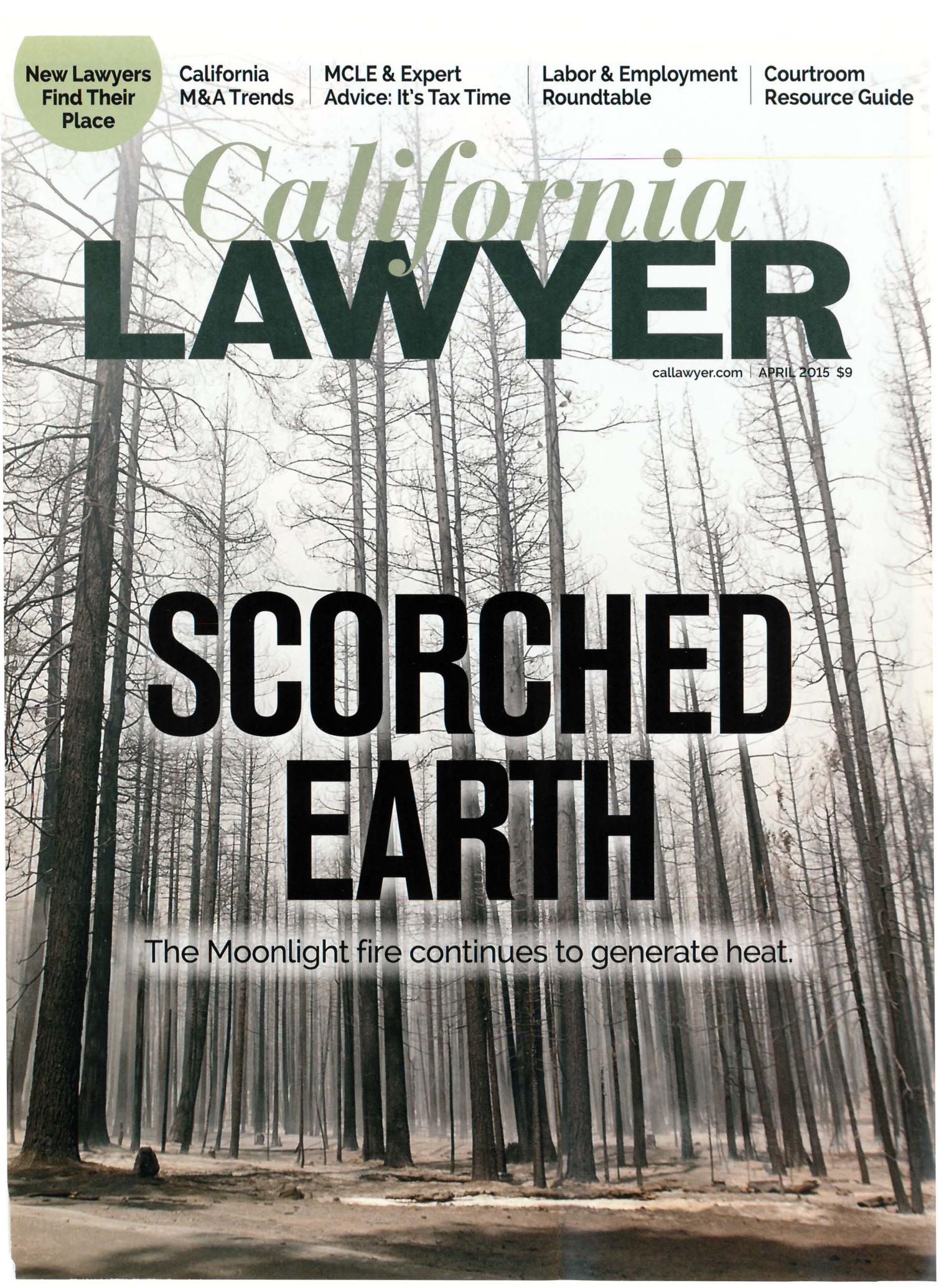
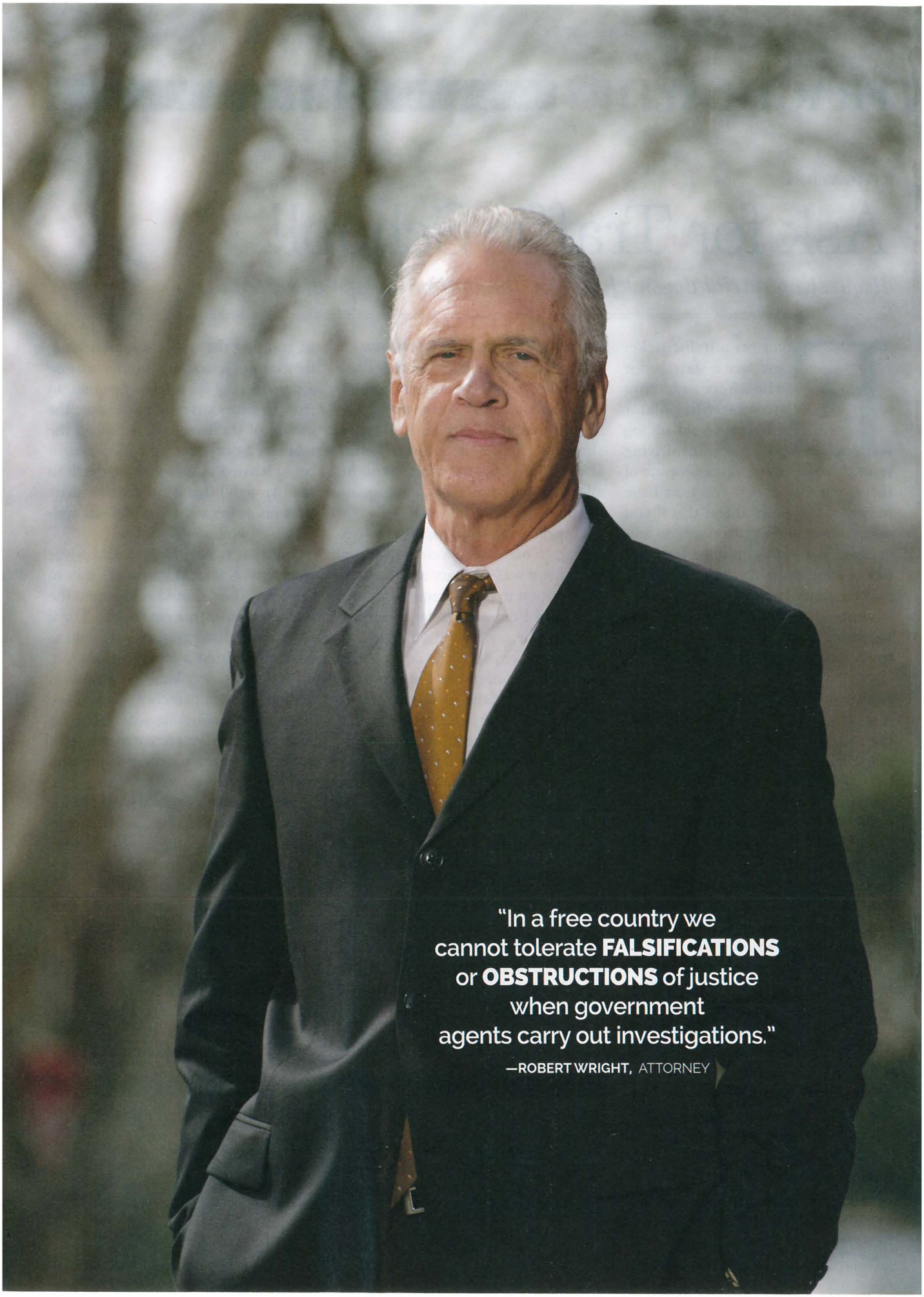


# SCORCHED EARTH

The Moonlight fire continues to generate heat.


"In a free country we
cannot tolerate **FALSIFICATIONS**
or **OBSTRUCTIONS** of justice
when government
agents carry out investigations."
—**ROBERT WRIGHT,** ATTORNEY

Photos of Robert Wright by
*José Luis Villegas*

# STILL SMOLDERING

## A former assistant U.S. Attorney adds fuel to claims that federal prosecutors engaged in a fraud on the court to win fire-recovery damages. *by Pamela A. MacLean*

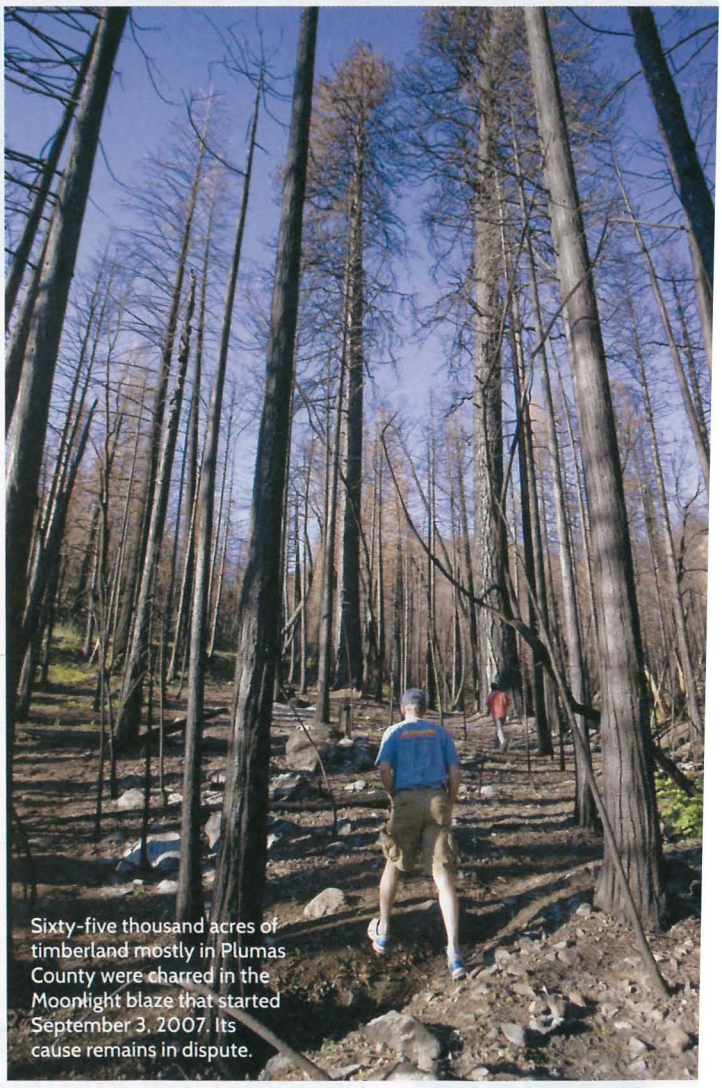
The mammoth 2007 Moonlight fire in remote Plumas County grabbed the attention of Assistant U.S. Attorney E. Robert Wright from the moment he was tapped to head the Eastern District's fire litigation cost-recovery team.

The blaze began on a hot September day near Moonlight Peak, roughly 85 miles east of Red Bluff. Over the next three weeks the fire blackened 65,000 acres and consumed valuable stands of old-growth Douglas fir before fire crews were able to extinguish it, at a cost of $20 million. Because 70 percent of the charred acreage was in the Plumas and Lassen national forests, recovering money for lost timber and fire suppression also became a federal problem—and thus the responsibility of the U.S. Attorney for the Eastern District of California.

Within hours of the midday ignition, fire investigators had blamed the conflagration on negligence by the nation's second-largest timber producer, Redding-based Sierra Pacific Industries—raising the prospect of a record-setting damages award.

Wright, a Harvard Law School graduate and former captain in the U.S. Army, had spent the previous eleven years of his long career in the Eastern District's Sacramento office. In June 2008 he jumped at the potential to recover damages caused by major fires on federal lands. State and federal investigators would not issue their final joint report on the Moonlight blaze for nearly another year, but Wright sought early referral of the case. He hired several consultants to assess the fire, and in October 2008 he visited the fire site.

As Wright walked the burned-over ground with the lead investigators for the United States Forest Service (USFS) and the state Department of Forestry and Fire Protection (Cal Fire), he didn't know this case would produce its own scorched earth. Still raging seven years later, related litigation



Sixty-five thousand acres of timberland mostly in Plumas County were charred in the Moonlight blaze that started September 3, 2007. Its cause remains in dispute.

RANDY PENCH/MCT/ZUMA PRESS

Pamela A. MacLean is a *California Lawyer* contributing writer.

Firefighting "hotshots" Anthony Estrada, left, and Eddie Apadoca run hose in an effort to contain the Moonlight fire more than a week after it ignited.

in state and federal courts would pit Wright's ethical standards against those of his bosses, precipitate his retirement from government service, and eventually prompt him to assist the very timber company he had sued for negligence. Wright's declaration—filed with the Justice Department in an ethics complaint and later in federal court—bolstered Sierra Pacific's allegations that state and federal prosecutors aided in evidence tampering and the withholding of documents and—worst of all—engaged in a fraud on the court.

The point of this purported misconduct? To maximize damages recovery, according to William R. Warne, Sierra Pacific's outside counsel at Sacramento's Downey Brand. In court papers, Warne quoted a federal prosecutor who worked on the Moonlight case for just two months before walking away: "It's called the Department of Justice," Eric Overby told his colleagues. "It's not called the Department of Revenue."

But U.S. Attorney Benjamin B. Wagner says it is Downey Brand that has acted unethically. Wagner's office is seeking to disqualify ten defense lawyers, from four firms, for allegedly accepting privileged information from Wright, and for encouraging him to breach his duty of loyalty to the government and to violate the attorney-client privilege.

Wright stands by his actions. "As a member of the bar for 40 years, I have a very, very strong belief that in a free country we cannot tolerate falsifications or obstructions of justice when government agents carry out investigations," he said in an interview.

Since 2008, the Moonlight fire prosecution has generated 265,000 pages of documents, including 185 interrogatories and 660 requests for admissions. Lawyers deposed 59 witnesses and 75 experts. But there still has been no trial on the merits to determine how the fire began, or who started it.

Those central questions have faded into the background, replaced by claims and counterclaims of misconduct leveled

The state's case is based on "a thoroughly **CORRUPT INVESTIGATION** designed to frame these Defendants."

—**WILLIAM R. WARNE,** DOWNEY BRAND

TOP: GUY KITCHENS/ZUMA PRESS

by both sides. Wagner, Warne, and Wright—now a potential witness—have been dragged along, defending themselves against charges of legal ethics violations.

## The Investigation

The Moonlight fire litigation began typically enough. In the early days of the joint federal-state investigation, Wright toured the fire site with Cal Fire investigator Joshua White and USFS Special Agent Diane Welton. They told him that September 3, 2007—Labor Day—was a "red flag" day—indicating high fire danger.

Nonetheless, a two-man crew working for a Sierra Pacific logging contractor, Howell's Forest Harvesting Company, used a bulldozer to drag logs and build soil berms for erosion control on a log-skidding trail on private timberland. Based on the initial investigation by White and USFS investigator David Reynolds, White said he was confident a Caterpillar's tracks or grouser blade had scraped a rock, and that hot metal chips sparked the fire. He collected metal shavings at the work site as evidence. He and Reynolds told Wright that Howell's crew shut down that day without performing a mandatory "fire walk" to check for embers. They simply left, the investigators said.

In addition, the day the fire began Reynolds obtained a signed statement from one of the crewmen, J. W. Bush, that "CAT tracks scraped rock to cause fire."

To investigators, establishing liability for Sierra Pacific, Howell's, and the private landowners looked like a slam dunk. Under provisions of a Cal Fire regulation that took effect in 2007, timber operators are required to "conduct a diligent aerial or ground inspection within the first two hours after cessation of felling, yarding, or loading operations." (See Cal. Code Regs., tit. 14, § 938.8.)

U.S. Forest Service Special Agent Diane Welton examines the site where a logging contractor's bulldozer is believed to have struck rock and generated sparks.

California's Health and Safety Code sections 13009 and 13009.1 authorize the recovery of costs from parties held responsible for starting a fire and allowing it to spread. In August 2009 Cal Fire filed suit in Plumas County seeking $8.1 million in damages for suppression and investigation of the Moonlight fire. Five private parties also filed lawsuits. All told, Sierra Pacific and the other defendants faced more than $60 million in state claims. (*Calif. Dept. of Forestry v. Howell*, No. GN-CV-09-00205 (Plumas Cnty. Super. Ct.).)

Four weeks later, Wright followed with a federal lawsuit for unspecified damages on claims of vicarious liability, negligence, and trespass by fire against Sierra Pacific, Howell's, and the private landowners. (*U.S. v. Sierra Pacific Industries*, No. 09-CV-2445 (E.D. Cal. filed Aug. 31, 2009).)

Under a joint prosecution agreement, lawyers from the state attorney general's office and the Eastern District collaborated on the investigation for the next three years. According to Warne's declaration, the prosecutors coordinated deposition scheduling, jointly prepared the primary investigators for their depositions, hired many of the same consultants, and disclosed many of the same expert witnesses.

In the months following the 2009 court filings, Wright encountered problems in his own office. His self-described "zero-tolerance of litigation misconduct by the government" brought him into conflict with his supervisor, Assistant U.S. Attorney David T. Shelledy, chief of the civil division.

In two unrelated fire cases, Wright had tangled with Shelledy over Wright's plan to disclose to defendants information that was damaging to the government. In one instance that fall, Wright found a $10 million error in a timber loss calculation. He says Shelledy opposed disclosure.

Wright sought advice from the Justice Department's Professional Responsibility Advisory Office (PRAO) in Washington, D.C. Eventually, he received an opinion advising disclosure of the calculation error.

Two months later, in January 2010, Shelledy relieved Wright as lead prosecutor of the Moonlight case and barred him from working on the federal action in any capacity. Wright viewed the move as unprecedented in his experience as a federal prosecutor. He would later say he believed Shelledy discovered there might be problems with the investigation and wanted Wright—with his high standards for disclosure—kept away from it.

Wright appealed his removal. But in an email, U.S. Attorney Wagner responded, "I understand your concerns, and I also appreciate that you are reluctant to give up the case, given the work that you have put into it." But Wagner concluded, "I will not overrule that decision."

Wright's replacement, Assistant U.S. Attorney Kelli L. Taylor, told Sierra Pacific and the other defendants that the government wanted $791 million in damages. The addition of interest and legal costs meant they faced claims of more than $1 billion—the equivalent, defense lawyers claimed, of "an economic death penalty."

Sierra Pacific marshaled its defenses behind Downey Brand's Warne, whose distinguished silver sideburns and ready smile belie a take-no-prisoners litigation style.

Warne's team faced an uphill battle. In 2011 court filings, Warne alleged that fire investigators had "failed to properly

consider alternative causes, failed to test their favored hypothesis, and flat-out ignored and/or suppressed problematic evidence, even created false evidence when necessary." At trial, Warne promised, defendants would prove that "government investigators engaged in widespread dishonesty in an attempt to pin the Moonlight fire on defendants they believe could pay a lot of money."

But as the trial date approached in 2012, U.S. District Judge Kimberly J. Mueller denied Warne's summary judgment motion as to the negligence claims, and she rejected his request to strike Cal Fire investigator White's affidavit as a "sham" because it conflicted with his later deposition.

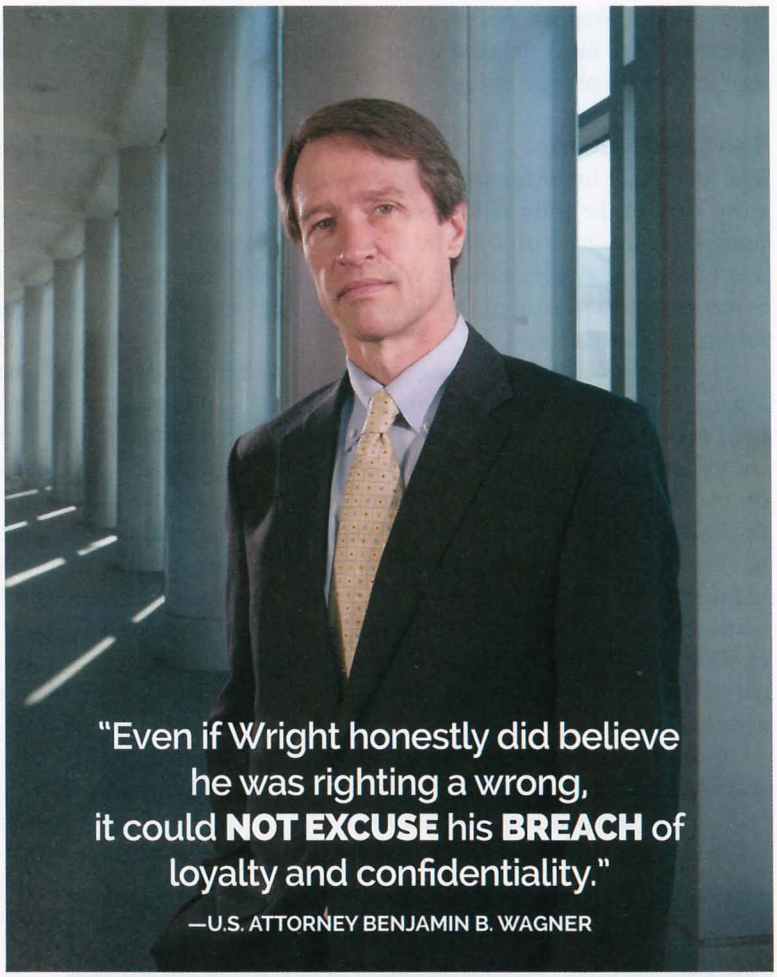
The government vehemently denied any wrongdoing, bolstering its position by claiming Howell's had caused three other fires in 2007 the same way: with a negligent bulldozer strike. Warne responded that Howell's 30-year fire-safety record was exemplary, and that none of those other fires was larger than three acres. The Moonlight investigation, he claimed in the defendants' trial brief, "was more than just unscientific and biased. When the investigators realized that their initial assumptions were flawed, they resorted to outright deception."

In July 2012 Judge Mueller cut the ground from under Warne's plan to show that a third party likely started the Moonlight fire. She signed a pretrial order that defendants could be liable for negligence per se regardless of how the fire began, and she limited Sierra Pacific's use of evidence that might indicate arson, allowing it only to show weaknesses in the government's investigation rather than to "elicit evidence to argue that someone else started the fire."

Less than a month later, Sierra Pacific conceded. The defendants signed a record $122.5 million settlement, agreeing to pay $55 million cash and to transfer 22,500 acres of timberland to the federal government. Warne insisted, however, that the court not adopt the settlement terms as its order. So Mueller dismissed the complaint with prejudice and reserved jurisdiction, but she did not issue a consent decree.

U.S. Attorney Wagner trumpeted the deal in public statements, and later he received a Justice Department commendation for the settlement.

Warne countered in a Sierra Pacific statement, "Typically, a settlement signifies the end of a dispute, but this is just the beginning."




## Glowing Embers

As Warne promised, the Moonlight fire saga would not end so simply. By 2013 the fabric of the joint federal-state investigation appeared to be unravelling.

Over the years of litigation, for instance, piecemeal defense discoveries showed that fire investigators White for the state and Reynolds for USFS had excluded from the official origin-and-cause report a contemporaneous sketch suggesting the fire had a single point of origin—marked, as is routine, with a white flag. But the final report—produced two years after the blaze—found its origin to be two separate heavy-equipment rock strikes about ten feet from the original, flagged location.

White and Reynolds met with prosecutors in early 2011 to discuss the white flag issue. Later, in depositions, they at first denied they could even see the flag in a photo of the site. (Once the photo was magnified, they did acknowledge seeing it.) Nor could they explain why they hadn't used flags to mark the two nearby rock strikes they ultimately identified as the fire's origin.

When Bush of Howell's bulldozing crew was later interviewed by White, he adamantly denied telling Reynolds on the day of the fire that a rock strike had started it, as the statement he signed indicated. During his deposition he also admitted, grudgingly, that he can't read.

In a February court filing, U.S. Attorney Wagner calls Bush's illiteracy claim "dubious," and in any case asserts that Reynolds had read the statement aloud to Bush. The forest service's official report summarizes Bush's rock-strike

JENNIFER HALE

admission but does not mention the denials he made in White's tape recording of their conversation.

In addition, an aerial videotape of the fire captured hours after it began shows that the alleged point of origin had not yet burned—and that the wind was blowing the flames away from the area. Warne contends that the fire started at least 150 feet uphill from the bulldozing work, and only after the crew had left the area.

Then came details of the lookout tower incident.

On the day of the fire, USFS technician Karen Juska drove to the Red Rock fire lookout to repair a radio. The lookout sits atop Diamond Mountain, about ten miles from where the Howell crew was working. Juska climbed the stairs to the elevated cabin, where she found a surprised lookout, Caleb Lief, on the catwalk urinating on his bare feet. Lief told her it was "an old hot-shot trick to cure athlete's foot." She noticed a glass marijuana pipe on the counter by the sink, and reported that Lief's hand and radio smelled heavily of pot. She testified that Lief appeared to be embarrassed by her presence and made excuses for his behavior. Only after the two descended the tower to empty trash did Juska see a plume of smoke and call in the Moonlight fire.

Although Juska wrote a report detailing the incident, she said USFS Special Agent Welton directed her to exclude it from her witness statement in the official fire report. In his deposition, Lief emphatically denied being stoned that day, and Juska denied having reason to believe he was stoned.

Wagner dismissed the entire episode in a recent filing. "As for Lief peeing on his foot," he wrote, "the United States did not deem his personal hygiene issue to be responsive and had no greater obligation to include that than whether he blew his nose the same day."

But the omission was significant to the defendants, who argued that their potential $1 billion liability would have been greatly reduced had they been able to establish, using reports of Lief's conduct, that the government shared some culpability for the extent of the fire.

Lastly, Warne charges that investigators glossed over evidence that a suspected serial arsonist—a USFS fire management officer named Michael McNeil—may have been in the area when the Moonlight fire ignited. McNeil has been implicated in five previous fires, and he was transferred to Lassen National Forest just two months before September 3, 2007. He was eventually arrested and charged with arson in yet another matter; later he was convicted of making extortionist threats to various judges, law enforcement officials, and politicians. Although the Moonlight investigators wrote a confidential report about McNeil's criminal history, in depositions they denied having any interest in him as a suspect in their inquiry.

> **"CAL FIRE'S ACTIONS** initiating, maintaining, and prosecuting this action, to the present time, [are] **CORRUPT** and **TAINTED."**
>
> —SUPERIOR COURT JUDGE LESLIE C. NICHOLS

Warne also learned that a firewood cutter, Ryan Bauer, had been nearby on the day of the fire using a souped-up chain saw. He was seen speeding away from the area in his truck "like a bat out of hell" just after the fire began.

To Wagner and his prosecutors, none of this matters: The fire began at the site of the bulldozer work. "The defendants continue to evade responsibility for the fire by blaming others, including the United States, the State of California, and innocent people in the communities surrounding the fire," Wagner had argued in his trial brief.

## Hot Spots

As the state trial approached in July 2013, the defendants challenged the AG's case on the pleadings. Under *Cottle v. Superior Court* (3 Cal. App. 4th 1367 (1992)), in complex litigation a judge may order the exclusion of evidence if the plaintiffs are unable to establish a prima facie claim prior to the start of trial. The court also may dismiss the case.

In a three-day hearing, Santa Clara Superior Court Judge Leslie C. Nichols—sitting by assignment in tiny Plumas County—heard the state's claims that Sierra Pacific had caused

U.S. Forest Service personnel at the Red Rock lookout called in the first report of the blaze that Labor Day afternoon.

LEFT: RON KEMNOW


the Moonlight fire through negligence, and found them unpersuasive. (*Calif. Dept. of Forestry v. Howell*, No. GN-CV-09-00205 (Plumas Cnty. Super. Ct. order issued July 26, 2013).)

"Cal Fire expert Bernie Paul confirmed that running over a rock while driving a bulldozer is not negligent," Nichols wrote. In addition, he noted that the Howell's crewmen could have complied with section 938.8 by returning to the scene for a fire walk before 3 p.m.; allegations that they failed to do so are irrelevant to damages because Juska reported the blaze at 2:24 p.m. To prevail on a regulatory violation, the judge concluded, Cal Fire had the burden of showing that the defendants' acts "were a substantial factor in causing plaintiff's damages. The court finds the plaintiffs are unable to do so."

Following Nichols's dismissal, Warne filed motions in October 2013 for sanctions, fees, and expenses, alleging discovery abuse and fraud by the state.

A week later, the defendants got another big break: The California State Auditor issued a report on $9.3 billion that various agencies had been holding outside the state's treasury system—in nearly 1,400 bank accounts. Only one account drew harsh criticism: a $3.66 million Cal Fire fund that was neither authorized by statute nor approved by the Department of Finance.

Between 2005 and 2012 Cal Fire had used the Wildland Fire and Investigation Training and Equipment Fund, known as WiFiter, to pay for training junkets and equipment for its enforcement crew. Although fire-recovery funds belong in the state treasury, a group within Cal Fire that included investigator White often asked defendants for two checks when settling fire-suppression claims without litigation: One check went to the state treasury; a second, smaller check went to the California District Attorneys Association to benefit WiFiter.

For fees that ranged above 10 percent, CDAA would disburse the funds as Cal Fire instructed. Over the life of the account, the association received about $374,000 for handling Cal Fire's money. Though the state auditor did not fault CDAA, the association had withdrawn in February 2013 as WiFiter's fund manager, informing the auditor that managing the expenditure requests was taking up too much time. Mark Zahner, chief executive of CDAA, declined to discuss its role with WiFiter because of the outstanding Moonlight fire litigation.

> "We ... look forward to the day this can be **TRIED** on the **MERITS**."
>
> —**JANET UPTON,** CAL FIRE DEPUTY DIRECTOR

The auditor's report noted that because Cal Fire had "circumvented accounting and budgeting processes" for the program, the money was not subject to state fiscal controls. For instance, Cal Fire didn't track who received 527 cameras bought with WiFiter funds, and it lost a $13,500 check made out to CDAA that was never deposited. The state is still looking for that money.

## Blowing Smoke

For the Moonlight fire defendants, the state auditor's exposure of the WiFiter slush fund was litigation gold. In court filings Warne argued that White had a contingent interest in the case, and that the state's concealment of the motivational bias created by WiFiter constituted a fraud on the court. "At bottom, a small cadre of Cal Fire managers and their counsel created a money-skimming operation which instilled in wildland fire investigators an undisclosed personal, direct, illegal and contingent beneficial interest in the outcome of their own investigations," Warne wrote.

The report revealed, for example, that Cal Fire investigator White had written to Sierra Pacific in August 2009 asking for cost-recovery payments of $7.7 million to the state treasury, and an additional $400,000 to CDAA. Those payments were not forthcoming, and five days later the state attorney general's office filed suit.

The auditor's report also cited Cal Fire emails. Warne had sought that material during discovery in both the state and federal lawsuits, but it was never produced. Following release of the report, Warne's renewed call for production of emails yielded an avalanche of documents from state prosecutors relevant to the Moonlight fire—two batches totaling 7,000 pages.

Rory K. Little, an ethics and criminal law professor at UC Hastings College of the Law and former federal prosecutor, points out that civil defendants don't share the constitutional due process protections that criminal defendants have under *Brady v. Maryland* (373 U.S. 83 (1963)). "There is no civil *Brady* obligation," Little says. "There is no obligation to turn over documents that government lawyers think aren't helpful to their case, or don't think are relevant." However, he adds,

SHUTTERSTOCK

"Government lawyers still have a special duty of candor—they can't lie, cheat, steal, or hide evidence."

Wagner agrees. "*Brady* is categorically inapplicable in civil cases such as this," he wrote in the recent court filing. And, Wagner added, the WiFiter fund involved only state actors and not the federal government. "State records are not in the constructive possession of federal prosecutors."

Warne's call for discovery-abuse sanctions in the state case drew a response from Judge Nichols in February 2014. "Cal Fire's actions initiating, maintaining, and prosecuting this action, to the present time, [are] corrupt and tainted," he read from the bench, adding that the agency's conduct "reeked of bad faith." Specifically, Nichols found, "Cal Fire failed to comply with discovery orders and directives, destroyed critical evidence, failed to produce documents it should have produced months earlier, and engaged in a systematic campaign of misdirection with the purpose of recovering money from Defendants."

Contents of the withheld Cal Fire emails reveal that members of its recovery unit overseeing the Moonlight fire "were fixated on the cash flowing in and out of the illegal WiFiter accounts," a footnote by the judge observes. Documents created shortly before the Moonlight fire support Sierra Pacific's assertion that the state's case manager "was seeking out 'high % recoveries' to keep WiFiter from 'being in the red,' " Nichols wrote. In addition, Cal Fire's general counsel at the time warned a regional Cal Fire official against taking too large a cut of recoveries because it might "look fishy."

Nichols concluded that Cal Fire had engaged in misconduct "that is deliberate, that is egregious, and that renders any remedy short of dismissal inadequate to preserve the fairness of the trial." In a separate 57-page order, he sanctioned Cal Fire for discovery abuse and granted Sierra Pacific and the other defendants $32.4 million for costs and attorneys fees. (*Calif. Dept. of Forestry, v. Howell*, No. 09-CV-02445 (Plumas Super. Ct. order issued Feb. 4, 2014).)

Although Nichols ultimately declined to sanction the two deputy attorneys general on the case, he vented his frustration with prosecutors. "The sense of disappointment and distress conveyed by the court is so palpable because it recalls no instance in experience of over forty-seven years as an advocate and as a judge, in which the conduct of the Attorney General so thoroughly departed from the high standard it represents and, in every other instance, has exemplified," he wrote.

Warne's assessment was more succinct. In court papers filed in January, he called the state's case "a thoroughly corrupt investigation designed to frame these Defendants."

In papers appealing the 2013 dismissal of the state's case, the AG's office complained it had been "blindsided" by Nichols's ruling. "[T]he trial court disposed of Cal Fire's case through a proceeding in which it did not give Cal Fire the chance to present its supporting evidence," the state contended. (*Brandt v. Sierra Pacific Industries*, No. C074879, (Cal. Ct. App., 3d Dist.).)

In an interview, Cal Fire Deputy Director Janet Upton added, "Judge Nichols threw out the case before the merits were established. That is important. We have appealed. We stand behind our investigators and look forward to the day this can be tried on the merits."

In a separate appeal of the sanctions in late January, the state argued that Nichols had no jurisdiction to issue sanctions once the dismissal had been appealed. The sanctions, wrote Supervising Deputy Attorney General Gary E. Tavetian, amounted to an improper "second judgment."

Tavetian went further, arguing that Nichols had usurped the jury's role as the finder of fact, substituting his own assessment of Cal Fire's discovery compliance. Regardless of exactly where the fire actually started, he contends, any of the disputed points of origin implicate the defendants.

"The record proves that Cal Fire properly located the specific area of origin of the fire, properly determined that defendants' logging operations started the fire, and responded to discovery pertaining to the fire's origin and cause completely and truthfully," Tavetian wrote.

## Fraud on the Court?

The dismissal of the state's case wasn't enough for Sierra Pacific. Last July, Warne filed a claim with the Justice Department's Office of Professional Responsibility alleging misconduct by federal prosecutors in U.S. Attorney Wagner's office. Then in October Warne asked the district court in Sacramento to set aside the $122.5 million settlement and order the return of Sierra Pacific's timberlands.

But Warne had a problem: The one-year statute of limitations for alleging fraud on an opposing party under rule 60(e) of the Federal Rules of Civil Procedure had long since expired.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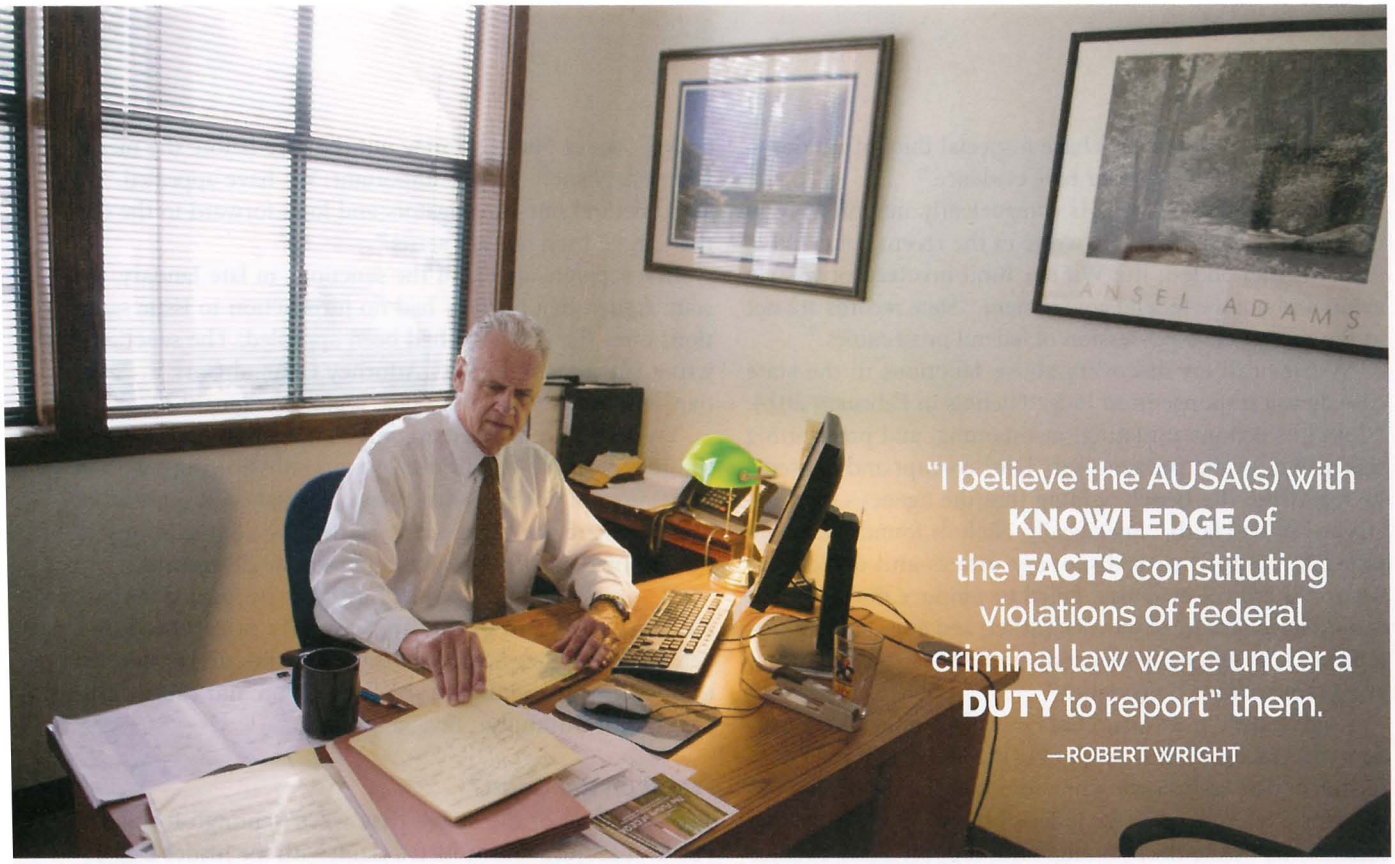


So he alleged that state and federal prosecutors had perpetrated a fraud on the court under rule 60(d)3. He argued the Ninth Circuit has found that fraud on the court exists when the moving party demonstrates "by 'clear and convincing evidence,' that the opposing party's misconduct has harmed 'the integrity of the judicial process,' " (*U.S. v. Sierra Pacific Industries*, No. 09-CV-02445, defendants' memorandum filed Oct. 9, 2014).)

"I never expected to be in a position where we would be forced to show that joint government investigators and prosecutors were defrauding the courts," Warne says. "But we have to play the cards we've been dealt."

U.S. Attorney Wagner was having none of it. In his opposition to the motion for relief from judgment, Wagner emphasized that the joint prosecution agreement with California was intended for sharing investigation costs and preserving the attorney-client privilege—but "did not provide that any attorneys for the State would represent the United States or have any role in prosecuting this case." He argued that because his office was not party to the state case, it "had no opportunity to present evidence, to defend witnesses in depositions after the federal settlement, to make arguments, to explain the applicable law, or to correct Sierra Pacific's misstatements of the record." Because Judge Nichols's order is currently on appeal and therefore not final, Wagner concluded, "the findings are nothing more than hearsay in this proceeding."

Wagner was particularly incensed by Warne's claim that the existence of Cal Fire's WiFiter account represented a fraud on the court by his office. In his opposition to the motion for relief from judgment, Wagner asserted that he was never asked to produce documents related to WiFiter, that he had no such documents, and in any event, that the joint prosecution agreement did not "give the United States an interest in any recovery by the State in its case, or *vice versa*."

His opposition brief declared: "It seems there is nothing Sierra Pacific will not do to avoid responsibility for the destruction caused by its neglect."

But before Warne's motion was assigned, Chief Judge Morrison C. England ordered the recusal of every judge in the Eastern District, stating that the impartiality of the judges might be questioned. He referred the matter to Judge Alex Kozinski, then chief judge of the Ninth Circuit, for appointment of an outside judge. Kozinski, however, refused to act unless the case was first offered to every judge in the district.

There was just one taker: Senior U.S. District Judge William B. Shubb of Sacramento, a no-nonsense, 25-year veteran of the federal bench and a former U.S. Attorney himself. Shubb has scheduled a hearing on the fraud-on-the-court claims for April 13.

## Back Fire

Robert Wright read Judge Nichols's 2014 sanction order with great interest. He also obtained a copy of the joint federal-state Moonlight fire origin-and-cause report, and a copy of the separate federal Plumas National Forest Fire Origin Investigation Report authored by Reynolds. After talking with the original expert consultant he'd hired for the case—a retired Cal Fire agent named Mike Cole—Wright told Cole that he would be willing to talk to lawyers for one or more of the defendants. Defense counsel then contacted him.

The result was Wright's 15-page declaration, sent last July along with Warne's ethics complaint to the Justice Depart-

continued on page 58

ment. Wright described the purported reluctance on the part of Assistant U.S. Attorney (AUSA) Shelledy in 2009 to disclose information damaging to some of the government's fire cases. As for the Moonlight fire, he asserted, "The change in the point of origin and the reasons for the change should have been, but were not, disclosed in [Reynolds's] Report. These omissions from the Report were material."

Instead of disclosing the shift, Wright stated, government attorneys and investigators present at a January 2011 meeting "apparently obstructed discovery of the truth" by permitting investigators White and Reynolds to claim in depositions that "what might look like a white flag was instead a 'chipped rock.' "

Wright declared that these material omissions were intentional and provided grounds for charges of obstructions of justice. "I believe the AUSA(s) with knowledge of the facts constituting violations of federal criminal law were under a duty to report" them under 28 U.S.C. section 535(b), he wrote.

"I also believe if the AUSA(s) concealed and failed to make the violations and/or possible perjured testimony known that would warrant consideration for possible charges for misprision of a felony under 18 U.S.C. § 4," Wright stated. "Finally, I believe that continued prosecution of [such] a badly damaged civil case would likely not have been a realistic possibility."

Wright's statement wasn't made public until last October, when Downey Brand filed it to support its fraud-on-the-court motion asking Judge Shubb to set aside the federal settlement. It immediately brought howls of protest from U.S. Attorney Wagner's office. A month later Wagner filed a response arguing that Wright's declaration should be "stricken from the record." He also moved to disqualify Warne and nine other defense lawyers—from Downey Brand, Matheny Sears Linkert & Jaime, and Rushford & Bonotto in Sacramento; and from Bracewell & Giuliani in Washington, D.C.

"By meeting with Wright, accepting his information, preparing his declaration, and filing it in the public record," the motion stated, "defense counsel breached their ethical obligation not to 'knowingly assist in, solicit, or induce' Wright's violation of the State Bar Act." (See Cal. R. Prof. Conduct 1-120.) Wagner's office maintained that Wright's statement improperly disclosed privileged consultation about the origin of the Moonlight fire, prosecutors' legal strategy in other pending cases, confidential legal advice from the Justice Department's PRAO, and Wright's work product—an analysis of documents that was produced in discovery.

> **"A fraud on the court tackles multi-faceted ethical and substantive law issues. It is very contextual—there is no generic answer."**
>
> —MARK L. TUFT,
> COOPER WHITE & COOPER

In addition, the motion to disqualify stated, Wright breached the duty of loyalty when he "switched sides and assisted the defendants in the very case in which he initiated suit against them on behalf of the United States."

"One might fairly conclude from Wright's declaration that his judgment was clouded by his bitter feelings about being passed over," the motion acknowledged. "But clouded judgment cannot excuse his conduct. The duty of loyalty is absolute and Wright's breach is inexcusable." It went on to state: "Even if Wright honestly did believe he was righting a wrong, it could not excuse his breach of loyalty and confidentiality."

Wright calls suggestions that he was disgruntled or bitter "ridiculous and absurd." He points out that he signed his declaration in June 2014, *after* Judge Nichols had dismissed the state's case, four and a half years after he was removed from the Moonlight fire case, and three and a half years after he retired from the U.S. Attorney's Office.

"I reached a decision I needed to do something [about the potential falsifications and obstructions of justice], and I had a duty to do so," says Wright, who now works as an environmental lawyer for Friends of the River.

Wagner's opposition brief charges that Wright's declaration "appears to have been included in Sierra Pacific's motion primarily to besmirch the reputations of Assistant U.S. Attorneys handling this case" since it "fails to bolster their claim of a fraud on the court."

In an interview after the filing, Wagner complained of Sierra Pacific's "rhetoric and scandal-mongering" throughout the litigation. "If people take the time to dig into the record," he said, "in the end it will be clear the AUSAs in this office did nothing wrong."

### Wright or Wrong

The case law about when a government lawyer has an obligation to disclose misconduct is complicated, says UC Hastings's Little.

Mark L. Tuft, an ethics specialist with Cooper White & Cooper in San Francisco, agrees. "A fraud on the court tackles multi-faceted ethical and substantive law issues," he says. "It is very contextual—there is no generic answer."

So far as Wright's declaration is concerned, Little says, it is clear that federal rules bar government lawyers from disclosing confidences without permission or an exception. But it's not clear whether the State Bar recognizes an unwritten whistleblower exception; the California Business & Professions Code and the Rules of Professional conduct don't contain one.

Lawyers with a concern about misconduct are expected to initially pursue it through their employer, according to Little. Failing to achieve a satisfactory response, there seems to be an unwritten understanding that it's acceptable for lawyers to approach judges or the State Bar for advice—but not for them to reveal confidences directly to the press or to opposing counsel.

As for the fire investigators' disputed testimony regarding the point of origin, Tuft adds, a separate ethical issue arises

if government lawyers took no action—as the defense alleges—instead of disclosing perjury during depositions. The ethical duty to take remedial measures, Tuft says, "arises when a lawyer *knows* [testimony] is false, not just suspects or is worried about it."

For Sierra Pacific, the key question remains: Did federal prosecutors mislead the court by fraudulently inducing Sierra Pacific into a $122.5 million settlement? U.S. Attorney Wagner is adamant they did not. "[T]o this day, there is no evidence that anyone but the defendants caused the fire," Wagner wrote in a recent court filing.

Wagner's opposition brief also maintains "there can be no fraud on the court when judgment is entered upon a settlement, unless a court order approving the settlement was procured by fraud. That requirement cannot be satisfied here."

According to Little, Sierra Pacific faces a daunting legal challenge. "The fact that the federal case settled will be a big factor for Judge Shubb," he says. "A settlement is an agreement to resolve the case despite having incomplete information. In a settlement we go on with life, even if we can't know everything."

Sierra Pacific, Little says, is essentially saying, "Yes, we settled—but we never would have if we'd known about the [allegedly] falsified reports."

Wagner maintained in his February filing, "[F]raud on the court requires egregious misconduct directed to the court itself, and alleged perjury—especially in a deposition—does not qualify unless the court was deceived. ... The Court was not deceived."

By now, Little says, the Moonlight fire case has degenerated into "one of the more ugly cat fights I've seen in federal court." Unfortunately, he adds, the fight comes in "a very serious case with a lot of money at stake, and people's jobs on the line."

In an interview, former AUSA Robert Wright returned to a prosecutor's basic obligation: to investigate crime. "While there can be a difference in the quality of investigation," he says, "what we can't have is any type of dishonesty."

kinds of problems I'm asked to solve.

No matter how smart you are, the key to identifying the best solution to a legal matter is understanding the real problem you're trying to solve—not the technical, legal problem, but the problem as the client experiences it. What constraint or burden is being placed on the client's business? Why is it significant? The only way to answer these questions is to ask the client and listen to the answer. Most clients are quite happy to explain things if you seem genuinely interested. And demonstrating a real desire to understand a client's business in depth and see things as they do will pay dividends in confidence and trust.

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My current company, where I've been for more than five years, matches people looking for unsecured personal loans with investors interested in helping fund those loans. We're still a fairly small player in a new sector, so I like to think I understand what we do pretty well. But when I talk with colleagues outside our legal department, I still find myself learning new things about how we operate and gaining a more nuanced understanding of what drives our success.

### Miles to Go

Listen more, talk less: It's easier said than done. After almost 20 years of practicing law, I've made some progress, but there's still plenty of room for improvement. So, for better or worse, I expect "becoming a better listener" to remain at the top of my list for many years to come.