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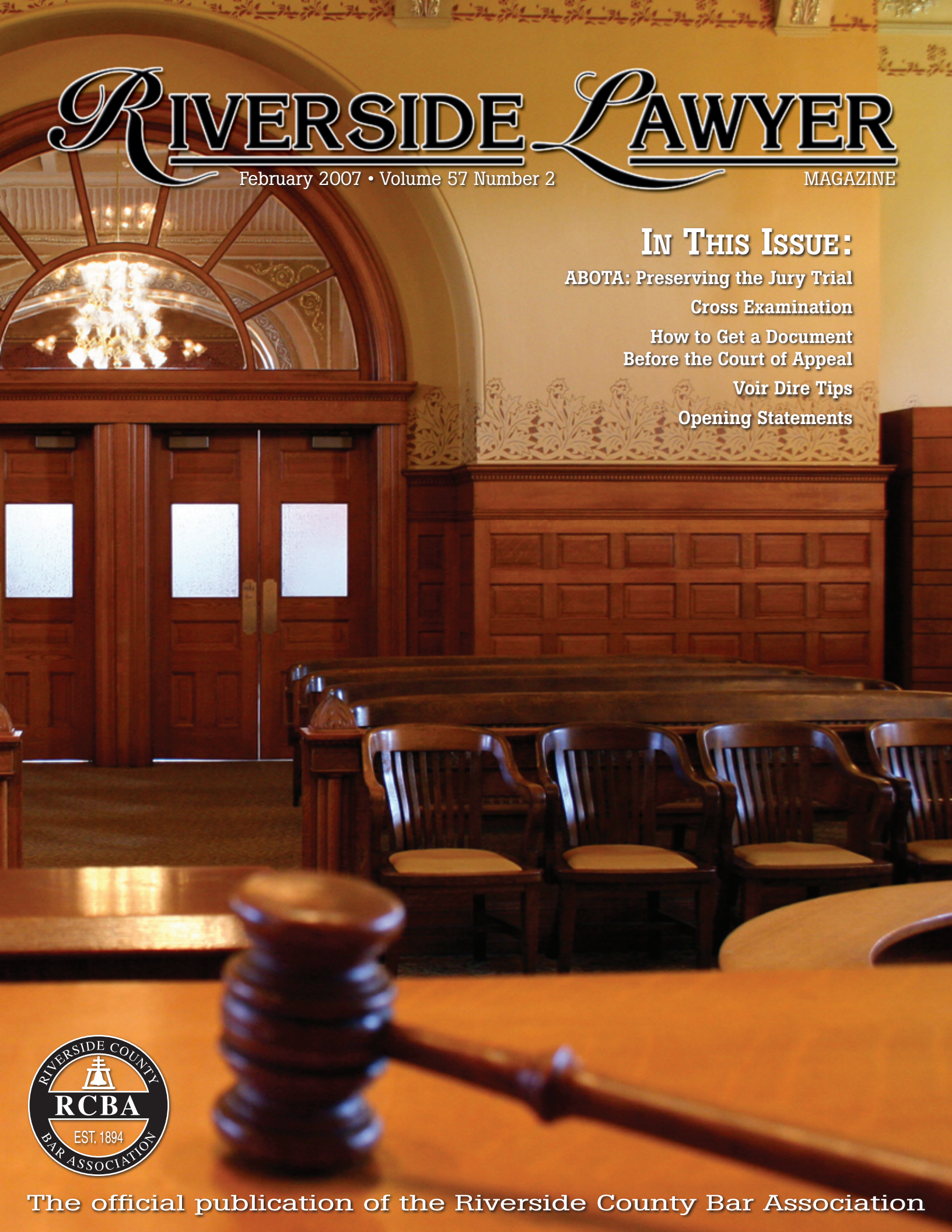

RIVERSIDE COUNTY BAR ASSOCIATION RCBA EST. 1894

The official publication of the Riverside County Bar Association

Riverside County Bar Association
4129 Main Street, Suite 100
Riverside, California 92501

Telephone
951-682-1015

Facsimile
951-682-0106

Internet
www.riversidecountybar.com

E-mail
rcba@riversidecountybar.com

RIVERSIDE LAWYER
MAGAZINE

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve its members, and indirectly their clients, by implementing programs that will enhance the professional capabilities and satisfaction of each of its members.

Serve its community by implementing programs that will provide opportunities for its members to contribute their unique talents to enhance the quality of life in the community.

Serve the legal system by implementing programs that will improve access to legal services and the judicial system, and will promote the fair and efficient administration of justice.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in Riverside Lawyer.

The material printed in Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

Calendar

FEBRUARY

19 **Holiday**

RCBA Golf Tournament
Canyon Crest Country Club, Riv.
8:00 a.m. – 3:45 p.m.

20 **Family Law Section**
"Law Enforcement Approach to Child Abduction"
By the Riverside County DA Child Abduction Unit
RCBA Bldg., 3rd Floor – Noon
MCLE

22 **Federal Bar Assn.**
"Federal Civil Rights Litigation: Issues & Solutions for Excessive Force Cases"
Speakers: Panel of Trial Attorneys
MCLE

23 **Appellate Law Section**
Guided Tour of the Court of Appeal by Justice Doug Miller
Departs from the Court House - Noon

27 **Mock Trial – Regional – Round 1**
Riverside, Southwest Justice Center, Indio

28 **Inn of Court**
Victoria Club – 6:00 p.m.

MARCH

1 **Mock Trial –Regional – Round 2**
Riverside, Southwest Justice Center, Indio

2 **Riverside Superior Court Pro Tem Training**
"Judicial Demeanor Course for Temporary Judges"
Morongo Conference Center – 1:00 p.m.

3 **Mock Trial – Round 3 – HOJ – 8:30 a.m. – 11:00 a.m.**
Round 4 – HOJ – 1:00 p.m. – 3:30 p.m.
Awards Ceremony – Riverside Convention Center – 5:00 p.m.

5 **Appellate Law Section (Planning Meeting)**
RCBA Bldg., 3rd Floor – Noon
MCLE

Continuing Legal Ed Committee
RCBA – Noon

7 **Bar Publications Committee**
RCBA – Noon

(continued on page 28)

President's Message

by David T. Bristow

As May 1 draws near, and we gear up to celebrate our nation's Law Day, I must make a confession: I used to be a Law Day cynic.

When I first learned of the existence of Law Day, I must admit my brow likely furrowed, for I viewed it as simply another of the seemingly endless "days" that our nation embraces with such enthusiasm. The rampant proliferation of the various "days" in our lives – Grandparent's Day, Left-Hander's Day, Greeting Card Company Shareholder's National Avarice Day – has left me longing for the days when we only bestowed such an honor on an appropriate subject.

So when I first learned of Law Day, I smugly lumped it into the class of pretenders, a subject not worthy of its own day for recognition. Looking back, I think my disdain was based on the belief that the majesty of the law, its constitutional preeminence and importance, is such an integral part of our nation's fabric, of our consciousness and of our daily lives, that to try to distill its importance and glory into a single day seemed almost impertinent. I mean, why on earth would the law need its own day? Every day of this nation's existence is Law Day, for it is the rule of law that allows it to exist in the first place.

And so I looked askance at Law Day. Until, that is, I was talked – some would say press-ganged – into volunteering to assist with the RCBA's Law Day activities, the free legal clinic we provide at the local shopping malls, and our Good Citizenship Award ceremony. It was only then that I had my epiphany and realized the value and virtue of Law Day.

Sitting at the RCBA's free legal advice table at the Moreno Valley Mall, I was moved by the gratitude of the public as my fellow volunteers – all attorneys and RCBA members – fielded a variety of questions about legal issues spanning the spectrum of possibilities. "What are my rights regarding international child-custody agreements?" "How can I patent my invention?" "Explain eminent domain to me?" Through our attempts to answer questions such as these, as well as to offer guidance on how to – hopefully – resolve the various legal problems confronting our guests, I glimpsed first-hand the frustration of those unable to afford a lawyer to solve their legal issues, the disconnect between our legal system and the citizens it is supposed to serve, and – most importantly – the hope of obtaining a fair and well-reasoned resolution to their various problems. In short, like spending time in small claims court, my stint as a volunteer helped reconnect me, as a cog in the legal system, to the public for whom the system is intended.

Whether my initial opinion resulted from a certain jaded outlook, or simply from the professional myopia that comes from practicing law, it melted even more when I participated in the RCBA's Good Citizenship Award ceremony. As you may know, our Good Citizenship Award is bestowed by the principal at each high school in Riverside County on a member of the school's junior class who has exhibited exemplary civic characteristics. The award is not based on academics, nor necessarily on achievement or involvement in school activities. Rather, the award is for that student who has done the most to alleviate the plight of his or her fellow students, a student who has exhibited those traits – leadership, integrity, selflessness and commitment to the betterment of one's community – that make a good citizen.

The ceremony is held every year in May in Department 1 of the Historic Courthouse, and presided over by a member of the

bench. In addition to receiving an armful of certificates from our legislators, each of whom sends a representative for the occasion, each recipient received $100 from the RCBA. Sitting in our beautiful ceremonial courtroom, looking out across a sea of eager young faces and proud family members, some of whom must travel over 100 miles to attend, one can't help but be inspired by the day's events, and by the respect and honor that the honorees hold for the institution in which they receive their awards.

Which leads me to this year. Each year, the RCBA seeks volunteers for our Law Day activities, and each year, the same dozen hardened veterans show up for duty. It's a shame that the opportunity to extend the RCBA's outreach isn't shared by more of our members, which is why it is fortunate that this year offers a new chance for expanding our community awareness and involvement. In addition to staffing our free legal advice tables at the Moreno Valley Mall (apparently the Galleria at Tyler is no longer interested in the benefits of the rule of law) and bestowing the Good Citizenship Award, Judge Sharon Waters has proposed sending teams of attorneys and judges during the month of May to each of the county's high schools to discuss the legal system in general and careers in the law in particular. Such a program would be an excellent way of stimulating an interest in our legal system among our young citizens, and would greatly improve the connection between the county's legal system and its intended beneficiaries. Of course, we need sufficient volunteers – lots of volunteers – to make such a program a success. I therefore call on our members to step up and volunteer. So as not to ask anything of you that I won't do myself, I hereby volunteer for duty at my alma mater, La Sierra High School. Between our members who attended high school in this county, and those whose children currently do (or recently did), we should have little trouble covering the county.

And so I encourage you to take heart from my confession and to embrace Law Day – sign up and volunteer. Also, sign up to play in (or sponsor) the RCBA Golf Tournament, which is scheduled for Monday, February 19 (President's Day – a court holiday) at the Canyon Crest Country Club. The proceeds from this tournament will help fund not only our Good Citizenship Award, but also our Elves Program, which provides Christmas gifts and dinner to those in need. Given the challenges confronting our county's legal system, Law Day is the perfect time to educate our fellow citizens, and to remind ourselves why we do what we do.

David T. Bristow, President of the Riverside County Bar Association, is a Senior Partner with Reid & Hellyer in Riverside.

Barristers Column

by Matthew M. Benov

For young lawyers, each year of practice brings both a new level of experience and an even greater sense of responsibility. However, it is also important to recognize that law school did not teach us everything (well, next to nothing) about what it means to be a practicing attorney. Barristers provides a forum for young lawyers to learn about important skills from our more experienced colleagues. Our first meeting of the new year focused on the topic of marketing. James Manning and David Bristow of Reid & Hellyer offered both practical tips and anecdotes concerning the most effective ways for lawyers to market their skills.

For those of us who focus primarily on litigation, marketing our practice is a daunting task. Most of our clients don't know they need a lawyer until something bad happens, and then, when the lawsuit is over, they hope never to see us again. Manning and Bristow offered a few simple tips: Instead of offering your business card, take business cards; always introduce yourself to strangers in a room; and make it easy for laypersons to understand what type of law you practice. Manning suggested coming up with simple "buzz words" that describe your practice. Taking Manning's example, he often tells people that he practices Newspaper Law, which he says often grabs people's attention and starts a conversation.

For those attorneys who already have a large book of business, it is important to maintain good relationships with the clients you already have. To achieve that goal, Manning and Bristow suggest being available after business hours for the rare client emergency and making your clients feel that you are "their attorney," not just a lawyer who helped them once. Furthermore, Bristow suggests getting involved in local organizations and meeting your fellow members of the bar. You never know where your next referral will come from.

There are many different ways to market our services to clients. The challenge is finding the best fit for your practice, whether you are a solo practitioner or an associate in a larger law firm.

The topic for the March meeting will be trial advocacy. This will be an interesting and informative presentation for attorneys of all skill levels and practice areas. The meeting will be on March 8 at 6 p.m., at the usual spot, the Cask 'n Cleaver, located at 1333 University Avenue in Riverside. We hope to see many of you there.

There are continual volunteer and financial needs to be met. Volunteers are needed for life-skills training and fundraisers. Financial donations are needed to keep the youth living in safe and stable homes and to pay for their extra school expenses, some clothing, and transportation costs, as well as for the general running of the charity.

Most of the young women aspire to give back to the community by pursuing such professions as social work, nursing and teaching. These young women will be able to remain in the Inspire program until they complete their educational goals.

Space is limited, demand is high, and opening new homes depends on community support and the donations they receive.

Another one of Inspire's goals is to add an outreach component to the program for foster kids in their early teens to let them know there is hope for their future and opportunities for them, so they will be motivated to work harder in school.

Our communities benefit from breaking the cycle of abuse and poverty in young people's lives. One way or another, we as a society will pay for the youth that exit the foster care system. Inspire believes in putting that money into helping them to become educated and to transition successfully into adulthood rather than becoming dependent on public programs.

Please consider how you could make a difference today in the life of a foster child, and remember that no donation is too small.

For more information, please visit their web site at www.inspirelifeskills.org. You may also contact Kristi Camplin directly at (951) 316-0011.

Matthew M. Benov, of Best Best & Krieger, is the Secretary of Barristers.

ABOTA: Preserving the Jury Trial

by Bruce E. Todd

Since the theme of this month's issue is about trials and juries, I wanted to discuss an organization that has long been dedicated to the preservation of the jury system. Many of the top civil trial attorneys in the Inland Empire are members of this organization.

The American Board of Trial Advocates (ABOTA) was started in 1958 in response to a then-potential threat to the jury system – at least as it involves personal injury tort matters. Around that time, a group of plaintiff's tort lawyers in Los Angeles that was an offshoot of the National Association of Claimant's Compensation Attorneys (NACCA) was trying to convince the legislature to turn tort litigation into a system much like "no-fault" and/or worker's compensation. Rather than having jury trials for tort cases, these lawyers wanted tort claims to be handled outside the jury system, much as worker's compensation claims are currently addressed.

Furthermore, the plaintiff's bar was concerned about the then-existing system of contributory negligence. Under this system, a plaintiff's claim for damages would be denied if just one percent of negligence was attributed to the plaintiff. The plaintiff's bar wanted its clients to be able to recover damages even if they were partially responsible for their injuries (the plaintiff's bar eventually got its wish with the adoption of comparative negligence in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804).

On the other hand, the insurance industry was concerned about the possibly costly implications of a worker's-compensation-type system for personal injury claims. The insurance industry also wanted to preserve the old-fashioned contributory negligence system. In the mid 1950's, insurance claims managers in the Los Angeles area would periodically meet with their defense attorneys to discuss strategies for defeating proposed legislation sponsored by the plaintiff's bar to turn tort litigation into a "no-fault" or worker's-compensation-type system.

ABOTA started as a response to this movement by the plaintiff's bar. For this reason, the early membership of ABOTA consisted entirely of insurance defense attorneys. The early agenda of ABOTA was to preserve the jury trial system and to oppose "no-fault" and worker's-compensation-type systems for personal injury tort litigation.

Eventually, some of the bigger names among these insurance defense attorneys (such as James Kenealy) started handling cases that were outside of the realm of insurance defense cases (such as divorce cases and plaintiff's personal injury cases). While many of the members of ABOTA were irritated that some members were now handling some non-insurance-defense cases, others realized that they could supplement their insurance defense incomes by handling large plaintiff's cases, family law matters and even some criminal matters. Therefore, a movement began to let some of the more prestigious plaintiff's attorneys into the organization. Today, ABOTA is made up of both plaintiff's and defense attorneys who are recognized as top civil trial litigators.

Unlike many organizations (such as bar associations, etc.), ABOTA is not open to just anyone who is willing to pay dues. An applicant has to have proven him or herself on the trial battlefield, actually trying cases in the courtroom; at a minimum, an applicant must have tried at least 10 civil jury trials to conclusion. In addition, the applicant must have earned enough points under a detailed point system to qualify for membership. Furthermore, a person who is applying for membership must be determined to be a trial attorney who is of high personal character and honorable reputation. There are now numerous local chapters throughout the country, and generally potential members will apply to their respective local chapters.

The first chapter was started in 1958 in Los Angeles, with Mark P. Robinson (later an Orange County judge) serving as the first president. Chapters in San Francisco and San Diego were started in 1963. The first chapter located outside of California was started in Arizona in 1967. There are now numerous chapters throughout the country, and, although it started in Los Angeles, the organization is now headquartered in Dallas, Texas.

The Inland Empire obtained its first chapter in 1974, with the formation of the San Bernardino/Riverside Chapter. The original 18 members included the following notable Riverside County attorneys: Don C. Brown, Robert "Carlo" Coppo, Arthur W. Kelly, Bruce Morgan, Roger Roberts, Gene Royce and Everett Spriggs. The members from San Bernardino County included Caywood Borror, Roger Broderick, George Bruggeman, Ronald Burford, Thomas Eckhardt, Gerald Egan, John Marcus, Clifton Smith, C.L. Vineyard and Robert Youmans. The first chapter president was Thomas Eckhardt.

According to Arthur Kelly, a former partner in the long time Riverside law firm of Thompson & Colegate, the Inland Empire chapter was started when "we had a meeting with the representatives of the L.A. chapter at that

restaurant on the hill in Pomona and they gave us their blessing. I guess that we were christened that day."

Over the years, some of the top civil trial attorneys in the country have emerged from the San Bernardino/Riverside Chapter. Don C. Brown and Florentino Garza have previously been named ABOTA California Trial Lawyer of the Year. More recently, Jeffrey S. Raynes (Redlands) received the prestigious honor in 2005.

Agnes Smith (San Francisco) was the first female member of ABOTA. Marsha Slough, now a San Bernardino County Superior Court judge, and Patricia Law (Riverside) followed in her footsteps when they were elected into the San Bernardino/Riverside Chapter.

Long-time ABOTA members from the Riverside County Bar Association include, among others, Thomas T. Anderson, Michael Bell, Terry Bridges, Don Grant, J.E. Holmes, E. Michael Kaiser, John W. Marshall, David Moore, Dennis Thayer, James Ward, Douglas Weathers and William Weathers.

The preservation of the civil jury trial is still the primary purpose of ABOTA. The organization also seeks membership from qualified younger attorneys who want to achieve a higher level of trial advocacy while improving integrity and civility.

Note: Thanks must go to Robert C. Todd – a/k/a my dad – for his input to this article. He is a retired Orange County Superior Court Judge and a founding member of the Orange County Chapter of ABOTA.

Bruce E. Todd, a member of the Bar Publications Committee, is with the law firm of Ponsor & Associates in Redlands.

Cross Examination

by David G. Moore

Cross-examination is a subtle art that is complex and requires a mastery of the laws of evidence and procedure.

The technical aspects can be learned and are available to anyone who wants to study, but one important requirement is more difficult to acquire: experience. With today's limited access to the courtroom, few attorneys have an opportunity to hone their cross-examination skills. Anyone can go down to court and see other lawyers in action, but that is sort of like learning to ski by watching a video of a great professional skier. As a Nike commercial says, you have to "just do it."

Some fortunate lawyers seem to have a natural talent, a feel for cross-examination that defies the learning process. Even without that talent, however, anyone can be an effective cross-examiner with technical knowledge and experience. And, really, that's all most of us need in an ordinary trial.

Years ago, I listened to a tape made by a master cross-examiner, Professor Irving Younger. His grasp of the art was broad, and his sense of humor second to none. While he died almost 20 years ago, there are audio and video tapes of his lectures still available as well as his book: The Advocate's Desk Book: The Essentials of Trying a Case, which has been reprinted several times.

Professor Younger has ten commandments, and they have not changed over the years:

1. Be brief. The trial lawyer must remember the jurors' ability to absorb information before reaching a saturation point is limited.
2. Use plain words.
3. Use only leading questions.
4. Be prepared. There is an old bromide that you never ask a question to which you do not know the answer. While there are exceptions to this rule, they are rare.
5. Listen. Sometimes lawyers get so caught up in preparing for the next question that they do not analyze the answer the witness has just given.
6. Never quarrel with the witness.
7. Avoid repetition.
8. Do not allow the witness to explain.
9. Limit questioning. Don't fall prey to the "one question too many" trap. When you have what you need, STOP and sit down!
10. When you have solicited a point that you need, save it for summation.

The most common mistake that I see lawyers make is asking questions when they do not have the knowledge or experience to verbally fence with the witness. It's as if the lawyer feels he or she must perform for the client, and grabbing for the spotlight often backfires.

Examination of an expert witness puts on added pressure. Adequate preparation is the key. Most professional witnesses have testified a number of times in trial or depositions. Do your homework and research these cases. Read the transcripts. Visit the expert's website, if there is one. Obtain and read the witness's resume. Often these resumes contain a bibliography and background facts that you might want to investigate to see if there are any irregularities such as an exaggeration of educational attainment or work history achievements. You might want to run a litigate check to see if your expert has been sued and, if so, for what?

And, of course, one of the best resources to cross-examining and the opponent's expert witness is your own expert. Your witness can give you a crash course on the elements you need to explore the opposing expert in both the deposition and trial phases.

I asked Mark Lester, a trial lawyer with Lobb Cliff & Lester, to add his thoughts to this article because of an experience he had with an adverse expert witness not long ago in Riverside Superior Court. Here's what Mark had to say:

"In terms of my recent experience in trial on a legal malpractice and breach of fiduciary duty case where I was defending the lawyer, I found that doing some background research on the lawyer expert who was to testify as to the standard of care and professional responsibility issues was invaluable.

"In my case, he was critical of the lawyer for suing his own client on a business deal they entered into together, claiming that in the process the defendant lawyer had failed to comply with the applicable standard of care, had breached his fiduciary duties and committed professional ethics violations.

"In the expert's deposition, I asked him if he had ever sued a client, and he said, 'Sure.' I asked him if he had ever been sued for malpractice and he said, 'Yes.' In checking on his background, I also found he had been sued for making the misrepresentation in his advertising as an expert that he had never failed to qualify in any state or federal court as an expert witness, which was not true. At trial I asked him if making misrepresentation to clients was below the standard of care; he said 'Yes.' He also agreed it was a breach of fiduciary duty for a lawyer to lie to his client and

that it was in violation of applicable ethical standards and the Rules of Professional conduct.

"Despite the fact that my client had arguably not followed the rules of disclosure and obtaining informed written consent, the expert's testimony was rendered inert and I, in fact, chose not to call my own expert to the stand. The CACI instructions are less harsh about uncontradicted expert testimony.

"In the best of all possible cross-examination worlds, getting the other side's expert to agree with those things that you want to hear and in effect, testifying for your case, is a wonderful tool when you can make it work. The Association of Southern California Defense Counsel, DRI, Consumer Attorneys and ABOTA all have expert witness databases for obtaining old depositions, publications, etc."

In sharing his recent experience, Mark illustrates that along with the just plain hard, time-consuming work involved, a successful cross-examination is one of the most exhilarating and rewarding experiences of being a trial lawyer.

David G. Moore, president of the RCBA in 1984, is with the law firm of Reid & Hellyer in Riverside.

How to Get a Document Before the Court of Appeal

by Donald A. Davio, Jr.

Attorneys in a civil case generally think of one thing when they think about an appeal – the briefs. However, before briefing starts, you must have a record. An appeal with a defective record is like a house with a bad foundation – very shaky and of questionable value. Thus, to bring a successful appeal, the practitioner must focus on both a complete record and good briefs. This article will help you ensure that your appeal has the necessary foundation.

An appellate record consists of documents and transcripts of oral proceedings. At the court of appeal, we find that attorneys have the most difficulty with the documentary portion of the record, and that the source of the problem usually occurred *before* the filing of the notice of appeal, during the superior court proceedings. The first step towards avoiding documentary problems is to recognize that every document utilized in the superior court process must be handled in one of three ways to ensure its inclusion in the appellate record. The three ways are by filing or lodging in the superior court file; by offering the document in evidence as an original exhibit; or by the superior court's taking judicial notice either of, or by using, the document. I will explain the basic procedures concerning these three methods of creating a documentary appellate record and then discuss some special problems.[1]

Filing or Lodging a Document

The bulk of the documents that ultimately become part of the appellate record are those that are filed or lodged with the superior court clerk. Most of these documents are file-stamped by the superior court clerk and physically placed in the superior court file. Occasionally, a document will not be file-stamped, but will nevertheless be retained in the superior court file – this is what is meant by "lodging" a document in the superior court file.

To file or lodge a document in the superior court file is the primary way to ensure the document will become part of the appellate record. Such documents are placed before the appellate court for consideration generally in one of three ways.

The first way is by a notice of designation filed under California Rules of Court, rule 8.120(a) [formerly rule 5(a)]).[2] The notice designates the documents to be included in the clerk's transcript and must be served and filed with the superior court within 10 days after the filing of the notice of appeal. The notice of designation is often included in the same notice that designates the oral proceedings to be reviewed by the court. (Rules 8.120(a)(2), 8.130(a) [formerly rules 4(a), 5(a)(2)].) You now must always file a notice regarding the reporter's transcript: If you intend to use a reporter's transcript, you must designate the dates of the oral proceedings to be transcribed; if you do not intend to use a reporter's transcript, you must state that you will proceed without one. (Rule 8.130(a)(1) [formerly rule 4(a)(1)].) Both of these notices (designating the clerk's transcript and stating your intentions respecting a reporter's transcript) are often included in the notice of appeal.

The second way in which filed or lodged documents come before the court of appeal is by an appendix in lieu of a clerk's transcript. (Rule 8.124 [formerly rule 5.1].) Instead of a notice of designation, a notice of election to file an appendix in lieu of clerk's transcript is filed within 10 days of the filing of the notice of appeal. (Rule 8.124(a)(1) [formerly rule 5(a)(1)].) As with the notice designating a clerk's transcript, the notice of election is often combined with the notice designating the reporter's transcript and included in the notice of appeal. (Rule 8.124(a)(2) [formerly rule 5.1(a)(2)].) In contrast with the clerk's transcript, which requires no effort by appellate counsel, the appendix in lieu of clerk's transcript requires the attorney to perform all of the functions normally done by the superior court clerk. In effect, the attorney must produce a clerk's transcript, and it is important for the attorney to think of the appendix as a clerk's transcript in complying with the requirements in rules 8.124 and 8.144 (formerly rules 5.1 and 9) for preparing the appendix.

[1] If a document that was offered to the superior court is not properly handled, the problem can usually be remedied by stipulation. However, if the parties will not stipulate, then the only remedy is a hearing in the superior court. (Rule 8.155(c)(2) [formerly rule 12(c)(2)].) The hearing will generally delay preparation of the record by two or three months. The agreed (rule 8.134 [formerly rule 6]) and settled (rule 8.137 [formerly rule 7]) statements are not discussed – they are rarely used. Also not discussed because so rarely made and almost never granted are the motions to take additional evidence and make findings on appeal. (Rule 8.252(b), (c) [formerly rule 22(b), (c)].)

[2] All rule citations refer to the California Rules of Court.

In that respect, only the documents that can be included in a clerk's transcript can go in an appendix. The appendix is not a way in which a party may circumvent the strictures about what goes into a clerk's transcript. Thus, rule 8.124(g) (formerly rule 5.1(g)) provides that: "Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file." That is also why rule 8.124(b) (formerly rule 5.1(b)(1)(A)), by reference to rules 8.120(b)(1) and (2) (formerly rules 5(b)(1) and (2)), requires certain documents relevant to timeliness and appealability to be copies of documents file-stamped by the superior court clerk or conformed by counsel. Although not required by rule, best practice requires that all documents in the appendix be file-stamped or conformed so as to show the date of filing in the superior court. In this respect, I disagree with the deletion of this practice from the text now in rule 8.124(d)(1) (formerly rule 5.1(d)(1) and, prior to this deletion, rule 5.1(c)(1)) and with the Advisory Committee's Comment that the time or expense of conforming documents by stamp or hand is not justified by the documentation of the accuracy and chronological order of filings in the superior court. The date of filing provides a means of identifying a document in addition to title or description. Documents showing the date of filing make compliance with the requirement of arranging the contents of an appendix chronologically easy and obvious. (Rule 8.124(d)(1) [formerly 5.1(d)(1)], by reference to rule 8.144(a)-(c) [formerly rule 9(a)-(c)]; see in particular rule 8.144(a)(1)(C) [formerly rule 9(a)(1)(C)].) Therefore, counsel should consider conforming at least the more important documents. Conform an unstamped document by handwriting or typing "Filed" and the date the document was filed in the upper right hand corner of the first page, where the file stamp would have appeared.

A number of other requirements are set forth in rules 8.124 and 8.144 (formerly rules 5.1 and 9), and I will mention a few of the most often ignored requirements. The copies must be legible and arranged in chronological order of filing, and each page in every document copy must be consecutively numbered. Just as in a clerk's transcript, alphabetical and chronological indices of every document in the appendix are required. The documents must be arranged in volumes of no more than 300 pages each. Finally, although the appellant's opening appendix is filed at the same time as the opening brief, it cannot be a part of the brief – the appendix must be a separately filed document. (See rules 8.124(d)(1), 8.144(a)-(c) [formerly rules 5.1(d)(1), 9(a)-(c)].)

The third way in which a document filed or lodged in the superior court becomes a part of the appellate court record is by augmentation. After the clerk's transcript or appendix in lieu of clerk's transcript has been filed, and while counsel is preparing the appellant's opening brief (or the respondent the respondent's brief), it is not uncommon for the attorney to discover that a document necessary to the court's review of the issues to be raised in the appeal has been erroneously omitted from the appellate record. Augmentation occurs in one of three ways. The first way is by a motion or application for a supplemental clerk's transcript. (Rule 8.155(a)(1) [formerly rule 12(a)(1)].) This procedure generally takes 30 days after the order for augmentation is granted. The second way is to attach copies (preferably file-stamped or conformed with the date of filing) to the motion. (Rule 8.155(a)(2) [formerly rule 12(a)(2)].) This way has the advantage of avoiding any delay beyond the issuing of the court's order deeming the copies to be part of the record on appeal. The court prefers this method, as long as large augmentations have a page-numbering system similar to an appendix. The third way is for a party to notify the superior court clerk of any omission from the record designated by the party. (Rule 8.155(b) [formerly rule 12(b)].) Send a courtesy copy of the notification to the appellate court clerk, as well. The superior court clerk then files a supplemental clerk's transcript. This takes less time than filing a motion, but more time than attaching a conformed or file-stamped copy.

Having given you an overall idea of the principal means by which documents find their way into the appellate record, I now proceed to the first of the two much narrower paths by which documents come before the court of appeal.

Documentary Exhibits Admitted Into, or Excluded From, Evidence[3]

Note that I am *not* talking about "exhibits" that are attached to pleadings and motions – those exhibits appear in the clerk's transcript or appendix as documents that were filed or lodged in the superior court file. What I *am* talking about are exhibits introduced into, or excluded from, evidence at trial or an evidentiary hearing.

Documentary exhibits can be included in the clerk's transcript or appendix. Specifically, rule 8.120(b)(3)(B) (formerly rule 5(b)(3)(B)) permits copies of all exhibits designated by a party to be included in a clerk's transcript, and rule 8.124(b)(5) (formerly rule 5.1(b)(5)) permits copies of exhibits to be included in an appendix, with a mechanism for obtaining copies of exhibits possessed by other parties provided in rule 8.124(c) (formerly rule 5.1(c)).

Documentary exhibits, however, differ from documents filed with the clerk in that the trial court, and occasionally the appellate court, may need to see the original exhibit. The appellate court needs to see an original only when it is

[2] Documentary exhibits include photographs, charts, maps, graphs, etc., no matter how large or small. Nondocumentary exhibits are seldom viewed by the appellate court, and then only if specifically requested under rule 8.224 (formerly rule 18).

different from a copy in a way significant to an issue in the appeal – a rare circumstance. Rule 8.224 (formerly rule 18) facilitates the designation and transmission of original exhibits in time for consideration by the court at the critical point when the draft opinion is being prepared. That rule allows a party to notify the superior court within 10 days after the filing of the last respondent's brief to transmit the specified original exhibits to the appellate court within 20 days. (Rule 8.224(a), (b)(1) [formerly rule 18(a), (b)(1)].) Furthermore, recognizing the practice of most superior courts to return exhibits to the parties, rule 8.224 also requires any party in possession of original exhibits to transmit them on request to the appellate court. (Rule 8.224(b)(2) [formerly rule 18(b)(2)].)

However, this court prefers another way of placing original exhibits before the appellate court, and provides notice and a form to encourage counsel to use this third method. Rule 18(d) authorizes the appellate court at any time to direct the superior court clerk, or a party in possession of an exhibit, to send the original exhibit to the appellate court. So, when the clerk of this court gives notice that the record on appeal has been filed, the notice directs the parties "(1) to discuss in their briefs any trial exhibits that are important to a resolution of the appeal and (2) to serve and file with the clerk of this court the enclosed form requesting early transmission of any exhibits mentioned in their briefs (Cal. Rules of Court, rule 8.224(d) [formerly rule 18(d)])." The form directs the parties to return the form with their *initial* briefs, and to list on the form the exhibits to be transmitted. Directing counsel to request transmission of relevant original exhibits at the time of filing their initial briefs allows counsel to do so at the time they are most likely thinking about the documents needed to support their contentions. This earlier start gives the appellate clerk more time to make sure the exhibits have arrived by the time the court starts to consider the appeal.

Counsel's assistance is requested in thoughtfully determining the exhibits that this court needs to review – the court does not want to review every exhibit, only those that pertain to issues raised in the briefs. At the same time, the court does not want to have to interrupt its consideration of an appeal to obtain exhibits crucial to a determination of the points raised because copies have not already been included in the appellate record.

The first two ways of placing documents before the court of appeal cover the great majority of documents dealt with during superior court proceedings. The third category, though small, is at times critical, and I discuss it next.

Judicially Noticed Documents

The third and final way by which a document comes before the court of appeal is by judicial notice. A specific rule now deals with judicial notice, rule 8.252(a) (formerly rule 22(a)), referring to Evidence Code section 459, which authorizes a reviewing court to judicially notice any document that could be judicially noticed by a trial court. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 45 et seq., p. 137 et seq.) The rule requires a separate motion (rule 8.252(a)(1) [formerly rule 22(a)(1)]) and the attachment of copies of the documents to be used or noticed, unless they are already in the appellate record (rule 8.252(a)(2) [formerly rule 22(a)(2)]).

Generally speaking, the court of appeal will not judicially notice a document unless a request for judicial notice was made in the superior court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3, second par.) If a party feels that the reviewing court should judicially notice a document that was not judicially noticed by the superior court, the motion for judicial notice should establish "exceptional circumstances" justifying a departure from the general rule. (*Ibid.*) The best way to ensure that the document will come before the court of appeal is to file or lodge it in the superior court file, which does not preclude separately and additionally requesting judicial notice of it.

As to the procedure in the court of appeal, once a request for judicial notice has been made, this court automatically notifies opposing counsel to file opposition, thereby complying with the notice requirements for appellate judicial notice. (Evid. Code, §§ 455, subd. (a), 459, subds. (c), (d).) Unless the request for judicial notice is unopposed and should obviously be granted, ruling is generally reserved for consideration by the panel that will decide the appeal. The parties may discuss in their briefs the matters to be judicially noticed, so that additional briefing is not required if and when the panel decides to take judicial notice. If the court declines to take judicial notice, the portions of the briefs discussing the matters of which judicial notice had been requested will simply be ignored. The reason ruling is reserved is that the court of appeal will not judicially notice matters that are not relevant to its consideration of the issues raised in the appeal, which is best determined after a full review of the record and briefs. (*Mangini v. R..J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.)

A typical reason for requesting judicial notice is to place before the court of appeal documents that were filed in a different superior court case that are nonetheless relevant to the court's determination of an issue in the present appeal. Such documents cannot be designated, included in an appendix, or augmented, because those avenues are

limited only to documents that were filed in the superior court case out of which the appeal arises. Again, if the documents were not offered for judicial notice in the superior court, the appellate court will want to know why not.

In summary, the most important point made by this article is that every document must fall into one of these three categories in order to be eligible for inclusion in the record on appeal. In any trial proceeding, in order to preserve the client's right to appeal based on a complete record, for every important document, counsel must use the appropriate method to make it part of the appellate record.

Special Problems

Having discussed generally how documents find their way into the appellate record, I will now consider several special problems.

The first problem is the box-sized exhibit to a motion, usually a motion for summary judgment. An example is a city's general plan attached to a motion for summary judgment. Such a large exhibit cannot be physically attached to the motion because of its size. Furthermore, it does not fit well in a file cabinet. Consequently, such exhibits may be misplaced, or the superior court deputy clerk preparing the record may not know where the exhibit is being kept. The best way to handle these exhibits is to keep them with the exhibits that were admitted into or excluded from evidence in the exhibit locker with a note placed in the file indicating the location. Counsel should be sure to clarify with the superior court clerk where the large exhibit will be kept and how it can be located for future reference in the trial court as well as in the appellate court.

Another problem is the ex parte application that is denied. Quite frequently, such a document is never filed or lodged in the superior court file. Of course, if it is not filed or lodged, its denial can never be the subject of appellate review. If the superior court clerk does not think that formal filing is appropriate because of the application's denial, counsel should request the superior court clerk to receive-stamp the document and lodge it in the superior court file.

Occasionally, documents are presented to the superior court judge for review without having been filed, marked for evidence, or the subject of a judicial notice request. This frequently happens with documents that a party wants the superior court to consider but has not had time to file. Often, documents that are filed late, such as an opposition to a motion for summary judgment not filed within the statutory time limits, will be refused filing. Again, if counsel wishes to raise the exclusion as an issue, contending that the document should have been considered because it was not late or even though it was late, the document has to find its way into the superior court file, most logically by lodging it rather than filing it.

Deposition transcripts are sometimes lodged with the superior court. However, merely lodging a deposition transcript with the superior court does not ensure that it will become part of the record on appeal. One appropriate way to ensure the superior court's consideration of the contents of a deposition is to read them into the record. A second and equally appropriate way is to attach excerpts from the deposition transcript as exhibits to a motion, again usually a motion for summary judgment. (See rule 3.1116 [formerly rule 316].) Without an order from the court of appeal or a stipulation by the parties, a deposition transcript that was merely lodged in the superior court may not be copied as part of the clerk's transcript, nor may the original deposition be lodged with the court of appeal. (Rule 8.120(b)(4) [formerly rule 5(b)(4)].) The court of appeal generally will not consider portions of depositions that were not presented to the superior court for consideration. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 [documents not before trial court generally not part of appellate record]; *Sacks v. FSR Brokerage*, Inc. (1992) 7 Cal.App.4th 950, 962-963 [entire deposition lodged, but only excerpts offered]; *DeYoung v. Del Mar Thoroughbred Club* (1984) 159 Cal. App.3d 858, 862-863 [augmentation limited to documents filed or lodged with superior court].)

Finally, the introduction into evidence of electronic recordings is often mishandled. Constantly neglected rule 2.1040(a) (formerly rule 243.9(a)) provides, "Unless otherwise ordered by the trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court and to opposing parties a typewritten transcript of the electronic recording. The transcript must be marked for identification. A duplicate of the transcript, as defined in Evidence Code section 260, must be filed by the clerk and must be part of the clerk's transcript in the event of an appeal." Additional comment is not necessary, except to note that another very viable way of including the contents of an electronic recording played to the jury or the court is to have the court reporter take down the recording as it is played to the trier of fact. Although rule 2.1040(b) (formerly rule 243.9(b)) provides that "the court reporter need not take down or transcribe an electronic recording that is admitted into evidence," neither is there any reason why the reporter should not do so (the beginning of the same sentence permits the trial court to order it), and, indeed, is not the reporter's transcript the best place for any audible proceeding to be recorded?

Sealing Documents

General principles are the key to understanding sealed documents and the sealing and unsealing of documents on appeal. I have encountered counsel who have not understood these fundamental principles.

First, filing a document in a court is not a good way to keep it private – that pretty much makes it a public document, accessible to anyone that wants to look at it. That is because court documents are really no different than oral court proceedings – the public has a First Amendment right of access to court proceedings, whether civil or criminal in nature, including documents. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 297-298 [noting application of principles and criteria to civil documents in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1208, fn. 25, 1217-1218, and in rules 2.550-2.551, formerly rules 243.1-243.2]; see also Advisory Com. com. foll. rule 8.160 [formerly rule 12.5].)

Second, if the document was *not* sealed in the trial court, it *cannot* be filed under seal in the court of appeal. (Rule 8.160(d) [formerly rule 12.5(d)].) And remember, a document has not been sealed unless a court order says so. (Rule 8.160(b)(2) [formerly rule 12.5(b)(2)].)

Third, if the document *was* sealed in the trial court, it must be filed under seal in the court of appeal and remain sealed unless that court orders otherwise. (Rule 8.160(c)(1) [formerly rule 12.5(c)(1)].) If you proceed by clerk's transcript, you need not do anything, and the superior court clerk is pretty good at transmitting its sealed records and documents under seal, as is the appellate court clerk at keeping them sealed. Nevertheless, it does not hurt to check with the superior and appellate court clerks as to how sealed documents are being transmitted and held. If you are not proceeding by clerk's transcript, then a motion to seal, or at least a copy of the trial court's sealing order, depending on the appellate court clerk's office policy, will be necessary to show the appellate court clerk that the documents must be sealed in the appellate record. (Rule 8.160(e) [formerly rule 12.5(e)].) This applies to appendices, augment motions, judicial notice requests, and any other filing attaching or including documents sealed in the trial court.

Fourth, if you want to unseal a document that has been sealed in the appellate court file, or file unsealed a document that has been sealed in the superior court, you have to serve and file a motion in the appellate court. (Rule 8.160(f) [formerly rule 12.5(f)].)

In conclusion, counsel must be vigilant during trial court proceedings to ensure that the documentary record is being maintained so that, in the event of error, an effective appeal may be taken.

Donald A. Davio, Jr., Principal Attorney, at the Court of Appeal, Fourth District, Division Two.

Judicial Profile: Commissioner Bambi Moyer

by Donna Johnson Thierbach

The best thing about writing profiles is that not only do I get to meet a lot of interesting people, but I get to learn a little more about people I already know. I first met Commissioner Moyer about 15 years ago, when she was in the District Attorney's office. I always thought she had a good sense of humor and was very professional. However, I knew very little about her, except that she had a very unusual first name. Well, that would make for a very short article, so Commissioner Moyer was kind enough to give me an opportunity to work on my interviewing skills.

Bambi Moyer

Commissioner Moyer was born in Bethpage, New York, and was named "Bambi" after her mother's best friend. Her mother is a school nurse (now retired) and her father is a financial director (also retired). Commissioner Moyer lived in Bethpage until she was ten years old, and then her family moved to Yorktown Heights, New York. In high school and college, Commissioner Moyer was involved in theater and chorus. She said her best role was probably when she played Rose in Gypsy. Although I thought "Bambi" would be a perfect stage name, she assured me she had no plans to be an actress. Rather, she attended Union College in Schenectady, New York, as a biochemistry major. However, as she neared graduation, she knew she did not want to do laboratory work, but was not sure in what direction she did want to go. As fate would have it, a friend planning to attend law school was studying for the LSAT. Commissioner Moyer looked through the LSAT study materials and started doing the logic questions for fun. In fact, she liked doing them so much that she started showing up for her friend's LSAT study sessions just to do the logic questions! It was only then that she began to consider law school. Commissioner Moyer took the LSAT, did well, and was accepted at Albany Law School in New York.

So how does a New York girl end up in California? After graduating from law school, Commissioner Moyer's first job was at a patent firm in Albany. Commissioner Moyer described it as the most boring job imaginable, because she just she sat in a room alone all day describing things. She said the job was just not a good fit for her, because she prefers working with people. So she went to the career development center at her alma mater to see if there were any interesting positions posted. There, she learned of an associate position in Riverside, California. Riverside attorney Martin "Marty" Blumenthal had attended Albany Law School, and was recruiting an associate through Albany. When Commissioner Moyer interviewed in New York for the position, she had never been to Riverside. However, she thought moving to California was a splendid idea, since her parents had moved to Florida and she no longer had family ties to New York anyway. Thus, when she was offered the position, she packed up a U Haul and drove to California. At that time, she was admitted to the New York and Connecticut bars. Commissioner Moyer's mother made the five-day drive with her, which allowed her to study for the California bar exam while her mother drove. Commissioner Moyer arrived in California in time to take the July bar in 1987. She must have fallen in love with California, because she did not return to New York until just last year, when she and her family went there for vacation.

Commissioner Moyer worked for the firm of Blumenthal & Milliken until October 1988. She was doing civil litigation, with an emphasis on real estate and construction defects. However, she wanted to be in the courtroom and to have more contact with people, so in October 1988, she went to work for the Riverside County District Attorney's office. She was there for eight years, and had assignments in juvenile, career criminal, misdemeanor trials, preliminary hearings, master calendar and gangs. She said what she misses most about the office is the camaraderie.

Commissioner Moyer has been a commissioner for ten years now. She has served in assignments in the Banning, Lake Elsinore and Hemet courts, involving everything from criminal arraignments to limited civil cases, unlawful detainers, small claims and traffic. Commissioner Moyer said handling small claims was like taking the bar every week. Although the amounts of the losses were small, the cases could be complex and diverse, including whistleblower, section 1983 deprivation-of-civil-rights and vehicle code issues. For the past three years, she has been assigned to family law in Riverside. She said family law requires a lot of reading

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Voir Dire Tips

by Terry Bridges

Here are some thoughts that have been helpful to me in voir dire.

1. Due Diligence. Check with your colleagues. What has been their experience with respect to the trial court's practices, preferences and restrictions relative to voir dire?
2. Check with the Clerk. At an appropriate time close to trial, ask the court clerk if he or she or the judge has any preferences or concerns regarding voir dire.
3. Check with the Judge. Does the judge have printed "local local" rules? If so, comply. If not, no later than the final status conference, make sure that you have discussed with the judge his or her practice with respect to voir dire, empanelment of the jury (e.g., 6-pack, 18-pack, etc.) and how challenges are to be exercised (e.g., at the end of voir dire, at the end of the examination of the individual juror, in open court, in chambers, etc.).
4. Visiting the Jury Assembly Room. Unfortunately, my trials take place outside of Riverside County. Each time I appear in a "foreign" court, I spend time observing the jury panels in the Jury Assembly Room in order to gain an impression of the probable jury makeup.
5. Vetting Your Voir Dire. We may think that we have prepared a great voir dire. However, sometimes, particularly closer to trial, we tend to become more and more myopic. I suggest that you run the topics of voir dire past your mentor or a respected trial lawyer in order to get his or her input and suggestions. We might have missed an important point or included a point that might not be appropriate.
6. Make Things Interesting. Understandably, most jurors don't want to serve. In an attempt to engender interest in serving, I have used something similar to the following:

   "Ladies and gentlemen, my client, Ms. X, and I look forward to presenting our case to you. My colleague, _____, and I have spent over a year preparing this case on behalf of our clients for this day. Judge _____ has ruled on a number of motions over the past year, and together we have attempted to resolve as many issues as we could prior to coming here this morning.

   "My colleague, Ms. _____, is an exceptionally talented trial lawyer.

   "Through the testimony of witnesses, you will be introduced to some interesting issues, including _____ and _____, and you will also have the opportunity to hear from experts dealing with _____ and _____."
7. Divide the Questions Between Counsel. Include on your agenda for your final pretrial meet-and-confer conference with opposing counsel an agreement to identify common questions and divide them between yourselves, so that you will be able to avoid duplication of questions and save precious time.
8. Be Brief. To the universal irritation of jurors, we tend to ramble on and on in voir dire. Consider asking the jurors only a few questions, particularly if, between the questions from the judge and your opponent, key issues have been covered. Subject, of course, to follow-up questions, my shortest voir dire went something like the following:

   "Ladies and gentlemen, Judge _____ and my colleague, Ms. _____, have essentially covered the issues I considered discussing with you.

   "After thinking about your prior answers and those of your fellow jurors, would any of you prefer not to remain on the jury? Why?

   "Is there anything that any of you think you should discuss with us, either here in open court or in Judge _____'s chambers?"
9. Watch! Be alert and sensitive to jurors' body language. How do they react to the judge, to you, to your colleague, to fellow jurors, to the parties?
10. Listen to the Jurors! As trial lawyers, we tend to have a genetic defect that precludes us from listening effectively. We can gain more information from jurors if we simply put down our checklists and honestly and openly listen to the responses.
11. Listen to Your Client, Paralegals, Etc.! Make sure that you discuss with your client representative, paralegal, etc., their feelings as to each potential

juror. If you don't have the time to discuss their reactions outside the presence of the jury, an appropriate communication system should be arranged so that their valuable reactions are considered.

12. Engaging the Jurors in Conversation. Most jurors will be reluctant to talk about issues, and perhaps shy, particularly on the first day of trial and prior to any "juror bonding." To get a juror to open up, ask open-ended questions, such as "Would you please explain?," "How do you feel about that?," "Can you tell us more?," "How do your friends and family members feel about that?," "What conversations have you had with friends and family on that issue?," etc., etc.

13. Follow Up. After listening to the jurors' responses, follow up.

14. Dealing with Sensitive Issues. I have always felt that it is strategically dangerous and, more importantly, insensitive to jurors to ask them about private matters (prior sexual harassment, termination from employment, convictions of felonies, etc.). To obviate this, consider working with opposing counsel to come up with a stipulated list of sensitive questions for the judge to ask the jurors. Jurors tend to be less offended when the sensitive questions are asked by the judge.

15. Give the Jurors an Out. Ask the judge to instruct the jury in his or her voir dire that if there are any questions that a juror feels are sensitive or confidential, he or she should either write a note and give it to the bailiff or raise his or her hand. The judge should then explain that the issue will be handled in chambers.

16. Approaching the Jury. Too many of us invade the jurors' "space," without even the benefit of a handshake. My suggestion is that, at this early stage of the trial, you don't get too close to the jury box.

17. Civility and Respect. Treat the jurors, the court, opposing counsel, the opposing party and courtroom personnel with dignity, civility and respect. If you do not, you put yourself behind the eight-ball from the very beginning of the case.

18. Create a Favorable First Impression. I am amazed at how often counsel forget the importance of personal appearance and organization of materials. Jurors make initial judgments before hearing from any of the attorneys, and studies have shown that such early judgments and impressions remain as filters of information throughout the trial.

19. Profiling. Tomes have been written about juror profiles. Frankly, I don't trust them, and my experience hasn't borne out the validity of profiling. Jurors have a multitude of feelings on many issues and I think it is a grave mistake to keep or dismiss a juror simply because of stereotyping.

20. Keeping Track of Peremptories, Juror Characteristics, Code of Civil Procedure Section 231.5 (enacted in 2006) and Wheeler Motions. Make an enlarged chart and use larger-sized post-its so that you can keep track of various characteristics, including the racial and general makeup, of each juror, follow-up questions and overall judgments (plus or minus, or a judgment of 1-10, etc.) The general format provided by the clerk's office is generally too small to accommodate this task effectively. After the jury has been empaneled, make sure to have your paralegal prepare a master jury seating chart with all of the above information on it.

21. Objections. During the voir dire by your opponent, don't forget the basic objections, which include (a) arguing facts, (b) invading the province of the court by arguing the law, and (c) attempting to precondition the jury to a particular result or to curry favor with the jurors. At the same time, use these objections sparingly, if at all, and only in the event that counsel has gone significantly over the line. Cf. Code Civ. Proc., § 222.5.

22. Challenging for Cause. Don't try this unless you have a high degree of confidence that the motion will be granted.

    I am always frustrated when I genuinely believe that a challenge for cause is well-taken, but the judge, not wishing to give a signal to other jurors as to how they can get "off the panel," asks the traditional question, "Now, Ms. _____, even having those feelings or opinions you just expressed, do you feel that you can be fair to both sides in this matter?" Jurors generally respond something like, "Of course, your Honor."

    Having raised the challenge for cause, you might as well proceed to inquire further, but only in a manner that is calculated to be least likely to offend or embarrass the juror. You can explain that it is your duty to inquire about various matters and that you are hopeful that the juror will understand that you are carrying out your ethical obligations and professional oath to your clients. After such an explanation, I ask, "Do you still have those feelings that you shared with us about a while ago? How long have you had similar feelings? Have you shared those feel-

ings with your friends and family? Do your friends and family have the same feelings?

After discussing the above, conclude with something like, "Do you still feel and believe that _____ (substance of prior testimony that raised the challenge for cause)?"

23. Stipulations re Excuse. Meet with opposing counsel prior to trial in order to work out an arrangement whereby counsel can discuss during voir dire, hopefully at sidebar or in the judge's chambers, those jurors whom counsel may stipulate to have excused. A simple nod at the counsel table between cooperating counsel generally does the trick. Of course, don't forget to clear with the judge his or her practice with respect to stipulations for cause.

24. Bargain-Basement Focus Groups. I am not a big fan of professional jury consultants. In a blatant display of egotism, I prefer to trust my instincts and experience, as well as those of my client, over hugely expensive jury focus groups. In the past, I have collected a cross-sectional group of acquaintances and put on a very brief case presentation, direct and/or cross-examination, etc., in the presence of those people. Their input has proved to be both accurate and tremendously valuable.

25. Throwing out the Book. I believe we make a significant mistake when we try to follow "cookbook" forms of voir dire. They take away from spontaneity and flexibility. Nothing beats simply pacing around your desk and thinking through how you should conduct your voir dire. Having done so, your brief voir dire outline should be much easier to execute, since it is your work-product.

26. Forget the Role Models. Don't try to imitate a demonstration of voir dire by so-called "masters." While we can always learn from more experienced trial counsel, voir dire has to be reflective of our own particular strengths, weaknesses and personalities.

27. Leave Your Sense of Humor at the Door. There should always be room for humor during the course of the trial. Inevitably, things will occur that justify an appropriate comment by counsel, the judge and indeed the jury. My experience, however, has been that attempts at humor at the voir dire stage detract from your ability to present a serious, well-prepared and dedicated image. We are lawyers, not comedians, and the jurors expect a serious, courteous and professional approach throughout the trial, and particularly in voir dire.

28. Judicial Administration Standards. Be aware that most judges will utilize the applicable voir dire questions contained in Section 8 of Division One of the Standards of Judicial Administration in conducting their voir dire, or at least the substance of them. Ask the judge in your chambers conference to explain if he or she will use the questions contained in the rules, and make sure to also determine what additional questions will be asked by the court.

29. Conclusion. I am pleased to share these thoughts with you. I hope that some of them might be of assistance.

Terry Bridges, president of the RCBA in 1987, is with the law firm of Reid & Hellyer in Riverside.

Judicial Profile *(continued from page 18)*

and, because she is the trier of fact, can be stressful, but it is interesting. She said it really helps that the family law attorneys who appear before her are very good.

Commissioner Moyer said that, although she enjoyed trials as a Deputy District Attorney, she likes sitting on this side of the bench more, because she can just focus on the pure legal aspects of the case. As a commissioner, she said, she has really enjoyed learning new areas of the law and has never been bored.

Donna Johnson Thierbach was formerly a Deputy Public Defender with Riverside County and is currently the Director of the Riverside County Probation Department.

Opening Statements

by James C. Packer

There are as many approaches to an opening statement in a civil case as there are trial lawyers. The most effective ones paint a picture for the jurors that captures their interest, while supporting the key points to be brought out.

The twelve people who have been sworn in are anxious to hear what the case is all about. From a plaintiff's perspective, more information is often provided than by the defense, because the plaintiff has the burden of proof and may believe that more issues need to be discussed than the defense case requires. The amount of time and detail devoted to liability is usually governed by how complex the issues of liability are and how clearly it can be established. For example, in a rear-end collision, less effort should be devoted to discussing fault. The severity of the impact may be important, but the focus is usually on damages. The factual support is derived from what the plaintiff's own testimony will be, about how the actions of the defendant have changed the plaintiff's life. Then testimony from the plaintiff's expert can be intermingled with the plaintiff's description of pain and suffering, so the jury knows what to expect. Separate emphasis is given to economic losses; obviously, the more severe the losses, the more that needs to be commented on.

Typically, issues of fault are addressed first, often in a chronological manner, but this is very subjective. There can also be initial facts supporting liability that are woven into the effect they have on someone's life, followed by a discussion of damages, returning back to liability.

The defense perspective is not always as definitive. Even with the amount of discovery that takes place, there should be room to adapt to plaintiff's case without making promises that cannot be kept. Both sides are cautious about making sweeping statements that are not fact-supported. This may hurt your case in closing, if done. Additionally, there are often points neither side alludes to in opening, to enhance their impact on a jury who may hear them for the first time on cross-examination.

A defense opening, if given, should usually counter most of the plaintiff's major themes, by setting forth counter-themes. There are occasions when openings are reserved to the point in time when the defense case begins. Again, this is personal to the attorney and case-sensitive.

One of the most instructive approaches was provided by a psychologist consultant, who concentrated on the effect an opening has on a jury. If enough time is allotted (federal court being a bit more restrictive than state court), the themes are presented in well-defined headers. These are usually a couple on liability and the same for damages. In this way, the facts can be organized to address elements of

the plaintiff's or defense case, which are then referred back to in closing. "You tell them what you are going to tell them, then tell them, then tell them about what you just told them." It seems basic but is effective.

There are occasions when either side may interject argument into the opening, creating a negative impact. It may be quickly stopped by objection.

Again, the time allotted for opening is usually tied to how complex the judge views the case as being. There is certainly justification for lengthy road maps when there are difficult concepts being presented. Some cases require a complete section of the opening be devoted to education. Examples of this are with certain medical issues that are subtle, engineering, testimony or other expert areas that are beyond common experience.

Once the opening is completed, care should be taken to fulfill what can be viewed as promises by making sure the evidence is emphasized to support them. If this is not done, your opponent will probably point out your failures in closing, to the detriment of your case.

There is no one perfect approach to openings. They need to fit the attorneys' and the cases' comfort level. However, the opening is the first opportunity for attorneys to make an impression and demonstrate their skill level. Remember that there is only one initial opportunity to make a good impression that may be carried through to verdict.

James C. Packer is the President of the San Bernardino-Riverside Chapter of ABOTA.

Settlement Faire

by Larry Maloney, Family Law Facilitator

You may have heard that the Riverside Superior Court Family Law Division recently held a Settlement Faire. What, you may wonder, is a Settlement Faire? Let me explain.

The problem that confronts every court system, including family law, is gridlock. New cases continue to be filed each day, adding to the thousands of cases already in the system. The formal process of settlement conferences and trials is time consuming, intimidating, resource-intensive and expensive. If we could identify cases that could be settled, and do something about those cases, we would be better able to manage this problem.

Recently, Judge Sherrill Ellsworth had a flash of inspiration. What if she and Judge Michele Levine were to schedule settlement conferences at the same time and work together, so that the parties could benefit from the views of more than one judge? If that seemed like a good idea, why not expand it – if two judges could settle more cases, why not eight judges? The flash of inspiration began to grow into plan.

Judge Ellsworth's epiphany, fanned by Judge Levine, was the beginning of the development of the Riverside Superior Court Family Law Division Settlement Faire that took place from December 4 through 7 in Riverside and Hemet. The plan brought together a large number of judges, commissioners, attorney arbitrators, mediators, translators and staff, along with enough resources at one time, in one place, to hold a mass settlement conference: a Settlement Faire.

This event involved setting aside significant court resources, finding a place to hold an event and finding the necessary people (such as mediators, family law examiners and clerks) to run it. This effort required judges from the criminal and civil departments who had family law experience. The assistance of private attorneys to act as arbitrators and to help prepare judgments, as well as to represent their clients, was essential. If all these resources could be brought together at one time, could enough cases be resolved to make the cost and the effort worthwhile? Judges Levine and Ellsworth thought so.

In Hemet, the Settlement Faire brought together as settlement officers Judges Sherrill Ellsworth, Michele Levine, Jean Pfeiffer Leonard and Michael Hider; Commissioners Dale Wells, Pamela Thatcher and Thomas Hudspeth; and attorneys Jim Wiley, Sheryl McDonnell, Jude Powers, Vance Van Kolken, David Angeloff and Michael Angeloff. The entire Family Law Court staff in Hemet, including clerks, examiners and supervisors, assisted, along with the entire Mediation Department. The Hemet Courthouse was used, and in addition, the firms of Powers Hanich & Patterson and Angeloff & Angeloff donated the use of their offices and their staff.

In Riverside, the Settlement Faire involved Judges Levine, Ellsworth and Leonard again, as well as Judges Patrick Magers, Edward D. Webster, Elisabeth Sichel and Becky Dugan. Commissioners Mike McCoy, Matthew Perantoni and Bambi Moyer also participated. The whole mediation department was available, along with the court's translators, clerks and family law examiners, as well as the Facilitators Office. In addition, private attorneys Irma Asberry, Sherry Collins (along with her office staff), Elizabeth Glasser, Harry Histen and Julie Hill donated their valuable time and expertise.

There was a remarkable commitment by the family law bar. Private attorneys volunteered their time, offices and staff, provided lunch, rearranged already full schedules and, what is most important, came prepared to settle cases.

The morning of the December 4 dawned sunny and clear. The public areas of the Hemet Courthouse were packed. Cases were called, checked in and assigned to a judge, commissioner or attorney arbitrator. The excitement was palpable. Settlement was in the air. The parties began talking with their own attorneys and with opposing parties. A dialogue started. Clerks pulled files and guided parties to courtrooms or chambers or offices to talk to a settlement officer. The court set aside every courtroom, chambers and clerk's office, and even nearby law offices as settlement sites. The clerks served coffee to parties who were waiting in the hall for their chance at settlement. The scene was chaotic, yet somehow organized. The Settlement Faire continued for two days in Hemet before moving to Riverside.

In Riverside, on December 6 and 7, the action was concentrated in the third-floor training room. Settlement officers held conferences at conference tables around the perimeter of the room. Some settlement attempts resulted in a quick agreement, but some lasted for hours or even all day. One settlement conference continued until 6:30 in the evening; Commissioner McCoy persevered until a settlement was finally achieved. On one wall, a chart was set up showing the number of cases that had been settled. The number grew throughout the day. The parties, the attorneys, the judges and the staff, everyone was primed for settlement.

What did we accomplish? Did this Herculean effort live up to expectations? In a word, YES! Over 104 cases were settled over the four day period. Several cases settled simply because the parties were brought together, even before they sat down with a judge or commissioner. Some of the cases that settled involved only one thin file, while other cases that settled filled multiple volumes. According to an estimate prepared by Judge Levine, the Settlement Faire saved over a million dollars in court time and costs. As a result of this Settlement Faire, over 200 people will not have to come back to court. This saves the court money. It also opens up court time to hear other cases – maybe your case.

The Settlement Faire showed that all some people need is a chance to settle their disputes. By bringing the parties face-to-face with a judge – sometimes more than one judge – we can help bring the issues into focus and enable the parties to resolve their disputes. This new approach worked in at least 104 cases. This team-collaboration approach provided a chance for a large number of people to access numerous settlement professionals, in one arena, at one time. It helped people understand how their cases would be viewed by judicial officers.

What Judges Ellsworth and Levine created was a favorable atmosphere for settlement, and it worked. The consensus of the judges, commissioners and attorneys is that this program should become a frequently scheduled event in the future.

Coming soon, to a courthouse near you, Settlement Faire 2007.

Classified Ads

Online Temporary Judge Ethics Training is Now Available

The online version of the temporary judge ethics training is now available. This is a mandatory course for all attorneys that volunteer their time to the court to serve as temporary judges. The course can be accessed at the following link: http://www2.courtinfo.ca.gov/cjer/pro_tem.htm.

If you have any questions regarding the Riverside County Superior Court's program, please contact Sylvia Chernick, Temporary Judge Program Administrator, 760-863-8127.

Attorney – Riverside

AV-Rated Riverside law firm seeks associate attorney with 2-5 years of experience in civil litigation and excellent advocacy skills. Salary is commensurate with experience. Please send resumes to: Thompson & Colegate, LLP, Attn: GTM, P. O. Box 1299, Riverside, California 92502.

New Leather Chair

New Kensington High Grade Leather Executive Chair by Thomasville; Cost $2190; Asking $1350; Vincent Nolan, 951 788 1747; vpnlaw@VincentNolan.com

Office Space

Furnished, up to 1600 sq ft. Conference room. High visibility - Magnolia / Tyler Mall. Call 951-662-1515

Conference Rooms Available

Conference rooms, small offices and the third floor meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance, by contacting Charlotte at the RCBA, (951) 682-1015 or charlotte@riversidecountybar.com.

Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective February 28, 2007.

Enrique R. Acuna – Sole Practitioner, Bloomington
Alina Amarkarian – Gresham Savage Nolan & Tilden, Riverside
Warren Chu – Office of the County Counsel, Riverside
Harvey B. G. Fiji – Sole Practitioner, Fontana
Bruce G. Fordon – Office of the County Counsel, Riverside
Parissh Anthony Knox – Best Best & Krieger LLP, Riverside
Katherine A. Lind – Office of the County Counsel, Riverside
Danya L. Norris – Gresham Savage Nolan & Tilden, Riverside
Douglas Plazak – Reid & Hellyer, Riverside
William D. Shapiro – Law Offices of William D. Shapiro, San Bernardino
Ronny R. Tharp (R) – Retired, Palm Springs
Gregory M. Tuss – Sole Practitioner, Riverside
Anna Wang – Office of the County Counsel, Riverside
Lilia Wilkerson – Office of the County Counsel, Riverside
Min-Chih Jennifer Yeh – Lobb Cliff & Lester LLP, Riverside

Calendar *(continued from page 2)*

7 **Mock Trial Elite 8**
Hall of Justice – 6:00 p.m.

9 **Judge Michael Kaiser Retirement Ceremony**
Riverside Historic Court House, Dept. 1 – 4:00 p.m.

10 **Mock Trial Semi-Finals**
Historic Court House – 9:00 a.m.

Mock Trial Finals, Championship Round
Historic Court House, Dept 1 – 1:00 pm
Award Ceremony - 4:00 p.m.

15 **Criminal Law Section**
"The Ins & Outs of Drug Court: Everything You Need to Know About Defending a Drug Case"
RCBA Bldg., 3rd. Fl. – Noon
MCLE

16 **General Membership Meeting**
RCBA Bldg., 3rd Floor – Noon
MCLE