

# RIVERSIDE LAWYER

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MAGAZINE



## IN THIS ISSUE:

Halloween Haunts  
Witch Hunting and Soul Searching  
Halloween Costume Controversy  
in Public Schools



The official publication of the Riverside County Bar Association

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# 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.

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*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

## OCTOBER

### 16 Family Law Section

“DCSS: New Developments”

Speaker: Lloyd Porter, Esq.

RCBA 3rd Floor – Noon

(MCLE)

### 19 Enrobement Ceremony for Hon. Carol Codrington

Historic Courthouse, Dept. 1

4:00 p.m.

### 23 CLE Brown Bag Series

“Duty to Defend” (Liability insurers’ duty to defend actions against their insureds.)

Speaker: D.W. Duke, Esq.

RCBA 3rd Floor – Noon

(MCLE)

## NOVEMBER

### 6 Joint RCBA/SBCBA Environmental & Land Use Law Section

RCBA 3rd Floor – Noon

(MCLE)

### 12 Holiday – Veteran's Day

### 13 Joint RCBA/SBCBA Landlord/Tenant Law Section

Cask 'n Cleaver, Riverside

6:00 p.m.

(MCLE)

### 14 Barristers

Cask 'n Cleaver, Riverside

6:00 p.m.

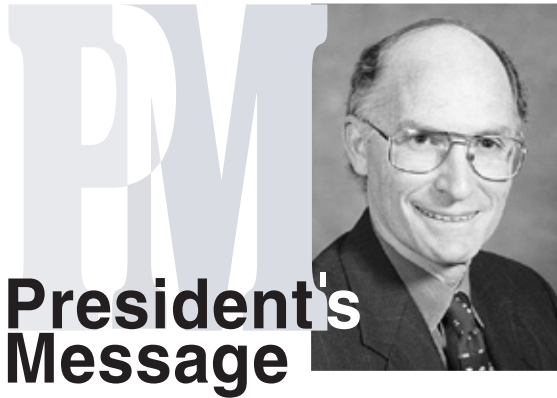
(MCLE)

### 16 General Membership Meeting

RCBA 3rd Floor – Noon

(MCLE)





by Daniel Hantman

The theme of this month's *Riverside Lawyer* is "Halloween." Our wonderful Jacqueline Carey-Wilson, Editor of the *Riverside Lawyer*, has asked me about "ghost/scary" stories tied to the Mission Inn. I lived there for four years when it contained mostly apartments, and I gave tours as a docent for the Mission Inn Foundation's Mission Inn Docents Association (MIDA). The residents of the Mission Inn always thought that the walls "talked" about the rich and famous who had visited there. Although I cannot write about the ghosts, I want to give you a little history about the Mission Inn and the special guests that have walked its hallways.

Barbara Burns, our MIDA trainer and docent-extraordinaire, recites a "List of People Who've Been to the Mission Inn" during her tours that is breathtaking. Some of those on the list are Ben Affleck, Muhammad Ali, Susan B. Anthony, Anne Bancroft, Humphrey Bogart, Jerry Brown, Pat Buchanan, George W. Bush, Andrew Carnegie, Bette Davis, Jack Dempsey, Bob Dole, Amelia Earhart, Albert Einstein, W.C. Fields, Henry Ford, Gerald Ford, Judy Garland, Cary Grant, Zane Gray, Benjamin Harrison, Bob Hope, Harry Houdini, Herbert Hoover, Helen Keller, John F. Kennedy, Ted Kennedy, U.S. Supreme Court Justice Anthony Kennedy, Jack Lemmon, June Lockhart, Walter Matthau, William McKinley, Steve McQueen, John Muir, Richard Nixon, Paul Newman, U.S. Supreme Court Justice Sandra Day O'Connor, Anthony Quinn, Ronald Reagan, Theodore Roosevelt, Ginger Rogers, Will Rogers, Jonas Salk, Martha Stewart, Arnold Schwarzenegger, William H. Taft, Lee Trevino, Barbara Walters, Booker T. Washington, Pete Wilson and Chuck Yeager.

Former President Nixon not only walked the hallways of the Mission Inn, he married Patricia Ryan in the Presidential Lounge in 1940.

A little history of Riverside will help in showing the importance of the Mission Inn. Riverside began as a colony in September 1870, covering around 31 square miles. It was incorporated as a charter city in 1883, covering around 52 square miles. Presently, the City of Riverside covers around 90 square miles and has a population over 300,000. The County of Riverside was incorporated in 1893. We are the second largest county in landmass in the continental United States. San Bernardino County is the largest county.

Frank Augustus Miller, who originally made the Mission Inn famous, came to Riverside on October 21, 1874 at the age of 17. He wrote in his diary, "Passed through a very desolate plane all the way ... reached River Side at 6 p.m." His parents, Christopher Columbus Miller and Mary Ann Miller, were both college graduates and wanted Frank to return to the East to obtain a college degree. But Frank fell in love with Riverside, and possibly with Riverside's first hired school teacher, Isabella Hardenburg. It is said that Frank promised his parents that he would not drink, smoke or swear if he could stay in Riverside. Isabella was one of the first residents of the Glenwood Cottage, the two-story, 12-room boarding house that the family built in 1875. Frank and Isabella were married in 1880 and bought the boarding house and property that eventually became the Mission Inn. They had one child, a daughter, Allis.

Frank made the Mission Inn into a world-famous destination hotel. He was always involved in local, state, national and international matters. He passed away in 1935. His daughter, his son-in-law, Dewitt Hutchings, and their family member held the Mission Inn until 1956. The Mission Inn was then sold to Ben Swig and his San Francisco Fairmount Hotel Co. A great deal of the art and furnishings were sold at auctions in 1957 in an effort to modernize the Mission Inn. A number of successive owners and an even larger number of managers tried and utterly failed to make the Mission Inn into a profitable enterprise.

Rumors of the Mission Inn's demise had been circulating since the 1950s. In 1969, a group of prominent Riverside citizens formed the Friends of the Mission Inn to save the Mission Inn and its remaining artworks and antique furniture. There were rumors that the Mission Inn was to be demolished and the land made into a parking lot.

On July 15, 1976, the Redevelopment Agency (RDA) of the City of Riverside purchased the Mission Inn from the Connecticut General Life Insurance Company for a reported \$2 million. The RDA held title to it until March 28, 1986. Because the city charter prevented the City and the RDA from managing the Mission Inn, a separate, nonprofit entity was formed and named the Mission Inn Foundation (MIF). The lease of the Mission Inn to the MIF was at \$1 a year. Our own Arthur Littleworth of Best Best & Krieger (BB&K) was elected its first president. Glen Stephens, also of BB&K, helped draw up the agreement between the RDA and the MIF. Present MIF attorney/judge/spouse board members include: President John Brown (BB&K), immediate past President Judge Victor Miceli (Ret.), Judge Charlie Field (Ret.), Mike Marlatt, Liz Cunnison and Ann DeWolfe.

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In 1985, the Mission Inn was closed to the public and surrounded by a security fence. The Carley Capital Group began a multi-million dollar renovation of the Mission Inn, financed by the Chemical Bank of New York. In 1988, renovations at the Mission Inn were approximately 90 percent complete and announcements of an opening had been sent out. A few weeks before the grand opening, Carley Capital filed for bankruptcy.

The Mission Inn remained closed until December 1992, when Duane Roberts, a native Riversider and entrepreneur stepped in to preserve it. Under his care, the Mission Inn has received national and international recognition. The Mission Inn continues to capture the passion and patronage not only of the local community, but of state, national and international visitors.

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*Dan Hantman, president of the Riverside County Bar Association, is a sole practitioner in Riverside.*



*by Gayle E. Webb*

## More MCLE Opportunities at the Law Library

Have you felt lately that the Law Library was offering more for pro pers than for attorneys? Well, our Public Legal Education Forums have been extremely successful in bringing more citizens into the Law Library, even winning us a national award for Excellence in Marketing from the American Association of Law Libraries – and we were up against the biggest and the best university and county law libraries in the country!

However, we have not forgotten our favorite customers – YOU. The Law Library will now begin presenting programs tailored specifically for the legal community, with MCLE participatory credits. While the Law Library is not certified for providing these credits yet, our speakers will be.

Our first offering will be on Thursday, November 1 from 12 noon to 1:30 p.m., and the one and a half hours of credit will be FREE. Bring your lunch and eat while attorney Roslynn E. Anderson teaches you the tricks of the trade for finding and analyzing cases and statutes on

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Westlaw, including searching using terms and connectors or natural language and accessing secondary sources like Witkin and Cal. Jur., and gives you an overview of the powerful citation research service KeyCite, available exclusively on Westlaw. You don't have to be a Westlaw subscriber in your own office to benefit from this informative program, because, as you should know by now, your Law Library offers every attorney one free hour of Westlaw use every day!

The next MCLE program to be offered will be on a Saturday in December, with Hugh Christensen, C.P.A., C.F.P., who will speak on "Business Valuation." Attorneys interested in more information should call our Public Services Librarian Bret at (951) 955- 6397. Details will be revealed in the November issue of Riverside Lawyer and even sooner on our website's "What's New" section, at [www.lawlibrary.co.riverside.ca.us](http://www.lawlibrary.co.riverside.ca.us).

We've also ordered several new Continuing Education of the Bar CD/booklet sets, which may be checked out for self-study MCLE credits. We have a new streamlined online circulation system and we'll give you your very own Law Library checkout card, good for getting all the credits you want. So come on in to YOUR library – we've got what you want, and if we don't, we want to hear from you!

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*Gayle E. Webb is the Riverside County Law Library Director.*



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# HALLOWEEN HAUNTS

by Bruce E. Todd

Hey, kids (and adults)! Want something scary and fun to do this Halloween? Well, here you go.

## Ghost Walk

Now in its 16th year, the Ghost Walk is presented by the California Riverside Ballet, and this year it will be held on October 26 and 27, 2007. Each Ghost Walk visits 12 historic sites, including such places as the Mission Inn, the Riverside Library, the Riverside Art Museum and various historic churches.

Tour attendees are treated to scary (and sometime humorous) stories at each location. The tour guides recite fictional stories that have been written specifically for each site. The stories have been previously selected by a story committee from numerous entries from both amateur and professional writers. For instance, noted local newspaper columnist Dan Bernstein of the Press-Enterprise has previously submitted some stories.

The tour guides are costumed and there are often live costumed performers at each site. Some of the performances at each site are a bit scarier. As midnight approaches, we would expect that the later walks will become more spooky and "haunted."

The Ghost Walk is the major fund-raiser for the California Riverside Ballet. It was the brainchild of Cathy Allavie, a former board member of the ballet. She came up with the idea while on a visit to historic Charleston, S.C., where she observed a similar event.

"The first year, we had about 400 people attend," said Allavie. "Now they have to turn people away."

According to Adam Young, the administrator for the ballet, there will be up to 2,500 who will attend each night, for a whopping total of 5,000 for the two nights. Many of those in attendance come fully dressed in Halloween garb.

Each tour lasts about an hour and a half, and the tours leave every 20 minutes. The first tour begins at 5:40 p.m., and the last tour commences at 11 p.m. There are four different walks from which to choose. The cost is \$10 per walk (children five and under are free). According to Young, many people go on more than one walk. A total of 31 tour guests are allowed on each walk. The Ghost Walks begin on the main mall near the Mission Inn.

Prior to each walk, members of the ballet generally put on a short performance in the ballroom of the California Riverside Ballet, located at 3840 Lemon St. in Riverside. The performances are, of course, Halloween-themed. The

California Riverside Ballet is located within the old Aurea Vista hotel building, which, at night, can seem spooky itself.

Both Young and Allavie complimented the numerous ballet members, their parents and family members, and volunteers for their contributions and support. Since the event is a fund-raiser, the ballet tries to enlist sponsors for each site that is visited. There is also an "event" sponsor and sponsors for the ballroom performances. Interested sponsors are welcome to contact Young at (951) 787-0879. Young indicated that the ballet is working with various restaurants to be on hand to sell food and drink during the walks.

## The Logan Halloween House



*Sandi and the monsters*

If you are out and about trick-or-treating in the historic Wood Streets of Riverside, be sure to stop by the spooky home of Joe and Sandi Logan, located at 3543 Larchwood.

The Logans first moved into their home about 20 years ago. Joe and a friend (the late Don Hall) would dress up in costumes to provide some amusement and a bit of a scare to passing trick-or-treaters. Over time, the Logans started decorating their house with ghastly, ghoulish and even funny displays. There are more carved pumpkins in the yard than one can count, and even a large graveyard that features a real coffin. They even have a fog machine to enhance the scary experience for visitors.

According to Sandi Logan, she got the old casket from a neighbor. The neighbor told her, "You can get more use out of this than I can." She laughs when she remembers the time that they had the coffin stored in their cellar, with





*Joe and Sandi Logan*

a fake skeleton in it. It turns out that an exterminator almost had a heart attack when he discovered it while investigating some unwanted critters.

Sandi said that it now takes about three weeks prior to Halloween to decorate their house. They often have help from family members and neighbors.

The rest of the year, their large collection of Halloween props is stored in their cellar.

Sandi said that she is thinking of having a pumpkin-carving contest this year among the neighborhood children, to assist with the decorations. She says, "It seems like all the neighbors like to pitch in and that they really enjoy it."

Besides all of the spooky decorations, there are also live costumed ghouls and goblins on the premises. Joe and Sandi have, of course, been costumed for years. During the early years, Sandi wouldn't let Joe and Don dress up in scary costumes for fear that they might frighten the visiting children, but, over time, the kids seemed to really enjoy the spooky garb, so Joe can now sometimes be observed in some type of ghoulish attire.

Several years ago, an instructor of a literature course at Riverside Community College brought her students to the house one October evening so that they could each write stories as part of a class assignment.

The Logans' love of Halloween can sometimes be expensive. Sandi estimates that they handed out over 1,000 pieces of candy last year. For them, however, the joy of providing a spooktacular time more than offsets the cost.

Although it must be the subject of another story, it should be noted that the Logans also go crazy with their Christmas decorations. Many people drive by their house at Christmas time to view them. The city has rewarded them for all of their hard work by presenting them with a crystal plaque as a Good Neighbor award.

For now, however, it's time to concentrate on Halloween. As Sandi reflects, "I am just tickled to death to do this every Halloween."



# WITCH-HUNTING AND SOUL-SEARCHING

by Richard Brent Reed

*O Christian Martyr Who for Truth could die  
When all about thee Owned the hideous lie!  
The world, redeemed from superstition's sway,  
Is breathing freer for thy sake today.*  
— John Greenleaf Whittier

The Salem Witch Trials of 1692 began with a disgruntled pastor whose congregation had quit paying him. The village of Salem, Massachusetts (now Danvers) was settled in 1629. In 1641, England made witchcraft a capital crime. In 1684, Parliament declared that the colonies could not govern themselves.

## The Witch Hunt Begins

In 1688, the Glover children in Boston started having fits. Reverend Cotton Mather began to look for witches. He found one in a local laundress and had her tried and hanged. He then published a treatise, “Memorable Providences, Relating to Witchcrafts and Possessions.” That same year, at the invitation of prominent Salemite John Putnam, Reverend Samuel Parris grabbed a copy of Mather’s book and rushed off to Salem to assume his new post as minister. He then started to pester his congregation to give him a cost-of-living increase and other perks.

In October 1691, Parris’s parishioners quit paying Parris and told him to get out. In January 1692, a clique of bored teenage girls, formed around the nucleus of Parris’ daughter Betty and his niece Abigail, began to have fits and paroxysms. Parris called in Doctor William Griggs, who was only too willing to diagnose the girls as bewitched. Tituba, an Indian slave whom Parris had picked up when he was a planter in Barbados, made a mistake: she baked a cake – a “witchcake” – and fed it to a dog to exorcise the oppressing demons.<sup>1</sup>

## The Events of 1692

In February 1692, all hell broke loose: the clique of “afflicted” girls denounced everyone in sight, at the urging of Parris and Putnam, a land baron who wanted to grab up his neighbors’ estates as they escheated. On February 29, arrest warrants were issued for Tituba, Sarah Osborne, and Sarah Good. The next day, Magistrate John Hathorne<sup>2</sup> gave the three women a breast examination to determine if they were witches. Tituba broke down and confessed and turned state’s evidence: she said she saw the Devil come in the form of a wolf, a cat, and a yellow bird.<sup>3</sup> In mid-March, Putnam’s daughter Ann implicated various neighbors. By the end of March, dozens of Salem females had been arrested as witches, including four-year-old Dorcas Good. When John Proctor came to the defense of his wife Elizabeth, he was arrested, too. Former minister George Burroughs, who fled to Maine, was arrested and brought back.<sup>4</sup> More attention-starved



girls joined their sisters-in-hysteria and started cultivating afflictions.

In May, newly elected Governor Phips arrived in Boston. He created a Court of Oyer and Terminer (an assize to hear and determine criminal matters), appointed Lieutenant Governor Stoughton<sup>5</sup> as Chief Justice, and commissioned, among others, Magistrates John Hathorne and Samuel Sewall.<sup>6</sup> Cotton Mather urged his friend Stoughton to admit spectral evidence.<sup>7</sup> Hathorne immediately resumed his top-down investigation. John Alden<sup>8</sup> was jailed, but escaped and hid out until the trials were over.

In June, the hangings began with 60-year-old Bridget Bishop, the owner of a local tavern. Judge Nathaniel Saltonstall, disgusted by the marsupial nature of the court, resigned. Cotton Mather, who had practically invented spectral evidence, wrote a letter to the court, cautioning that spectral evidence alone should not be relied upon and that defendants had the right to a speedy trial. The court continued to rely on spectral evidence, but sped up the trials.

In July, five people were hanged because they would not confess. In August, another five people took the drop on Gallows Hill, including John Proctor. His wife escaped hanging by confessing – that she was pregnant. Since jurisdiction never attached to the unborn child, the state had no right to take the life of an innocent person. (This loophole was whimsically referred to as a “reprieve for the belly.”)

In mid-September, octogenarian Giles Corey was indicted for having stubbornly defended his wife. He just as stubbornly refused to plead

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guilty to the charge of witchcraft and refused even to stand trial, so the sheriff subjected him to *peine forte et dure*: a big beam was placed on Corey's chest, from which were suspended heavier and heavier stones. Two days later, Corey died. His last words: "More weight." By the end of September, eight more people had been hanged.

On October 3, 1692, the President of Harvard University (a school of divinity, at that time) finally intervened: Reverend Increase Mather, father of Cotton Mather, denounced the use of spectral evidence in a work entitled *Cases of Conscience*. On October 8, shortly after his wife was accused of being a witch, Governor Phips instructed the court that spectral evidence would no longer be relied upon. On October 29, Governor Phips ordered that the arrests cease and dissolved the Court of Oyer and Terminer.

## Epilogue

In November 1692, the General Court established a Superior Court to clean up the mess left by the Court of Oyer and Terminer. The following January, Judge Stoughton, presiding over the new Superior Court, ordered the execution of all the women who had escaped the gallows through the pregnancy exemption. Phips blocked his order; Stoughton quit the bench in a huff, protesting that Phips had interrupted him when he was just about to "clear the land" of witches. 49 people were released due to the insufficiency of spectral evidence. In May, Phips pardoned the remaining prisoners. Tituba was released from jail and sold back into bondage. Altogether, 19 people were hanged. A handful died in prison or confessed their way out of the hangman's noose.

In 1696, Judge Samuel Sewall apologized for his role in the Witch Trials and declared January 19 to be a day of fasting and soul-searching.

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Stoughton never did apologize. That same year, the good people of Salem – those who were left – ran Reverend Parris out of town. He was replaced by Joseph Green.

In 1702, the General Court declared the Salem Witch Trials unlawful. Four years later, Ann Putnam apologized for having falsely accused all of those people. In 1711, the colonial legislative body allocated about £600 for restitution to the heirs of the victims. In 1752, Salem was renamed "Danvers."

## How to Try a Witch

(freely retranslated)

1. The Afflicted Person maketh a Complaynt to the Magistrate about a suspected Witch. The Complaynt may be made through a Third Person.
2. Ye Magistrate issueth a Warrant for the Arrest of the Accused.
3. The Accused is taken into Custody and examined by two or more Magistrates. If, after listening to Testimony (oyer), the Magistrate determineth that the Accused is probably guilty (terminer), the Accused is sent to Gaol for possible further Examination and to awayt Tryal.
4. The Case is presented to the Grand Jury. Depositions relating to the Guilt or Innocence of the Accused are entered into Evidence.
5. If the Accused is indicted by the Grand Jury, he or she is tryed before the Court of Oyer and Terminer. A Jury, instructed by the Court, decideth the Defendant's Guilt.
6. The Court, having oyered the case, terminer's the Guilt of the Defendant, convicteth the Defendant, and sentenceth the Defendant to hang.
7. The Sheriff carries out the Sentence of Death on the Date determined.

## Exorcising Salem Witch Trial Myths

Myth No. 1: The Salem victims were all women.

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The Truth: Out of 19 known Salem fatalities, 7 were men.

Myth No. 2: The Salem witches were burned.

The Truth: They were hanged. Burning witches was practiced by ecclesiastical courts in Medieval Europe. We never burned witches in this country.

Myth No. 3: Suspected witches were drowned to prove their innocence.

The Truth: This form of interrogation was called “trial by ordeal.” It was used in ecclesiastical courts in Medieval Europe, until the Pope banned it. It was never used in the New World.

[The primary source for this article was “Famous American Trials: Salem Witchcraft Trials 1692,” <http://www.law.umkc.edu/faculty/projects/ftrials/salem/salem.htm>.]



<sup>1</sup> No doubt such mojo would go unnoticed in Barbados, but not in Puritan Massachusetts.

<sup>2</sup> Hathorne was a successful, hyper-pious local politician. He was also the grandfather of Nathaniel Hawthorne.

<sup>3</sup> If a demon or spirit oppressed someone in the shape of a suspect, that was proof of their guilt, since it was believed that a devil could not assume the shape of an innocent person.

<sup>4</sup> At Burroughs’ execution, Mather assuaged the crowd of on-lookers by reminding them that Burroughs had had his day in court.

<sup>5</sup> Stoughton was a prominent preacher with no legal training.

<sup>6</sup> Sewall was a wealthy merchant and the officially appointed government printer.

<sup>7</sup> Spectral evidence was testimony that a witch’s spirit had appeared to the witness in a dream or vision. Cotton Mather was a big proponent of spectral evidence, in most cases.

<sup>8</sup> His father, John Alden, Sr., was later immortalized by Longfellow in “The Courtship of Miles Standish.” John, Jr. became a naval commander of the Massachusetts Bay Colony and a member of the Old South Church in Boston. On a trip to Salem, he was accused of witchcraft and spent 15 weeks in a Boston jail. He escaped just before nine other “witches” were executed.

<sup>9</sup> In *Cases of Conscience*, a treatise on evidence, Increase Mather wrote: “[I]t were better that ten suspected Witches should escape, than that one innocent Person should be Condemned.”

<sup>10</sup> Sewall observed that day for the rest of his life. He partially redeemed himself in 1700, when he published *The Selling of Joseph*, in which he presented religious arguments against slavery.

<sup>14</sup> He did, however, become the next governor of Massachusetts.

# HALLOWEEN COSTUME CONTROVERSY IN THE PUBLIC SCHOOLS

by Kirsten S. Birkedal

Halloween is a favorite holiday of many, especially school children. Public schools have traditionally been a focus for Halloween celebrations, including costume parties and parades. Students usually dress up in costumes depicting ghosts, witches and vampires.

Recently, some parents have objected to Halloween parties in public schools. These parents believe Halloween is a holiday associated with witchcraft. In order to accommodate these concerned parents, some school principals have gone as far as canceling any festivities associated with the traditional Halloween celebration, including costume parties.

For example, one parent took issue with a public school Halloween celebration that included decorations of witches, cauldrons and brooms and the teachers dressing up as witches in black dresses and pointed hats. The parent argued the school party was celebrating witchcraft, a type of religion, and therefore was in violation of the rule regarding the separation of church and state. As a result, the parent kept his children out of school on Halloween and subsequently sued to permanently enjoin the school from including these depictions and costumes in future Halloween celebrations. (*Guyer v. School Board of Alachua County* (Fla.App. 1994) 634 So.2d 806.)

The case went to the Florida Court of Appeal after the school's motion for summary judgment was granted by the trial court. The Court of Appeal held that the mere depiction of witches, cauldrons and brooms and the use of related costumes in the public school's Halloween celebration did not violate the establishment clause of the First Amendment. (*Guyer v. School Board of Alachua County, supra*, 634 So.2d at pp. 808-809.)

The court based its reasoning on the three-part test set forth in *Lemon v. Kurtzman* (1971) 403 U.S. 602. According to *Lemon*, in deciding whether a government practice violates the establishment clause, the court should determine whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. In addition to the *Lemon* analysis, the court also considered whether the challenged governmental practice either has the purpose or effect of "endorsing" religion,

as well as the context of the alleged religious symbols displayed. (*Guyer v. School Board of Alachua County, supra*, 634 So.2d at pp. 808-809, citing *Allegheny County v. Greater Pittsburgh ACLU* (1989) 492 U.S. 573, 598.)

By applying the *Lemon* test, the court found that the school's celebration did not have the primary effect of endorsing or promoting religion, even assuming such symbols could have religious significance to followers of particular religion related to witchcraft. The court also found that no type of religious ceremony occurred and that the Halloween decorations served the secular purpose of enriching children's educational background, cultural awareness and sense of community. (*Guyer v. School Board of Alachua County, supra*, 634 So.2d at pp. 808-809.)

Recently, another issue regarding Halloween costumes in public schools was raised in federal court in Florida. A complaint filed by a special interest group alleged a First Amendment violation against a school district and principal for refusing to allow a fourth-grader to take part in the Halloween festivities at school because he wore a Jesus costume to the event. According to the complaint, the student showed up to school for the annual Halloween parade wearing a faux crown of thorns and told the other school children he was Jesus. The principal allegedly told the student's mother that the costume violated a school policy prohibiting the promotion of religion. The student was allowed to participate as long as he identified himself not as Jesus but as a Roman emperor. The plaintiff special interest group argues that the student's rights were violated because his classmates were allowed to dress up in witch and devil costumes. (<<http://abcnews.go.com/US/wireStory?id=2894431>>, as of Sept. 17, 2007.)

This case will be interesting to follow at the trial court level because of the previous precedent set in *Guyer*. While witches and cauldrons are a traditional part of the Halloween celebration and therefore do not promote religion in public schools, the Jesus costume may be characterized as having the opposite effect.

However, the plaintiff special interest group has a strong freedom of speech argument that may override any establishment clause argument by the school district. For example, the United States Supreme Court has essentially

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ruled that freedom of speech rights trump establishment clause concerns for public schools in certain situations. (*Good News Club v. Milford Central School* (2001) 533 U.S. 98 [holding public school violated the club's free speech rights when it excluded the club from meeting after hours at the school based on its morality lessons for children based on Christian faith].)

In addition, the Supreme Court has upheld students' freedom of speech rights, as long as they do not interfere with the rights of others at the school. (*Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503, 506 ["It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."].) In *Tinker*, the Court found students wearing black armbands to protest against the Vietnam War were not disruptive and did not impinge upon the rights of others. Hence, the court held that the students' conduct was within the protection of the free speech clause of the First Amendment and the due process clause of the Fourteenth Amendment.

Like the students in *Tinker*, the special interest group in the current case could argue that the fourth-grade student's freedom of speech was violated when he was prohibited from wearing a Jesus costume. In addition, the student's choice to wear a Jesus costume at the Halloween

parade did not disrupt or impinge on the rights of the other students and teachers at the school.

At the local level, a recent search did not produce any reported cases or news reports in California involving the issue of Halloween celebrations in public schools. Dr. Jack Lipton, a partner with Burke, Williams & Sorensen LLP in Riverside who practices education law and teaches education law at Southwestern Law School in Los Angeles, states that the issue of whether Halloween parties should be held in public schools is rarely litigated. According to Dr. Lipton, Halloween is not a religious holiday from a legal perspective. Dr. Lipton adds that if a parent objects to a decision at a public school that the parent believes violates his or her child's rights and decides to bring suit, then the question will turn on the balancing of interests between the student's First Amendment rights of freedom of speech and religion as compared to the school district's interest in promoting its reasonable policies and procedures.

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# OPPOSING COUNSEL: MICHAEL J. MARLATT

by Bruce E. Todd

One thing can certainly be said about Riverside attorney Michael J. Marlatt – he’s been there and done that. Besides being a prominent trial attorney, Mike has traveled the globe, hobnobbed with celebrities and served in more community organizations than you can shake a stick at.

Mike joined the Riverside legal community in 1984, when he accepted a job with Thompson & Colegate. By 1991, he was a partner in that law firm, which he still serves.

“I had only one legal job interview in my life and it was with Thompson & Colegate,” explained Marlatt. “I learned about the firm from a fellow law school classmate (Lori Huff, who was then serving there as a law clerk). I discovered that it was an old historic law firm.”

Before his interview, he did some research about the firm and learned that it specialized in medical malpractice. He had a passion for medical issues after studying biology at USC. He also learned that the late Don C. Brown, who was one of the nation’s preeminent medical malpractice trial attorneys, was a senior partner in the law firm. It was a match made in heaven for Mike.

He has now tried approximately 40 cases to verdict. He was accepted as a member into the American Board of Trial Advocates (ABOTA), a prominent national organization of trial attorneys, in 1999. He has also previously served as a board member (as the Riverside representative) of the Association of Southern California Defense Counsel. He has appeared as a guest lecturer at numerous legal functions.

Besides his service as a lawyer, however, Mike has served in numerous local organizations. He was president of the board of the Mission Inn Foundation from 1998-2000. James Wortz (of Thompson & Colegate) got him involved in this organization. As Mike describes it, “The foundation serves the public interest in the Mission Inn and its collections. We are there for an historic basis.” The foundation is involved in docent tours of the Inn, the annual 5K/10K run, and preserving the Inn’s physical structure, artwork and collections.

As a result of his involvement with the Mission Inn, Mike also previously served on the board of the local Humane Society.

Currently, Mike is in his second year as the Chairman of the Board of the Riverside County Regional Medical



Michael J. Marlatt

Center Foundation. He explains that “the purpose of the foundation is to assist with the financial needs of underserved people in the county, especially children.”

He also has been the sole lawyer representative on the board of the Bio-Ethics Committee of Riverside Community Hospital since 1998. He said that the primary purpose of this group is to handle end-of-life issues.

As a passionate sports fan, Mike previously served for five consecutive terms as the president of the UC Riverside Athletic Association. As he quipped, “My biggest accomplishment was the fact that I wasn’t impeached.” More seriously, his biggest accomplishment was helping guide the UCR athletic program through the difficult transition of gaining Division I athletic status. “That was definitely the biggest thing while I was there,” he said.

Another interesting aspect of his association with UCR athletics is that he handled the responsibilities of the radio color commentator for the men’s basketball team from 1993-1996. One year during that time, UCR advanced to the finals, where Mike had the good fortune to help call the plays while Craig Marshall was the star three-point shooter on the team. Craig is the son of Jack Marshall, one of Mike’s fellow partners at Thompson & Colegate, and has since become an attorney with Best Best & Krieger. “I watched Craig mature as a basketball player from the time that he was about 12 years old,” said Mike.

As a former Trojan, Mike’s passion for sports naturally extends to USC football. He is a long-time season ticket holder. He attended his first USC football game in 1964. Furthermore, as someone who grew up in Pasadena, he has regularly attended the annual Rose Bowl game. He had a streak going from 1974 through 1986. That streak was broken in 1987, when his wife Donna asked him to stay home. “I was like a caged animal,” he laughed. “She knew that she made a mistake, and I have attended every game since 1988.”

Speaking of Pasadena, Mike, now 50, grew up in the same house in that city from 1965 until he left to start college. His mother and father (Jim and Norma) encouraged his endeavors in the law, even though, as he says, “no one in my family has a history in the legal profession.” He attended La Salle High School (where he earned letters in five different sports) and graduated from Pepperdine Law



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School in 1984. Mike and Donna, his wife of many years, eventually moved to Riverside after he started at Thompson & Colegate. He loves the camaraderie of the local legal community. “The only improvement that I would like to see,” he laughed, “is that they start getting some civil cases back out to trial.”

When he is not meeting with clients, Mike can often be found rubbing elbows with celebrities. This started in law school, when he and some friends were at a local Malibu watering hole and Nick Nolte asked to buy them all a round of drinks. On another occasion, he ran into Tom Selleck at a grocery store, while Selleck was at the height of his fame as “Magnum, P.I.” He was later at an event at the Nixon Library and was able to have his photograph taken with Richard Nixon (ironically, this particular photograph did not turn out). These encounters caused Mike to develop an interest in having his photograph taken with sports stars, celebrities and other people of interest.

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He has attended the Academy Awards and many other high-profile functions too numerous to detail. He estimates that he has photographs of himself with at least 200 celebrities. As he is a long-time admirer of the late Ronald Reagan, his most prized photograph is one that was taken of them together in Reagan's office.

His technique for obtaining these photographs is to use a disposable camera. In this way, he provides assurance to the person being photographed that he is merely a fan and not a member of the paparazzi. He finds that

most celebrities are very cooperative. "It's just a matter of being polite and having the right timing," he explains.

Although Mike loves to travel and has been fortunate to see many countries (including Spain, where he had an adventure running with the bulls in Pamplona), he is truly happy calling Riverside his home. As he states, "The city still has a very quaint charm to it and I love working in the local legal community."

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



# JUDICIAL PROFILE: IRMA POOLE ASBERRY

*by Robyn A. Lewis*

I really hope that you have had the opportunity to meet Irma Poole Asberry. If you have not, I would urge you to introduce yourself to her at your earliest opportunity. Not only is she one of the nicest and most gracious people that I have had the privilege of meeting, but she is truly an inspiration as a lawyer, a fellow member of the Riverside County Bar Association, a mother and wife, and now one of our most recent additions to the Riverside bench as a judicial officer.

Judge Asberry started her legal career after graduating from the University of San Diego School of Law and passing the bar exam in 1979. Having grown up in Rialto, and as a graduate of UCR, Judge Asberry knew that she wanted to return to the Inland Empire to practice law. She became an associate attorney for the law firm of Butterwick, Bright, Pettis & Cunnison, where she began practicing in a variety of areas. However, the majority of her practice at that firm evolved into family law and bankruptcy.

Judge Asberry remained at the same firm until February of 1988. "I wanted to go out on my own," she explained. Although she enjoyed working at Butterwick, Bright, Pettis & Cunnison, she decided that becoming a solo practitioner would allow her more flexibility at home in raising her daughter.

After opening her own firm, Judge Asberry continued to focus on family law and bankruptcy. "After a couple of years, I decided that I didn't want to do bankruptcy any longer and I just did family law."

While establishing herself as a prominent family law attorney in town, Judge Asberry became very involved in the Riverside legal community, which was something that she was inspired to do while still an associate at Butterwick, Bright, Pettis & Cunnison. "The great thing about the Butterwick firm was that they wanted all of the lawyers to be actively involved in the bar association." Judge Asberry was a member and, at one point, chair of the Family Law Section. She was also involved in the Public Service Law Corporation and served on its board, and she served as an arbitrator on the RCBA Fee Arbitration Panel. She was actively involved in Barristers and served on the Law Day Panel and on the Judicial Evaluation Committee.

Judge Asberry's greatest commitment to the RCBA was during the time that she served on its Board of Directors. She was the RCBA president in 1997-1998. "It was very rewarding," she explained. "The thing that stands out the most was working with the members of the board. I got a lot of personal growth out of that experience."

Judge Asberry also commented on the special relationship that she had with the late Louise Biddle, former Executive Director of the Riverside County Bar Association. "She was just so wonderful to work with." On the day of her enrobement ceremony, Judge Asberry felt Louise's absence. "I felt a sore spot in my heart that she wasn't there, because she was so involved with not only my career, but everyone who



*Judges of the Riverside County Superior Court*



*Comments by Jude Thaddeus Powers*



*Irma Poole Asberry being sworn-in by Judge Stephen Cunnison*



*Judge Asberry and Michael Clepper*

was a member of the Bar Association. You just felt like she was your mother, your big sister. She was just really wonderful.”

Becoming a judicial officer was something that Judge Asberry originally had not seriously considered. “I am sure that every lawyer thinks that someday they might be a judge. I had been asked over the years to think about doing it.” Judge Asberry was also very committed to her church and its ministry as coordinator of its youth ministry program.

However, as time went on, Judge Asberry’s career path changed course. Her daughter grew up and went on to start her own career, and Judge Asberry’s responsibilities with the youth ministry at her church were no longer as demanding. “In March of 2006, I spoke with some judges and some other people and I really got serious about thinking about becoming a judge.”

With her husband’s support and the support of colleagues and several judges, Judge Asberry began the arduous application process to become a judicial officer and was ultimately appointed earlier this year. “It has been really exciting,” she said to me during our interview. “It has also been a very humbling experience. As I went through the process of appointment and I read letters that people wrote for me, it was very humbling for me.”

Judge Asberry’s enrobement ceremony was on June 22, 2007 at the Historic Courthouse. Mike Clepper, Jude Powers, and Judge Sherrill Ellsworth spoke on her behalf. “It was really terrific. Mike and Jude are the two people that I have known the longest as family law attorneys and over the years of my practice. It was wonderful having them there and it was wonderful having Judge Ellsworth speak on my behalf.”

She was also thrilled to have Judge Stephen Cunnison swear her in, as he was one of her first employers at the law firm of Butterwick, Bright, Pettis & Cunnison. Judge Cunnison later commented: “For some of us, balancing personal humility with a willingness to use the power of the court in an appropriate way is a daily struggle. Judge Asberry has given every indication that she will achieve that balance with dignity and grace. She has avoided the limelight and has turned the focus toward the legitimate interests of her clients and the improvement of the bar. Those who appear before her can rest assured that her rulings will not only be lawful, but will be informed by her personal qualities of loyalty, devotion to duty and family, and kindness. We are fortunate to have her join us.”

Since her appointment, Judge Asberry now presides in Department F-402 in the Riverside Family Law Court, which she very much enjoys. Judge Asberry also remarked on the camaraderie that she has experienced with the other judges that currently preside in family law court: Judge Sharon Waters, Judge Becky Dugan, Commissioner Matthew Perantoni, and Commissioner Pamela Thatcher. In fact, Judge Waters is serving as Judge Asberry’s mentor. “Every day, I feel so blessed to have her.”

I am sure that we will hear nothing but good things about Judge Asberry as she embarks on her path as one of the newest members of the esteemed Riverside bench. Again, please introduce yourself to her, if you don’t know her already. I am certain you will be glad that you did.

*Robyn Lewis, a member of the Bar Publications Committee and Secretary on the RCBA Board, is with the Law Offices of Harlan B. Kistler in Riverside.*



*Judge Asberry with her mother Joyce Henke (left), daughter Alexis and husband Q’Vinc Asberry*



*Jane Carney and Judge Asberry*



*Presiding Judge Richard Fields and Judge Asberry*



*Judge Asberry, Dr. Robert Wilks, Mrs. Freda Wilks, and Judge Sherrill Ellsworth*

*Photographs by Michael J. Elderman*

# MANDATORY ELECTRONIC FILING FOR ALL CIVIL CASES U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA BEGINNING JANUARY 1, 2008



Beginning January 1, 2008, the United States District Court for the Central District of California will require all documents in civil cases to be filed electronically through the Case Management and Electronic Case Filing (CM/ECF) system. This is a comprehensive electronic system that allows the court to maintain its case files electronically. As of January 1, 2007, all documents in criminal cases are already required to be filed electronically. Before attorneys are permitted to file documents electronically, the court requires them to complete a court-approved workshop on the electronic filing procedures. Once the workshop is completed, the attorney will receive a password to the CM/ECF system and can begin filing documents electronically. All legal professionals will be encouraged to complete the workshop, but only attorneys admitted to practice in the United States District Court, Central District of California will be issued a password. This workshop is certified for two hours of MCLE credit.

Beginning in September 2007, hands-on workshops in computer labs will be offered at California State University, San Bernardino, College of

Extended Learning's San Bernardino and Palm Desert campuses; the University of California, Riverside Extension; and the University of La Verne School of Law. The Inland Empire Chapter of the Federal Bar Association has been instrumental in bringing this training to the inland area.

The enrollment fee is \$125 for members of the Federal Bar Association and \$135 for nonmembers. See link below for Federal Bar Association membership. Registration fees will increase on November 1, 2007, so early enrollment will both assure a place in class and offer the biggest savings.

If you have any questions or would be interested in becoming an instructor for these workshops, please contact Dennis Boyer at [dboyer@ftatechnologies.com](mailto:dboyer@ftatechnologies.com) or (951) 682-7000.

For more information and to enroll:  
Inland Empire Chapter of the Federal Bar Association

<http://www.fedbar.org/inland%20empire.html>

FTA Technologies (list of classes and links)

<http://www.ftatechnologies.com>



# ANIMAL FIGHTS V. ANIMAL RIGHTS

*by Richard Brent Reed*

Traditionally, people have rights, governments have powers, and animals have protections. Modernly, there are folks who want to shuffle those around, giving governments and animals rights and offering people protections. When people are given protections, they are sometimes called “entitlements”: the right to a privilege, as it were. People speak of a government’s rights, but what they really mean is “unenumerated” powers. People speak of “animal rights,” but what they really mean is “animal protections.”

Renewed interest in animal rights has been stimulated by furor over the “sport” called dog-fighting. In this combat spectacle, two dogs, each bred and trained to maul the other dog, go at each other. The winner goes on to fight in another match. The loser – often mortally wounded – is executed by electrocution. Dog-fighting is a felony in Virginia and 47 other states.

## The Vick Scandal

Recently, a federal grand jury in Richmond, Virginia, indicted Atlanta Falcons quarterback Michael Vick for running dog fights on his Virginia property. According to the indictment, Vick “used this property as the main staging area for housing and training the pit bulls involved in the dog-fighting venture and hosting dog fights,” and Vick and his confederates “executed approximately eight dogs that did not perform well in ‘testing’ sessions by various methods, including hanging, drowning and/or slamming at least one dog’s body to the ground.” The Feds asserted jurisdiction through the Commerce Clause (of course), since transporting dogs over state lines for dog-fighting is a federal crime. The indictment alleges that Vick attended fights, covered bets, and was involved in the post-game electrocution of at least one dog. Vick faces up to six years in prison and \$350,000 in fines if convicted.

Cockfighting – the poultry version of dog fighting – is an increasing problem in California: two roosters, facing each other in an arena known as the “cockpit,” are fitted with razor-sharp spurs so that their frenzied clawing will result in a fatality. Such competitions violate California’s gaming statutes.

## The Pedigree of Animal Combat

Recreational animal combat is not new. In Shakespeare’s time, Hamlet, King Lear and Othello had to compete not only with dog-fighting and cockfighting, but with the spectacle called “bear-baiting.” This involved placing bull

terriers in a pit with a chained bear – hence the term “pit bull.” Efforts to end this practice – along with rat-baiting, badger-baiting, and bull-baiting – were thwarted by Henry VIII and Elizabeth I, both of whom were avid fans. In 1583, the Puritans made a futile attempt to ban bull- and bear-baiting. But beast-baiting went unabated until Parliament passed the Cruelty to Animals Act of 1835, which forbade the keeping of any house, pit, or other place for baiting or fighting any bull, bear, dog, or other animal. In just a few years after the passage of the act, animal-baiting died out in England.

## The Evolution of Animal Rights

The law of “animal rights” is evolving, as atrocities shock the public conscience. Canada is importuned by animal rights groups on a yearly basis to abate the clubbing of baby harp seals. In Uruguay stands a newly built stadium, which is vacant and dilapidated due to that country’s ban on bull-fighting. Most recently, groups like the Animal Legal Defense Fund are promoting a bill of rights for animals. Those rights would include:

- The right of animals to be free from exploitation, cruelty, neglect and abuse.
- The right of laboratory animals not to be used in cruel or unnecessary experiments.
- The right of farm animals to an environment that satisfies their basic physical and psychological needs.
- The right of companion animals to a healthy diet, protective shelter, and adequate medical care.
- The right of wildlife to a natural habitat, ecologically sufficient to a normal existence and self-sustaining species population.

## The Five Freedoms

For the last three years or so, England, Wales, and Western Australia have been considering a bill of rights for pets called the “Five Freedoms.” Modeled after the Freedom Foods labeling standards established in the United Kingdom in 1994, the bill would amend English humanitarian laws that date back to 1912. Under the Five Freedoms, a pet would have the right to:

1. Have a suitable environment;
2. Have a suitable diet;
3. Exhibit normal behavior patterns;
4. Be housed with other animals or apart from other animals (as required);

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5. Be protected from suffering, injury, and disease.

The animal health and welfare bill being considered will also restrict pet purchases to people over the age of 16. It carries penalties of about \$15,000 for causing suffering or for creating conditions that will lead to suffering and will force pet owners to guarantee animals the enumerated rights.

## An Eye to Babalu

In 1993, a Florida case came before the U.S. Supreme Court, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, testing four ordinances whose aggregate effect was to prohibit animal sacrifice in religious rituals. Justice Kennedy wrote the opinion:

Each of the ordinances pursues the city's governmental interests only against conduct motivated by religious belief, and thereby violates the requirement that laws burdening religious practice must be of general applicability. Ordinances 87-40, 87-52, and 87-71 are substantially underinclusive with regard to the city's interest in preventing cruelty to animals, since they are drafted with care to forbid few animal killings but those occasioned by religious sacrifice, while many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. The city's assertions that it is "self-evident" that killing for food is "important," that the eradication of insects and pests is "obviously justified," and that euthanasia of excess animals "makes sense" do

not explain why religion alone must bear the burden of the ordinances.

That "killing for food is 'important'" may have been true for Ice Age Man, some 10,000 years ago, but, to modern Man, killing for food would be better phrased "food for killing." The modern high-fat, high-protein diet induces osteoporosis, high cholesterol, obesity, colon problems, and a host of other life-shortening maladies. Public awareness and education have made meat-eating less "important" to many health-conscious Americans.

That the ordinances protecting animals were "underinclusive" suggests that statutes prohibiting both industrial and religious animal sacrifice would withstand the strict scrutiny that defeated the Florida laws. In 1906, *The Jungle*, Upton Sinclair's novelized exposé of the meat-packing industry, prompted President Theodore Roosevelt to urge Congress to enact reforms, not to protect animals, but to protect workers and consumers.

Talk radio is abuzz with debate about dog-fighting and other blood sports. A groundswell of public opinion, prompted by recent, sensational instances of animal abuse, may be expected to produce protective legislation in several jurisdictions in America.

The opinions expressed in this article are, arguably, those of the author.

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*Richard Reed, a member of the Bar Publications Committee, is a sole practitioner in Riverside.*



# EIGHT WEEKS IN THE BOX, PART II

by *Donn Dimichele*

*(Part two of a four-part series)*

## **4. Get It in Writing, Part 2 – Juror Note-Taking**

Note-taking by jurors traditionally has been viewed with suspicion by the bench and bar. In 1984, in fact, the California Supreme Court held it is “better practice” for a court to give a cautionary instruction on note-taking,<sup>1</sup> though the court later made clear that an instruction is not required.<sup>2</sup> The court listed as dangers of note-taking: (1) jurors may favor their notes, which may be inaccurate, over their independent recollections; (2) notes may focus on irrelevant points and ignore more substantial ones; (3) the juror with the best notes may unduly influence and possibly mislead the other jurors; (4) instead of listening to important testimony, jurors may be jotting down notes on a less important point; and (5) while taking notes, jurors may not pay enough attention to witnesses’ behavior to assess their credibility.<sup>3</sup>

In view of these reservations about note-taking, approved jury instructions caution jurors not to let note-taking interfere with their attention to the witnesses and testimony, as in this excerpt from CACI 102: “Do not let your note-taking interfere with your ability to listen carefully to all the testimony and to watch the witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be influenced by whether or not other jurors are taking notes. Your independent recollection of the evidence should govern your verdict and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.”

These cautions are appropriate as far as they go. My only misgiving about the instruction is that it refers only to the possible drawbacks of note-taking, without acknowledging any advantages. Thus, prospective jurors may get the impression note-taking is so fraught with disadvantages that, perhaps, it may be better to take few notes or none at all.

Conveying that impression would be unfortunate, and inaccurate as well, as research data do not appear to confirm the traditional reservations about note-taking. A 1997 study concluded that while there was little affirmative support for the purported advantages of note-taking, the evidence also was “overwhelmingly unsupportive of the purported harmful consequences” of the practice.<sup>4</sup> In par-

ticular, the study concluded: (1) jurors’ notes do not produce a distorted view of the case; (2) note-takers can keep pace with the trial; (3) note-takers do not distract other jurors; and (4) note-takers do not have an undue influence over non-note-takers.<sup>5</sup> Further, on recall tests, note-takers outperformed non-note-takers by “a modest but significant margin,” and of those who took notes, those who took the most had the best recall.<sup>6</sup> (Surprisingly, though, the study did not find notes were especially helpful in longer or more complex cases.)<sup>7</sup>

My experience convinced me of the value of note-taking. Given the length of the trial, I’m confident I could not have remembered most of the salient testimony without notes, and I saw a noticeable correlation between other jurors’ note-taking and their participation in deliberations. Comparing notes proved to be useful both in confirming that our recollections of the evidence were correct and in identifying areas of uncertainty for which we needed read-backs of testimony. In addition, when we did need a read-back, having notes made it much easier to pinpoint where in the trial the testimony in question had been given. This was important because almost all of the expert witnesses testified over several days, and the plaintiff’s experts testified both in his case-in-chief and again, weeks later, in his rebuttal case. It would have been much harder for the reporter to find the relevant testimony had the jurors not taken notes.

In view of my experience, I wish the CACI editors would tone down the precautionary language in instruction 1.02 so as not to discourage those who might be uncertain whether to take notes. At the least, the instruction could include a provision to the effect that notwithstanding the precautionary language, jurors should take notes if they believe doing so would help them understand and recall the evidence.

## **5. Let My People Go – Frequency and Duration of Breaks**

I imagine this suggestion won’t find much favor among trial lawyers or judges. In my experience, most judges take one recess in the middle of the morning session and one in the middle of the afternoon session, plus the lunch recess. Assuming the sessions last three hours each – say 9:00 to 12:00 and 1:30 to 4:30 – this works out to a break every one and one-half hours.



If my experience is any guide, that's not often enough. Most of time, I found it difficult to listen to testimony, particularly from experts, for more than an hour without becoming noticeably fatigued. Complaints of fatigue were common among my fellow jurors as well. The fatigue problem is heightened where, as in our case, the testimony is complex and therefore requires particularly close attention. According to Professor Thomas A. Mauet, an authority on trial practice, "most persons can maintain a high level of attention for only 15 to 20 minutes."<sup>8</sup>

It appears trial judges recognize that taking more frequent breaks would promote jurors' ability to follow the evidence. A study by the National Center for State Courts, surveying hundreds of trial judges around the country, found that 87 percent believed providing additional breaks for jurors was a "moderately to extremely effective strategy" for reducing juror stress.<sup>9</sup> A former presiding judge of the Riverside County Superior Court put it bluntly: "[A]fter about 45 minutes, you've got to let off a bomb to have the jury continue to pay attention . . . ."<sup>10</sup>

Why, then, the apparent reluctance to take more frequent breaks? Presumably, judges and lawyers are afraid that with more interruptions, trials will become slower and more discontinuous than they are already. But getting through the evidence faster is counterproductive if the jurors' attention is diminished during much of the presentation.

Granted, it is not practical to take a break every 15 or 20 minutes, even though that might be more in keeping with jurors' "high level" attention spans. However, I submit two breaks per three-hour session, at one-hour intervals, would be a reasonable compromise. If the breaks were shortened to five or ten minutes instead of the usual ten or fifteen, it might be possible to avoid any overall loss of trial time. It might help to explain at the start of the trial that the additional breaks will only work if the jury scrupulously complies with the time limits, and that if the jury cannot do so, the schedule will revert to the usual one break each morning and afternoon.

If this suggestion is not acceptable, I would at least suggest taking one extra break during the afternoon session. In my experience, it was considerably more difficult to keep focused in the afternoon than in the morning, perhaps due to accumulated fatigue or, as one of our witnesses suggested, "postprandial fatigue" following lunch. Another approach would be to eliminate the afternoon session altogether and use a trial day of four hours, from 9:00 a.m. to 1:00 p.m., with two 15-minute breaks. Judge Ronald M. Sabraw of the Alameda Superior Court used that schedule in the three-and-one-half-month trial in *Savaglio v. Wal-Mart Stores, Inc.*, the action by Wal-Mart employees for missed meal and rest breaks that resulted in a \$172.3 million verdict in late 2005. Judge Sabraw noted that the schedule allowed counsel for the parties more time to prepare for the next day.<sup>11</sup> Presumably, the added preparation time

translated into more efficient, though shorter, trial sessions.

*Part III will be published in the November issue of Riverside Lawyer magazine.*

*Donn Dimichele is a Deputy City Attorney for the City of San Bernardino.*



<sup>1</sup> *People v. Whitt* (1984) 36 Cal.3d 724, 747-748.  
<sup>2</sup> *People v. Marquez* (1992) 1 Cal.4th 553, 578.  
<sup>3</sup> *People v. Whitt*, supra, 36 Cal.3d at p. 746.  
<sup>4</sup> Penrod & Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making* (1997) 3 Psychology, Public Policy, and Law 259, 280.  
<sup>5</sup> *Id.* at p. 271.  
<sup>6</sup> *Id.* at p. 266.  
<sup>7</sup> *Id.* at p. 281.  
<sup>8</sup> Mauet, *Trial Techniques* (5th ed. 2000) 407.  
<sup>9</sup> National Center For State Courts, *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* (1998) 32.  
<sup>10</sup> Hon. Dallas Holmes, in Department of Fair Employment & Housing v. County of Riverside, Riverside County Superior Court No. RIC352666.  
<sup>11</sup> Sabraw, *Empowering Jurors: Creative Techniques Learned From the Wal-Mart Trial* (Fall 2006) California Courts Review 6, 7-8.

## VOLUNTEERS NEEDED

**Family Law and Criminal Law Attorneys are needed to volunteer their services as arbitrators on the RCBA Fee Arbitration Program.**

If you are an RCBA member and can help, please contact Charlotte at (951) 682-1015 or [charlotte@riversidecountybar.com](mailto:charlotte@riversidecountybar.com).

# IN MEMORIAM: WILFORD N. SKLAR

*by Justice John Gabbert (Ret.)*

**W**ilford N. "Bill" Sklar was born in Salt Lake City, Utah, on December 13, 1916. He passed away at the age of 90 on May 14, 2007, in Riverside. When he was a youngster, his parents moved to Pittsburg, Pennsylvania, where he attended grammar school and high school and graduated from the University of Pittsburgh with the degree of Bachelor of Science.

After college, he worked for two years with Loew's and Warner Bros. theaters in advertising and then joined his father and brother, Frank, in a photographic business that operated in four states.

During World War II, he served in the U.S. Air Force as a photographer and as an entertainment coordinator. While awaiting transportation to the southwest Pacific at Camp Anza here in Riverside, he met his future wife, Sarah Bauman, a native Riversider. After his overseas service, Bill returned to Riverside, married Sarah, and remained here thereafter.

Bill opened, owned and operated Kiddiland Photo Studios in Riverside, at March Air Force Base and in San Diego for about 10 years. In the later years of that operation, he began the part-time study of law at both Loyola University and at Southwestern Law School in Los Angeles. This study extended for some time, and Bill often commented that it took him "50,000 miles of commuting" to get his legal education. He was admitted to the California State Bar in 1960 and prac-



*Wilford N. Sklar*

ticed in Riverside as a sole practitioner for over 40 years.

Bill was the unofficial volunteer photographer of the Riverside County Bar Association for many years. He took numberless photos for the Bar Bulletin and of Bar Association activi-

ties, recording meetings and special events. He served on many civic, church and community improvement programs; he was active in the original effort and organization of Watkins House program at UCR, was Chair of the Chamber of Commerce Military Affairs Committee, worked for the Elks' Youth Program, and was active in the Anti-Defamation League and in affairs of Temple Beth El. Bill also served on the Citizens' Advisory Committee on Urban Development and on the Human Relations Commission. Bill was long a member of the RCBA and of the American Bar Association.

Bill and Sarah had two daughters, Beth Lynn and Teri. Tragically, Beth Lynn predeceased both of her parents. Bill was also preceded in death by his wife, Sarah, both of his parents, and his brother, Benjamin. He is survived by his daughter Teri Sklar, brother Frank Sklar and sisters Nancy Morgan and Elaine Guettner. Services were held at Temple Beth El in Riverside on May 17, 2007, with interment at Olivewood Memorial Park.

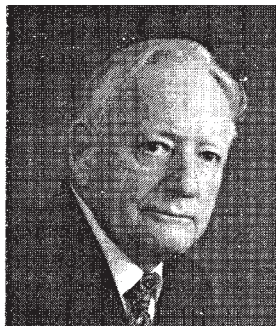
*Justice John Gabbert, retired from the Court of Appeal, was president of the RCBA in 1949.*



# IN MEMORIAM: JESS A. BARNETT

by Judge Charles Field (Ret.) and Judge Victor Miceli (Ret.)

When your two authors arrived in Riverside in the early 1960s, the bar was small enough that almost everyone knew almost everyone. We knew who was good, whom to trust, whom to respect. And if we didn't, we could find out with a phone call. Jess was a competent, honest, responsible attorney and a true gentleman. It was always a pleasure to find him on the other side of a matter, for you were guaranteed a good professional experience.



Jess A. Barnett

Jess was born in Kansas City, Kansas, in 1919. His parents died when he was quite young, and relatives, living in Cleveland and then California, raised him. He worked on a cattle ranch near Sequoia National Park, and graduated from Exeter High School in 1936. He moved to San Francisco, worked in a print shop and a bank, and took an exam for the U.S. Immigration and Naturalization Service (INS). Not hearing about his exam, he attended the U.S. Maritime School, but just as he was finishing that program, he was notified the INS had accepted him. He joined that agency and went on duty in El Paso, Texas, on November 21, 1941, just about three weeks before the Japanese attack on Pearl Harbor and the start of WW II for America. With the INS, he served in New Mexico and in Calexico, California. He then joined

the U.S. Navy in 1944, serving as a radioman on a tanker in the South Pacific. After two years in the Navy, he was released, returned to the INS, was assigned to Los Angeles, and enrolled in a night law school program. He graduated, passed the bar, and was admitted to the bar in 1954. He got a job with Riverside attorney William Shaw, a legendary trial lawyer, and moved to Riverside, forming the law firm of Shaw and Barnett, later joined by John Morgan, becoming Shaw, Barnett, and Morgan. Jeff left the firm in 1960 and continued practicing law as a sole practitioner until his retirement. Because of his background with the INS, Jeff was one of the very first "immigration specialists," long before that field became as prominent as it is today. Jeff was a true general practitioner, well prepared and versed in the law, and always a gentleman.

Jess passed away on May 9, 2007 in Riverside, California.

It was a pleasure to know him as a lawyer and a friend.

*Judges Charles Field and Victor Miceli both are retired from the Riverside County Superior Court.*



## MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective October 30, 2007.

**C. Robert Bakke** – Serembe Bakke & Seaman, San Bernardino

**Nicholas Firetag** – Gresham Savage Nolan & Tilden APC, Riverside

**Amanda Marie Francuz** – Rich Harris, A Law Corporation, Riverside

**Kelsi K. Guerra** – Office of the Public Defender, Murrieta

**Kelly M. Henry** – Long Williamson & Delis, Santa Ana

**Paula F. Henry** – Hershoren & Henry LLP, Foothill Ranch

**Don Johnson** – Don Johnson Law APC, Riverside

**Maura R. Rogers** – Office of the Public Defender, Riverside

**Susan D. Ryan** – Riverside County Superior Court, Murrieta

**Catherine A. Vincent** – Law Offices of Catherine A. Vincent APC, Victorville

Renewal:

**Mona S. Farraj** – Law Offices of Mona Farraj, Corona





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## Attorney – Riverside

Riverside law firm seeks associate attorney with 2-5 years of experience in civil litigation. Salary is commensurate with experience. Please email resume to: [paj@varner-brandt.com](mailto:paj@varner-brandt.com).

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is \$540.00 per month. Please contact Julie Clancy at (909) 581-8300.

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## Executive Suites Moreno Valley

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## ATTENTION ATTORNEYS

**MCLE Compliance Group 3 (Last Names N – Z)  
Deadline of February 1, 2008  
(Period 2/1/05 – 1/31/08)**

If you are members of Group 3 and not part of an exempt group, you must complete 25 hours of continuing education courses by the deadline, including 4 hours of Legal Ethics, 1 hour of Elimination of Bias and 1 hour of Substance Abuse Prevention.

Compliance information is available on the State Bar's website,

[www.calbar.ca.gov](http://www.calbar.ca.gov)>Attorney Resources >MCLE