RIVERSIDE LAWYER

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MAGAZINE

INSTALLATION OF OFFICERS

RCBA BOARD 2009-2010

BARRISTERS BOARD 2009-2010

The official publication of the Riverside County Bar Association


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on history.
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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.

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

NOVEMBER

10 **PSLC Board**
RCBA – Noon

10 **Joint RCBA/SBCBA Landlord-Tenant Law Section**
Cask 'n Cleaver, Riv. – 6:00 p.m.
"Changing Policies as to Non-Stips on UDs and General Info on the Courts of Riverside County"
Speaker: Presiding Judge Thomas Cahraman
(MCLE: 1 hr)
RSVP/Info: Contact Barry O'Connor, 951 689-9644 or udlaw2@aol.com

11 **Holiday (Veterans' Day)**
RCBA Offices Closed

12 **LRS Committee**
RCBA – Noon

13 **General Membership Meeting**
RCBA 3rd Floor – Noon
"State of the Riverside Superior Court"
Speaker: Presiding Judge Thomas Cahraman
(MCLE: 0.75 hr)
RSVP by Nov. 10th.

16 **CLE Brown Bag Series**
RCBA 3rd Floor – Noon
"The Continuing Ripple Effects of the Foreclosure Crisis in the Inland Empire"
(MCLE: 1 hr)

17 **Family Law Section**
RCBA 3rd Floor – Noon
"Current Issues in Family Law Accounting"
Speaker: Howard Friedman, CPA
(MCLE: 1 hr)

17 **RCBA Board**
RCBA – 5:00 p.m.

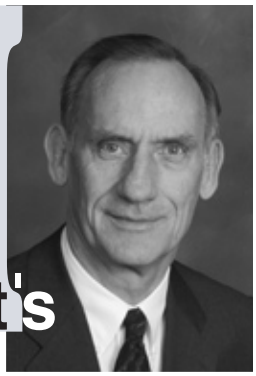
18 **Estate Planning, Probate & Elder Law Section**
RCBA 3rd Floor – Noon
(MCLE: 1 hr)

18 **Mock Trial Steering Committee**
RCBA – Noon

18 **Barristers**
Citrus City Grille at Riverside Plaza – 6:00 p.m.
"Getting Your Evidence In at Trial"
Speaker: Judge Richard Fields
(MCLE: 1 hr)

19 **Solo & Small Firm Section**
RCBA 3rd Floor – Noon
"Substance Use and Abuse Treatments"
Speaker: David Cannon, Jury Research Institute
(MCLE: 1 hr Substance Abuse)

26 & 27 **Thanksgiving Holiday**



President's Message

by Harry J. Histen, III

This month, we celebrate the 115th anniversary of the founding of the Riverside County Bar Association. We also gladly, and with a good measure of relief, applaud the hard-won accomplishments of our superior court judges and personnel in ameliorating our shortage of judges. Their determined, complex and focused effort over several years has come to fruition.

I am happy to announce that Riverside Superior Court Presiding Judge Thomas Cahraman will speak at our November General Membership Meeting. He will address the court's status and innovative efforts. Unless only absolute perfection satisfies you, you will be proud of those efforts.

The RCBA will and does express heartfelt appreciation and admiration for stunning achievements, not the least of which is the resumption of civil trials. RCBA members have generously assisted the court where possible. The court and the bar association have a long and symbiotic relationship. However, all attorneys in the county can realize the benefits of RCBA membership.

Trying economic times challenge us to act as our predecessors always have: Get lean, grow, encourage one another and prosper. Professional and social connection are facilitated by associations like the RCBA. Membership is not a one-size-fits all proposition. Permit me to begin this message by discussing that.

Dues-paying members are, at a minimum, entitled to: a subscription to *Riverside Lawyer* magazine; inclusion on the mailing and email lists for notice of bar association events; and the member telephone directory.

Greater benefits accrue from active membership, including educational and personal contact. One great benefit of RCBA membership is having the opportunity to meet attorneys and judicial officers, especially those in different practice areas. And equally important, they get to know you under circumstances in which the first contact is a positive one.

The bar association staff facilitates practice area section meetings, which allow members in the various practice areas to meet for lunch and keep up to date with developments in the law as well as local procedures. These section meetings can be helpful even to attorneys outside the particular practice area. For example: One may gain insight on how to care for a parent or other loved one who becomes unable to act for him or herself by attending a free lunch-time brown-bag meeting of the Estate Planning, Probate & Elder Law section.

Many lawyers give freely of their time to counsel the poor under the auspices of the Public Service Law Corporation. The PSLC ensures that the lawyer does not have to waste valuable time getting ready to advise a client. The lawyer spends his or her time doing "lawyer stuff." Again the RCBA and PSLC staffs provide the facility, clerical staff, scheduling and support.

The bar association conducts an annual Elves Program. This program, which owes its existence to the ingenuity and efforts of Brian Pearcy, "adopts" needy families, then provides dinners and gifts to them at Christmas time. Brian and his office staff give generously of their own time and resources. You can help by making donations and by shopping, wrapping and delivering gifts. It's a great way for you and your friends or family to give time, meet people and learn about real

need. When children observe the workings of the program, they generally do not need any further explanation. (You can read more about the Elves Program in this issue, see Brian Pearcy's article.)

The *Riverside Lawyer* magazine continues to excel with the hard work of the editor-in-chief Jackie Carey-Wilson and her staff. Yet there will always be room for – and a hearty welcome to – new contributors and editors.

We ask you, our members, to urge your colleagues who have yet to join the RCBA to consider the benefits of membership. Tradition, activities and functions are an important part of professional life. As a cynic from the 60's used to say: "Mindless ritual and meaningless tradition are what separate us from the animals."

Simultaneously, the superior court is working hard to ameliorate the ongoing judicial shortage and the increase in unrepresented litigants. The effects of unemployment and under-employment have adversely affected orderly case management. Effective processing in family law is hampered because in some 75 percent of the cases, there is at least one unrepresented party. Though the percentages may be different, the malady is increasingly affecting probate, conservatorship, guardianship and landlord-tenant cases as well.

Our court is working to create instructional programs, seminars and computer-aided assistance for unrepresented litigants. Though it may seem like heresy, pesky due process requirements often force procedures to be complex even in simple cases. There is no shortage of challenges. Find one that interests you and see what you can do with it.

Please remember: Judge Cahraman will speak at the Gabbert Gallery on the third floor of the RCBA building at noon on November 13, 2009. While it will not be possible for him to address all of the court's programs, he is always informative and entertaining. It will be well worth attending, and, with luck, finding your niche in all of this.

Please join us – you'll enjoy it.

BARRISTERS

by David M. Cantrell

David M. Cantrell

It is my privilege to serve as the Riverside County Barristers President for the 2009-2010 year. For those of you who are not familiar with the Barristers Association, it was created primarily to promote camaraderie among the young lawyers in the area. The group provides newly admitted lawyers with an opportunity to meet lawyers from other firms and practice areas who are experiencing similar issues related to the practice of law. We make an effort to keep our meetings somewhat informal, in the hope those in attendance will interact with others and build relationships that will foster civility in the practice of law in this community.

I am proud to welcome our incoming board members for 2009-2010. Kirsten Birkedal Shea of Thompson & Colegate will serve as Vice-President. Jean-Simon Serrano of Heiting & Irwin will serve as Secretary. David Lee of Varner & Brandt will serve as Treasurer. We have two Member-at-Large positions, which have been filled by (1) Jeffrey Boyd of Heiting & Irwin and (2) Brian Pedigo of the Pedigo Law Corporation.

This year, the Barristers Board has elected to rotate the location of the meetings. In September, we held an informal social hour at Ciao Bella in Riverside, and our October meeting was held at Citrus City Grille. In October, our speaker was Brian C. Unitt. Mr. Unitt's topic was "How in the World Can You Practice Law? – How to Overcome Bias in the Legal Profession."

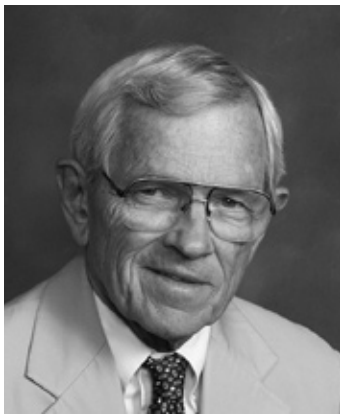
Our November speaker will be the Honorable Richard T. Fields, who will discuss the topic of "Getting Your Evidence Admitted at Trial." Judge Fields is an extraordinary speaker, and I would encourage those interested in this topic to attend. The November meeting will be held on November 18, 2009, at 6 p.m., at Citrus City Grille. We look forward to seeing you in November!

David M. Cantrell, President of Barristers, is a partner at Lobb Cliff & Lester, LLP in Riverside.

A Son's Memories of Growing up with a District Attorney Father

by Ed Mackey

My parents, Bill and Rita, and my brother, Bill, came to Riverside in the early 1930s. I was born in 1933. We lived on Merrill Avenue, between Palm and Archway, in a two-bedroom, tile-roofed home. It was a neighborhood full of kids who played hide and seek, kick the can, and red rover on summer evenings. The parents had neighborhood parties in the backyard, with hamburgers, watermelon and badminton. My dad was a deputy district attorney. Earl Redwine was the DA.



Ed Mackey

One of my earliest memories of the DA connection was the county car. It was a Studebaker. It had a red spotlight. We kids were fascinated by it. It did not come home often, but when it did, it was an event. But my dad had this strict rule that it was used only for his business, which meant that I could only look at it, never ride in it.

We had only one car – also a Studebaker – which meant that my mom, my brother and I would often drive to the courthouse to bring my father home at the end of the day. The DA's office was in the southwest corner, so we would sit outside in the car waiting for my dad.

In 1938 or '39, my dad and brother were going to hike up San Jacinto Mountain. They were to meet at John and Kay Gabbert's house on Redwood Drive to begin the trip. John was also a deputy DA. My mom and I drove them there. Everyone was excited about the trip. The hikers had their backpacks and canteens. I wanted to go, too, and was very disappointed when they left without me.

Riverside probably had a population of 35,000 in 1938-39. In December, Christmas trees lined the center of Main Street. It was the place to shop for all of Riverside County west of Beaumont. The farmers and ranchers from Murrieta and Hemet would come to shop on Saturdays. My parents seemed to know many of the owners and employees of the stores, and between stores, they usually found friends who wanted to stop and talk. It would get a little boring for me; I wanted to get home and play with my friends. In the summer, there were De Anza Days, with parades of horses, mules and even oxen down Main Street and "jails" to house the men who failed to wear the required beard.

In 1942 or '43, we moved to Terracina Court, which was just south of Riverside City College. My dad served as president of the Riverside County Bar Association in one of those years. At about that time, or perhaps a little earlier, the board of supervisors decided to create the office of county counsel to handle the civil law work that the DA's office had been handling. Earl Redwine became county counsel. My dad and Bob Switzer joined him in that office. I had a tour of the new office, which was on the east side of the courthouse. It seemed pretty small. Some of Mr. Redwine's stuffed animal heads hung on the walls. John Neblett became the district attorney.

In 1944, John Neblett told my dad that he was not going to run again for DA and that he was going to join the law firm of Sarau & Adam, which would eventually become Sarau, Adam, Neblett & Sarau. My dad decided to run for DA. He ran unopposed, which was a big relief to my mom. I was 11, and my brother was 15. I can't remember who was in the district attorney's office at that time, but shortly thereafter, there were a lot of new faces. Ray Sullivan became the assistant DA, Tom Bucciareli and Woody Rich arrived, and John Babbage came on board. Scooty Dales and John McFarland joined the office at some point. Hal Gustaveson, Byron Morton, Jim Angel and Harry Moss became deputies. My folks had a number of outdoor summer office parties at our home. It was a wonderful home – the terraced front yard with badminton court and barbeque was used like a back yard, and my dad would grill hamburgers for the guests. These seemed to be happy occasions for the office.

Local politics was a big subject at our house. At the beginning of the '40s, there was only one superior court judge (Judge O.K. Morton, Byron's father) in all of the county. After his death, there was a big campaign to fill the vacancy. Russell Waite, Dick Welch and Hayden Hews (Jake's father) were the main contestants, but also in the race was Joe Seymour, a perennial candidate and a fiery criminal lawyer. Russell Waite was the winner. In the mid-'40s, Governor Warren appointed John Gabbert as our second superior court judge. He also appointed Milton McCabe as the first superior court judge in Indio. Dave Hennigan was appointed by the board of supervisors as the first public defender of Riverside County.

In 1948, Wallace Rouse from Indio ran against my dad. There was a big campaign. I remember being at the office when the election results gave my dad the victory. Bucciareli and Woody were also at the office. Bucciareli was active in the campaign. He was watching the election returns. Woody had just become a deputy DA. He had on a crewneck sweater (I don't think I had ever seen one before) and was busy looking at law books, seemingly uninterested in the campaign.

My dad became county counsel again in the '50s. The board of supervisors and Earl Redwine got into a dispute. The

board discharged him and gave all the county civil law work back to the district attorney. Ray Sullivan became the assistant district attorney. Bob Dougherty and Leo Deegan joined the office. After some of the board members were replaced, the offices were again separated, and Ray became the county counsel and Leo his assistant.

Until the early '50s, the courthouse did not have air conditioning. Trials were not postponed just because it was hot. Probably to keep me busy in the summertime, my dad would let me attend some of the major criminal trials. I remember Ray Sullivan and Bill Shaw, an able defense attorney, arguing before the jury, their jackets soaked through with sweat.

In the '50s and '60s, many other lawyers worked in my dad's office. Some I met at our house, others at my dad's office or in the courtroom. Those I remember were Lee Badger, Pat Malloy, Roland Wilson, Craig Biddle, and Jim Ward.

My dad served five terms as district attorney, until 1964, five years after I started with Swarner, Fitzgerald & Dougherty. Upon his retirement, he joined our firm and opened a branch office with Morgan Dougherty in Palm Springs. He was still practicing there when he died in 1970.

These were exciting and happy times, not only for me, but for my dad. Tremendous growth was taking place, in his office and throughout the legal community. My dad was very proud of his office and the many lawyers who received their first trial experience under his tutelage. I was fortunate to grow up in Bill Mackey's world.

Edward Mackey, admitted to the State Bar of California in 1959, has also been a member of the Riverside County Bar Association for 50 years.

Mediation in Civil and Family Cases: The Care and Feeding of Trial Counsel

by Donald B. Cripe

Mediation of civil and family law cases is becoming more popular, particularly under the cloud of overwhelmed and under-budgeted superior courts. Yet it appears that many trial lawyers avoid or thwart the process, for a number of reasons, some of which are unwise and possibly not in the best interests of their clients. This article is intended to try to encourage trial counsel to see the real benefit of the mediation process for the client and to view the mediation process as a very positive dispute resolution process.

Donald B. Cripe

Conduct of Counsel

Counsel has an absolute duty to act in the best interests of the client. "A lawyer's duty of loyalty goes beyond the scope of the CRPC requirements: 'It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent . . . By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests.' [Citations.]" (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2009) ¶ 3:187.1, italics omitted, quoting *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548; see also Bus. & Prof. Code, § 6068; Rules Prof. Conduct, rules 3-500, 3-510.)

"I never settle cases because I can get sued," one seasoned attorney recently said to me. "It is better to let a judge decide so I don't have the responsibility," said another. The most over-used comment I have heard is, "I can't let my client do that." And the most incredible example comes from a recent mediation conducted by a colleague, in which the mediator crafted a truly amazing solution that would have returned to the plaintiff far more than it would have realized at trial, without the inherent risks. The only thing the settlement did not provide was the payment of fees to the plaintiff's attorney. The attorney refused to carry the settlement offer to the client because he was not going to get paid by the defendants.

It is true that some cases have to be tried, for a variety of reasons. However, it is likewise true that the vast majority of civil and family cases should be, and many are, settled. Unfortunately, the settlement rate is far too low, forcing cases to be set for trial, thereby adding to the backlog of cases and the rush to get cases tried when they do get a courtroom. The situation puts a particular burden on those cases that need to be tried and, because of the rush to the open courtroom, probably fails the litigants.

The final analysis for counsel has to be, "Whose case is it?" Counsel absolutely must protect the client from the abuses and unscrupulous acts of the opposition, as well as from the client's unfamiliarity with the litigation process. That said, it is not an attorney's responsibility to assert his or her personal judgment over that of the client. It is the attorney's absolute responsibility to advise the client on the law and on what the possibilities, both good and bad, may be with respect to the case. But no more would we tell the client what to plant in his garden than we should tell a client whether or not to accept a deal to settle the case. Most believe that counsel must look at the long-term outcome, i.e., what is it going to cost the client compared to what the client is going to net at the end? This, in mediation terms, is called the "net to client." There is very little justification for an attorney to push a case to trial when the same case could have been settled at far less expense to the client, at mediation or at any other time. Additionally, it seems to be a very risky proposition for an attorney to advise a client to try a case unless that attorney can and will guarantee an outcome. Of course, that is an even more risky position for an attorney.

It is also true that when lawyers negotiate settlements, particularly when some client arm-twisting is necessary, the specter of malpractice looms for months or years thereafter. No practicing lawyer has been able to avoid the influence upon clients of neighbors, family and friends who know someone else who had an "identical" case, irrespective of the facts and applicable law. Consequently, counsel are all too often second-guessed when a client tells friends about a settlement. That second-guessing sometimes can lead to bar complaints and civil lawsuits. However, the California courts have fashioned relief from this fear whenever an attorney formally mediates a case with the participation of his or her client. The California courts and the statutory scheme providing for mediation have created very strong protections for the attorney and, for that matter, the client. The most significant case addressing these issues is *Wimsatt*

v. Superior Court (2007) 152 Cal.App.4th 137, discussing Evidence Code section 1115 et seq. This case was a legal malpractice action that arose out of a mediated settlement. The court held that since mediation was a confidential proceeding (e.g., the misused term "mediation privilege"), none of the matters directly involved with the mediation upon which the plaintiff sued were admissible. The court ordered a protective order in favor of the attorney, prohibiting discovery of those documents upon which the client relied. Ultimately, the case was resolved in favor of the attorney. Thus, though an attorney can always be sued by a disgruntled client, submitting a case that should be settled to the mediation process not only enhances the client's potential of obtaining a satisfactory outcome, but also protects the attorney from the phenomenon sometimes referred to as "buyer's remorse" on the part of the client.

Those of us who want the court to make a decision because we do not want to bear the responsibility for the outcome of the case are also best served by taking cases to mediation. In mediation, depending upon the approach taken by the mediator, the client ultimately makes the decision of whether or not to settle the case, with the advice of counsel and the input of the mediator. Thus, if your mediator takes an "evaluative approach" and tells the client the weaknesses of his or her lawsuit, the case is more likely to be settled, while protecting the interests of both counsel and client.

The above begs the question, "How is a mediated settlement agreement enforceable by the court if the process is confidential?" The answer is revealed in *Estate of Thottam* (2008) 165 Cal.App.4th 1331. Basically, a trained mediator should be able to craft an agreement that avoids this difficulty, rendering the agreement admissible for the purpose of enforcement while in no way removing the protections provided in *Wimsatt*. However, caution must be taken to avoid the difficulties encountered by the parties and counsel in *Davis v. Rael* (2008) 166 Cal.App.4th 1608. In that case, the individuals who crafted the settlement agreement did not incorporate the language necessary to allow it to be admissible for the purpose of enforcement. As a consequence, the enforcement action (basically, an action under Code of Civil Procedure section 664.6) was dismissed and relief was unavailable. Mediation is a safe and effective way to resolve even the most difficult cases, if the cases are presented by attorneys who are prepared to mediate, to a professional mediator who knows what he or she is required to do for the protection of all involved. The nonpublished, noncitable case, *In re Marriage of Beetley* (2009) 2009 WL 1238785, offers a very good recitation of the mediation process.

It should be clearly understood that the mandatory settlement conference process and other forms of ADR specifically do not provide the same level of confidentiality and protection as the mediation process. In my experience, MSCs tend to be less successful because the information exchanged may be admissible at trial.

A long time ago, a senior colleague of mine said that being litigation counsel is one of those careers in which, if we do our job correctly, our income stops. While that is true on individual cases, I suspect that if the word gets around that a certain attorney gets cases resolved efficiently, quickly and inexpensively (relative to going to trial), that attorney will find that business will increase. Not many know that Abraham Lincoln was not only a very practical trial lawyer, but an attorney who urged mediation, as well. When asked by others if mediating cases and peace-making wouldn't hurt his law practice, he said, "There will still be business enough." Lincoln urged mediation in his largest cases. In the Superfine Flour case, though he had a very good case to litigate, he told his client: "I certainly hope you will settle it. I think you can if you will . . . ." He also said, "By settling, you will most likely get your money sooner; and with much less trouble and expense." With respect to most cases Lincoln said, "Persuade your [clients] to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses and waste of time."

(continued on page 11)

The point is that if we are truly thinking of our clients' best interest, settlement, one way or another, is most often the best way to go. The last example (above) of a comment by trial counsel related to his ability to collect attorney fees should go without too much discussion. For an attorney to put his financial interests ahead of the client's best interest is professionally reprehensible. In that particular case, the "little guy" client would have left the mediation in a position far superior to that in which he will now likely find himself after trial, simply because the attorney wanted to make sure that he got paid first.

As in most situations, the conduct of counsel is critical in mediation.

It is the nature of the trial attorney to be somewhat possessive about his or her case. My observation is that this is particularly true in family law matters, where the majority of litigants are far less sophisticated than they may be in civil matters. Thus, family law counsel frequently resist mediation for the baseless reason that, though they may be able to take criticism from the bench or differ wildly from the opinions and perspectives of opposing counsel, they tend to not want to submit voluntarily to a neutral evaluation or to the input of a family law mediator or arbitrator. For reasons that frequently escape me, those of us who practice in the family law courts strenuously resist formal ADR for settlement. The analysis in this article applies here just as it does in civil cases. Who benefits from resisting ADR? Is it the attorney or the client?

Family law attorneys frequently overlook the benefit of Family Code section 2554, which gives the family law bench discretion to order some cases to judicial arbitration to determine property issues. It states, "[I]n any case in which the parties do not agree in writing to a voluntary division of the community estate of the parties, the issue of the character, the value, and the division of the community estate may be submitted by the court to arbitration for resolution pursuant to [Code of Civil Procedure section 1141.10 et seq.], if the total value of the community and quasi-community property in controversy in the opinion of the court does not exceed fifty thousand dollars ($50,000)." (See generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 8:970 et seq.) Thus, cases may be submitted by stipulation to arbitration of those issues, thereby saving the clients time and money. The process is almost identical to the civil judicial arbitration process. Instead of a wait of five months for a trial, the matter could be completed in a matter of weeks. If counsel is reluctant to submit to ADR because of the cost, I submit that even engaging the services of a private arbitrator or mediator will be less expensive than trying the same issues.

If we are determined to take a case to trial, irrespective of the net outcome to the client, we are doing our clients an incredible disservice. Most family law clients want the case to be over with, but also want to feel like they are getting a fair deal. Most of them (sometimes appropriately) distrust opposing counsel and sometimes even believe that their own attorney is in league with the opposition for the benefit of the lawyers. In those cases, if the matter is submitted to mediation, not only is the overall cost to the client generally less than if the case were tried, but the client should be able to air his or her concerns to a neutral party and, at the end of the case, know that he or she had a substantial say in the outcome. Furthermore, the lawyer is relieved of much potential acrimony with the client. Family law lawyers could be a little less territorial in these matters.

Preparation

Before I realized the efficiency and effectiveness of the mediation process, I, like many of my colleagues, sometimes elected mediation as my ADR of choice solely to avoid the downside of judicial arbitration, e.g., discovery cutoffs, premature preparation, etc. After all, we had to go to ADR anyway, and everyone knew that a case is never resolved in that process, so why not take the easy way out? As it should have been at that time, the answer is obvious. If counsel has an opportunity to resolve the case more quickly and efficiently for the client, he or she has an absolute duty to prepare and be ready to present the client's case to the arbitrator or mediator. Just because the mediation does not result in some kind of finding or order (though it may result in an enforceable stipulation), the mediation proceeding is not rendered unimportant. One of the purposes of mediation is to try to get cases resolved before there are huge expenditures for discovery, depositions, etc. That said, there should still be enough investigation and discovery completed to allow the proceeding to go forward. I have mediated several hundred cases. With the exception of the relatively few cases in which the parties were simply too entrenched to negotiate in good faith, the only cases that have had to be continued or the mediation simply adjourned were those in which the excuse of both counsel for not being able to negotiate was a lack of investigation and discovery.

Counsel should look at it this way: if preparation will assist in settling the case, it should be done, and even if the case doesn't settle, counsel will be better prepared to proceed to either another mediation, a mandatory settlement conference or trial. There is never a downside to preparation in order to meet the needs of the proceeding. In the infancy of mediation, the superior court judge in Riverside who ran the program (either before confidentiality was the standard, or in spite of the standard) would routinely check a box on the form he carried with him during mediation, requesting the trial court to set an order to show cause for sanctions against any attorney who was unprepared or refused to cooperate. I am a loyal adherent to the confidentiality standard, but I will admit that there are times when I would love to be able to march over to the trial judge to tell him or her that an attorney or the attorneys were being boneheaded. Though that is not the appropriate course to take, if counsel would refer back to their duty to the client to competently represent the client's best interest, counsel would be pre-

pared to submit cases to mediation and to attend mediation well-prepared to negotiate in good faith with the goal of resolving the case.

Settlement

More often than not, the actual parties to litigation are far more interested in resolving a case than in going to trial. If a settlement opportunity is presented, that settlement opportunity should be explained to the client, along with the net outcome, the savings of time and the avoidance of the continuing stress of litigation. While I was still actively litigating cases, I enjoyed trial. It provided a marvelous adrenaline rush and, when we prevailed, fed my ego tremendously. At the time, I failed to appreciate that no matter how great I felt, the client was generally happy just to get it over with. And if we lost at trial, all of my wonderful feelings from the previous victory dissolved, but the client was still just glad to get it over with. When considering whether or not your case should go to mediation, think very carefully about the best-case and worst-case scenarios for your client, win or lose. That consideration should include the cost and risk to the client. I strongly believe that if cases are analyzed in a businesslike manner, the answer should be obvious.

The Bench

One critical element in the ADR process is our bench officers. If bench officers view ADR as a necessary evil before they can send the case to trial or, in family law cases, as matters to which no one would agree, they can be as much of an impediment to the process as counsel and the parties. We are fortunate that in Riverside, we have civil bench officers who see the benefit in promoting ADR and, most specifically, mediation. If the bench assumes the attitude that ADR is ultimately in the best interest of the litigants, and if the bench will encourage the process, not only by providing ADR literature at the time of filing, but also at the beginning of every morning calendar, the ADR process will be enhanced. If the attorneys and litigants believe that the bench is indifferent to the ADR process, why should they show any interest, and why should they have any confidence in the process?

Litigants and, though to a lesser extent, counsel look to the bench for guidance and confidence that someone is hearing them and cares about their cases. If the bench can make it clear, or at least give the impression, that it has confidence in the ADR process, I believe that the perception will be contagious.

Now What?

When considering how to proceed in a civil or family law action, I encourage counsel to seriously consider mediation under the supervision of a trained and experienced mediator. If during that process counsel has questions or concerns as to how they or their clients will benefit from the process, counsel should contact a mediator they would consider for their case for the purpose of finding out how the process would proceed and what to expect. Most mediators who are serious about their profession will be happy to provide any information to assist counsel in making the decision.

I urge civil and family law counsel to seriously consider mediation for all cases and, frankly, the more contentious the case, the stronger my urging.

Donald B. Cripe is a sole practitioner in Riverside, having tried numerous civil and family cases over the past 20 years. Mr. Cripe is a professional mediator under the business name of Just Results Mediation Services. He is on the panel of civil mediators for the Riverside Superior Court, has been a mediator with the RCBA Dispute Resolution Service for the past 10 years and acts as a settlement conference referee and mediator in San Bernardino civil and family law cases.

Thanksgiving and Christmas Giving

There are many ways to give during this holiday season. Throughout Riverside County, organizations (including the RCBA Elves Program) are meeting the needs of families by:

1. Providing food, so that families can prepare their own Thanksgiving and Christmas dinners;
2. Providing meals, so that families can enjoy a hot meal on Thanksgiving and Christmas;
3. Providing gifts, so that needy children will have a present to open on Christmas morning.

The Volunteer Center of Riverside County has a list of the organizations in Riverside County that are providing these very important services during the holidays. Please consider contacting the Volunteer Center to donate to one of these organizations or to find out what organizations need assistance. If you are calling from within the County of Riverside, simply call 211. If you call from outside the county, please call (800) 464-1123. To donate your time and/or money to the RCBA Elves Program, please contact the RCBA office at (951) 682-1015 or rcba@riversidecountybar.com.

Thank you for doing what you can to make a difference in people's lives. Your generosity will touch many hearts.

Sincerely,
Jacqueline Carey-Wilson
Editor, *Riverside Lawyer*

Installation of Officers Dinner

Rebecca Pacheco, District Attorney Rod Pacheco, Virginia Blumenthal

Justice John Gabbert (right) introducing James Heiting, recipient of the Krieger Meritorious Service Award

Judge Irma Asberry and Harry Histen

Sandra Leer, Ed Mackey (recipient of the 50-year State Bar and RCBA membership plaque), Judge Gloria Trask

The Installation Dinner was held on Thursday, September 24, 2009, at the Mission Inn. Harry J. Histen, III was installed as the 2009-2010 President of the Riverside County Bar Association.

James O. Heiting received the James A. Krieger Meritorious Service Award, the highest honor bestowed by the RCBA. The award was established in 1974 to recognize those lawyers or judges who have, over their lifetimes, accumulated outstanding records of community service. The award is not presented every year. Instead, it is given only when the extraordinary accomplishments of a particularly deserving individual come to the attention of the selection committee. The award has since been presented to James Wortz, Eugene Best, Arthur Swarner, Arthur Littleworth, Justice James Ward, Fred Ryneal, John Babbage, Patrick Maloy, Ray Sullivan, Justice John Gabbert, Jane Carney, Judge Victor Miceli, Justice Manuel Ramirez, Kathleen Gonzales, and Terry Bridges.

Photographs by Michael J. Elderman

Debbie Foley (Harry's secretary), Leroy Perry, Bea Perry (Sherise's mother), Harry Histen and his wife Sherise, Jacqueline Lenoir, John Lenoir, Jeanne Histen Brown (Harry's sister), Alexander Brown

RCBA Past Presidents: (seated, front center) Aurora Hughes; (back, left to right) Justice Bart Gaut, Steve Harmon, Judge Irma Asberry, Sandra Leer, Commissioner John Vineyard, Brian Pearcy, James Heiting, Judge Steve Cunnison, Geoffrey Hopper, Judge Craig Riemer, Jane Carney, Justice John Gabbert, Dan Hantman

Stan Orrock, Master of Ceremonies

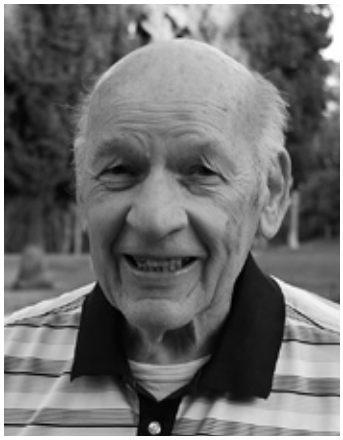
Mark Lester, Installing Officer for Barristers Board

Judge Sharon Waters, Installing Officer for RCBA Board

Elwood Rich: His 62 Years with the Court

by Bruce E. Todd

He'll be 90 years old a year from now. Yet, when I offered to come pick him to bring him to my house for our interview, he insisted on walking the three-quarters of a mile from his house to meet me. When we finished the interview several hours later, he insisted on walking back home in the dark.



Elwood Rich

The man has more giddy-up than the Energizer Bunny. There are legendary stories of his holding mandatory settlement conferences into the wee hours of the night. Yes, he said, it is true. In fact, he returned (by car this time) to my home later that same night with a calendar he had saved from 1979, on which he had recorded the hour that he had departed from the courthouse each evening of that year. Circled on it were three dates when he had settlement conferences that terminated after midnight (one of them at 2 a.m.!). In fact, he mentioned one settlement conference, which he held at the office of Best Best & Krieger, that did not end until 3 a.m.

Elwood Rich first arrived in Riverside in 1947. Known to many of us as just "Woody," he started working for the Riverside district attorney's office that same year. "I can still remember walking up those front steps to the courthouse in October of 1947," he reminisced.

His journey to Riverside started in Turbotville, PA, where he was born on November 20, 1920. His parents (George and Helen) were apple pickers. Eventually, they settled in Williamsport, PA, which is now famous as home of the Little League World Series. He recalls playing sandlot ball on Sunday in church leagues. He formed the team for his neighborhood.

"Many of us just went to church so that we could play on the team and wear a uniform," he said. "This was before Little League baseball had been formally organized in 1939."

After graduating from Williamsport High School in 1939, he made the trek to Duke University to try to play for the baseball team, which was coached by Jack "Cy" Coombs, a former star pitcher in the major leagues (31-9 in 1910).

"I could pitch the baseball very fast, but my problem was that I had no movement on it, " said Rich.

After completing his undergraduate studies, he enrolled in Duke Law School, but he decided to seek out warmer weather, and he left after his first year for California, where he enrolled in USC to continue his law school studies.

"The climate – and the climate alone – brought me to California," he remembers. "I saw all those citrus labels on the citrus crates, and that had a lot to do with me coming to California."

After graduating from law school, he passed the California bar exam on his first try and was issued bar number 19,335. There were about 9,000 active lawyers in California at the time. He began to search throughout California for a place to work. Ideally, he wanted to locate a place that was similar in size to his home back in Williamsport. He was offered a job with the district attorney's office in El Centro, but he decided against accepting it because of the extreme high temperatures in Imperial County. He had previously passed through Riverside, and the DA's office had a job opening, but for less money than he was initially willing to accept.

"They must have had a hard time finding someone, because, when I looked again in Riverside, they had increased the job offer to $290 per month," he said. He looked around, and it seemed like a city that was similar in size and layout (both were near rivers) to his home back in Williamsport. "I didn't grow up in the big city. I didn't want to live in the big city. I wanted to be able to mentally envision the boundaries of the city."

He accepted a job offer and, as noted above, started working for the district attorney's office in 1947. Being a bachelor, he rented a room at the YMCA, which was located in a historic downtown building that is still around, though no longer used as a YMCA. His rent was $35 per month. He would eat dinner almost every night at Mapes Cafeteria for 85 cents. Since he was single, he started going to various community functions, and he eventually met his future wife, Lorna. They were married in 1948 (sadly, she passed away in 2007).

When Rich first came to Riverside in 1947, there were just two sitting superior court judges (Russell Waite and O.K. Morton). Judge John Gabbert became the third

superior court judge in 1949. In 1952, Rich decided to run for a municipal court judgeship. He faced two other challengers. Luckily for him, he was in the midst of a high-profile murder trial, which undoubtedly gave him some favorable publicity.

"I was involved in a case called *People v. John Chauncey Lawrence*," he recalls. "Lawrence was accused of murdering his niece and leaving her nude body by the side of the road out in the desert near Palm Springs. The case was covered by a lot of newspapers, including the Los Angeles Times. I can still remember him to this day. His story did not hold water, and he was convicted in short order."

Rich won what would be his last case for the district attorney's office, and, shortly thereafter, he was sitting on the bench after winning the election. In 1971, he was elevated to the superior court, becoming the eighth sitting superior court judge in Riverside. He went on to spend many years in what is now Department 8, where Judge Bernard Schwartz currently sits.

While he was serving as a judge, he formed Citrus Belt Law School (now California Law School) in Riverside in 1971. He is proud to say that many of its graduates are now prominent attorneys and judges.

During his tenure on the bench, the other judges noticed that he had an ability to get cases settled. In 1979, he was put in charge of handling all of the mandatory settlement conferences. He eventually retired from the bench in November 1980, and in 1981 he started handling arbitrations, private mediations and voluntary settlement conferences for the court. In 1984, then-Presiding Judge Robert Garst asked him to handle the court's MSC calendar two days a week on a contract basis. He has essentially continued to handle it on Mondays and Tuesdays ever since.

When he first started handling the court's MSC calendar, there was no room to put him in, so he handled all of the settlement conferences in the Great Hallway of the historic courthouse (just as he still does today). As somewhat of an accommodation, he was also given use of the cozy quarters known as Room 163. This now legendary room is where he would sometimes retreat to discuss a case privately with one side or the other. It was oftentimes in this room that counsel would hear the now immortal phrase, "Confidentially, for my ears only, if I could get the other side to . . . ."

Judge Rich has handled numerous settlement conferences on just about every legal topic, and, oftentimes, counsel remain mystified as to how he can keep track of the facts of their respective cases, as he has been known in the past to be handling 10 or more settlement conferences at one time.

He has lived in the same house in Riverside for over 25 years. Every day, he has walked the one mile or so each way to the courthouse. He estimates that he has walked enough miles so as to have been able to travel across the country. On days when he is not handling settlement conferences, he walks the one mile that it takes to travel to his law school so that he can oversee matters as the dean.

Since his retirement in 1980, he has been fortunate enough to travel all over the world. His late wife Lorna would usually make all of the travel plans. They would sometimes be on the road for as much as 90 days. She also blessed him with four sons: Stevan, Brian, Gregory and Scott.

A portrait of Judge Rich depicting what he does best (handling a settlement conference, of course) graces the foyer of the historic courthouse. He is such a treasured figure in the history of the courthouse that, as one will observe while walking around the interior of courthouse, this painting is the only painting that is allowed to hang within its venerable walls.

Judge Rich remains as amiable as ever. He is a living monument to Riverside's historic legal community. Be sure to give him your regards the next time you pass him in the hallway of the courthouse – but beware, he might inquire about how much settlement authority you have!

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

The Proper Method of Awarding Attorney Fees in Minor's Compromise Cases

by Judge Elwood Rich, Ret.

"[Probate Code s]ection 3601, subdivision (a) provides that in approving a minor's compromise, a court shall make an 'order authorizing and directing that such *reasonable expenses . . . , costs, and attorney's fees*[] as the court shall approve and allow . . . shall be paid from' the settlement proceeds." (*Padilla v. McClellan* (2001) 93 Cal.App.4th 1100, 1103-1104, italics added.)

In *Padilla*, both the original attorney who had been discharged and the successor attorney were petitioning for attorney fees for their services.

The court stated: "The amount of attorney fees to be awarded is within the court's sound discretion, taking into account the type and difficulty of the matter, counsel's skill vis-à-vis the skill required to handle the case, counsel's age and experience, the time and attention counsel gave to the case, and the outcome. [Citation.] . . . [¶] Objector properly asserts quantum meruit as the standard for calculating the amount of the award." (*Padilla v. McClellan, supra,* 93 Cal.App.4th at p. 1107.) *This is a "reasonable attorney's fees" standard.*

In *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, the court stated: "The major factors the trial court must consider in determining an attorneys' fee award include: the nature of the litigation and its difficulty; the amount of money involved in the litigation; the skill required and employed in handling the litigation; the attention given to the case; . . . the intricacy and importance of the litigation; . . . and the amount of time spent on the case. [Citations.]"

The expression "reasonable . . . attorney's fees" in Probate Code section 3601 does not authorize a judge to make a choice from the varying, reasonable methods that attorneys utilize in charging their clients for legal services. The expression "reasonable attorney's fees" has a *well-known distinctive meaning in the law*. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 superbly explains what "reasonable attorney's fees" means. It states: "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is *fundamental* to a determination of an appropriate attorneys' fee award.' [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary. [Citation.]" (*Id*. at p. 1095, italics added.)

"The superior court calculated the attorney fees to be awarded PLCM based on their market value, specifically, the reasonable in-house attorney hours multiplied by the prevailing hourly rate in the community for comparable legal services. The Court of Appeal affirmed. We agree that the award constituted reasonable attorney fees." (*PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1094.)

In effect, the attorney is remunerated by multiplying the number of hours reasonably expended doing the legal work by a reasonable hourly rate, which total dollar amount may be adjusted on consideration of factors specific to the case. There was no adjustment in *PLCM*.

Recently (in January 2003), the Judicial Council adopted California Rules of Court, rule 7.955 to carry out the reasonable fee standard mandated by Probate Code section 3601. This rule states that "the court *must* use a reasonable fee standard when approving and allowing the amount of attorney fees payable . . . ." (Italics added.)

The Judicial Council made it mandatory that the attorneys use the MC-350 form petition to approve minor's compromise. To implement California Rules of Court, rule 7.955, this form at No. 14 states that "a declaration from the attorney explaining the basis for the requested fees must be attached as Attachment 14a."

This form at No. 14 should be changed to make it clear what is required. It should state that the declaration shall contain a detailed description of the work that was done and the amount of time, separately stated, that an attorney or paralegal expended doing the work.

With this information, the judge can use his or her experience and knowledge of a reasonable hourly rate and make a "reasonable attorney's fees" award as required by Probate Code section 3601.

Many attorneys have the parents sign an agreement retaining the attorney to represent their injured minor in

litigation to recover damages for the minor with a provision that the attorney be paid 25% or more of the recovery as attorney fees, despite the fact Family Code section 6602 states, "A contract for attorney's fees for services in litigation made by or on behalf of a minor, is void . . . ." The provision for attorney fees in these retainer agreements of 25% or more of the recovery is *void*. It also conflicts with Probate Code section 3601, which sets a "reasonable attorney's fees" standard for attorney fees – not a "percentage of the recovery" standard.

Judicial Council statistics show that 98% of personal injury cases settle without the need of a trial. The attorneys have little risk of not being paid. The principal determinant of the amount of the settlement is the amount of injury, suffering and economic loss sustained by the client – not the amount of work and time expended by the attorney. The greater the injury to the client, the greater the fee to the attorney, if attorney fees are based on a percentage of the recovery. This is why the attorneys prefer a contingency fee based on a percentage of the recovery rather than a contingency fee based on even a very high hourly rate of pay. In general, basing attorney fees on a percentage of the recovery results in *far higher* attorney fees than the "reasonable attorney's fees" standard required by Probate Code section 3601.

There are 58 counties in the state, and 23 of these county superior courts have adopted local rules in minor's compromise cases that typically provide that the attorney be awarded 25% of the settlement amount as attorney fees.

Government Code section 68070 provides that courts may make rules "not inconsistent with law or with rules adopted and prescribed by the Judicial Council." These local rules are inconsistent with Probate Code section 3601 and California Rules of Court, rule 7.955 and therefore are invalid.

In *Cortez v. Bootsma* (1994) 27 Cal. App.4th 935, the court concluded that a San Diego Superior Court local rule limited the discretion of a trial court to award statutory "reasonable attorney's fees" and therefore was invalid.

Awarding attorney fees on a "percentage of the recovery" basis is an entirely different method than awarding "reasonable attorney's fees" as required by Probate Code section 3601. In a percentage calculation, how much or how little work and time was expended is *completely irrelevant*. In "reasonable attorney's fees," the amount of work and the time expended are *dominant factors*. In many minor's compromise cases, no lawsuit is even filed, and therefore there are no depositions taken and no discovery of any kind done. In these cases, the work consists primarily of negotiation by letter and telephone by the attorney or her or his paralegal with the insurance claims representative. Even where a lawsuit is filed, it is often possible for the attorney to achieve a settlement with a moderate expenditure of work and time.

There is an obvious night-and-day difference between remuneration based on a percentage of the recovery and remuneration based on multiplying the number of hours of work done times a reasonable hourly rate, which is what "*reasonable attorney's fees*" basically is. You don't have to be an attorney to understand that these are two different, conflicting methods of awarding attorney fees.

These local rules are obviously invalid. They are in conflict with Probate Code section 3601 and California Rules of Court, rule 7.955. In recognition of this, the San Luis Obispo and Stanislaus County courts have repealed their local rules, and the Riverside and Monterey County courts are in the process of repealing theirs. These local rules are grossly unfair to the minors and an injustice. The Administrative Office of the Courts should prevail upon the remaining county superior courts with such local rules to repeal them, and if unsuccessful, should recommend to the Judicial Council that it adopt a rule of court to the effect that California Rules of Court, rule 7.955 occupies the field on the method of awarding attorney's fees in minor's compromise cases and preempts the local rules in that field. This would be similar to California Rules of Court, rule 3.20, regarding preemption of other local rules.

Judge Elwood (Woody) Rich retired from the Riverside County Superior Court in 1980.

Opposing Counsel: Harry J. Histen, III

by Kirsten B. Shea

If you want to get on Harry Histen's good side as the new president of the Board of the Riverside County Bar Association, then quote him a line from the Dilbert cartoon. Harry is a big fan of the famous comic strip, which depicts a character named Dilbert who is an engineer at a large technology company and who makes his own inventions.

Harry enjoys Dilbert not only for its humor, but also because it reminds him of where he came from before he was a lawyer. Like the character, Dilbert, Harry also worked at a large technology company, as a programmer developing new inventions for aerospace projects like Apollo. In fact, he did not decide to be a lawyer until later in life.

Harry was born in St. Louis, Missouri in 1942. Shortly after he was born, his family moved to a small town in Ohio named Huron. When Harry was 13, he and his family moved to Glendora, California, where they eventually settled.

Aside from school where he excelled, Harry also gained financial independence at a young age. By the age of 10, he held two jobs, which included a paper route and a job as a pin setter at the local bowling alley. For fun, Harry enjoyed solving math equations. He loved math so much that it took him on his first career path as a programmer in the aerospace industry.

In college, Harry earned a bachelor of science in mathematics. It was during one of his college math classes that he was recruited to work as a programmer in the aerospace industry at a company called North American Aviation, which later became Rockwell International. At Rockwell, Harry worked on several high-profile computer system projects involving the space program, including the Apollo moon missions. He also helped adapt Apollo systems for the first GPS system, which was utilized with the Space Shuttle.

While at Rockwell, Harry enjoyed being a pioneer in the aerospace industry. In total, he spent 11 years working for Rockwell. Harry also spent two years in the United States Navy during the Vietnam War.

It was not until his last four years at Rockwell that Harry decided to make a career change to law, because Rockwell's computing department had developed into a large bureaucratic entity from a smaller pioneering endeavor. His decision to attend law school was made one fateful evening as Harry was driving home from work on Brookhurst Avenue in Fullerton and he saw the sign for Western State University College of Law in Fullerton. At that point, Harry made a U-turn and immediately enrolled as a night student in the J.D. program.

Harry used the benefits of the G.I. Bill to help pay for the cost of law school. After earning his J.D. in 1976, Harry decided to open up his own law practice in Riverside. He chose Riverside because it had a growing legal market that was underserved at the time.

Since starting in Riverside, Harry has had the same practice, which includes business and commercial law, trusts and estates, family law and general litigation. His specialty, however, is advising small business owners on various topics, including forming entities, estate planning, contracts and real estate. Harry shares his clients' entrepreneurial spirit and states that small business owners are the "salt of the earth."

Harry first became a member of the board of the RCBA after his friend, former president Irma Asberry, encouraged him to run for the position of a member-at-large in 2004. Back then the economy was sound and the RCBA had money to spend.

Now, as the new president of the board, he will be faced with the effects of the recent economic downturn on the RCBA. However, Harry is a natural problem-solver and he is eager to tackle the fiscal problem.

For example, Harry is on a mission to advertise the benefits of the RCBA to current and potential new members in order to raise the additional funds needed. He wants all current members of the RCBA to step up this year more than ever and support the RCBA, not only by renewing their memberships, but also by making additional contributions of time and/or money to supplement the RCBA's resources during the economic downturn.

Harry declares, "The benefits of being a member of the bar are endless, including the Lawyer Referral Service and the Public Service Law Corporation." In addition, he also points out that being able to access other lawyer members for questions is one of the greatest benefits.

Harry recalls one question he had many years ago regarding an issue of conflicts in which he felt the need to bounce ideas off of someone. Harry decided to call a prominent attorney, with whom he had earlier served on the Lawyer Referral Service, for help. He recalls speaking candidly, and in the end, he was able to find a resolution to his dilemma without sweating it out on his own.

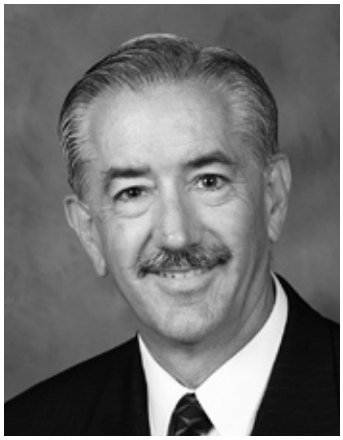
Harry encourages other lawyers to use the bar list of members in the same way. "If you have a question, then simply pick up the phone and call another attorney, because that single phone call was more valuable than all the dues I ever paid to the RCBA."

In his spare time, Harry leads a simple life. He has not watched television since he gave it up in the mid-90s. He exercises everyday and he eats the same lunch during the week, which consists of a Peter Pan peanut butter sandwich with apricot jelly and a tall glass of low fat milk. By keeping life simple, Harry is able to focus on what is most important in his life – his family. Harry enjoys spending his free time with his lovely wife, Sherise, and his three children Derek, Kerry and Stefanie.

Harry Histen can be reached at his law firm, located at 1485 Spruce Street, Suite E, Riverside, CA 92501, phone (951) 682-4121. The author, Kirsten B. Shea, is an attorney at Thompson & Colegate in Riverside, CA.

Workers' Compensation "Reform" – At What Cost?

by Richard H. Irwin



Richard H. Irwin

While it was interesting to read the article authored by one of my learned colleagues in the February '09 issue of this magazine, I feel compelled to respond on behalf of the injured worker. After all, that article, although written by someone whom I hold in high regard for her knowledge and professionalism, has a clear and undeniable defense perspective, which perspective is admitted to in the opening to her article.

First, she made some valid points. Specifically, there were, *in the 1980s*, some unscrupulous medical providers who took advantage of not only the system, but also the injured worker. However, many law firms representing injured workers would seek out credible reporting physicians who would not take such advantage. In addition to the obvious reasons for doing this, this was done because it did not take long for these "physicians" to obtain a reputation not worthy of most reputable medical practitioners, with the result that workers' compensation judges also felt their opinions were "not worth the paper they were written on."

In discussing the "*boom of the 1980s*," the author stated that "*employees* took advantage of long periods of temporary disability, then vocational rehabilitation and *generous* permanent disability settlements [emphasis added]." Quite frankly, having represented injured workers for over 28 years, such statements concern me. Specifically, it is unfair to suggest that all employees, or for that matter, even the majority of them, took advantage of anything, especially those injured workers with serious injuries. For instance, temporary disability paid them only two-thirds of their average weekly wage, up to a maximum "capped" figure. If their earnings were significantly higher, they would not be compensated for *any* of the loss above the cap. This could, and often did, have devastating financial consequences for injured workers and their families.

Likewise, what was wrong with the idea of vocational rehabilitation? If injured workers were unable to return to their usual and customary jobs, at least there was an effort by the workers' compensation system to return them to work such that they could once again contribute to society and take care of their families. That is not true today.

Similarly, to suggest that permanent disability settlements were "generous" distorts reality. Although there were times when an injured worker could obtain a significant amount for his or her permanent disability, this was usually accompanied by a significant and life-long disabling condition, many times with intractable pain and extreme physical limitation that would impact the quality of life, the ability to return to work and the worker's family forever. Although a few individuals made for good headlines by abusing the system (including claimants and insurance companies), many deserving employees with severe injuries received nominal compensation that did not come close to adequately compensating them, and their needs were not (and often are not) addressed by the system. In fact, the insurance industry, for obvious reasons, does not want this side of the story to be told.

In the discussion of the *1989 and 1993 reforms*, the $16,000 vocational rehabilitation cap is only briefly touched upon. It is true that this cap was developed to limit costs, and also to streamline the vocational rehabilitation process. It largely limited the applicant to three-to-six-month vocational trade schools, with no guarantee (and a limited likelihood) of employment. In fact, usually $4,000-4,500 of this $16,000 was paid to a qualified rehabilitation representative to "guide" and "assist" the applicant in forming a vocational rehabilitation plan and to provide assistance until the conclusion of the vocational rehabilitation program. In addition, the injured worker was provided a vocational rehabilitation benefit that paid a *maximum* of $246 a week (wow!) during the vocational rehabilitation plan. This left very little for the expense for educational retraining and limited the employee to a short-term program, often with short-term results, or none.

Regarding the period from *1994 to 2003*, the article references the 1994 deregulation of the workers' compensation insurance industry, indicating that by 1997, some "major" workers' compensation insurance companies were going out of business in California. It should,

however, be pointed out that some insurance companies appeared to use deregulation to undercut their competition to the point that certain of those companies claimed they could no longer afford to do business here. Some who weathered this, though, acted to quickly recoup their (alleged) "losses" by increasing premiums to historically new levels – while blaming the injured worker rather than either their own greed or their own careless management.

But the main focus of my angst and concern from the article is the *April 2004 "reform"* legislation (S.B. 899).

For years before these "reforms," workers' compensation carriers in California were making *significant profits* under a system that essentially *froze the benefits* for injured workers from 1996 through 2002. Then, in 2003, when benefits to injured workers were increased to balance the freeze, the insurance industry put its substantial power, lobbyists and money behind an effort, not only to halt the balancing increase in benefits for which the injured worker had waited for over seven years, but also to limit further the rights and benefits of the injured worker and to increase its own "bottom line" that much more.

Our governor, unfortunately, turned a deaf ear to the needs of the injured employees of the State of California and instead chose to listen to his friends within the insurance industry. The result is a bill fraught with "reforms" that have had the effect of driving the injured worker into greater financial distress and, in many cases, into public assistance programs or out of the work force entirely. These "reforms" include:

1. The *total elimination* of any *vocational rehabilitation* retraining program for injured employees, who, because of their injuries, cannot return to work, even in a job that they may have had for several years. The result, obviously, is even more disastrous when you consider the difficulty of their returning to work after having worked in only one industry for the majority of their adult life; they are now required to search for a job in another, and often unrelated, field, with a known and documented, and often obvious, permanent impairment.

2. A *reduction* in *permanent* disability benefits of between, in many cases, 50 to 70 percent! This has always been intended to be an amount to assist the worker with an injury resulting in permanent physical or mental impairment during the time necessary to recover to the extent possible and to reenter the work force. To reduce this benefit by such an amount is unconscionable and often has a devastating impact upon an injured worker and his or her family.

3. A medical *utilization review* by a physician who will *never actually examine* the injured employee and who is often out-of-state, reviewing the medical procedure requested by the injured worker's often long-time treating physician and making a determination that denies or substantially denies or delays a much needed medical test, procedure, or treatment.

4. A *limitation* of *temporary disability* payments to 104 weeks from the *date* of the *first payment*. As a result of this unique "reform," in many cases, an injured worker who collected only a couple of weeks or months of temporary disability after the initial injury, but whose condition (for example, a disease or a significant lower back injury) flared up or deteriorated more than two years later to the point that the worker needed surgery, could be denied any temporary disability. Yet the worker would be out of work for several weeks or months, recovering from surgery. For injuries after January 1, 2008, the injured worker can now receive a maximum of two years of temporary disability, to be paid *within* five years from the date of injury. Again, even in very serious cases, when the injured employee may be temporarily yet totally disabled for greater than two years, no further temporary disability benefits will be paid.

5. *Apportionment* (i.e., attributing a portion) of disability to an *underlying degenerative* condition. Even if the individual had absolutely *no symptoms or disability* attributable to the underlying condition before the work injury, and, arguably, even if the individual could have gone for years, or even a lifetime, without ever experiencing symptoms or disability, under the new legislation, a portion or percent of overall disability will be attributed to this asymptomatic and nondisabling condition, reducing the permanent disability benefit.

To make matters worse, every physician I have ever deposed states that degenerative processes are synonymous with the aging process. Thus, by permitting apportionment (and the resulting reduction of benefits) to the aging process, this bill is effectively discriminating against injured workers on the basis of age. This is improper and unlawful, yet now sanctioned by this reform legislation.

The previous article asked the question, "How has the 2004 reform worked?" In response, let me say that, if by "working," you mean that it:

- Has unjustifiably cut many injured workers' recoveries by up to 50 to 70 percent;

- Has totally eliminated the ability of an individual who cannot return to the workforce to receive any retraining or vocational assistance;
- Has severely limited temporary disability benefits, even in the most serious injury cases, where they are so greatly needed;
- Allows physicians who never see or examine the injured employee to deny and delay reasonable treatment requests by the employee's long-time treating physicians;
- Allows an individual's work-related disability to be reduced because of age and/or conditions that have never resulted in symptoms or disability and which, absent the work injury, never would have;
- Limits physical therapy to a set number of visits (even if post-surgically there is a recommendation for additional therapy);

– then I guess you could say it's "working."

Personally and professionally, I have a problem with a system that was created to properly "compensate" the injured employee, in lieu of allowing the right of independent civil actions against employers for work injuries, when inequities and unfairness abound.

Equally of concern is the stated fact that many applicant (i.e., injured worker) attorneys have left the practice and that, if the current schedules of benefits continue, "very few attorneys will be representing injured workers." What a travesty it would be if the employee, who is the backbone of our economy and who is already being denied rights, benefits and privileges by this legislation is also effectively denied representation – denied help! Is this "reform"? Is this change for the good?

There is no question that the reforms have reduced costs to insurance carriers and that profits are up – but at what cost to the injured worker? The cost is much too high. We should all want our injured workers to have *just* and *fair* rights and benefits, without which they, and their families, will not thrive, and in some cases will not survive.

Don't we owe an obligation to those workers who provide services to and on behalf of their employers, our community and our state on a daily basis, risking injury and, at times, their lives, for and in the service of others? Maybe our priorities need to be reevaluated.

Richard H. Irwin, of Heiting and Irwin, is a recognized specialist in workers' compensation law. He has been certified as a specialist by the State Bar of California since 1995. He limits his practice to handling only workers' compensation cases.

Seven Years and Still Growing! – The RCBA Elves Program

by Brian C. Pearcy

Would you like to experience the true joy of giving during the holiday season by helping out a local family in need? You and your family are invited to come join your fellow members and participate in the RCBA Elves Program this holiday season.

For the past seven years, the Elves Program has assisted needy families that have had a difficult time providing anything more than the bare essentials to their children. Once again, the Elves Program is working with the Child Abuse Prevention Center of Riverside County to give local families a wonderful Christmas.

Back in 2002, the program's first year, we were able to assist six families living in some of the poorest areas of Riverside County, which included 17 children and seven adults. With the continued generosity of RCBA, its members, and the community, this program has grown tremendously over the years. Last Christmas was our most successful year. The Elves Program assisted 28 families, consisting of 80 children and 44 adults. We delivered holiday joy to individuals in Mira Loma, Corona, San Jacinto, Moreno Valley, Perris, Lake Elsinore, Riverside, and Hemet. The positive feedback from the Elves and the families served was overwhelming. This year, our goal is to try to assist over 30 families.

Depending upon your time, talents, and interests, we have four Elf categories for you and your family to participate in:

1. **Shopping Elves:** On our designated day and appointed time, the Shopping Elves will meet at the Big Kmart on Alessandro in Riverside. You will receive a Christmas "wish list" from the children of your adopted families. Your job is simple – fill your basket with as many gifts as possible within the dollar amount allotted.

In the past, our Shopping Elves have made this a family affair. The families of RCBA members are great at assisting in the determination of what the "cool" gifts are. This is a great way to experience the joy of giving to the less fortunate.

2. **Wrapping Elves:** After the Shopping Elves finish their job, the Wrapping Elves meet in the RCBA Boardroom (on a date to be determined) and wrap the gifts purchased. Wrapping Elves must ensure that all the gifts are tagged and grouped by family for easy pickup and distribution by the Delivery Elves. Excellent wrapping and organizational skills are welcomed, but not required. The camaraderie generated by the wrapping teams each evening will get even the biggest "grinch" into the holiday spirit. The Wrapping Elves' motto is: "The more the merrier!"

3. **Delivery Elves:** If you are looking for a warm holiday glow inside and out, this is it! Depending on the total number of families we are able to adopt, teams of two to four Delivery Elves will personally deliver the wrapped gifts to our adopted families. The deliveries will be made between the 18th and the 24th of December. To accommodate the Delivery Elves' personal schedules while efficiently distributing the gifts to the varied household locations, they may be assigned to deliver to more than one family.

While delivering gifts to the families is potentially time-consuming, many members have expressed that this was by far one of the most rewarding experiences. When signing up, please tell us whether you will be willing to drive and what type of vehicle you have. This will allow us to match the number and size of gifts to the storage area available in your vehicle.

4. **Money Elves:** We need you! The Money Elves provide the resources necessary for the shopping, wrapping and delivery to the many families throughout the county. Sending in your check by December 1st will help us identify the number of families we can help, but donations will be accepted through the 18th of December. Obviously, the more money raised, the greater the number of families we can help and the greater the number of wishes our Shopping Elves can fill.

Please make your checks payable to the RCBA and put the words "Elves Program" in the memo section of the check. (The RCBA is a section 501(c)(6) corporation, Tax I.D. No. 952561338.) We thank you for your holiday generosity in advance.

To become a Shopping, Wrapping, Delivery or Money Elf, please phone your pledge to the RCBA at (951) 682-1015 or email your name and desired Elf designation(s) to one of the following: Veronica Reynoso (vreynoso@bpearcylaw.com), Lisa Yang (lisa@riversidecountybar.com) or Brian Pearcy (bpearcy@bpearcylaw.com). By contacting us via email, you will help us to notify and update each of you via email on a timely basis.

To those who have participated in the past, "Thank you," and to those who join us for the first time this year, we look forward to meeting you. Don't forget to "Tell a friend!"

Brian C. Pearcy, president of the RCBA in 2002, is Chair of the giving-back Elves Program.

Classified Ads

Office Space – Riverside

Office space available in the Tower Professional Building located on the corner of 13th and Lime Street in downtown Riverside. We are within walking distance to all courts. All day parking is available. Building has receptionist. Please call Rochelle @ 951 686-3547 or email towerpm@sbcglobal.net. Residential services available also.

Professional Office Space – Colton

Office spaces and executive style suites available in the Cooley Ranch area of Colton. 100 sf. to 2,174 sf. Centrally located among Riverside, San Bernardino and Rancho Cucamonga courts. Rates as low as $270.00 per month. Class A management. Please call Ray at (909) 824-5700.

Independent Contractor Paralegal

22 years experience in Plaintiff and Defense. Services include preparation of discovery and court documents, review and summarization of records and other projects as may be discussed. All work completed from my home office. Stephanie Michalik, (951) 735-3165 or smichalik@ca.rr.com

CPA Forensic Accountant, Howard E. Friedman

Business Valuations, Cash Flow, Separate vs. Community Property Tracing. Court-Appointed Expert, Receiver, Special Master. Call 909-889-8819, Fax 909-889-2409; 454 N. Arrowhead Avenue, San Bernardino, CA 92401.

Office Furniture/Law Books

Filing cabinets, great shape, $50 small, $70 large; 2 secretary desks, 1 right-return, 1 left-return, good shape, $75 each; Cal Reporters approx. 230 volumes, #117-286 and Cal Reporter 2nd #1-60, great wall decorations, $200. Contact James Ybarrondo at (951) 925-6666.

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 Charlene or Lisa at the RCBA office, (951) 682-1015 or rcba@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 November 30, 2009.

Blake G. Harrison (S) – Law Student, La Verne

Michael G. Heaton – Sole Practitioner, Palm Springs

Nathan W. Heyde – Varner & Brandt LLP, Riverside

Michael A. Scafiddi – Law Offices Michael A. Scafiddi, San Bernardino

Amanda E. Schneider – Gresham Savage Nolan & Tilden APC, San Bernardino

Renewals:

H. Samuel Hernandez – Law Offices of H. Samuel Hernandez, Riverside

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