RIVERSIDE LAWYER

July/August 2009 • Volume 58 Number 7 MAGAZINE

In This Issue:

RIVERSIDE COUNTY RCBA EST. 1894 BAR ASSOCIATION

The official publication of the Riverside County Bar Association


GREAT
LAWYERS
leave their mark
on history.
This is Alan Blackman, Deputy City Attorney for
Los Angeles and Class of 2001 graduate.
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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

AUGUST

12 **Bar Publications Committee**
RCBA – Noon

13 **Court of Appeal, Fourth District, Division Two –** Inaugural Justice John G. Gabbert Historic Oral Argument and Lecture Series
At Court of Appeal, 3389 Twelfth St., Riv. – 3:00 p.m.
Presented by Erwin Chemerinsky and Dr. John Eastman
Case: Korematsu v. United States
(MCLE)

Info/RSVP: Contact Paula Garcia, 951-248-0212 or Paula.Garcia@jud.ca.gov

14 **CLE Brown Series**
"What to Expect Coming into Bankruptcy Law & Motion"
Speaker: Judge Peter Carroll, Ret.
RCBA 3rd Floor, Gabbert Gallery – Noon
(MCLE)

SEPTEMBER

7 **Holiday – Labor Day**

8 **Bar Publications Committee**
RCBA – Noon

8 **PSLC Board**
RCBA – Noon

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

10-13 **State Bar Annual Meeting and Conference of Delegates**
San Diego

24 **RCBA Annual Installation Dinner**
Mission Inn – 5:30 p.m.

President's Message

by E. Aurora Hughes

As we combine the July and August issues of the Riverside Lawyer, this is my last President's Message. As you will recall, I set out a number of items I wanted to accomplish during my term as president. I am pleased to inform you that the board has worked on each of these goals, and the ones that could be accomplished, have been. The rest are works in progress, but have been set up.

The goal of reducing judges' caseloads and obtaining new judges and support staff is an ongoing task that my predecessors began and I continued; those who follow me will carry on the battle. With regard to my goals of educating the public and attorneys as to the appropriate roles for each, we have set in motion at least one talk on the subject through the law library program. This program will be either on September 1 or later in November of this year.

This year, we have had a successful Elves Program and Mock Trial Competition, with our own Poly High School placing eighth in the state. We have welcomed Sherri Carter as our new Riverside Superior Court Executive Officer. We conducted a successful Bridging the Gap Program for our new admittees. The Good Citizenship Award program was one of the largest we've had. We had two swearing-in sessions for new attorneys, thanks to the kindness of Judge Gloria Trask in allowing us to use her Department 1 of the old Historic Courthouse, which were presided over by Justice Manuel Ramirez.

We also sponsored a few events and met a number of the women judges and attorneys from the Afghanistan delegation while they were here learning about our system of justice and how various programs work. I was surprised and humbled to note the number of women in Afghanistan willing to face death on a daily basis to see that justice is afforded.

Not long after I assumed the presidency, I was invited to attend the swearing-in of the San Bernardino County Bar President Michael Scafiddi. I had met him during my own swearing-in. I have been blessed to have been given the opportunity to get to know this gentleman. His energy and enthusiasm for the law are equaled only by his generosity and true compassion for his fellow man.

I also had the opportunity to attend the High Desert Bar Association installation of officers. Now, these people know how to have a good time. They had a '50s theme, a dance floor, and a DJ. Their formal ceremonies were carried out, of course, but one could tell that this bar association knew each and every one of its members, and they cared greatly about each other. They had raffles and piñata guitars. Even the judges enjoyed themselves. I felt right at home. We talked a little business and we had a whole lot of fun. This is something our bar association needs a little more of.

We did have a little fun this year celebrating Justice John Gabbert's 100th birthday. It seems we celebrated it everywhere. But I believe the best celebration was on June 20, 2009, the actual day of his 100th birthday, when people from all over the country, family, friends and dignitaries had the opportunity to listen to this great man, who appeared so humble and thankful, share some of his life and his wisdom with us.

We heard Presiding Justice Manuel Ramirez show how the appellate courts are handling the onslaught of appellate cases arising from our local courts and heard his vision of how he would like to see our division become a district of its own.

We also had the grand jury report on the District Attorney's office, which was critical. The grand jury report was responded to by a Chief Deputy rather than the District Attorney himself. It was done in the form of a letter, released to the press. I was contacted by the Desert Sun for my comments on the grand jury report. Since I had not yet read it, the reporter was kind enough to summarize its essence. I made my comments based upon the summary. The Desert Sun printed a couple of my quotes. The following week, I was contacted again by the Desert

Sun and asked to write a piece on the grand jury report and the district attorney's response based upon my prior comments. I did so, and apparently my piece was published over the following weekend. The following week, I received multiple comments from individuals throughout Riverside County who had read my comments and who related to me some of the dissatisfaction they also felt with how the district attorney is conducting himself and how his office is being run. While I was aware that many of the attorneys in Riverside County have not been enamored with the position the District Attorney's office takes on dealing with crime, I was surprised to hear that many of the Riverside citizenry are likewise unhappy with how the DA's office is performing. Many citizens are disillusioned, mostly because of the time delays in hearing their cases.

An independent judiciary is vital to the success of not only Riverside County, but the country itself. Unfair criticism of our judges published by the media does nothing to support the independent judiciary; it serves only to undermine it. The public does not understand why judges do not respond to criticism levied against them for the decisions they have made. They do not understand that judges are not allowed to comment on pending cases. But the public does understand that, when they cannot get their cases heard or feel they are being ignored due to the actions of the District Attorney's office, they do have a recourse. They understand that their vote can count, that they can make a difference.

Pardon my meanderings in this last President's Message. I have had a lot of things to do during my presidency that I have thoroughly enjoyed. I have had only two matters that I was unable to attend to due to my illness. I want to thank each and every member of the bar association for supporting me, for their participation, and for their prayers, which have sustained me throughout my tenure.

For those of you who do not know about amyotrophic lateral sclerosis (Lou Gehrig's disease), please note that it is an incurable disease for which there is no treatment, and it causes death on the average within one to five years after onset of symptoms. During the course of my presidency, I have gone from being able to take a few steps to total dependency upon my wheelchair, a lift to use around the home and the assistance of a caregiver. I no longer can feed myself or type. My breathing is failing me and the doctors have inserted a feeding tube into my stomach in case I have to choose between breathing and eating. Nevertheless, I hope to continue to participate in Riverside bar activities for as long as possible, including the coming year as immediate past president.

I also want to thank Charlotte Butt, Lisa Yang, Sue Burns, and all the other staff of the Riverside County Bar Association and its affiliates for the hard work and dedication they have demonstrated. I want to welcome Charlene Nelson as our new executive director as we bid a fond farewell to Charlotte Butt as a full-time executive director. Charlotte will work part-time, helping out the bar association with its fee arbitrations and in other assignments as needed, until the end of the year.

When I first arrived in Riverside County, Charlotte was not yet the executive director, but had been with the bar association for quite a number of years. I saw this smiling, enthusiastic, and gentle person, seemingly exasperated, yet quite in control moving around the office. As time passed, we had at least two changes in the executive directorship, and I was pleased to see the energetic Charlotte Butt selected as the executive director. Since my involvement first began, from the Conference of Delegates, to the Bar Publications Committee, to the Continuing Legal Education Committee, to the Bench-Bar Committee and then to the board, I have relied upon, been kept informed by, and made decisions with this wonderful woman, whom I am proud – no, immensely proud to call my friend. Our bar association owes a great debt of gratitude to Charlotte and to how she gets all the work done and motivates her staff. Thank you, Charlotte, from the bottom of my heart.

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(September 1, 2009 – August 31, 2010)

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by Richard Brent Reed

Court Fee Insurrection

On March 22, 1765, the Parliament of George III required the American colonists to pay for a stamp to be applied to all official documents. The revenues so raised were to reimburse the British government for the cost of defeating the French in the Seven Years' War.[1] Assemblies throughout the colonies sent petitions of protest to Parliament. The Stamp Tax gave rise to colonial activist groups like the Stamp Act Congress in New York and the Boston-based Sons of Liberty.[2] The Stamp Act applied to almanacs, calendars, pamphlets, and newspapers; it also imposed:

> "For every skin or piece of vellum or parchment, or sheet or piece of paper, on which shall be engrossed, written, or printed, any declaration, plea, replication, rejoinder, demurrer or other pleading, or any copy thereof; in any court of law within the British colonies and plantations in America, a stamp duty of three pence."

On or about May 5, 2009, Riverside Superior Court Subscription Service announced that, effective July 1, 2009:

> "Pursuant to Government Code section 68150(h) and California Rule of Court 2.506(a), an amount of $7.50 will be charged to view or print civil documents available on the Internet for the first 10 pages, plus $.07 for each additional page, with a cap of $40 per document. Name searches may be conducted, and the register of actions viewed, from the Internet free of charge."[3]

On or about May 11, 2009, the firm of Redwine and Sherrill (hereinafter "Redwine") petitioned the court by letter for redress of grievances, suggesting that offering free internet access to the public, as opposed to requiring it to queue up at the clerk's office, actually saves the court money:

> "Over the last several years, it has become much easier to obtain electronic copies from the internet than to get copies from the clerk's office. It seems that the court actually saves time and money to allow the public to access these documents from the internet rather than to use valuable court time to obtain the file and then make copies. If a person went down to the court and had the clerk obtain the file and then make copies of the document from the court file, do you charge $7.50? The current internet access is superior for both the clerk's office and the public. This should result in a savings . . . I believe that this fee is excessive. I request the fee be re-evaluated."

The Redwine letter goes on to submit:

> "The $0.07 per page additional fee seems reasonable. That is close to what Pacer charges for federal documents. However, the $7.50 fee per document appears unreasonable."

On or about May 18, 2009, the court responded by letter, which, in pertinent part, rejoins:

> "Please note that if your firm drives to the courthouse to request copies of documents, it will be charged 50 cents per page with no cap in accordance with Government Code § 70627(a). Of course, the cost of gas, parking and wait time would more than make up the difference."

The letter goes on to advise:

> "The current fees will be re-evaluated in May 2010 to ensure they adequately reimburse the court for providing this unmandated service."

If the new policy is applied as written, it will cost about $40 to take a peek at most pleadings. Presumably, the litigants in any particular action may wait to receive their copy of court documents when they are, eventually, served, but judicial council forms are updated periodically, so parties in pro per who do not subscribe to Westlaw or some other such internet service will be financially disadvantaged if their litigation outlives the forms compact disk in the sleeve of their Nolo do-it-yourself book.

The unintended consequences of the revised fee schedule have yet to be determined. Will the added costs result in bootlegged minute orders or a black market in local rules? Certainly, there will be consternation in some quarters, as the Redwine letter of protest evinces. But, whether or not the new fees inspire the formation of a Court Fee Congress or provoke Riverside County law firms to start throwing judicial council forms into Boston Harbor remains to be seen.

1 A/k/a the French and Indian War.

2 A similar tax on tea resulted in the Boston Tea Party in 1773.

3 Also beginning on July 1, all filing must be done at the court where the action is being litigated, though facsimile filing will be available for a flat fee of $100. An updated fee schedule is available on the court's website at http://riverside.courts.ca.gov. Presumably, the updated fee schedule may be viewed for about $7.50.

The International Criminal Tribunal for Rwanda

by Jacqueline Carey-Wilson

In April 1994, I listened in disbelief to reports broadcast on National Public Radio about the atrocities occurring in Rwanda. Thousands of Rwanda's Tutsis were being slaughtered by Rwanda's Hutus. The killings began after the assassination of Juvénal Habyarimana, the President of the Republic of Rwanda, on April 6. President Habyarimana was a Hutu. Over a period of approximately 100 days, it has been estimated, between 800,000 and 1,175,000 Tutsis were killed.

L-R—Peter Tafah, Judge Rick Fields, Judge Stephen Larson, James Parkinson, Justice Hassan Bubacar Jallow, Pierre Prosper, Jacqueline Carey-Wilson, and Justice Douglas Miller

As more information emerged, personal stories were shared. I vividly recall being moved to tears after hearing a report about a village where Tutsis sought refuge in a church. The Hutus then burned the church to the ground, with hundreds of Tutsis inside.

Fifteen years later, I had the privilege of meeting and speaking with Justice Hassan Bubacar Jallow, Chief Prosecutor for the International Criminal Tribunal for Rwanda (ICTR). Justice Jallow stopped by the George E. Brown, Jr. Federal Courthouse in Riverside for lunch, hosted by Judge Stephen Larson. Justice Jallow was traveling with Peter Tafah, another prosecutor of the ICTR. Both men were on a one-week visit to the Southland with Justice Douglas Miller and James Parkinson.

Justice Jallow was appointed by the United Nations Security Council in September 2003. Born in the Gambia in 1950, he studied law at the University of Dar es Salaam in Tanzania (1973), the Nigerian Law School (1976) and University College, London (1978).[1] However, Justice Jallow's father was a devoted Muslim, an imam, who was against his son going to law school. He gave his blessing only after Justice Jallow promised that he would dedicate his life to public service. Justice Jallow never wavered from the oath he made to his father.

Justice Jallow worked as state attorney in the Attorney-General's chambers in the Gambia from 1976 until 1982, when he was appointed Solicitor-General. He served as the Gambia's Attorney-General and Minister of Justice from 1984 to 1994 and subsequently as a Judge of the Gambia's Supreme Court from 1998 to 2002. In 1998, he was appointed by the United Nations Secretary-General to serve as an international legal expert to carry out a judicial evaluation of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia. He served as a legal expert for the Organization of African Unity and helped draft the African Charter on Human and People's Rights, which was adopted in 1981. He has also served the Commonwealth of Nations in various respects, including chairing the Governmental Working Group of Experts in Human Rights. Until his appointment as Prosecutor for the ICTR, Justice Jallow was a judge of the Appeals Chamber of the Special Court for Sierra Leone on the appointment of the United Nations Secretary-General in 2002, as well as a member of the Commonwealth Secretariat Arbitral Tribunal.

During our recent lunch, Justice Jallow gave some background on the court and the prosecutions. In November 1994, the United Nations created the ICTR. The court was formed to contend with the serious violations of humanitarian law that had been committed in Rwanda. The purpose of court was to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. The ICTR was established to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994.[2]

The ICTR is governed by its Statute, which is annexed to Security Council Resolution 955. The Rules of Procedure and Evidence, which the judges adopted in accordance with Article 14 of the Statute, establish the necessary framework for the functioning of the judicial system. The Tribunal consists of three organs: the Trial Chambers and Appeals Chamber; the Office of the Prosecutor, in charge of investigations and prosecutions; and the Registry, responsible for providing overall judicial and administrative support. The Security Council decided that the seat of the Tribunal would be located in Arusha, Tanzania.

Justice Jallow and Peter Tafah gave us some history on Rwanda. This was not the first time that large numbers of

1 The information about Justice Jallow was found at http://www.unictr.org/ENGLISH/factsheets/Jallow.htm.

2 The information about the International Criminal Tribunal for Rwanda was found at http://69.94.11.53/main.htm.

Rwandans had been murdered based on ethnicity. Between 1959 and 1994, there were a number of occurrences when hundreds and sometimes thousands were killed. Each time, people sought refuge in churches, school, and government buildings. In the past, the killers respected these places as safe havens, but not this time.

Justice Jallow spoke of the great breach of trust that occurred during this genocide. First, the government, which was sworn to protect its people, actually planned and implemented the slaughter of its own citizens. Tutsis who sought protection in government buildings were killed by Hutu government workers. The heads of the army and police, who were also obligated to defend the civilian population, instead sent the military out across Rwanda to eliminate Tutsi civilians. Medical doctors actually killed their patients or surrendered them to the militia to be slaughtered. Neighbors killed neighbors. Radio broadcasters and journalist used their tongues and pens to incite ethnic hatred and called on Hutus to kill Tutsis. The last breach of trust Justice Jallow discussed was committed by the clergy. Rwanda is largely Christian. When the Tutsis sought refuge in churches, the Hutu clergy often walked the refugees outside and surrendered them to the armed militia or opened the church doors and invited the militia inside. In one case, Mr. Tafah prosecuted a Hutu Catholic priest who had allowed his church to be bulldozed, killing the more than 1,000 Tutsi refugees inside.

The ICTR choose to concentrate on the leaders of the genocide and individuals like the priest who committed the most egregious offenses. According to Justice Jallow, the ICTR brought indictments against 92 persons from different parts of the nation. Of the 92, 56 have been convicted and 7 acquitted; 13 are fugitives; and the rest are imprisoned awaiting trial. The ICTR will remain open until 2011.

The ICTR is prosecuting this genocide to prevent it from happening again. The ICTR wants other African countries to absorb the lessons of Rwanda. According to Justice Jallow, this is the first time high-ranking individuals in a government in Africa have been called to account before an international court of law for massive violations of human rights on the continent. The ICTR is establishing important precedents for future international criminal courts and making fundamental contributions to peace and justice in the 21st century.

As the world becomes smaller, we need to work together to ensure such atrocities are neither repeated nor forgotten.

Jacqueline Carey-Wilson is deputy county counsel for the County of San Bernardino, President of the Inland Empire Chapter of the Federal Bar Association, a Director-at-Large of the RCBA, and editor of the Riverside Lawyer.

Photographs by Jacqueline Carey-Wilson

Peter Tafah, Judge Rick Fields, and Justice Hassan Bubacar Jallow

Justice Hassan Bubacar Jallow and Jacqueline Carey-Wilson

Judicial Profile: Hon. Jorge C. Hernandez

by Donna Thierbach

Judge Jorge Hernandez always seems to have a smile on his face, and one would never guess the interesting life he has lead. He seems to prove we can more than get by with a little help from our friends. Judge Hernandez was born in Tucson, Arizona, and was the fifth of eight children. Imagine having one sister and six brothers! When he was six years old, his parents separated, and his mother packed up the children with the intent to move to San Jose. However, their car broke down in San Bernardino and they never made it. The family spent their first three days in California at a San Bernardino Salvation Army. From there, they moved to Fontana, Los Angeles, Riverside and Rubidoux. Their mother supported them by working as a hotel maid and receiving some assistance from AFDC and food stamps. Nonetheless, they had to move a lot, because oftentimes the income was not enough to pay the rent. As a result, Judge Hernandez went to six elementary schools, two junior highs and two high schools. The free lunch program provided him the incentive to attend school, because at times that was the only food he received. There is a silver lining to every cloud, though, because the best thing that happened to him was when they moved to Riverside and he began attending North High School. At North, he discovered a circle of individuals and faculty members, including Ms. Knox, Ms. Rene and Mr. Moshier, who took an interest in him and were willing to help him achieve his goals. For example, Ms. Knox gave him various jobs at the school basketball and baseball games so he would have some money and bought him his only yearbook. Ms. Rene encouraged him to apply to college and made him stay after school until he completed his application.

Judge Jorge Hernandez (far right) and family

Judge Hernandez learned at an early age that without an education, there was no money, and without money, the power to control one's own life was diminished. So after graduating from North High School, he attended UCR and became active in student organizations. He was the chair of a theater group, Teatro Quinto Sol, as well as the Chair of Chicano Pre-Law and MEChA. Judge Hernandez's initial goal was to get a Ph.D. in Sociology and become a college professor, because he had an older cousin who had achieved that goal. However, by the time he discovered he had to take the GRE to attend graduate school, he had missed the test. He then asked what other test he could take and was told that the LSAT was the following week. Prior to this, he had never really considered becoming a lawyer, but he completed a couple of practice tests and took the LSAT as a walk-in. He then applied to three law schools, UC Davis, UCLA and UC Hastings. He applied to Hastings because he was told it had a strong La Raza Law Students Association. The only other thing he knew was that it was in San Francisco. He chose Davis and UCLA because he was now married with a baby on the way and heard they had good housing for married couples. Did I say married? He had met his wife Veronica in the summer of 1981 at the UCR Bridge Program. This was a course that introduced new college students to college life and assisted them in adjusting to it. It must have been a good program, as both he and his wife graduated from UCR.

After receiving rejection letters from UCLA and Davis, Judge Hernandez was surprised to receive a phone call from Hastings requesting a phone interview. When he was accepted, he could not believe it, and neither could his wife when he told her they were moving to San Francisco to go to law school. The first time he saw the school was when he drove there to attend, and he had no idea it was just two buildings downtown.

Judge Hernandez knew when he graduated from law school he wanted to move back to the Riverside area, as that was where all of his friends and family lived. He had clerked for the Riverside County Public Defender's office, and when he was offered a job, he immediately accepted, because his family had expanded to two children.

Judge Hernandez worked for the Public Defender's office from 1989 to 1994. He then went into private practice and worked for the Conflict Defense Panel from 1994 to 2002 and the Conflict Defense Lawyers from 2002 until his appointment. He decided to seek a judgeship because he was ready for a change. He had been an effective advocate, but he felt he wanted to do more, and a judgeship presented him with the opportunity to be more than an

advocate. He knew it would be a challenge, and he has not been disappointed.

Judge Hernandez said he feels like he won the lottery. He has a profession, a wonderful wife and now four sons. His two oldest attend UCR, and the younger two are still in high school and junior high. Only his oldest is interested in the practice of law, but his interest is not in criminal law, but rather international law.

Each Friday evening, there is a transformation as Judge Hernandez becomes "Mr. Blue," the host of his own radio program from 10 p.m. to midnight on the UCR radio station. He and his wife love music and dancing, so much of their free time revolves around music. As if that is not enough to do, he also enjoys fixing up old cars, so he and his wife spend a lot of time at car shows. Currently, he has five cars that he has restored. Until recently, his wife Veronica worked at UCR Extension. She is involved in the Riverside Museum Family Village Festival, and after organizing a cultural event of poetry reading, they plan to organize more events. Judge Hernandez also devotes time to motivational speaking, something he has done since he was an undergraduate. He feels that if he could succeed, then so can anyone. He said he did not do it alone, there were a lot of amazing people who helped, but he wants kids to know they, too, do not have to do it alone.

Donna Thierbach, a member of the Bar Publications Committee, is Chief Deputy of the Riverside County Probation Department.

Lawyering with Berettas – A Review of Judge Advocate Experiences in Northern Iraq

by Stevan C. Rich

The M9A1 Beretta 9-mm pistol is a wonderful sidearm, at least if you don't have to use it. It has a sexy Italian name. It's reliable and accurate, comes with a 15-round clip, and is available for free because it's standard issue through the military supply system. Moreover, it is made in America. If you do have to use it – that is, really use it – its one drawback, a relative lack of stopping power compared to a .45-caliber pistol, doesn't matter much, because you are in a world of really serious hurt for other reasons.

As officers with a certain amount of status, Judge Advocates (JAs) usually carry a Beretta. Indeed, most officers carry a sidearm, because their real job is to lead, not shoot. (In 19th-century warfare, noncommissioned officers also carried pistols. Their job was to shoot any of their troops who might make the mistake of trying to leave the battle formation as it approached the enemy.) So by its very nature and history, a sidearm denotes a certain status. Wasn't Saddam Hussein often pictured with a pistol on his hip or in his upraised hand? He was the leader, not the shooter. George Patton had his pistol, too.

This article is to praise two Beretta-packing lawyers – Majors John Breland and Jim Wherry. John is a private practitioner from Clinton, Mississippi, who was activated to serve with the 431st Civil Affairs (CA) Battalion in support of the 101st Airborne Division (Airmobile). (He later studied Arabic in an intensive one-year program in Cairo. And then he redeployed to Iraq in 2007.) Jim Wherry deployed to Iraq in 2008. He is the International Law Officer with the 448th CA Bn. at Ft. Lewis, Washington. (More about Jim later.)

I was privileged to serve on active duty as an Army Reserve JA and then to deploy to Iraq in early 2004 to work on the Iraqi court system in Nineveh Province. While I was outside the Forward Operating Base (FOB), my Beretta was in my drop-down holster. (And my M 16A2 rifle was in my arms.) A double load of ammunition was in ammo pouches clipped onto my body armor. The Army Reserve had activated me and sent me to Mosul, a city divided between Shi'a and Sunni Arabs, Kurds, and numerous tribes and clans.

With two weapons to carry, my firepower was certainly heavy, but it gave me some comfort, because I did not think all Iraqis would be impressed with my lofty status as a Beretta-toting US Army JA. I wanted the M 16 available to impress the bad guys. The M9 was simply visible to impress the good guys as I promoted the reestablishment of the Rule of Law.

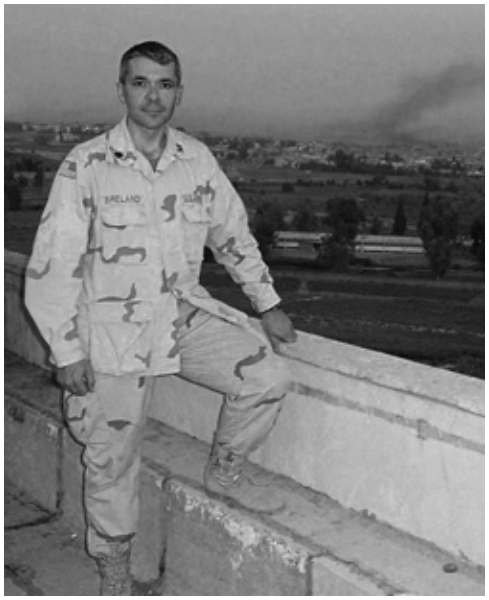
In fact, though, my work was largely physical. After all, much of the Rule of Law lawyering was done by my predecessors. This article is a tribute to those fine, brave officers who work so hard to help the Iraqi legal system get going again during the occupation.

Once the invasion was launched, US forces swept through Iraq like greased lightning. And before they knew it, the 101st Division was occupying northern Iraq. Then-Major General David Petraeus was the division commander, and he had an excellent sense of what needed to be done. In an ad hoc process, he managed to get a squadron of some two dozen JAs and other Judge Advocate personnel in place, scurrying about, assessing everything and everyone associated with the remnants of the Iraqi legal system.

John Breland and other JAs made the main effort in this regard. Courthouses were visited – all were pillaged by looters and needed repair. Lawyers were interviewed – how did they fit into the old regime? Judges were assessed – did they follow (or even know) the law, or were they corrupt? Like the courthouses, the jails and prisons were gutted. (Iraqi prisons had been emptied by Saddam in October 2002, when he granted a general amnesty; thus, thousands of criminals roamed the country.) And following all the assessing, action was taken to refurbish the courthouses, jails and prisons, train the lawyers, restart the law schools, provide managerial support and training, and much more. The JAs were to establish some sense of order within the area of responsibility for the 101st.

General Petraeus was highly successful in this regard. Indeed, streets and newly refurbished civic buildings were named in honor of him and the 101st. Nineveh Province and Mosul City, at least, looked like a model for what Iraq could become, with enough time and money. The Rule of Law, and not of tyranny, was sure to reestablish itself in the province.

Sadly and tragically though, early planning for the overall post-invasion occupation had been quashed. (The problems in northern Iraq were typical of the whole country.) Our lack of planning was compounded by ill-considered decisions, such as the disbanding of the Iraqi Army and a wholesale de-Ba'athification policy. While the 101st was



Major John Breland on roof overlooking Mosul

largely successful in its ad hoc effort, we failed to remember history and glibly assumed that everything would magically fall into place, without forces or plans.

Still, my job – as the single successor to the flood of JAs – looked easy. That is, I had inherited the 90% solution from John Breland. So I and my legal assistant revisited courts, interviewed judges, monitored training programs, and pushed as hard as we could for our legal slice of the redevelopment pie. Traveling throughout northern Iraq with the Beretta in my holster was an adventure.

But then the news about the deplorable treatment rendered by US forces at Abu Ghraib prison came out, and we – the occupying forces concerned with restarting civil society – felt the sickening sensation that we knew would overshadow all of the outstanding effort and achievement of the 101st. Nevertheless, our forces continued the hard work of our predecessors. But it took a long time before achievements in establishing the Rule of Law overcame the stigma of Abu Ghraib.

My contacts within the Iraqi legal system understood quite correctly that Abu Ghraib was an aberration. (In fact, I think Iraqis in general were inured to the concept of torture from their years of experience with Saddam.) They seemed confident that we would sort out our bad apples. And my assessment of the Iraqi legal system remained positive.

Indeed, I looked at the long main corridor of the Mosul Courthouse and reflected on how similar it was to the long main corridor of the Riverside Courthouse. Lawyers and their clients milled about, waiting to go in to see the judges. Sometimes they actually came out of the chambers and courtrooms with some sort of resolution to their problem. (Whether bribes were part of the resolution was well beyond any assessment that I could do. Using my Beretta to solve the bribery problem was not a viable option.) I determined that no single Beretta-packing JA could effectively monitor the caseload of the province, so I recommended no further involvement on our part. It was time for the Iraqis to run their own courts.

We continued to support and enhance the judges, but in a much more low-keyed effort. For example,

numerous modest used automobiles were purchased for use by the judges to improve their status, mobility, and security. (They did not want SUVs, which were frequently targeted by Improvised Explosive Devices (IEDs).) We also developed and provided a simple "customer satisfaction" survey, so they could measure for themselves how well they were doing.

In Baghdad, where the real political power and action of Iraqi society resides, Beretta-packing JAs worked hard with the Iraqi Central Criminal Court (CCC) system to prosecute terrorists and other bad guys. They had to learn and understand the peculiarities of Iraqi justice. Remarkable flexibility was shown as they learned how photographic evidence was often literally seen as most persuasive. For example, if someone was captured during an attack on US forces, he was photographed with his weapons nearby. Iraqi judges found this evidence, although posed, to be convincing. Moreover, Iraqi judges were particularly hard on foreigners who were captured. To this day, CCC judges travel to the provinces to prosecute cases that are too dangerous for local judges to handle.

However, these continuing successes within the Iraqi legal system were not enough to overcome the deteriorating security situation. From the outset, we had failed to recognize that Iraq is a society based on honor and revenge. Our overwhelming invasion had dishonored many elements of the Iraqi and Sunni hierarchy. With de-Ba'athification, we eliminated many qualified personnel from public life simply based on their status. When the huge Iraqi Army was disbanded, the soldiers had no work. They carried off their weapons and were on the streets. We kicked all these people out of their jobs, and they lost their status as breadwinners. Thus, they were eager to take revenge. They did so by collaborating with Al Qaeda operatives and by targeting their ancient rivals, the Shi'as. In return, because they had been dishonored, the Shi'as took their revenge. US forces were caught in the middle, and not even JAs with Berettas could improve the deteriorating situation.

Fortunately, but after too many years, we took a step back to reassess the situation. The previous ineffective methods were dropped, and General Petraeus was brought back to rectify the problem. JAs with Berettas were part of the solution.

The main effort of "the Surge" involved getting our soldiers back into the neighborhoods and demonstrating that we were committed to providing security to the people nearby. Instead of one-hour patrols launched from the FOBs, many small bases were established in the neighborhoods that needed increased security. That 24-hour-a-day presence deprived the insurgents of their 23-hour-a-day access to the neighborhoods. We also (finally) got down to learning what Iraq was all about. The concept of the Human Terrain was born. (Presently there are 26 Human Terrain Systems Teams advising Brigade Combat Teams (BCTs) in Afghanistan and Iraq. These teams consist of five to nine social scientists, working as U.S. government employees.)

Kirkuk Law School Dean Fareed with Majors Jim Wherry and Rob Blackmon

Mosul Court before rehabilitation

The new Mosul Court

As I mentioned above, Major Jim Wherry is one of those Beretta-packing JAs working on the Iraqi Legal Human Terrain. In his civilian life, Jim is a government employee working as a Legal Assistance attorney at Ft. Wainwright, Alaska. Now part of a Provincial

Reconstruction Team in Kirkuk, he has nine important Rule of Law projects underway.

One, the local Criminal Justice Council brings together officials from the courts and police system. In these meetings, they discuss and resolve issues such as human rights and abuses in the jails, warrant-based arrests, and prosecutions. All ethnic groups are represented, and the Iraqis run the meetings.

Two, every courthouse in the province is visited at least once a quarter. A new main courthouse in Kirkuk will replace the old, inadequate one.

Three, publicity to promote legal awareness throughout the province is underway in various media. This campaign will also extend to the grade schools and secondary schools by means of a "McGruff"-type mascot.

Four, local bar associations are promoting legal clinics for the poor. These clinics include seminars focusing on women's rights.

Five, a 10-Year Plan is underway to reform and promote legal rights. It is being developed by the Kurdistan Regional Government. The Kirkuk province will develop a similar plan in the near future. These plans involve the courts, police, and correctional systems.

Six, the Kirkuk Law School recently received 427 Arabic law books from USAID. The USAID grant also provides library furniture and computer equipment. (The Baghdad Ministry of Higher Education is working on a curriculum to develop a 21st-century legal education program. Under Saddam, the Iraqi legal system was based on the civil law system inherited from the Fifth French Republic. In other words, Iraqis had not had access to developing European civil law for over 50 years.)

Seven, the Provincial Police Transition Team, which includes US Army police personnel, is working with Iraqi police to improve their efficiency. This includes budgeting as well as coordination with Baghdad officials.

Eight, Kirkuk Province does not have a prison, but the Kirkuk main city jail serves as the pretrial confinement facility. The team visits regularly to ensure that women and children are housed separately and that international standards as to food, clothing and hygiene are maintained.

Ninth and last, in keeping with goals set by the US Embassy, Kirkuk has developed and is operating a forensics lab. (I do not know if "CSI" is available on Iraqi television.) A new, larger facility is being planned.

Will these efforts eventually succeed? While the Surge calmed things down, none of its major political goals were fulfilled. Our efforts to understand the complexities of Iraq will necessarily continue, because there is no other choice. The Iraqis can resolve their problems, but they need continuing help. Moreover, Iraq is too important to fail, so the continuing effort of our Beretta-packing lawyers is vital.

Finally, I want to say the greatest Judge Advocate heroes of Iraq are those who lost their lives. Chief Warrant Officer Sharon T. Swartworth (November 7, 2003), Sergeant Major Cornell W. Gilmore (November 7, 2003), Sergeant Michael M. Merila (February 15, 2004), Corporal Sascha Struble (April 6, 2005), Major Michael Martinez (January 7, 2006), and Corporal Coty J. Phelps (May 17, 2007) are JAs and Judge Advocate personnel who died while promoting the Rule of Law in Iraq or Afghanistan.

We live in a society where 1% percent of our population is now fighting for the nation, while the other 99% worries about their credit ratings. With this in mind, I hope that every time you see a service member, pay for their meal at the restaurant, give up your first-class airline seat, or simply say, "Thank you, a friend of mine was a Beretta-packing lawyer in Iraq and I am proud of what you and the military have done for our nation."

LTC (Ret.) USAR Stevan C. Rich was deployed in Iraq (2004) and then in Djibouti (2007-2008). He is currently training as a Human Terrain Systems Team Leader for a deployment to Afghanistan later this year.

Painting Your Products Green: How Not to Lose Your Head

by Danielle Sakai

As the market for environmentally friendly goods increases and consumers continue to focus on the environmental impacts of their purchases, manufacturers seeking to tap into this $200 billion market[1] are facing a skeptical consumer base and growing concerns about regulatory compliance and litigation. Those manufacturers seeking to enter the world of environmental sustainability must move forward with eyes wide open or risk the backlash of being labeled as a "greenwasher",[2] or worse, being sued by a consumer group or competitors.

The FTC "Green Guide"

Despite the focus on marketing environmentally friendly products, there are no applicable "green" certification programs or regulations. The Federal Trade Commission (FTC) has attempted to fill this gap with its "Green Guide," first issued in 1992 and updated in 1998. [3]The FTC's guidelines were intended to ensure that "environmental claims are not deceptive and are adequately supported, but they are not law."[4]

The FTC's Green Guide states the following general principles related to environmental marketing:

- An environmental marketing claim should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product's packaging, a service, or to a portion or component of the product, package or service.[5]
- An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication.[6]
- An environmental marketing claim that includes a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. In addition, the advertiser should be able to substantiate the comparison.[7]
- It is deceptive to misrepresent, either directly or indirectly, that a product, package or service has a general environmental benefit, is degradable or biodegradable, compostable, recyclable, or refillable, contains recycled content, results in a source reduction, or is ozone-friendly unless those statements are true.[8]

Although the Green Guide provides examples of deceptive practices, the Guide does not provide any regulations about what is an appropriate claim and what is simply greenwashing.

The number of claims related to environmental marketing and advertising has increased, prompting the FTC to begin the process of reviewing the Green Guide earlier than expected.

Six Sins of Greenwashing

In November 2007, the environmental marketing firm TerraChoice Environmental Marketing, Inc. released a study called "The Six Sins of Greenwashing".[9]

As part of its research, TerraChoice found that all but one of the more than 1,000 randomly surveyed common consumer products marketed as environmentally friendly were guilty of greenwashing.[10] According to TerraChoice, the six sins of greenwashing are the:[11]

1. Sin of the Hidden Trade-Off
2. Sin of No Proof
3. Sin of Vagueness
4. Sin of Irrelevance
5. Sin of the Lesser of Two Evils
6. Sin of Fibbing

1 According to the Natural Marketing Institute, as of 2005, the United States market for purchasing goods based upon environmental and social impacts exceeded $209 billion. Mara, Janis I., *Consumers Urged to Scrutinize "Eco-Friendly Claims,"* Inside Bay Area, Mar. 9, 2008.

2 "Greenwashing" is defined by the Concise Oxford English Dictionary, 10th Edition, as "disinformation disseminated by an organization so as to present an environmentally responsible public image."

3 16 CFR Part 260.

4 *See* Abram, Susan, *Angelenos Find Gray Areas in Claims About What's Green,* The Daily News of Los Angeles, Mar. 14, 2008, p. A1.

5 16 CFR Part 260, § 260.6(b).

6 16 CFR Part 260, § 260.6(c).

7 16 CFR Part 260, § 260.6(d).

8 16 CFR Part 260, § 260.7.

9 TerraChoice Environmental Marketing Inc., *The "Six Sins of Greenwashing™" A Study of Environmental Claims in North American Consumer Markets*, Nov. 2007, available at http://www.terrachoice.com/files/6_sins.pdf.

10 *Id.* at p. 1.

11 *Id.* at pp. 2-4.

Some of these "sins" are fairly straightforward. If you claim to be "natural," "organic" or "environmentally friendly," your claim must be clear, honest and verifiable. However, the other three "sins" require a bit more explanation.

The "'Sin of the Hidden Trade-Off' is committed by suggesting a product is 'green' based on a single environmental attribute . . . without attention to other important, or perhaps more important, environmental issues . . . ."[12]

"The Sin of Irrelevance is committed by making an environmental claim that may be truthful but is unimportant and unhelpful for consumers seeking environmentally preferable products."[13] For example, TerraChoice found that some products committed this sin by claiming to be "CFC-Free" when all CFC products have been banned for nearly two decades.

Finally, the Sin of the Lesser of Two Evils is committed by "'green' claims that may be true within the product category, but that risk distracting the consumer from the greater environmental impacts of the category as a whole."[14]

Not only are the "Six Sins of Greenwashing" a tool for the consumer wary of "green" claims, but they are also a guide on what not to do for manufacturers and marketers.

The Perils of Greenwashing

Unfortunately, neither the "Green Guide" nor avoiding the "Six Sins of Greenwashing" can keep manufacturers and marketers out of hot water when products not traditionally thought of as "green" are advertised as such.

In *Holk v. Snapple Beverage Company* (D.N.J. 2008) 574 F.Supp.2d 447, the Snapple Beverage Company was sued for allegedly violating New Jersey's Consumer Fraud Act because it labeled its product as "All Natural," despite high-fructose corn syrup being in the product. Although the case was dismissed because the Federal Food, Drug and Cosmetics Act (21 U.S.C. § 301) preempted the New Jersey state consumer protection laws, Snapple incurred significant costs in legal fees and publicity related to this lawsuit.

A similar lawsuit was filed against the Gerber Products Company; however, Gerber did not have as favorable a result. In *Williams v. Gerber Products Company* (9th Cir. 2008) 523 F.3d 934, consumers brought a class action suit claiming that Gerber's fruit juice snack violated the Unfair Competition Law (Bus. & Prof. Code, § 17200), because it allegedly featured imagery of fruits not contained in the product, the only fruit juice in the product was grape juice concentrate, and it was described as made from "all natural ingredients," despite the fact that the most prominent ingredients were corn syrup and sugar. Unlike the court in *Snapple*, the Ninth Circuit found that such packaging "could likely deceive a reasonable consumer." (*Williams v. Gerber Products Company, supra,* 523 F.3d at p. 939.)

Other companies, such as Cadbury Schweppes Americas Beverages and Kraft Foods, have faced claims of greenwashing. However, rather than engage in costly litigation, these two companies decided to introduce new labeling for their products, 7Up and Capri Sun, respectively, in order to avoid threatened lawsuits by consumer protection groups over use of the term "All Natural" to describe products containing high-fructose corn syrup.[15]

Some of the most interesting cases related to greenwashing were not brought by consumers, but by competitors.

In *Sanderson Farms Inc. v. Tyson Foods, Inc.* (D.Md. 2008) 547 F.Supp.2d 491, a competitor sued Tyson over packaging that claimed that its chickens were "raised without antibiotics." The court enjoined Tyson's labeling, and Tyson subsequently agreed to change the label because its chickens were given feed containing antibiotics and their eggs were injected with an antibiotic prior to hatching. Tyson is also subject to a class-action lawsuit from consumers because of the "antibiotic-free" labeling.

In *All One God Faith Inc., doing business as Dr. Bronner's Magic Soaps v. The Hain Celestial Group, Inc.*, San Francisco Superior Court Case No. CGC-08-474701, Dr. Bronner's is claiming that its competitors falsely labeled and advertised their cosmetics as being "organic" or "made with organic ingredients." Dr. Bronner's is also challenging the voluntary standard and certification offered by Organic and Sustainable Industry Standards, Inc. ("OASIS"). OASIS provides voluntary organic production standards related to health and beauty products. This hotly contested case will have far-reaching consequences related to the regulation of environmental marketing claims and those voluntary entities that certify products as being "environmentally friendly."

Until there are clear rules, not just guidelines, related to green marketing, a good rule of thumb is to make sure that all marketing claims are clear, completely honest about the product as a whole, and verifiable.

Danielle Sakai is a partner with Best Best & Krieger LLP in Riverside, where her practice focuses on environmental and real property litigation.

12 *Id.*
13 *Id.*
14 *Id.*

15 *See* Cadbury Schweppes Americas Beverages' January 12, 2007 press release.

Opposing Counsel: Pamela J. Anderson Walls

by L. Alexandra Fong

Breaking New Ground: Riverside County's First Female County Counsel

On February 10, 2009, Pamela J. Anderson Walls was appointed County Counsel for the County of Riverside, culminating approximately 23 years of public service and becoming the first female County Counsel in the 116-year history of the County of Riverside.[1]

Pamela J. Anderson Walls

Pam was raised in Santa Barbara. In high school, she worked at a local restaurant that failed to treat its employees fairly. After she complained to labor standards enforcement, the restaurant changed its practices, and Pam knew then that she wanted to be an attorney so she could do the right thing for others and resolve their problems.

She attended the University of California at Santa Barbara, where she majored in political science. She attended law school at Santa Barbara College of Law and graduated in 1986. While in law school, she worked full-time as a court clerk for the Santa Barbara Superior Court during the week and as a law clerk for a local attorney on weekends. She met her husband, Bill, at the Santa Barbara County Law Library while researching issues to prepare a trial brief for a trial that was scheduled to commence the following Monday. Although she had never prepared a trial brief before, Bill graciously volunteered to assist her and romance blossomed.[2]

While in law school, she also worked as a law clerk for the Santa Barbara City Attorney's office while Bill worked in Los Angeles. After their marriage, neither wanted to live where the other worked, so they decided to move to Riverside.

Pam began her career as an attorney with the County of Riverside in 1986. During her tenure as a deputy county counsel, she worked with Jay Orr, currently the Assistant County Executive Officer, while he was at the District Attorney's office. She was a member of the Leo A. Deegan Inn of Court and section head of the Women's Law Section of the Riverside County Bar Association, which supported qualified women for judicial positions within the county. She hopes to see the section resurrected.

In early 2001, she departed Riverside for the Oceanside City Attorney's office so she could care for her mother, who loved the beach. Ultimately, she served as Assistant City Attorney and Interim City Attorney for Oceanside, before returning to Riverside in November 2005. As Assistant County Counsel, she headed the Code Enforcement – General Litigation section of the office. Under her leadership, the section grew from two attorneys to ten attorneys.

Now, as County Counsel, Pam heads a department consisting of 72 staff members, including 44 attorneys, located in four offices (Downtown Riverside, County Farm, Murrieta, and Indio).[3]

Every Tuesday, Pam sits with the county's legislative body, the Board of Supervisors, currently comprised of Bob Buster (First District), John Tavaglione (Second District), Jeff Stone (Third District and Chair of the Board), Roy Wilson (Fourth District) and Marion Ashley (Fifth District and Vice-Chair of the Board). The weekly board meeting may be viewed live at http://www.countyofriverside.us (follow the link to "Board of Supervisors Meeting"). She also sits with the Local Agency Formation Commission (LAFCO) and advises both the board and LAFCO on all legal matters. She will begin working with the grand jury shortly.

With an economic crisis facing the county, the office has been required to reduce staffing amid budget cuts. Her hard-working and conscientious staff has enabled the office to provide quality service with fewer resources. The office will be moving into the Regency Tower by year's end, which will also be occupied by the District Attorney's office and Probation Department administration.

Pam commutes daily from Carlsbad and has a great carpool buddy who loves to drive, leaving Pam able to work in the car during the approximately two-hour

1 On December 31, 2008, Pam had been appointed Interim County Counsel, upon the retirement of Joe S. Rank.

2 The attorney was pleased with Pam's work on the trial brief.

3 The attorneys and staff at the County Farm, Murrieta, and Indio offices deal solely in juvenile dependency law.

commute. She is never without her Blackberry, which allows her to respond to the hundreds of emails she receives daily.

Pam's husband and three children, Jessica (11), Alexandra (12), and Nick (19), provide unqualified support. She hopes to travel to Europe in the future with them.

Pam enjoys working for the county because it is a collegial place for attorneys. It provides a good and professional atmosphere for new attorneys to grow and thrive. The office has an internship program, to encourage and mentor future attorneys. Anyone interested in becoming an intern at the County Counsel's office is invited to contact Bobbi Sumrall at (951) 955-6300.

L. Alexandra Fong, a member of the Bar Publications Committee, is a Deputy County Counsel for the County of Riverside.

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How to Protect Against Discrimination and Harassment in the Workplace

by Tom Prescott

Less than 20 years ago, I met with cynicism from faculty advisors when proposing the topic of sexual harassment in the workplace for an MBA project. They did not believe it was a subject worthy of serious academic study. Today one would be hard-pressed to find any organization, public or private, that does not deal regularly with discrimination and/or harassment issues. Why the dramatic upswing in complaints of this nature?

In part, this may be explained by the ongoing expansion of what is protected from discrimination. When originally proposed, Title VII of the Civil Rights Act of 1964 created four protected classes: race, color, national origin, and religion. Sex was added as a fifth protected class in an unsuccessful effort to defeat passage of the bill. Today, California and federal laws identify an additional nine protected classes: ancestry, age, physical disability, mental disability, medical condition, marital status, pregnancy, sexual orientation, and gender identity. Apparently genetic information is next on the horizon.[1]

In addition to broader coverage, there also has been an increasing awareness among employees of their rights, perhaps attributable to the mandatory posters employers are required to display in the workplace and/or the regular harassment training provided to employees and managers. In particular, there appears to be developing a widely held but mistaken belief that employees do not need to tolerate any form of "harassment" in the workplace. Employees seem to believe that if the boss is a jerk, then his or her behavior must be harassment.

Unfortunately for the affected employees, discrimination statutes do not prevent the boss from being a jerk. The protection arises only if the boss is being a jerk (i.e., harassing or discriminating) because of a protected class. As the U.S. Supreme Court so succinctly stated:

> Title VII is not a "general civility code" designed to eliminate the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.[2]

That statement is indicative of the court's overall attitude towards discrimination statutes, which has been more restrictive than expansive. The court has been fine-tuning its assessment of discrimination complaints over the years, but it is now clear that to succeed, an employee usually must demonstrate that a "tangible job action," also referred to as an "adverse employment action," occurred. This means a significant change in employment conditions as a result of the discriminatory behavior and includes such decisions as hiring, firing, failing to promote, reassigning with significantly different (usually less favorable) duties, or altering significantly the employee's benefits. In short, there must be significant and objectively tangible harm to the employee.[3]

As it suggests, a tangible job action is more than a threat; it is an actual negative consequence resulting from discriminatory behavior. These can be the hardest claims to defend because they necessarily involve someone in a position of power making a decision that adversely affects the employee or applicant. Often this will result in the shifting of the evidentiary burden to the employer to prove some other nondiscriminatory basis for the decision. While this is not impossible to demonstrate, once the hint of a discriminatory animus is in the air, it can be difficult to disabuse the trier of fact of that allegation.

Even in cases without a tangible job action, the court has recognized that discrimination or harassment is possible under the "hostile work environment" theory. However, it was also under this heading that the court determined that Title VII is not a general civility code. The court requires proof of conduct so "severe or pervasive" as to alter the conditions of the victim's employment and create an abusive working environment. Generally that means that sporadic, non-severe conduct will be insufficient to support a claim of discrimination.

In addition, the court has recognized an affirmative defense for employers in cases where no tangible employment action has occurred. The employer must show that:

1. It exercised reasonable care to prevent and correct promptly any discriminatory behavior; and
2. The victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.[4]

California law is not quite so forgiving because an employer is strictly liable for the harassing behavior of its supervisors,

1 See copy of the proposed regulations for the Genetic Information Nondiscrimination Act at http://edocket.access.gpo.gov/2009/pdf/E9-4221.pdf.

2 *Faragher v. City of Boca Raton* (1998) 524 U.S. 775.

3 See, e.g., *Douglas v. Donovan* (D.C. Cir. 2009) 559 F.3d 549.

4 *Faragher v. City of Boca Raton, supra.*

even if it knew nothing of the conduct. However, even in California, there is a limited defense based on the avoidable consequences doctrine. While this does not avoid liability, it does allows the employer to reduce monetary damages by demonstrating that:

1. It took reasonable steps to prevent and correct workplace discrimination;
2. The employee unreasonably failed to use the preventive and corrective measures that the employer provided; and
3. Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.[5]

Of course, the better course of action is to avoid discrimination complaints altogether. One key element in achieving that goal is developing a strong, easy-to-understand policy that prohibits discrimination, including harassment, in the workplace and that sets up a reasonable reporting mechanism for people who feel that they have been discriminated against. As a general rule, the reporting procedure should permit the employee to bypass the immediate supervisor, who is often the person engaged in the discriminatory behavior.

Obviously, the very best policy does no good at all if it just sits on the shelf. The employer has to distribute the policy widely, train employees and management regularly on the contents and requirements of the policy, and "walk the walk" in the workplace. This needs to be more than just a run-of-the-mill company policy; the commitment to preventing discrimination has to become part of the corporate culture in order to be truly successful.

The days when discriminatory behavior could be ignored are long gone. Every employer needs to be aware of the issues and make every effort to address employee concerns in a timely manner in order to avoid discrimination and its attendant lawsuits and damages.

Tom Prescott is currently the Employee Relations Division Manager for Riverside County. He has been a labor and employment lawyer since 1989, having practiced in Canada and Washington before moving to Riverside in 2002.

5 *State Dept. of Health Services v. Superior Court* (McGinnis) (2003) 31 Cal.4th 1026.

Tort Reform – Unintended Consequences

by Jean-Simon Serrano

Oftentimes, well-intentioned legislation can have far-reaching and unintentional consequences. A great example of this is Civil Code section 3333.4, or "Prop. 213" as it is commonly known among those in the field of personal injury litigation.

Mr. Patterson, a client of mine and a retired factory worker, was driving home from the American Legion Hall last year when he was broadsided by a well-known company's parcel delivery truck, the driver of which had run a red light. The twisted hulk of metal that had been Mr. Patterson's car had to be cut apart so paramedics could rush him to the hospital for life-saving treatment. His right leg was so badly injured in this wreck that it required amputation. Because his wife had recently fallen ill, Mr. Patterson had unknowingly let his auto insurance lapse. As a result, he was an uninsured motorist on the date of the accident. The defendant truck company had full coverage.

Civil Code section 3333.4 states that a person "shall not recover non-economic losses to compensate for *pain, suffering,* inconvenience, *physical impairment, disfigurement,* and other nonpecuniary damages if . . . [¶] . . . [¶] (2) [t]he injured person was the owner of a vehicle involved in the accident and the vehicle was not insured . . . ." (Civ. Code, § 3333.4, subd. (a), emphasis added.)

Mr. Patterson's case provides a clear example of the problems surrounding Prop. 213. As a retiree, he has no loss of income. As an amputee, he has been provided a prosthetic limb and has minimal future medical expectations. Medical bills for the amputation come to roughly $3,500. Though his driving on the date of the accident was flawless, and there is no question that *he in no way contributed* to the occurrence of the accident, because of Prop. 213, Mr. Patterson will receive *nothing* for the excruciating pain he suffered at the time of the accident. He will not be compensated for the daily, constant pain he still experiences when he attempts to wear his prosthetic leg – pain which is so great, he often simply can't wear the prosthesis and must use crutches to get around. Phantom limb pain, so severe it often wakes him up in the night, will go unaccounted for. His disfiguring injuries, along with the inability to drive, run, walk, or continue his volunteer duties as a crossing guard for a local elementary school, entitle him to absolutely nothing from the driver who carelessly caused all of these injuries. Furthermore, he is now unable to continue to look after his wife, whose illness has worsened in recent months.

The intention of Prop. 213 was to curb the number of uninsured motorists on the road by pressuring people to get insurance. Whether it has been successful in doing this is doubtful. What was unintended but is very clear is the effect this bit of legislation has had on people such as my client, Mr. Patterson.

To make matters worse, plaintiffs in Prop. 213 cases often have a very difficult time finding representation, as most plaintiffs' personal injury attorneys must summarily refuse such cases because the limitations on recovery imposed by Civil Code section 3333.4 make them impractical for contingent fee representation. Thus, this legislation also has the unintended consequence of forcing such plaintiffs to proceed in pro per, if at all.

Thankfully, there are certain exceptions to Prop. 213. If the culpable party is convicted of driving while under the influence, Prop. 213 does not apply. (Civ. Code, § 3333.4, subd. (c).) This is the only exception specifically provided for in the language of the statute.

Other exceptions, however, have been developing over the years through case law. One such exception deals with those driving company vehicles in a

worker's compensation setting. *Montes v. Gibbens* (1999) 71 Cal.App.4th 982 held that Civil Code section 3333.4 does not apply to an employee driving the employer's motor vehicle at the time of an accident. Thus, the plaintiff in *Montes* was not precluded from recovering for his pain and suffering, despite the lack of personal insurance on the company vehicle he was driving at the time of the accident.

Another exception was created in *Hodges v. Superior Court* (1999) 21 Cal.4th 109, where the Supreme Court of California held that Civil Code section 3333.4 did not apply where the injuries were caused by a manufacturing defect of the vehicle. In *Hodges*, the uninsured plaintiff's gas tank ruptured when he was rear-ended.

A more recent exception was found in *Ieremia v. Hilmar Unified School Dist.* (2008) 166 Cal.App.4th 324. There, the Court of Appeal for the Second District held that Prop. 213 did not apply to a wife who was legally the owner of a vehicle when she did not have actual or constructive knowledge of the ownership. In *Ieremia*, the uninsured motorist was driving a car which, unbeknownst to her, had been purchased by her husband days before the accident. In what was perhaps a bit of a stretch, the court concluded that, as a matter of law, the plaintiff was not an "owner" of the uninsured vehicle for purposes of Civil Code section 3333.4, and thus that the plaintiff was entitled to recover noneconomic damages such as pain and suffering.

While there is, perhaps, nothing wrong with the intended goal of seeing that all drivers on the road have insurance, Civil Code section 3333.4 is not the best means to this end. Prop. 213 seems ill-suited to achieving its intended goal, and many, if not most, California drivers are completely unaware of its effects. Instead of having the intended deterrent effect, it is often not until after a tragic accident that many, such as Mr. Patterson, will ever learn of the horrible consequences to innocent parties – and at that point, it is often too late.

For those who do have coverage and who are injured by an uninsured motorist, uninsured motorist coverage is essential; indeed, it is required by Insurance Code section 11580.2 for all policies in California. However, one can opt out with a written waiver. I, and the firm where I work, Heiting & Irwin, encourage everyone to maintain *maximum* uninsured and underinsured motorist coverage on their automobile insurance policies. For a minimal expense, one can ensure that one will have full coverage in the event of a tragic accident. Further, having such coverage allows one to set one's level of coverage, rather than being constrained by the amount of coverage carried by the tortious party.

In the meantime, my office will be working to see if Mr. Patterson may be within one of the exceptions to Prop. 213, or if an exception may be extended to him. Mr. Patterson's case is truly unfortunate, and one that certainly merits an exception to this heavy-handed legislation.

Jean-Simon Serrano, an associate at Heiting & Irwin, is Secretary of the Riverside County Barristers.

Mental Health Court Celebration

by Maura Rogers

On May 14th in Department 1 of the Riverside County Historic Courthouse, the first Mental Health Court Celebration took place. This well-attended commemoration brought together Mental Health Court judges (past and current), agencies, departments, program vendors and clients who participate in and support Riverside County's Mental Health Court (MHC). MHC was created in 2001 in a collaborative effort by many who were present at the celebration.

Presiding Judge Tom Cahraman was Master of Ceremonies for the event. Judges Becky Dugan, Richard Fields, Jean Leonard, Bernard Schwartz, Roger Luebs, and Janice McIntyre attended and received special certificates for having served as MHC judges. Judges Paul Zellerbach and Paul Dickerson, who were not able to be present, also received certificates. Judge Tom Douglass, Indio's current MHC judge, received a certificate for his leadership in establishing an MHC in Indio two years ago.

A Board of Supervisors' proclamation was presented by Chairman Jeff Stone to Judge McIntyre. Supervisor Stone spoke about the positive impact MHC has on the community and within the criminal justice system. He also applauded the cooperative efforts of all the different agencies and judges working within MHC. The proclamation was first presented and read at the Board of Supervisors' meeting on April 14th by Supervisor Marion Ashley.

Jerry Wengerd, Director of the Department of Mental Health, presented Judge McIntyre with the Council on Mentally Ill Offenders (COMIO) Award given to Riverside County's MHC this year. COMIO's primary purpose is to "investigate and promote cost-effective approaches to meeting the long-term needs of adults and juveniles with mental disorders who are likely to become offenders or who have a history of offending." Each year, COMIO recognizes innovative programs that meet this goal and gives special recognition. This year, Riverside County's MHC was named COMIO's "Promising Project" for 2009.

Judge Becky Dugan, who was not only the first MHC judge but was also vital in its inception, presented a history of MHC. A community member, concerned about mentally ill criminal defendants, was instrumental in encouraging the first discussions about the needs and possibilities of a mental health court. Judge Dugan recognized court staffer Isela McConnell, who has been present since the beginning of MHC and still works there today. All participants of MHC in attendance were asked to stand and be recognized for all of their hard work.

Certificates of appreciation were presented to seven agencies and departments (Department of Mental Health – Jerry Wengerd, Probation – Mark Hake, Law Offices of the Public Defender – Gary Windom, Criminal Defense Lawyers – Steve Harmon, District Attorney – Kelly Sedochenkoff, Sheriff's Department – Captain Dave Nordstrom and the Hall of Justice – John Hawkins) for their involvement in and support of MHC. Recognition was also given to everyone who has worked in and participated in the efforts of MHC, including staff of the Mental Health Department, Probation Department, Sheriff's Department, Hall of Justice, Law Offices of the Public Defender, Criminal Defense Lawyers, and District Attorney's Office. The department or agency representatives spoke on behalf of their employees and had them be recognized. Judges Dugan, Leonard, and McIntyre presented a bouquet of flowers to Deputy Public Defender Maura Rogers for her work in MHC.

Following the program, a reception was held in the rotunda, accompanied by informational tables set up by a variety of programs. Excellent food was provided by Los Compadres in Moreno Valley; the owner, Iggy Bañuelos, provided extra portions of fruit and dessert and donated all leftovers to a local residential facility. Approximately 130 people came to the celebration, including many clients who were proud to show letters of appreciation from themselves and their families to thank everyone for the creation of MHC.

Leticia Laumboy, executive assistant to local criminal defense attorney Lori Myers, created large posters of thank you letters and articles about MHC and set them in the rotunda for everyone to read. Alene Ciampitti from the Law Offices of the Public Defender provided a beautiful creation of flowers for the welcome table, which prompted many compliments. Kathi Stringer volunteered her time, expertise and equipment to videotape the entire proceedings and take pictures of the event. She presented a video montage of the event to the MHC Celebration Committee, which is available for viewing. Many people helped with the organization and details of the celebration. Without their assistance this event would not have been possible.

MHC's purpose is to address the recidivism of mentally ill criminal defendants by providing a support network within the mental health system and the community. This is accomplished by the creation of a comprehensive treatment plan for the participant, along with intensive supervision. The treatment plan includes housing, doctors' appointments, medication, counseling, substance abuse treatment, anger management, and most importantly, a case worker. It connects clients to resources within the community and provides structure and supervision to ensure compliance. The caseworkers are an integral part of the treatment plan and provide the essential personal encouragement that inspires the participant's confidence to succeed. The combined oversight of a mental health caseworker, probation officer, defense counsel, deputy district attorney and MHC judge promotes a high success rate. Riverside County's MHC has much to celebrate and even more to be proud of.

Maura Rogers is a Deputy Public Defender for Riverside County and a member of the RCBA.

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.

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Free standing professional office bldg. Located near downtown. Contact Jeff (714) 612-0944. United Real Estate Group.

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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.

CPA Services

CPA with 30 plus years experience available to advise and testify on: Real Estate and Partnership Taxation and Accounting issues; Real Estate Syndication and Management issues; and Real Estate Finance matters. Please call or email for C.V., 310-476-5987, Jeff.FrombergCPA@gmail.com

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

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 August 30, 2009.

Claudius Croiset Van Uchelen (S) – Law Student, Ottawa, Ontario Canada

Wolf W. Kaufmann – Law Offices of Wolf W. Kaufmann, Riverside

Marilyn King (A) – Epsilon Medical Legal Consultants LLC, San Jacinto

Marguerite C. Lorenz (A) – Lorenz Fiduciary Services Inc., Fallbrook

Patrice Marissa Moreno – Sole Practitioner, La Quinta

William M. Paoli – Wentworth Paoli & Purdy LLP, Newport Beach

Diana Biafora Sparagna – Sparagna & Sparagna, Reseda

(A) – Designates Affiliate Member

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