RIVERSIDE LAWYER

MAGAZINE

March 2010 • Volume 60 Number 3

In This Issue:

The Current Supreme Court Term: La Plus Ça Change...

The Need for Legislation to Address Judicial Compensation

Electronic Discovery Under the Federal Rules of Civil Procedure

The official publication of the Riverside County Bar Association

College of Law
Center for Excellence in Advocacy

Shernoff Bidart Echeverria
Lawyers for Insurance Policyholders

Present

MOCK TRIAL
with the Masters

Featuring

Michael J. Bidart, Shernoff Bidart Echeverria, LLP

Thomas V. Girardi, Girardi & Keese

Brian J. Panish, Panish Shea & Boyle, LLP

and other nationally recognized trial lawyers

Keynote Lunch Speaker: Rick Friedman, Renowned Consumer Attorney

Friday, March 26, 2010
9:00 a.m. to 5:00 p.m.

7.5 Units of CLE Credit

A Live Mock Trial Demonstrating:

- Opening Statements
- Plaintiff Direct & Cross Examinations
- Defendant Direct & Cross Examinations
- Experts Direct & Cross Examinations
- Closing Arguments
- Jury Deliberations

Registration Fee: $250 **Early Bird Registration Fee: $200** **Students: $10**

Continental Breakfast & Lunch included

Location: 320 East D Street, Ontario, CA 91764

RSVP to (909) 460-2018 or cgaytan@laverne.edu by March 22, 2010

Learn from the masters & reserve your seat today!

To find out more, visit us online at
http://law.laverne.edu
or call **(909) 460-2018.**

Publications Committee

Michael Bazzo
Jeffrey Boyd
Yoginee Braslaw
Derek Early
Joseph Fitzgerald
Alexandra Fong
Donna Hecht
Sanjit Kaur
Robyn Lewis
Charlene Nelson
Richard Reed
Jean-Simon Serrano
Kirsten Birkedal Shea
Donna Thierbach
Bruce Todd
Jamie Wrage
Lisa Yang

Editor .... Jacqueline Carey-Wilson
Design and Production .... PIP Printing Riverside
Cover Design .... PIP Printing Riverside

Officers of the Bar Association

President
Harry J. Histen
(951) 682-4121
harry@histenlaw.com

President-Elect
Harlan B. Kistler
(951) 686-8848
hbkistler@pacbell.net

Vice President
Robyn A. Lewis
(951) 686-682-0488
rlewislaw@yahoo.com

Chief Financial Officer
Christopher B. Harmon
(951) 787-6800
christopherbharmon@sbcglobal.net

Secretary
Jacqueline Carey-Wilson
(909) 387-4334
jcareywilson@cc.sbcounty.gov

Past President
E. Aurora Hughes
(909) 630-3643
eaurorahughes@aol.com

Directors-at-Large

Chad W. Firetag
(951) 682-9311
firetag@yahoo.com

James J. Manning, Jr.
(951) 682-1771
jmanning@rhlaw.com

Timothy J. Hollenhorst
(951) 955-5400
thollenhorst@rivcoda.org

Randall S. Stamen
(951) 787-9788
rss@stamenlaw.com

Executive Director
Charlene Nelson
(951) 682-1015
charlene@riversidecountybar.com

Officers of the Barristers Association

President
David M. Cantrell
(951) 788-9410
dcantrell@lcl-law.com

Vice President
Kirsten Birkedal Shea

Secretary
Jean-Simon Serrano

Treasurer
David S. Lee, Jr.

Members-at-Large
Jeffrey A. Boyd
Brian T. Pedigo

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

Telephone
951-682-1015

Facsimile
951-682-0106

Internet
www.riversidecountybar.com

E-mail
rcba@riversidecountybar.com

Riverside Lawyer
MAGAZINE

CONTENTS

Columns:

3 .... **President's Message** *by Harry J. Histen*

COVER STORIES:

8 .... **The Current Supreme Court Term: La Plus Ça Change...**
by Charles S. Doskow

10 .... **The Need for Legislation to Address Judicial Compensation**
Statement of Chief Judge Audrey B. Collins on the Resignation of Judge Stephen G. Larson

16 .... **Electronic Discovery Under the Federal Rules of Civil Procedure**
by Daniel S. Roberts

Features:

5 .... **Opposing Counsel: Sheri N. Pym**
by L. Alexandra Fong

6 .... **Riverside's Court-Ordered Mediation Program: A Bench-Bar Partnership**
by Barrie J. Roberts

15 .... **FBA-IEC Installation Dinner**

19 .... **Judicial Profile: Hon. Peter H. Carroll**
by Christy Glass

22 .... **Judicial Profile: Hon. David T. Bristow**
by David G. Moore

24 .... **A Case for Early Mediation**
by Terry Bridges

26 ... **Famed Attorney and Author Vincent Bugliosi to Speak at Special RCBA General Membership Meeting**
by Robyn A. Lewis

Departments:

Calendar 2
Classified Ads 28
Membership 28

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

MARCH

9 Joint RCBA/SBCBA Landlord-Tenant Law Section
Nena's Restaurant, San Bdno. – 6:00 p.m.
"Procedures and Policies in Dept. 31"
Speaker: Judge John Pacheco, San Bdno. County Superior Court
(MCLE: 1 hr)
Info: Barry O'Connor, 951-689-9644 or udlaw2@aol.com

10 Barristers
Citrus City Grille at Riverside Plaza – 6:00 p.m.
"Substance Abuse and the Legal Profession"
Speaker: Gregory Dorst
(MCLE: 1 hr Substance Abuse)
Info: David Cantrell, 951-788-9410 or dcantrell@lcl-law.com

12 General Membership Meeting
RCBA, John Gabbert Gallery – Noon
"Court-Connected Mediation: Perspectives from the Court, Bar and Civil Mediation Panel"
Speakers from Riverside County Superior Court: Judge Gloria Trask, Michael Cappelli, Barrie Roberts
(MCLE: 0.75 hr)

16 Family Law Section
RCBA, John Gabbert Gallery – Noon
"Status of Family Law Court"
Speaker: Judge Irma Asberry, Riverside County Superior Court
(MCLE: 1 hr)

16 RCBA Board
RCBA – 5:00 p.m.

17 Estate Planning, Probate & Elder Law Section
RCBA, John Gabbert Gallery – Noon
"Crossover Issues in Estate Planning and Family Law"
Speaker: Mark Ellis, Esq.
(MCLE: 1 hr)

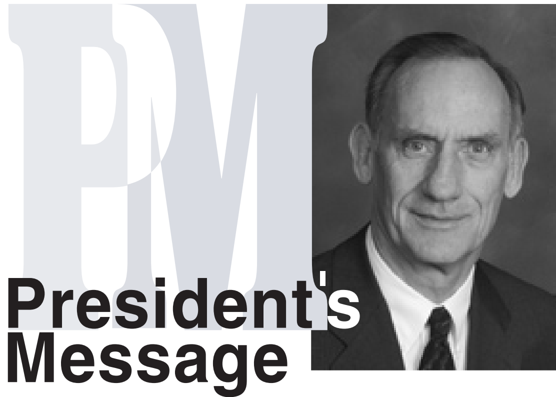
18 Immigration Law Section
RCBA, John Gabbert Gallery – Noon
"H-1B (Work Visa): A How-To Primer"
Speaker: Robert K. D'Andrea, Esq.
(MCLE: 1 hr)

19 - 21 State Mock Trial Competitions
San Jose

24 Federal Bar Association
Federal Courthouse, Courtroom 3 – Noon
"Original Jurisdiction in the U.S. Supreme Court"
Speaker: Roderick Walston
(MCLE: 1 hr)
RSVP: (949) 263-2600

25 Solo & Small Firm Section
RCBA, John Gabbert Gallery – Noon
"Successful Solo Practice Speaker Series: Testimonies from the Trenches, II"
Speaker: Virginia Blumenthal, Esq.
(MCLE: 1 hr)

31 HOLIDAY – Cesar Chavez Day
(RCBA Offices Closed)



President's Message

by Harry J. Histen

Federal Issues is a daunting theme. *Polarization and Political Correctness* seem worthy subjects. To avoid any appearance of bias, I will attempt to illustrate the problem by parsing the recent polarizing treatment of Senator Harry Reid (D-NV).

In their recent book, *Game Change*, the book's authors – journalists Mark Halperin and John Heilemann – write: "He [Reid] was wowed by Obama's oratorical gifts and believed that the country was ready to embrace a black presidential candidate, especially one such as Obama – a 'light skinned' African American 'with no Negro dialect, unless he wanted to have one.'"

Sen. Reid's comments were made during the run-up to the 2008 presidential election. That calls for a discussion of the decision-making mettle of political leaders, and how legitimate analysis can be compromised by political correctness. Sen. Reid, the Senate majority leader, had to evaluate the strength of Sen. Barack Obama's campaign incident to Reid's goal – that a Democrat would be elected president. He saw what appeared to be a very real opportunity to elect a black man President of the United States – Sen. Obama was compatible with his party's political views and had built a strong following nationally. Reid believed it was critical to choose the right candidate from among several Democrats seeking the nomination.

Sen. Reid actually analyzed the question using reason, history, and unvarnished facts. I believe that he agonized just as Branch Rickey did picking Jackie Robinson to be the first black major-league ballplayer. He used the same analysis as Thurgood Marshall did in choosing the right plaintiffs in *Brown v. Board of Education*. Or Ted Olson and David Boies in choosing their plaintiffs in *Perry v. Schwarzenegger*. Or NASA officials in choosing Neil Armstrong for the first lunar landing. Simply put, could *this person* withstand intense scrutiny and remain respectable?

Ever since the Kennedy-Nixon debates in 1960, appearance has been a compelling factor. It doesn't matter if it should be a factor, it is a factor. No doubt, Sen. Reid recognized that Sen. Obama was tall enough and handsome enough. The "light-skinned" comment simply addressed broad-based acceptance of the candidate's appearance with regard to current fashion. It mattered.

His use of the word "Negro" pertained to dialect. He had to evaluate whether the candidate's oral communication – his delivery – may be likely to alienate significant blocs of voters. Will he excel at the 20-second soundbite? Can he connect with a broad range of voters? Might the ability to turn a dialect on and off be advantageous? Sen. Reid's campaign analysis was proper and skillful. The timidity he displayed in 2010, in response to news stories, was disheartening, at best.

By failing to fight back, Sen. Reid risked giving credence to the implied accusations – accusations that challenged his character at a basic level. Instead, he gave in to the enemy that divides us. If the Senate majority leader will not lead, who will?

By not fighting scurrilous allegations, Sen. Reid left the high ground to the Republican Party. They immediately declined the opportunity. Were they unaware that the American people are fed up with petty political bickering and in search of some adults to represent them? The Republican Party could have announced that they would not criticize Sen. Reid on racial grounds – that the type of allegation made against Sen. Reid demeans us all, even when disguised as news. Sadly, Republicans did not acquit themselves well. They called for Sen. Reid to resign. Democratic support for Sen. Reid was tentative. An opportunity was lost. Polarization happens.

There is some evidence that we are left cowering. In February 2009, Attorney General Eric Holder charged that Americans are afraid to discuss race. I was excited! To me it sounded like a great opening to get down to it. An MSNBC commentator immediately opined that we would first have to choose sensitive words and prepare agreements to ensure that people would not be held responsible for letting political correctness down. Perhaps Holder decided that MSNBC's response showed that we weren't ready for that discussion just yet. It seems that his idea was dropped. Had Holder just proved his case?

We will do better if we speak candidly about past and present discrimination and mistreatment with all the civility we can muster. We will be far better off, and reach our goals more quickly, by remembering the message of Martin Luther King, Jr. and following it: Judge a person by his or her merit. Minorities and women are not so fragile.

Eric Holder was right. We are afraid to discuss race. We must get these issues out in the open. MSNBC was wrong; if we are honest with ourselves and each other, we won't be demanding resignations to be offered before the altar of Political Correctness.

"Be sensitive or you'll be branded a racist" is no way to run a country.

Opposing Counsel: Sheri N. Pym

by L. Alexandra Fong

An Advocate for Justice

Sheri Pym has devoted her career to the pursuit of justice. As Chief of the United States Attorney's Riverside office, she heads a team of 13 attorneys who are responsible for prosecuting all federal crimes that occur in Riverside and San Bernardino Counties.

Ms. Pym was raised in Seattle, Washington. Upon graduating from Williams College in Williamstown, Massachusetts with a degree in philosophy in 1989, she began her legal career as a document clerk in a private law firm in Seattle. She also worked at the King County Prosecutor's office in Seattle as a victim advocate. These early jobs in the legal field encouraged her to apply to law school to further her education.

After graduating from the UCLA School of Law and passing the bar exam in 1994, Ms. Pym practiced law at Milberg Weiss Bershad Hynes & Lerach LLP in San Diego. While at Milberg, she prosecuted plaintiffs' class actions dealing with consumer fraud and securities fraud. These cases included wage and hour cases, as well as tobacco-related litigation.

In 2002, returning to her interest in criminal law that had been inspired by her work at the King County Prosecutor's office, she joined the United States Attorney's office for the Central District of California as an Assistant United States Attorney. This career change coincided with her move to the Inland Empire with her husband, who had recently completed graduate school.

Ms. Pym chose to return to handling criminal matters because she wants to provide justice and "do the right thing." She believes that she can best advocate for the position she believes in as a prosecutor. She was promoted to Chief of the Riverside office in October 2006.

As an Assistant United States Attorney, she handles a wide variety of criminal cases, including Ponzi schemes, mortgage fraud, drug crimes, child pornography, and immigration violations. She also handles crimes that occur at the United States Penitentiary, Victorville, which is a high-security facility housing male inmates.

Ms. Pym's most recent challenging and satisfying case was *United States v. Richard Elroy Giddens*. The case involved allegations of mortgage fraud perpetrated at Mortgage One Corporation in Hesperia. Brokers would bring fraudulent loans to the company, which was known for approving any loan. The loans were insured through the United States Department of Housing and Urban Development, which lost almost $30 million in the scheme. Nine defendants in the Inland Empire were charged with mortgage fraud, among other crimes. Most of the defendants chose to plead guilty prior to trial and received sentences ranging from probation to six and a half years in prison. The sole remaining defendant, John Varner, chose to take his case to jury trial in Riverside, before District Judge Virginia A. Phillips. He was ultimately convicted in 2009, and in early February 2010, he was sentenced to 13 years in prison and ordered to pay $29,749,239 in restitution.

Due to the resignation of former District Judge Stephen G. Larson, Virginia A. Phillips is the only district court judge remaining in the Central District of California, Eastern Division. Since there are an insufficient number of district court judges to handle the burgeoning number of cases filed in the division, some of the cases handled by the Riverside office are venued at the federal court in Los Angeles. Although there are two magistrate judges (Oswald Parada and David Bristow) in Riverside, they are not authorized to preside over felony cases.

During her tenure at the United States Attorney's office, Ms. Pym has tried six felony cases and several misdemeanor cases. She has prosecuted the misdemeanors through the Central Violations Bureau (CVB) calendar, which magistrate judges are authorized to preside over. The CVB is a national center charged with processing violation notices (tickets) issued for petty offenses committed on federal property, including national parks and forests and the Jerry L. Pettis Memorial V.A. Medical Center in Loma Linda. Her upcoming felony trials are in cases charging a Ponzi scheme, possession of a firearm by a felon, and a prison assault.

Ms. Pym enjoys spending her free time with her family. She reads the Harry Potter series of novels with her daughter. She builds model train tracks and engages in light saber duels with her son.

L. Alexandra Fong, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside.

Riverside's Court-Ordered Mediation Program: A Bench-Bar Partnership[1]

by Barrie J. Roberts

The Judicial Council of California recognizes the third week of March as "Mediation Week." According to one of the "whereas" clauses in the Standing Resolution signed by Chief Justice Ronald M. George

> mediation offers many potential benefits to litigants, the courts, and the public, including increasing participants' satisfaction with the dispute resolution process and outcome, while reducing court filings, pretrial motions and trials, the time from the filing of an action to disposition, court workloads, litigants' costs, future disputes between the parties, and recidivism . . . .

To provide these benefits, some courts "strongly encourage" parties to try voluntary mediation; others "order" eligible parties into a court mediation program. Each approach has pros and cons. Studies suggest that while more cases go to mediation in court-ordered programs, more cases settle in voluntary programs. Riverside's programs were designed to combine the best of both worlds – to maximize the number of cases sent to mediation, as well as the number of cases that fully settle there. But program design alone does not ensure success; appropriate participation by counsel and parties is essential, as well.

What is Riverside's Court-Ordered Mediation Program?

In Riverside, most general civil cases valued at under $50,000 may be ordered to mandatory ADR – either judicial arbitration or mediation. (Local Rule 4.0010.) This order is usually made at the Case Management Conference, when the court, in consultation with the parties, determines whether the case is eligible for mandatory ADR, and if so, whether it is more amenable to arbitration or mediation. (Local Rule 4.0020.)

Although the court has the authority to order cases to mediation over party objections, this is rare. Why? Mediation is a joint problem-solving process rather than an adversarial one and does not work without voluntary participation. (See Cal. Rules of Court, rule 3.854, Advisory Committee Comment.) Moreover, because the court lacks the resources to order all eligible cases into the program, it is reserved for parties and counsel who wish to participate.

What are the Benefits of Riverside's Program?

1. Value: Cases ordered to mediation receive three free hours of mediation with a Civil Mediation Panel member. In Riverside, panel membership is limited to local attorney-mediators with a strong combination of litigation and ADR experience, high-quality mediation training, and dedication to providing mediation as a service to the court and parties. There are few better values in civil litigation than the opportunity to fully settle a case within a year of filing during a free three-hour session with a Civil Mediation Panel member.

2. Choice: It would certainly have been simpler for the court to design a program that assigned a mediator and a mediation date. Instead, the court has gone to great lengths to design a mandatory program that provides many benefits of voluntary mediation:

> a. Mediator selection: The program encourages parties to stipulate to the mediator of their choice and provides mediator profiles online to help them do so. Parties may choose non-panel mediators if they wish, but must make private arrangements to pay them. The court assigns a mediator only if parties do not stipulate to one.
>
> b. Scheduling: The court sets a completion date in consultation with the parties to allow for reasonable pre-mediation discovery and motions. The parties and the mediator work out a mutually convenient mediation date, time and location.

3. Case management: The order to mediation generally promotes early and serious attention to a case, including focused discovery and settlement negotiations, even before the mediation is scheduled. After the mediation, the court tracks each case and automatically sets an OSC re dismissal for cases that fully settle, or a Trial Setting Conference for cases that do not.

4. Party satisfaction: Almost 90% of the mediation surveys received report that the mediation experience with a panel member was "excellent" or "good," even when the case did not settle. The main criticism of the program has been that the opposing side did not participate or was not

1 In keeping with the *Federal Court* theme for this March issue, note that the mediation program for the United States District Court for the Central District of California in Los Angeles is described at: http://www.cacd.uscourts.gov; click on "ADR."

prepared, which brings us to the bench-bar "partnership" mentioned in the title.

Preparing for Court-Ordered Mediation

Regardless of program design, financial incentives to participate and mediator skill and dedication, mediation is rarely effective without serious preparation and participation by counsel, parties and insurance representatives. Voluntary mediation is often more successful than mandatory mediation because parties and counsel generally participate with more enthusiasm when paying their mediator hundreds of dollars per hour. To achieve the same results in a free, mandatory mediation program, counsel must do their part by preparing in these ways:

1. Complete enough discovery to make the session productive, but not so much that the potential cost savings of early mediation are destroyed.

2. Be sure that all attorneys, parties and principals will attend the mediation. Note this language from the mediation order: "A representative of each insurance carrier whose policy may apply must also attend all mediation sessions with full authority."

3. Calculate the dollar amounts of further litigation and trial. Consider the collectability of money judgments, the strengths and weaknesses of your case, and the risks of trial.

4. Per the mediator's instructions, draft a mediation brief covering the facts, law and settlement proposals.

Benefits to Litigators

When a court's mediation program works as a bench-bar partnership, it offers a benefit to litigators not mentioned in the Judicial Council resolution: the very satisfying opportunity to practice law with a problem-solving focus, rather than an adversarial one. In fact, in mediation, that's an order.

Please feel free to contact me to discuss the court's ADR programs: Barrie.Roberts@riverside.courts.ca.gov. These programs, and the Civil Mediation Panel, are described at: www.riverside.courts.ca.gov/adr/adr.htm.

And please note that the Civil Mediation Panel is available for private, voluntary mediation for cases above $50,000. Simply contact the mediators of your choice to make the arrangements.

Barrie J. Roberts is the ADR Director for Riverside County Superior Court. She received a J.D. from UC Hastings College of the Law and an LL.M. in Dispute Resolution from the Pepperdine University School of Law (Straus Institute). She practiced law for 14 years in northern California and became the court's first ADR Director in March 2008.

FINAL DRAWING of the Riverside Historic Courthouse by Judy Field

$100 each (unframed)

Signed and numbered limited edition prints.

Great as a gift or for your office.

Contact RCBA office, (951) 682-1015 or rcba@riversidecountybar.com

The Current Supreme Court Term: La Plus Ça Change…

by Charles S. Doskow

The United States Supreme Court opened its 2009 term last October with a new member enrobed. Sonia Sotomayor replaced the retired David Souter and slid seamlessly into his place in the minority of four justices (with Justices Stevens, Ginsburg and Breyer) on what is usually characterized as the "liberal" side of the court.

It has been said by justices that even one new justice creates an entirely new court, changing the dynamics of the institution far more than the transfer of a single seat would suggest. Maybe.

So far into this term, the court seems to be the same as we left it last summer, firmly divided into two blocs, with the conservative five (Chief Justice Roberts and Justices Scalia, Thomas, Alito and Kennedy) in control.

Two five-to-four decisions in January give stark evidence of the status quo. The first, a procedural skirmish in the currently ongoing Proposition 8 trial in San Francisco, apparently spells the doom of same-sex marriage in the federal courts. The second undoes generations of limits on corporate political spending.

Hollingsworth v. Perry, ___ U.S. ___ [130 S.Ct. 705] (2010) was brought by gay couples to establish a federal constitutional right to their marriage. The suit is something of a maverick enterprise, not favored by the anti-Proposition 8 establishment, which has urged patience. The plaintiffs, however, retained nationally known counsel to represent them.

Prior to the trial in San Francisco, the plaintiffs urged, in light of the widespread interest in the case, that it be broadcast beyond the courtroom. After declining to allow wider dissemination, the district court ruled that the trial could be videocast to several federal courthouses around the country.

The defendants applied to the U.S. Supreme Court for relief, arguing against such exposure. It was their position that telecasts of live testimony could bring reprisals against their witnesses, citing incidents in California.

The court granted their request, finding that the district court had not followed appropriate local rules in approving the videocasts; it found the lower court's procedures in approving the broadcast to be faulty. More importantly, it accepted defendants' arguments that irreparable harm would result from broadcasting proceedings around the country.

All this by a five-to-four vote. Same five, same four.

The dissent, Justice Breyer writing for himself and Justices Stevens, Ginsburg and Sotomayor, took issue with both findings. It faulted the ruling on the procedural aspects on jurisdictional grounds, and contended that the showing of danger to witnesses was illusory: all the witnesses for the defendants had already been publicly identified with their cause.

Cameras in the courtroom have been the subject of divided opinion for many years, and there are strong arguments both pro and con. The limited exposure proposed for this trial provided a poor vehicle for the Supreme Court to take an inflexible position. The lockstep support of defenders of Proposition 8 by the majority of five on this side issue suggests that the plaintiffs' case has little chance of success.

Citizens United v. Federal Elections Commission, ___ U.S. ___ [2010 WL 183856] (2010) was a much-awaited decision. Argued last term, it was set for an extraordinary reargument at a special court session in September. The *per curiam* decision, which came down on January 24, has had reverberations even unto the President's State of the Union speech.

The five-to-four vote overruled two precedents, which had approved restrictions on corporations and unions, both of which were prohibited by the Bipartisan Campaign Reform Act ("McCain-Feingold") from spending money from their treasuries for "electioneering communications." The case arose from a hit piece on Hilary Clinton ("Hilary: The Movie") produced by the plaintiffs, a group calling itself Citizens United. Some of the funds used in its production came from corporate treasuries, causing the Federal Elections Commission to rule that it could not be shown.

The Supreme Court's ruling (about 100 pages long, approximately half of which is dissent) held that as a limitation on speech, the law must be given strict scrutiny, the most difficult level of constitutional scrutiny to meet. None of the arguments to sustain the ruling constituted a compelling interest, the requirement for meeting strict scrutiny. Thus, the free speech rights of corporations and unions were violated, running afoul of the First Amendment.

There is, of course, much more to a very complex and multifaceted decision, but the key is that a longtime ban on corporate political spending has been held to violate the

Constitution. Concern exists that other provisions of federal and state laws regulating political spending may meet the same fate.

And serious concern as to the effect that removing the ban will have on future elections.

Both the preliminary ruling in *Hollingsworth v. Perry* and the decision in *Citizens United* were by five-to-four votes, with the usual lineup of justices. The court's division has never been more evident. Supporters of Proposition 8 and corporate donors have scored significant victories.

The division appears more and more to be less about ideology than about partisan politics. A true skeptic might suggest that at next year's State of the Union address, the majority of five should just go ahead and sit on the Republican Party side of the aisle, rather than occupying supposedly nonpartisan territory in front of the podium.

As to the State of the Union address, President Obama, a President of the Harvard Law Review, was well within the prerogatives of his office in criticizing a Supreme Court decision, even in front of the court. And probably Justice Alito was in order in reacting viscerally and visibly. Bear in mind that, when in the Senate, President Obama voted against confirmation of both Chief Justice Roberts and Justice Alito.

Charles S. Doskow, who expresses only his own opinion, is Dean Emeritus and Professor of Law at the University of La Verne College of Law in Ontario.

YOU ARE INVITED TO SPA FOR A CAUSE!

The Riverside County Bar Association is having a Day Spa fundraiser for its giving-back programs, such as Mock Trial, the Elves Program, Good Citizenship Awards for high school students, Adopt-a-School Reading Day, and other RCBA community projects.

We have made it easy for you to shop online and support us!
Enjoy $300 of Spa Services for only $59.
($15-$20 of every $59 purchase goes back to our cause)

1.) Each Spa Card entitles the recipient to 4 visits at a spa near them.

2.) Go to the website www.spasforacause.com and select/click on "pick a fundraiser." Type in Riverside County Bar Association.

3.) Select/click on "pick a spa" and type in your address or city for the spa nearest you or your recipient. The spa cards will be sent via email within 48 hours, Monday through Friday.

Thank you for continuing to support the RCBA and its giving-back programs.

The Need for Legislation to Address Judicial Compensation

Statement of Chief Judge Audrey B. Collins on the Resignation of Judge Stephen G. Larson

On November 2, 2009, Judge Stephen G. Larson resigned from the Court to take up a private law practice. Judge Larson's resignation once again draws attention to the adverse impact the combination of overwhelming caseload and low salary is having upon the U.S. District Court for the Central District of California. The Central District serves more people than any other federal trial court in the country, including the more than 19 million people living in the counties of Los Angeles, Riverside, San Bernardino, Orange, San Luis Obispo, Santa Barbara, and Ventura.

Judge Larson, who has been a district judge for just three and a half years (and was for six prior years a magistrate judge), was a highly respected, active judge who carried a large caseload in Riverside, California. Judge Larson, a devoted father of seven school-age children, had also remained active in the Riverside legal community.

Judge Larson was the third district judge the Court has lost during the last year. Senior Judge Robert M. Takasugi, who passed away on August 4, 2009, carried a full criminal caseload until late 2008; previously, former Judge George P. Schiavelli resigned in October 2008 to join JAMS, a California-based arbitration/mediation firm. In addition, Judge Florence-Marie Cooper has announced plans to retire in March 2010, when she is eligible to assume senior status; she, too, plans to work as a private mediator. The Court also lost the services of two magistrate judges this past year, with Judge Jennifer Lum's resignation to seek another career, and Judge Jeffrey Johnson's appointment to the California State Court of Appeal.

In short, the Central District of California faces a crisis of retention. Between 1998 and August 2009, eight federal district judges from the Central District resigned or retired from the federal court system. Five judges retired or resigned to join JAMS, the largest private alternative dispute resolution provider in the world, where neutrals have the potential to earn the equivalent of a district judge's annual salary in a matter of months. Two resigned to accept state judicial appointments, at a higher salary and better health benefits.

This crisis is due in large part to two factors: stagnating judicial compensation and ever-increasing caseloads. These factors affect federal judges throughout the country, but the Central District has been particularly hard-hit by both.

Low Judicial Compensation

In announcing his departure, Judge Larson told his colleagues on the Court, "Given that the much-discussed and anticipated judicial salary restoration has not occurred and is now not likely to occur any time soon, that even minimized COLAs [cost of living adjustments] are uncertain at best, and coupled with our primary responsibility to our seven children, we can no longer afford for me to continue my public service at this time. The costs associated with raising our family are increasing significantly, while our salary remains stagnant and, in terms of its purchasing power, is actually declining. The short of it is that I know I must place my family's interest, particularly the future of my children, ahead of my own fervent desire to remain a federal judge."

The American Bar Association and Federal Bar Association issued a joint report in May 2003, "Federal Judicial Pay, An Update on the Urgent Need for Action," urging Congress and the President to take remedial action to provide for immediate and lasting pay relief. The report states that over the course of the past three decades, judicial salaries have declined in value, while the salary of the average American worker has increased by 17.5 percent. In addition, judges suffered a 9.8 percent decline in the value of their salaries from 1993 through 2002. This erosion in judicial pay due to inflation has deprived judges (many of whom accepted significantly reduced compensation to become judges) of the prospect of salary stability during their tenure on the bench. This is especially true in California, where the cost of living is extremely high.

The report further states, "Members of the Federal judiciary increasingly are choosing not to remain on the bench. Premature departures of experienced and capable judges impose both real and intangible costs upon the judiciary – especially now, when the workload has increased markedly."

Increased Caseload

The caseload for federal judges, especially in the Central District, has increased markedly just as the pay level has deteriorated. Weighted filings per authorized judgeship here have been on the rise since 1997. During the 12-month period ending June 30, 2009, weighted filings per judgeship in the Central District reached 611, 42 percent above the national standard of 430 weighted filings per judgeship.

This measure has consistently remained above 500 since 2002, as shown below in Table 1.

Further, the Central District of California leads the nation with the highest number of mega-criminal cases (cases with more than seven defendants) filed in FY 2008. That year saw a total of 25 such cases filed here – including one with over 70 indicted defendants – with the number of big cases expected to rise even higher in FY2009. These huge cases typically involve large and dangerous street gangs and include charges of RICO violations, narcotics conspiracies, murder, illegal firearm possession, and money laundering. Trials can last months, and management of these cases drains limited judicial and staff resources. In addition, the requirements of the Speedy Trial Act push criminal cases to the front of the line, causing further delays in the civil calendar.

The loss of any judge imposes additional burdens on those remaining, as a departing judge's pending caseload is typically divided among the remaining judges, adding to the large caseload each already has. The impact of Judge Larson's departure will be particularly detrimental to the Court, however, due to the heavy civil caseload he has been carrying. He has been handling a number of very large cases with extremely complex issues, such as the Bratz copyright infringement litigation. Even more notably, however, his caseload has been large simply because he sits in Riverside, in the Eastern Division of the Central District.

State court difficulties in Riverside County make it extremely difficult for civil litigants to get their cases tried in state court. This impacts the caseload in the Eastern Division, as an increasing number of litigants seek to have their cases heard in federal court instead. Thus, the number of cases removed from state court to the Eastern Division dramatically increased by 377%, from 98 in the 12-month period ending June 30, 2008, to 468 in the 12-month period ending June 30, 2009.

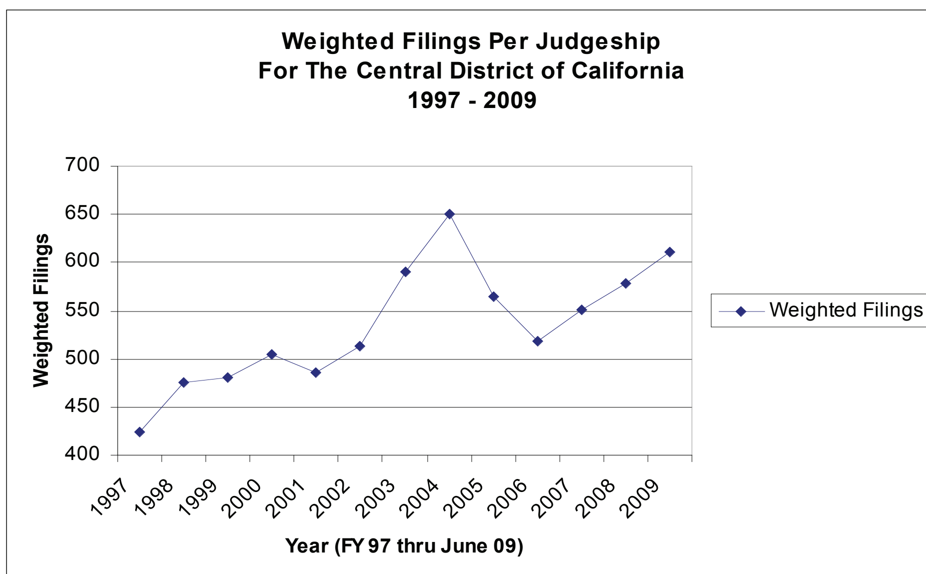
The recent economic downturn has exacerbated this upward trend, causing an unprecedented number of home foreclosures. District-wide, for the first half of 2009, foreclosure, other real property, and Truth-in-Lending filings were up 663%, and consumer credit filings were up 404%. A disproportionate number of these cases originate in the Eastern Division, which includes San Bernardino and Riverside Counties, both particularly hard-hit by the housing crisis.

With only two district judges in the Eastern Division, each Eastern Division judge has received an average of 39 removal cases every month since last fall – while judges in the Western and Southern Divisions have received an average of just 9 removal cases per month. The burden on the Eastern Division requires the Court to reassign many cases, inconveniencing litigants and requiring them to travel to Los Angeles or Santa Ana to have their cases heard.

Unfilled Judicial Vacancies

The problems the Central District has experienced in retaining judges have been compounded by delays in filling the vacancies created when judges leave. The Central District has 28 authorized judgeships (27 permanent and 1 temporary) to serve a population of over 19 million people, but is operating with a shortage of three – soon to be four – judicial vacancies. The Court appreciates the recent nominations to fill two of these vacancies, but even if the two nominees are confirmed soon, the Central District will once again have three judicial vacancies by March 2010. And even prompt action on the remaining vacancies will not immediately solve the lingering problems stemming from the length of time past vacancies in the Central District have remained unfilled. Of the four districts in the nation that have the highest number of authorized judgeships, the Central District had the most vacant judgeship months over the

Table 1



last ten years, with 378 vacant judgeship months.

Further, filling the currently open judgeships will not solve the Court's caseload problem completely. While the population and caseload of the Central District have grown in recent years, the last judgeship created here was one additional temporary judgeship in November, 2002. The Judicial Conference of the United States has recommended additional judgeships in the Central District for many years; most recently the Conference has recommended the creation of five additional judgeships in this district.

Congressional Assistance Requested

Congress has not enacted a judgeship bill in 19 years. I thank Senator Feinstein and Senator Boxer for their support of Senate Bill 1653, "The Federal Judgeship Act of 2009," which, if enacted, would create five new judgeships (four permanent and one temporary) for the Central District. Enactment of SB 1653, together with swift nomination and confirmation of the judgeships provided, would greatly alleviate the problems facing the Central District.

The deteriorating level of judicial salary, however, compounded by low or non-authorized COLAs, saps the morale of judges and taxes the financial ability of even the most dedicated judges to remain on the bench when other, far more lucrative career options exist. The bipartisan National Commission on the Public Service and every commission that has ever examined the issue recommend substantial increases in judicial compensation. The sad reality we now face is that, in at least some situations, active judges at the peak of their judicial careers must resign to support their families.

As the Chief Judge of the United States District Court for the Central District of California, I hope that Judge Larson's resignation, although devastating for the litigants and judges of this district, will serve to highlight this crisis of retention. The crisis can be alleviated in part by the authorization of additional judgeships and prompt consideration of nominees for judicial vacancies, but can be resolved only with the passage of legislation addressing judicial compensation. The citizens of the Central District – indeed, the citizens of every federal district in this country – deserve to have a fully staffed bench consisting of federal judges who can devote their entire remaining careers to serving the people of their district, without fear of having to leave the bench for financial reasons.

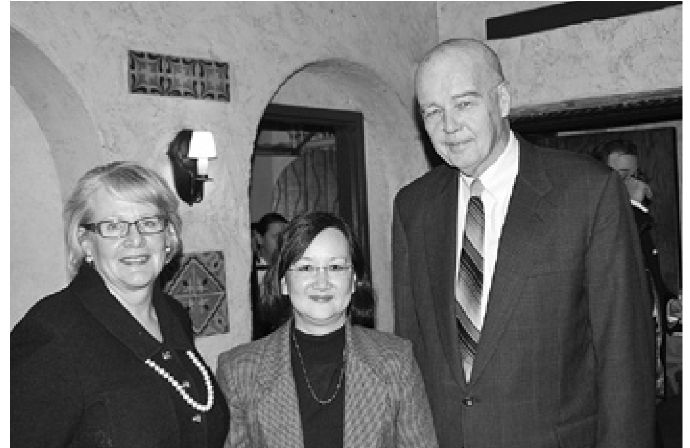
FBA-IEC Installation Dinner

Photographs courtesy of Jacqueline Carey-Wilson

Photos from the Installation of Offices of the Inland Empire Chapter of the Federal Bar Association and Annual Judges' Appreciation Dinner held at the Mission Inn on January 22, 2010:

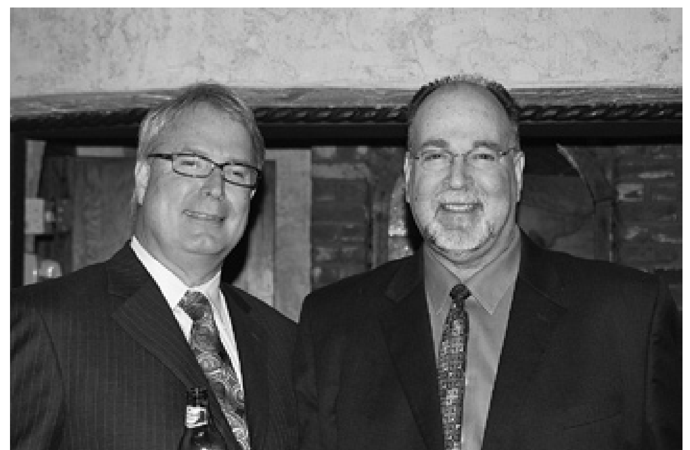
New Board of the FBA/IEC: (L-R) Robert Stacy (Secretary), Sheri Pym (Treasurer), Dennis Wagner (President-Elect), and Daniel Roberts (President)

Former Judge Stephen G. Larson and former Magistrate Judge John Rayburn, are awarded gifts for their service on the FBA/IEC board by immediate past president Jacqueline Carey-Wilson



L-R: Judge Virginia Phillips, Judge Dolly Gee, and keynote speaker James Brosnahan

Judge Craig Riemer, Riverside County Superior Court, and Presiding Judge Douglas Elwell, San Bernardino County Superior Court



Dennis Wagner (left) and Judge Michael Sachs, San Bernardino County Superior Court

Electronic Discovery Under the Federal Rules of Civil Procedure

by Daniel S. Roberts

One defendant's inability (or unwillingness) to understand its e-discovery obligations in federal court resulted in a default judgment of nearly $111 *million*.[1] Though extreme, this illustrates the importance of understanding e-discovery. The Federal Rules of Civil Procedure now specifically address many aspects of how to deal with e-discovery in federal court. Knowing these rules and the concepts therein is critical – even in smaller cases. Vital information to support your case is often stored electronically. This article is intended only to highlight the more important federal e-discovery rules and to help you spot the issues on which further research will be necessary in your case.

I. General Concepts of the Federal E-Discovery Rules

Although discovery of electronic information has been occurring for several years, generating various problems and case-by-case attempts to solve them along the way, the Federal Rules of Civil Procedure did not contain any specific provisions to deal with it until December 2006. The 2006 amendments tackle e-discovery issues from a more overarching perspective, establishing general procedures and forcing parties to anticipate and consider e-discovery issues before they arise and reach crisis stage.

A. Consider E-Discovery Issues Early

The e-discovery amendments bring order to the e-discovery process by making the parties and the court focus on e-discovery issues right from the beginning of the case. Rule 26(f) now requires counsel to discuss various e-discovery issues at the 26(f) meeting, such as preservation of electronically stored information ("ESI"), the form in which ESI will be produced, and privilege issues, including "claw-back" remedies. ESI is also subject to the same-disclosure requirements under Rule 26(a) as traditional documents. Agreements reached at the 26(f) meeting can be incorporated into the court's scheduling order under Rule 16(b).

B. "Accessibility"

Some ESI, although technically still in existence in some electronic medium, is simply not readily obtainable as a practical matter. To deal with such situations, the rules now incorporate the concept of "accessibility," which is defined in Rule 26(b)(2)(B). This rule provides a procedure by which a responding party can assert that certain categories of ESI are not "reasonably accessible" and therefore will neither be searched for nor produced. The rule also provides a procedure for resolving disputes over what is truly "inaccessible" and when even "inaccessible" ESI is so important to a case that it must be produced nevertheless.

C. The "Claw-Back"

Rule 26(b)(5) specifically addresses how to deal with the growing problem of inadvertent disclosure that arises because of the volume of documents produced in modern litigation by providing a procedure for the producing party to "claw back" items inadvertently produced. The rule does not address whether the inadvertent disclosure has resulted in a waiver, which is left to existing and developing case law. Instead, it provides a *procedure* under which such determinations can be made on a case-by-case basis without risk of further harm while the issue is being decided. Any agreement the parties reach in their 26(f) meeting will control over the default rules in Rule 26(b)(5)(B), but this rule does give a good starting point for that discussion at the 26(f) meeting.

II. Applying the Concepts

A. Rule 34 – Inspection Demands

Rule 34(a) now includes the ability to "test or sample" ESI. While under some circumstances, this may mean that your opposing counsel (or more likely their expert) can snoop around your client's computer to see if they can find anything, that is not the general rule. The 2006 Advisory Committee Notes expressly acknowledge that there is no routine right of direct access to a party's computer system. Rather, the rule merely acknowledges that testing or sampling ESI may be appropriate in *some* circumstances. Issues of intrusiveness, burden, privacy, and confidentiality can be addressed through discovery limitations and protective orders under Rule 26(b)(2) and (c).

1 *See Columbia Pictures v. Bunnell*, 85 U.S.P.Q. 2d 1448, 2007 U.S. Dist. LEXIS 96360 (C.D. Cal. 2007), 06-CV-1093FMC (JCx), Document No. 450 [Judgment].

Rule 34 now also contains default procedures regarding the form in which ESI is to be produced (in case the parties did not reach agreement on this point in their Rule 26(f) meeting). The requesting party may specify the format for production, but the responding party may object to that form and agree instead to produce in an alternative form. Unless the parties agree or the court orders otherwise, ESI must be produced "in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably useable."[2] The responding party cannot change the format of the ESI to make use of the information more burdensome or difficult. Thus, searchable .pdf documents cannot be altered to limit their searchability.

B. Rule 45 – Subpoenas

Rule 45 now permits a party to obtain ESI from a non-party by subpoena, just as it can request ESI from a party under Rule 34. This includes the ability to "test or sample" ESI and to specify the form in which the ESI is to be produced. The "claw-back" provisions discussed above now also apply to subpoenas. The concept of "accessibility" may be particularly of use to third parties complying with a subpoena for ESI.

2 See 2006 Advisory Comm. Notes to Rule 34.

III. The Rule 37(f) Safe Harbor

The 2006 amendments also added an important "safe harbor" from sanctions when ESI is lost through the routine and good-faith operation of a computer system – for example, when emails are automatically deleted after a certain period of time to save disk space. The safe harbor does not apply where information is lost after an affirmative obligation to preserve information is triggered (e.g., once litigation is reasonably foreseeable). Moreover, the safe harbor applies only to sanctions "under these rules" (such as monetary, evidentiary, or issue sanctions), so it provides no protection from other possible penalties (criminal obstruction of justice charges, professional discipline, etc.). Even when the safe harbor applies, the court may fashion some other substitute for the lost information, such as requiring the production of additional witnesses for deposition or ordering the responding party to answer additional interrogatories.[3]

Daniel S. Roberts is a litigation partner in Best Best & Krieger, LLP and President of the Inland Empire Chapter of the Federal Bar Association.

3 See Advisory Comm. Notes to 2006 Amendment to Rule 37.

Judicial Profile: Hon. Peter H. Carroll

by Christy Glass

Most of us know that the bankruptcy courts are suffering from overload in this present market. The five divisions of the United States Bankruptcy Court for the Central District of California (Los Angeles, Riverside, Woodland Hills, Santa Barbara, Santa Ana) combined received 65,856 bankruptcy cases in 2008. But, the combined case number for 2009 is already over 110,000. Riverside was assigned 31% of these cases and Los Angeles 34%. However, Los Angeles has 10 judges to hear its cases. Riverside has only two Riverside judges, assisted by three Los Angeles judges. The three Los Angeles judges hear Riverside cases via video conferencing. The result is that each of the resident Riverside judges hear over 200 matters a week. Most of these cases are consumer cases in which individuals seek the protection of the bankruptcy court to save their homes. However, an increasing number of the cases are big or unique, such as Woodside Homes, LLC, National R.V., Inc., and Valley Health System. This has been the norm for the last 18 months.

Judge Peter H. Carroll

Therefore, as strained as the Riverside bankruptcy judges are, I was quite pleased and honored that Judge Peter Carroll made time for this short interview allowing the *Riverside Lawyer* readers a personal glimpse into his life.

Judge Carroll was born and raised in Eureka, California, as a fourth generation native. His ancestors moved from Texas in 1848. They settled in the gold mining areas of California. His father, a stock broker, came from Humboldt county and his mother, a registered nurse from Marin. They married in 1951. The blissful pair nurtured a family of four boys and four girls with Judge Carroll being the eldest. When asked, Judge Carroll remarked that one nice thing about being the eldest was occasionally receiving new clothes. The younger children received a lot of hand-me-downs in such a large family. But, the downside might have been being the Guinea pig for well-meaning inexperienced parents, as it is with most first born children. (However in my opinion, they couldn't have messed up very often because Judge Carroll is a wonderful person. And, he confided that his family is still very close.)

Eureka, the locality of his birth remained Judge Carroll's home until the end of his junior year in high school. It was then that his family moved to Sacramento. The next year, his senior year in high school was spent at Christian Brothers High School in Sacramento.

After graduating from high school in 1970, he earned a history degree from the University of California at Berkeley. Berkeley was also where he met his lovely wife, Donna. She was born in Idaho, but raised in Richmond, California. They were married in 1975 and later blessed with two children, David and Tiphany. David is currently retired from the Navy. He was a Chief Petty Officer who served as a medic with the Marines. He completed two tours in Fallujah, Iraq. Tiphany, formerly a chef, is a certified Yoga instructor. Judge Carroll is also the proud grandfather of one grandson and two granddaughters.

So what led Judge Carroll to pursue his Juris doctorate degree? His father wanted him to study law, but that was not the major impetus. His football coach, who was also his English teacher, suggested that he think about a law career, as well. But it was after Judge Carroll's second year of college while completing his core history classes that he felt law was the right path for him. Consequently, Judge Carroll talked with his cousin who was a federal judge at the time, Judge Robert Peckham. After that talk, Judge Carroll was convinced a law degree would be in his future. Accordingly, he graduated from St. Mary's University in San Antonio in 1978 with his JD.

With his JD in hand, Judge Carroll engaged in private practice at the law firm of Brite & Drought in San Antonio, Texas. He had clerked for this firm during law school. Continuing with Brite & Drought after law school seemed like the logical course. From 1978 to 1993 with Brite & Drought, he focused on bankruptcy, real estate, oil and gas, banking, consumer law, and civil litigation. His first interest had been in the oil and energy field, but the 1980's oil crash led to a real estate crash in Texas and

many bankruptcies. Fortunately for Judge Carroll, he had taken a few classes in bankruptcy following passage of the Bankruptcy Code of 1978. Being familiar with the new Code, Judge Carroll had the unique opportunity to assist clients through an economic downturn at a time of significant change in bankruptcy law and practice. Bankruptcy has continued to be the focus of his career every since.

However, Texas did not continue to be his home. As the years flew by, California beckoned him. In 1993, he returned joining the United States Department of Justice. This choice to become a judge was well thought out. Judge Carroll had a few friends that were judges. Candid discussions about their judgeship experiences encouraged Judge Carroll to embark on this journey. Most of the judges enjoyed being judges. However, the merit selection process to become a bankruptcy judge was a different story. This was a nerve-racking and highly competitive process that produced anxiety in the sturdiest of applicants. But Judge Carroll was up for the venture.

In 1994, he accepted the position of Assistant United States Trustee for the Eastern District of California, at Fresno. And most recently in August 2002, Judge Carroll afforded Riverside the honor of being its new Central District of California United States Bankruptcy Judge replacing the Hon. Lynne Riddle who retired.

Despite his demanding schedule, Judge Carroll has authored several articles on bankruptcy throughout the years. He has been published in the St. Mary's Law Journal, Texas Bar Journal, The Colorado Lawyer, California Bankruptcy Journal, and the American Bankruptcy Institute Journal. In the past, he also has competed in distance-running marathons. There have been four full marathons and eight half-marathons to add to his accomplishments. However, the recent workload has hampered hobby time. But, he is determined to find a way to fit at least his hobby of running back into his schedule before long.

In concluding, if you asked Judge Carroll what helps a bankruptcy case proceed more smoothly and faster through the system, he would tell you, "reading through the Court's website and learning to utilize the online system correctly. Be familiar with the Bankruptcy Code and Federal Rules of Bankruptcy Procedures. Strictly follow the local bankruptcy rules. They are right there on the Bankruptcy Court's website. Please, please move into the Electronic Age! Save yourself Time and Money. Also, look to see if I have posted a final disposition for your case on my website. This will excuse appearances and allow an electronic order to be lodged from your office."

So, if you are lucky enough to have a case come before Judge Carroll, it is helpful to first check out the site: "http://www.cacb.uscourts.gov/cacb/Welcome.nsf/Information-Judge-PC?OpenPage". Exploring the links on that page will be very beneficial in the successful management of your client's bankruptcy case. Among the site's postings are Judge Carroll's written opinions, forms, procedures, self-calendar and much more. The self-calendaring system is extremely useful because it permits counsel and parties to schedule hearing dates for matters heard on regular notice without prior approval from the Courtroom Deputy – right from the internet.

To end this special investigation, my brief time with Judge Peter Carroll yielded more than just factual data. It gave a glimpse into the personal side of a dignified man. He is astute, sincere, and compassionate. I hope that you too will someday have the same good fortune to meet the genuine Judge Carroll.

Judicial Profile: Hon. David T. Bristow

by David G. Moore

I have known David T. Bristow as a friend for over ten years and as a law partner at Reid & Hellyer for six of those years. In June 2009, David was sworn in as a U.S. Magistrate Judge, and his formal enrobement was celebrated on October 2, 2009.

It is with bittersweet feelings that I view David's departure to the federal bench. He always was interested in public service because of his compelling desire to give back to the community, and his service as a judge will give him that opportunity. On the other side of the coin, we here at Reid & Hellyer will miss his wise counsel, his leadership and his ready smile.

Judge David Bristow with his wife Kristen

By way of background, David was born and raised in Riverside and attended La Sierra High School. He went to college at California State University, San Bernardino from 1980 to 1985, obtaining a Bachelor of Arts degree in history with a minor in economics. After graduating, he worked as a sports writer for the San Bernardino County Sun, where he remained for about three years. David left the Sun to begin his legal training at the University of the Pacific, McGeorge School of Law in Sacramento.

After earning his law degree, David returned to the Riverside area, where he had contacts in the legal field, and took a job at a law firm then known as Fidler, Bell, Orrock & Watase, working in the area of insurance defense. After a short stint there, he took a position at the San Bernardino District Attorney's office. David began his career in criminal law as most deputy district attorneys do – as a misdemeanor prosecutor. He worked his way up to conducting felony preliminary hearings and then to trying felony cases.

With his first felony trial, David faced a moral dilemma involving the so-called "Three Strikes Law." In that case, the accused was charged with possession of 1/10 of a gram of cocaine, which was discovered in the ashtray of the vehicle he was driving. The accused was on probation at the time of his arrest and, because this charge constituted his third strike, was facing 25 years to life in prison.

At the time, the San Bernardino District Attorney's office had a strict policy that its prosecutors did not plea bargain three-strikes cases. This, coupled with the fact that the law, as written then, did not give discretion to judges, meant that David would have to try the matter.

He returned to his office to consult with the senior deputies and was told that he could elect not to try the case, but doing so would mean a demotion to trying misdemeanors. However, when he explained his position to the district attorney, he was told to try the matter or resign his position. David opted for the latter. Unbeknownst to him at the time, he was the first deputy district attorney to lose his job for refusing to try a matter. Needless to say, the case became highly politicized and attracted much political fanfare. As for the accused, he was eventually acquitted of the charges against him.

Upon leaving the district attorney's office, he was promptly offered a position with the San Bernardino Public Defender's office. He remained there for a year and comments that it was one of the best jobs he has held in his career.

David next joined Thomas, Mort, Prosser & Knudsen; Burke, Williams & Sorenson; and Akin Gump, Strauss, Hauer & Feld, until he signed on with Reid & Hellyer in 2003 as a partner/shareholder. Thereafter, he was named President of the Executive Committee.

In 2006-2007, David served as President of the Riverside County Bar Association. He strongly advocated creating new judgeships to handle the cases that were overwhelming the Riverside County courts and was vocal in his criticism that new criminal cases were pushing aside civil matters.

Having lobbied many of the area's civil attorneys to apply for state and federal judicial positions, David realized that it was easy to ask others, but one had to "walk the walk" if one truly believed that filling vacancies and creating judgeships were vital to the community. When a position for U.S. Magistrate Judge in the Riverside federal courthouse opened up, David applied and was duly appointed.

I spoke briefly at David's formal enrobement about his achievements and his intellect, which all will contribute to his successful career as a judge. I am sincere in my belief

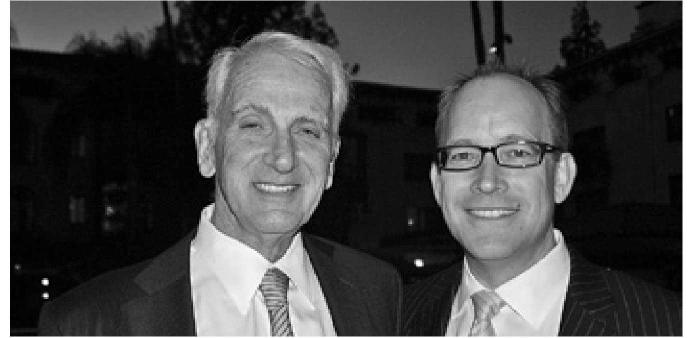
that he will do credit to himself and the community in the task he has set for himself as a judicial officer.

Reception at the Mission Inn following the induction of Magistrate Judge David Bristow on October 2, 2009:

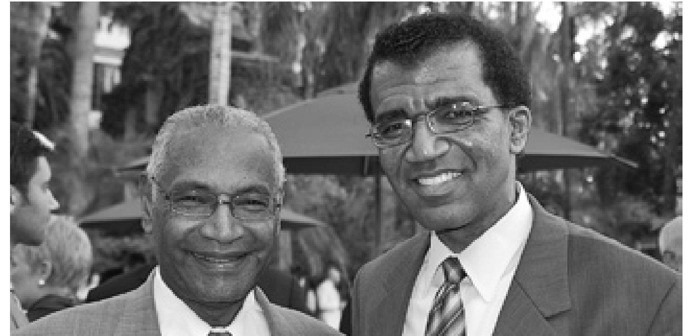
(L-R) Chief U.S. District Judge Audrey Collins, Diana and Frank Peasley, Andy and Diane Roth, Judge Oswald Parada

(L-R) Jeff Van Wagenen, Judge David Bristow, James (Jeb) Brown

David Bristow and Justice John Gabbert, who turned 100 in June 2009



David Moore (left) and Judge David Bristow



Judge Terry Hatter, Jr. (left) and Judge Richard Fields, former presiding judge of Riverside County Superior Court

(L-R) Judge Stephen Larson and Richard Roth

(L-R) Judge Rita Coyne Federman and Judge Virginia Phillips

David G. Moore, President of the Riverside County Bar Association in 1984, is a Senior Attorney with the law firm of Reid & Hellyer in Riverside.

Photographs courtesy of Jacqueline Carey-Wilson.

A Case for Early Mediation

by Terry Bridges

Introduction: Pitfalls inherent in traditional pretrial mediation. Frequently, mediation appears to be an afterthought. It is often considered only after being "suggested" by the court at the final status conference and after extensive and expensive written discovery, attendant motions, multiple depositions and a threatened or pending motion for summary judgment. By the time the case progresses to this point, too often parties are entrenched in their relative positions, convinced of the righteousness of their side of the controversy and hardened in their expectations about settlement. To compound the problem, attorneys tend to become entrenched in their client's position and fail to conduct a detached, objective evaluation of both liability and damage issues.

Terry Bridges

The purpose of this article is to suggest that parties and counsel should seriously consider mediation prior to filing an action or shortly thereafter.

Opposition to the concept of early mediation. Unfortunately, early mediation tends to be a forgotten tool in dispute resolution. A number of reasons, including the following, contribute to this reality.

- The concept of early mediation is often omitted in law school courses. Hence, the trial bar is unfamiliar with the concept.
- Attorneys have an inherent fear of negotiating, let alone mediating, without a significant amount of expensive and time-consuming discovery. Certainly, this reluctance is understandable in terms of our duty to thoroughly and properly evaluate a case before entering into settlement discussions. On the other hand, for reasons discussed in the next section, it can be forcefully argued that it is possible to properly evaluate a case without expensive or extensive discovery and sometimes without any formal discovery at all. Certainly there is a risk that some stone will be left unturned. However, it has been my experience that clients are receptive to the concept of early mediation and are willing to assume the slight risk that an impactive fact or document will not be discovered during the process of prolonged formal discovery.
- Attorneys often concentrate on the liability aspect of a litigated dispute rather than undertaking a thorough analysis of damages. Too often, the damage analysis is reserved, or at least not thoroughly considered, until dangerously close to trial. An early damage analysis will frequently illuminate the advisability of mediation.
- Finally, and sadly, some attorneys unfortunately consider early mediation as a lost opportunity for enhancing minimum billable hours.

Breaking down barriers to earlier mediation. There are a number of responses to conceptual oppositions to mediation, including the following:

- As a basic proposition, opposition to early mediation is contrary to the duty of a trial lawyer to be a problem-solver rather than a billable parasite on top of the client's problems.

  Such a duty is set forth in the Section 13 of the State Bar of California Guidelines of Civility and Professionalism, which provides:

  "An attorney *should* raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in *every* matter *as soon as possible* and, when appropriate, during the course of litigation.

  "For example: [¶] . . . An attorney *should* advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution." (Emphasis added.)

  These guidelines have been adopted by the California State Bar Board of Governors, as well as the Riverside and San Bernardino County Bar Associations and the Leo A. Deegan and Joseph Campbell Inns of Court.
- While it can be argued that early mediation is not yet a standard of practice, in some circumstances, failure to mediate at an early stage may preclude a client from settling the matter in an amount that is much more advantageous than closer to trial, when significant sums of fees and costs have been invested and the parties' positions have become much more inflexible.
- In addition to saving significant fees and costs, early resolution of a matter saves the emotional costs of litiga-

tion to a client, which we, as trial lawyers, too often fail to consider.

- Early resolution saves a significant amount of client time, which, when capitalized, translates into material sums.
- As alluded to earlier, I disagree with the argument that cases cannot be properly valued until the traditional discovery odyssey has been completed. Witness interviews, document review and summary, early research and preparation of a liability and damage analysis can frequently be completed at the outset of any dispute and generally serve as a reasonable predictor of the ultimate value of a case. Realizing that there is a risk in this process, if discovery is required, it may be exchanged voluntarily or, if necessary, targeted discovery, including limited depositions, may be completed. If the case cannot be settled, with the utilization of an appropriate agreement between counsel, discovery can be reopened and expanded.
- Finally, the argument is often made that in more complex cases, including class actions, significant factual investigation in discovery is an absolute necessity. I have served as defense counsel in a number of class actions, and my experience is to the contrary. For example, in wage-and-hour class actions, the plaintiffs are entitled to a reasonable representative sampling of time records. The parties should be able to agree on a limited voluntary production of these records. After the records are produced, the plaintiffs can conduct their own exposure analysis and share it with the defense. Working with the same database, the defense can prepare its responsive exposure analysis and provide the plaintiffs with such analysis. Of course, the exchange process needs to be appropriately documented and applicable settlement negotiation privileges preserved in writing. The parties are then quickly and relatively inexpensively ready to participate meaningfully in the mediation process.

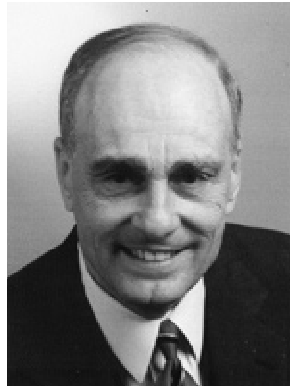
Conclusion. If it is our primary duty to be problem resolvers, utilizing some or all of the above principles, and working in a civil, constructive and professional manner with opposing counsel, we will be able to participate effectively in prefiling or early mediation, thereby saving our client significant time, fees, and costs, both financial and emotional. In so doing, we will enhance and cement our relationships with our client as well as opposing counsel. Believe me, it's a pleasurable experience.

Terry Bridges is a Senior Attorney with the law firm of Reid & Hellyer in Riverside. He was President of the Riverside County Bar Association in 1987 and also President of the Leo A. Deegan Inn of Court in 1998. The primary emphasis of Mr. Bridges' practice is mediation.

Famed Attorney and Author Vincent Bugliosi to Speak at Special RCBA General Membership Meeting

by Robyn A. Lewis

The Riverside County Bar Association is honored to announce that famed attorney and author Vincent Bugliosi will be speaking at a special RCBA general membership meeting, which will be a dinner event at the Mission Inn on May 5, 2010 (social hour at 5:30 p.m., dinner and program at 6:00 p.m.).



Vincent Bugliosi

In his career as a prosecutor for the Los Angeles County District Attorney's office, Mr. Bugliosi won 105 out of 106 felony jury trials. His most famous case was the Charles Manson case, which became the basis of his book, *Helter Skelter*, the biggest-selling true crime book in publishing history. At the upcoming RCBA event, he will be speaking on the topic of "The Manson Murders: The Trial of the Century."

Both *Helter Skelter* and the subsequent *Till Death Do Us Part* won Edgar Allen Poe Awards for the best true-crime book of the year. *And The Sea Will Tell*, another of his true crime books, was on the *New York Times* best-seller list. Mr. Bugliosi is also well-known for his other national best-seller about the O.J. Simpson trial, *Outrage: The Five Reasons Why O.J. Simpson Got Away With Murder*. He has also written *No Island of Sanity, Paula Jones vs. Bill Clinton, The Supreme Court on Trial* and *Reclaiming History: The Assassination of President John F. Kennedy*. Many of Mr. Bugliosi's books were made into television movies and miniseries.

Mr. Bugliosi participated in a British television production in which he prosecuted Lee Harvey Oswald for the assassination of John F. Kennedy, going up against celebrated defense attorney Gary Spence. The 21-hour docutrial had a real judge and jury, the actual witnesses in the Kennedy case and no script or actors. Ultimately, the jury convicted Oswald.

Tickets for this event can be purchased through the Riverside County Bar Association. The cost is $75 for RCBA/SBCBA members and $85 for non-members. **Seating is limited. Please call (951) 682-1015 to reserve your seat today.**

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.

Office Space – RCBA Building
4129 Main Street, Riverside. Next to Family Law Court, across the street from Hall of Justice and Historic Courthouse. Office suites available. Contact Sue Burns at the RCBA, (951) 682-1015.

Executive Office Suites for Lease
Ideal for professional office users. Abundant parking, views of Temecula in a serene park-like setting. 3 spaces available - space 203 @ 154sf; space 204 @ 170sf and space 204 @ 209sf. Located in the Galliano Professional Building @ 43521 Ridge Park Drive in Temecula. Please call (951) 694-3884.

Conference Rooms for Rent
$100-$200 per day. Meetings. Depositions. Interviews. Conference center. Beautiful, themed, spacious conference rooms for 4-25 people. Receptionist, luxurious waiting area, coffee, snacks, refreshments, Wi-Fi and electric outlet. Copying/faxing, whiteboard/flip-chart, notepads and pens included. Power point, DVD, audio-visual support on site. Optional administrative, notary and lunch/dinner service available. Call Tracie, 909.798.4554; 1710A Plum Lane, Redlands. Email rams@medaite.com. www.mediate.com/rams

Executive Office Available, Downtown Riverside
Very spacious, nicely decorated, conveniently located near the 60 Freeway at Market St. Includes: receptionist, telephone, DSL internet service, shared conference room, utilities, janitorial service & shared break room. $1,500/mo. Please contact Sara @ (951) 683-8320.

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.

Licensed General Contractor
Ron Fiducia (951) 271-0614. One call takes care of it all. Available for all your remodel and repair needs. Spruce up your office or remodel your house. Electric, plumbing, drywall, painting, tile/grout or carpet repaired, cleaned or installed. Over 14 years experience. Fiducia'a Construction Services CSLB B-924969.

IELLA Seeks FT Executive Director/Attorney
Responsibilities: operation/administration of organization, including personnel, pro bono attorney panel, programs, financial management/oversight and fund-raising. The candidate will have non-profit management, budget, fund-raising and grant writing experience, community networking, Spanish speaking and familiarity with public interest law. Must have JD degree. Submit resume to Steve Anderson, President IELLA BOD, P.O. Box 344, Riverside, CA 92502. No calls please.

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 March 30, 2010.

Leticia V. Barraza (A) – Leticia Medical Legal Consultants, Chino Hills

Martin R. Bender – Bender & Associates, Temecula

W. Raymond Bengert – Law Offices of W. Raymond Bengert, Indio

Jose S. Bohon (A) – U.S. Trust, Riverside

E. Lawrence Brock – Brock Law Office, Chino

Joseph A. Daily – Retired, Thermal

George H. David – George H. David Law Corporation, Palm Desert

Erik K. Dodd – Reid & Hellyer APC, Riverside

Donald H. Freeman – Sole Practitioner, Hemet

Joseph A. Gibbs – Joseph A. Gibbs & Associates, Indian Wells

Robert E. Habereder – Retired, Riverside

Monica M. Holmes – Law Office of Monica M. Holmes, Riverside

John J. Kuchinski – Retired, Indio

Jack Osborn – Hartnell Lister & Moore, Redlands

Victor Lewis – Law Offices of Victor Lewis APLC, Menifee

Robert G. Medof – Accident & Injury Helpline, Temecula

Andrew G. Owens, Jr. – Law Offices of Andrew G. Owens, Indio

Kimberly Prendergast – Sole Practitioner, Riverside

John L. Rosenthal – Sole Practitioner, Laguna Niguel

Samara Silverman – Office of the District Attorney, Riverside

Deborah R. Stone – Sole Practitioner, Rancho Mirage

E. Eli Underwood – Redwine & Sherrill, Riverside

Alisha M. Winterswyk – Best Best & Krieger LLP, Riverside

Renewal:

Don R. Inskeep – Retired, Riverside

(A) – Designates Affiliate Members

Riverside County LAWYER

Riverside County Bar Association
4129 Main St., Ste. 100, Riverside, CA 92501
RCBA 951-682-1015 LRS 951-682-7520
www.riversidecountybar.com rcba@riversidecountybar.com

PRSRT STD
US POSTAGE
PAID
PERMIT #1054
RIVERSIDE, CA

Why DRS?

Riverside County Bar Association
Dispute Resolution Service, Inc.
(A Nonprofit Corporation)

DRS benefits clients:
- Reasonable fee of $200/hour;no set-up fee or hidden costs
- Minimal waiting time facilitates quicker resolution of issues
- Neutral perspective by an attorney with at least 10 years' experience

DRS benefits attorneys:
- Saving clients' money creates satisfied clients
- Solving problems quickly enhances your reputation
- Innovative solutions can restore faith in lawyers

DRS benefits the courts:
- Prevents nuisance cases from getting to court
- Enables case settlements before going to trial
- Helps alleviate congested court calendars

BOARD OF DIRECTORS:
Christopher G. Jensen, President
Michelle Ouellette, Vice President
David G. Moore, Chief Financial Officer
Judith A. Runyon, Secretary
James O. Heiting, Director-at-Large
Michael G. Kerbs, Director-at-Large
Elliott S. Luchs, Director-at-Large
Harry J. Histen, RCBA President

4129 Main Street, Suite 100
Riverside, CA 92501-3629
(951) 682-2132
FAX (951) 682-0106

Call 951-682-2132