RIVERSIDE LAWYER
June 2010 • Volume 60 Number 6
MAGAZINE

29th Annual

Good Citizenship Award Recipients

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.
Read Alan's story at
www.go2lavernelaw.com/alan
UNIVERSITY OF
LA VERNE
COLLEGE OF LAW
The University of La Verne College of Law has been provisionally approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association since 2006. The Section of Legal Education may be contacted at 321 North Clark Street, Chicago, IL 60610 or by phone at (312) 988-6738.

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:

COVER STORY:

Features:

Departments:

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

JUNE

9 Barristers
Citrus City Grille, Riverside Plaza
6:00 p.m. to 7:30 p.m.
"Bankruptcy and Real Estate"
Speaker: John Boyd, Esq.
(MCLE: 1 hr)

15 Family Law Section
RCBA, John Gabbert Gallery – Noon
"Supervised Visitation Monitoring"
Speaker: Sherri Webb
RCBA members Free, Non-members $25.
(MCLE: 1 hr)

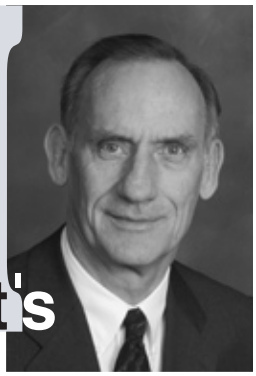
15 RCBA Board of Directors
RCBA – 5:00 p.m.

16 Estate Planning, Probate & Elder Law Section
RCBA, John Gabbert Gallery – Noon
"Death and Property Taxes"
Speaker: Larry Ward, Riverside County Assessor
RCBA members Free, Non-members $25.
(MCLE: 1 hr)

18 General Membership Meeting
RCBA, John Gabbert Gallery – Noon
"Social Media and Harassment"
Speaker: Michael Blacher
RCBA members $20, Non-members $30.
(MCLE: 0.75 hr)

SAVE THE DATE:
Thursday, September 30, 2010 – 5:30 p.m.
RCBA Annual Installation of Officers Dinner
Mission Inn, Music Room

President's Message



by Harry J. Histen

Our magazine's theme this month is "Litigation." When litigation is compared with other activities that primarily deal with human interaction, it shines as the most trusted and rational. Because litigation is its essence, the judicial branch of government is the most discerning branch of government, the only branch that makes decisions through the use of a system designed to find the correct answer. Public confidence depends upon principled stability.

A court's resolution of a dispute will be based on ultimate facts to be decided and reason applied to those facts. Its procedures guarantee, as much as is humanly possible, that all persons are equal under the law. Justice in our court system is essential to our freedom. We do not allow even facts and reason to run amok. The law guards against faulty reasoning by testing decisions against experience.

Litigation is based upon fact finding methods proven over the millennia. As a freshman in college, I had the arduous pleasure of taking a class in Aristotelian logic and Objectivism from a Jesuit professor. He taught that the elements of valid decision-making are, first, determine the existence or nonexistence of facts; second, apply reason to the determined facts; and third, conclude. Any extraneous influences invalidate the conclusion. The professor's list of unwelcome influences included feelings, emotions, and, to some extent, faith. He taught that your self esteem is in direct proportion to the degree that you believe yourself to be in control of your reality. A good, solid knowledge of your productive environment allows you to proceed through life with healthy self-confidence.

Conversely, though feelings and emotions serve to motivate behavior and to inspire goals, they pollute deliberate decision-making. Feelings have no limits. For example, we far too often see an individual who has lived an honorable, productive life suddenly lose it all because of a single regrettable action. Our hearts go out and our feelings urge us to believe that it is unfair to punish such a person. Yet, if we surrender to those feelings, we also renounce equality before the law. To allow such considerations in law would undermine the individual self-esteem of our citizens by undermining their confidence in a government of law – a fixed reality.

Because my professor was a deeply religious priest, it surprised me that he had excluded faith from the decision-making process. But he hadn't. He was cautious that faith's influence was wisely limited. His explanation was elegantly simple. Those who accept the precepts of a faith may rationally consider those precepts as facts in their personal reasoning. By way of example, he explained that it's okay, even healthy, to accept your faith's belief about life after death as fact and to guide yourself accordingly. He taught that to do so would have no more adverse effect on day-to-day decision-making than did acceptance of the erroneous beliefs that the earth was flat or that the sun rotated around the earth had on our ancestors' lives.

In our world, judicial branch proceedings do not fail because a law is changed or may be thought unwise. A law simply must identify the facts, or elements, that must be determined in order for the law to apply and to ensure that it is justly applied. We don't claim perfection. Courts frequently struggle with the pretense of knowledge offered as evidence by a would-be expert. Courts must hear and decide cases when they are presented. They don't have the luxury of waiting for science to develop stronger evidence. Through the litigation process, most steps are in truth's direction. Our society's strength emanates, in substantial part, from the impartial and zealous search for truth – from what we do.

Supreme courts give society the sense of stability – confidence in the court's dedication to truth and fairness. Elena Kagan's nomination to the Supreme Court resurrected discussions of judicial restraint. One side insists that the court shouldn't restrain anything, that the court should limit its inquiry into whether an act of another branch is within the power given to it by the people through the constitution. The other side urges that judicial restraint means that the court should restrain itself from interfering with democracy. As frightening as the latter

view may be, it does not seem that the public's confidence in the court will be altered much, if at all. I don't recall ever hearing a call for abolishing the court.

Executive and legislative branch decisions are driven largely by feelings and visions. Policy is made and laws are passed to assuage voters' desire for a dream to be true and because politicians will decree a dream to be true. Riverside County's shortage of judicial officers is illustrative. In 1997, the governor and the legislature took control of the trial court and made equal access to justice mandatory – the law of the state. They felt and enjoyed the thrill of commitment. They had done their job. They enacted a law.

The executive and legislative branches have been free to act on emotion because litigation and the courts protect our nation's stability, as well as the confidence of its citizens.

The RCBA is set to inaugurate a mentoring program: Because it is becoming more evident that many new lawyers, or lawyers changing the nature of their practices, could make good use of a mentoring program, the RCBA Board has voted to launch one. To get the program started while we figure out the details, some help is available now, with members of the Board being the mentors. Mentoring is available in criminal law, civil litigation, professional responsibility/ethics, trusts and estates, general business and business formation, personal injury, real estate and construction, public law and appellate law. I encourage those who would like to receive some mentoring in the areas mentioned to please call Charlene Nelson at the RCBA office at (951) 682-1015. In addition, please contact Charlene if you are interested in becoming a mentor. The RCBA hopes to have the program in full swing by the fall. We welcome your participation in this exceptional program.

29th Annual Good Citizenship Awards

photographs by Michael J. Elderman

National Law Day (May 1) is a special day focusing on our heritage of liberty under law, a national day of celebration officially designated by joint resolution of Congress in 1961.

As a part of its celebration of Law Day 2010, the Riverside County Bar Association and Riverside County Superior Court once again sponsored the Good Citizenship Awards (established by the RCBA in 1981) for high school students in Riverside County. The award is presented to those high school juniors who have been designated by their respective principals as exhibiting the characteristics of a good citizen – leadership, problem solving and involvement on campus.

RCBA Past President Daniel Hantman, Judge Gloria Connor Trask, RCBA Current President Harry Histen

RCBA President Harry Histen, Presiding Judge Thomas Cahraman, Judge Irma Asberry, Judge John Molloy, and Assemblyman Kevin Jeffries addressed the assembled high school juniors and their parents, teachers and counselors, and recognized their exemplary citizenship and accomplishments.

The recipients receive $100 cash stipends from the RCBA and the Lawyer Referral Service, as well as certificates of merit from the Riverside County Superior Court and local elected officials. This year, certificates of recognition were given by U.S. Senator Barbara Boxer, U.S. Congressman Ken Calvert, U.S. Congresswoman Mary Bono Mack, Senator Robert Dutton, Senator Dennis Hollingsworth, Assemblyman Paul Cook, Assemblyman Bill Emmerson, Assemblyman Kevin Jeffries, and Assemblyman Brian Nestande.

The awards ceremony was held on Friday, May 7, 2010, in Department 1 of the Historic Courthouse in Riverside. The following high school students from around the county were recognized for their good citizenship:

High School Name	Student Name
Abraham Lincoln	Isaiah Wheeler
Alessandro	Isaac Pelayo
Arlington	Alexis Wood
Banning	Carina Avila
Beaumont	Alejandro Martinez
CA Military Institute	Carlos D. Fletes
Canyon Springs	Monica Simril
Cathedral City	Austin T. Rodill
Centennial	Stephen Merchant
Chaparral	Samaira Sirajee
Citrus Hill	Rosa N. Esparza
Coachella Valley	Joshua Luna
Corona	Michael D. Gauger
Desert Mirage	Amauri Omar Reyes
Elsinore	Jared Forte
Glen View	Carlos Antonio Hernandez
Great Oak	Jorge Guerrero, Jr.
Hamilton	Alexander Zaykov
John W. North	Daisy Ocampo
John F. Kennedy	Christyana Cabal
La Quinta	Brooke Leachman
La Sierra	James Newton
Martin Luther King	Jimesa Coxsey
Murrieta Valley	Stephanie Gonzales
Notre Dame	Kathryn Wilson
Nueva Vista	Ashanti Armstead
Ortega	Maria Fuentes
New Horizons Model	Esmeralda Arciniega
Orange Grove	Scott Coshew
Palm Desert	Naomi Barney
Palm Springs	Genaro Gonzalez
Perris	Jacob Galvan
Santiago	Jared Ham
Sherman Indian	Unique Darrell
Tahquitz	Lizeth Lira
Temescal Canyon	Emely Villegas
Valley View	Olivia Reid
Vista Murrieta	Alexandria Pham
West Valley	Erica Gutierrez
Woodcrest Christian	Krystal Gomez

Assemblyman Kevin Jeffries, California State Legislature, 66th Assembly District

Judge Irma Poole Asberry, RCBA Past President

Presiding Judge Thomas Cahraman (right) congratulating a student recipient

Judge John D. Molloy (right) congratulating a student recipient

Early E-Discovery Resolution:
How California's New E-Discovery Statute Influences Your Case from the Very Start

by Benjamin A. Eilenberg

Over the past decade, e-discovery has been a growing concern for California attorneys and their clients. E-discovery disputes were resolved using an amalgam of traditional discovery principles and the Federal Rules of Civil Procedure. However, there were no clear guidelines. In 2009, the Legislature passed the California E-Discovery Act to help resolve the growing areas of concern over E-Discovery.

One of the lesser known changes in the California E-Discovery Act affects every civil case from its inception. Under California Rule of Court 3.727, parties must now meet and confer on e-discovery issues no later than 30 days before the first case management conference. This means that before anyone would typically know whether e-discovery may be required for the case, they must try to establish ground rules for how e-discovery will be done between the parties.

There are several factors to consider when coming up with e-discovery guidelines when meeting and conferring:

Will there be e-discovery?

If so, is the data in a commonly used program, or a proprietary system?

If the data is in a proprietary system, will you negotiate for a copy of the opposing side's software?

If you need to release a copy of proprietary software, will you require a confidentiality agreement?

Is metadata important in this case?

Will each side bear their own costs?

Will paper printouts suffice, or do the parties need the actual electronic data?

Do the parties expect to use outside consultants for e-discovery?

While not everything needs to be completely settled before the first CMC, lawyers can get into serious trouble by not having at least discussed the issue. Federal interpretations of e-discovery rules have held that by not establishing in what format the e-discovery would be produced, the parties waived the right to demand them in any particular format and paper printouts were therefore allowed. While California courts have not yet ruled on the issue, by not meeting and conferring, there is a risk that a party waives the right to demand documents in their electronic form. If a party waives that right, or fail to ask for the electronic form in their discovery requests when sent, the opposing side may be able to simply send printouts of the applicable files. In most cases, this probably will not matter, but the occasional case will require a full electronic copy of the documents.

How should a lawyer prepare for the meet and confer? Many lawyers have turned to an inside source to help them prepare, and sometimes participate, in the meet and confer: Their IT department. Your in-house technical support team not only can help you to understand the technology and terminology, but may also help determine whether the opposing side's requests are reasonable. If your client keeps its documents in a proprietary database program, giving a copy of the program to the opposing side could be hazardous to your case (or could expose your client to accidental copyright infringement for transferring a license). On the other hand, if the documents are all in Microsoft Office, then the only real issue is what information is changing hands.

While meeting and conferring on discovery issues before the first CMC seems premature, it can save a lot of time, and more importantly, preserve your ability to address the issues later if necessary.

Ben Eilenberg is an Associate at Gresham Savage Nolan & Tilden, APC. Mr. Eilenberg assists clients with all aspects of corporate, intellectual property, property, banking and environmental litigation.

The Hawthorne Court – Civil Litigation Goes Back to School

by Jean-Simon Serrano

Many civil trials in Riverside County are presently being held in the Hawthorne Court – a recommissioned elementary school in Riverside. In the past two months, my office has had the opportunity to try no fewer than three cases in this court. Though it is, for all intents and purposes, a civil courthouse, there are a few peculiarities to having a civil trial in a former elementary school that bear mentioning.

Space Is at a Premium

Although the courtrooms are decorated and configured as such, there will be times when it is difficult to forget that you are in a rearranged classroom. If your clients wish to have family members present, or if you are working with an insurance adjuster who wants to tag along, you should know that seating is extremely limited. Only two persons can sit at each counsel table. In one of my trials at Hawthorne, I was representing three clients – one client could accompany me at the counsel table, but the other two had to sit at the back of the classroom (where there is room for only one row of hard-backed, uncomfortable metal chairs).

It is often recommended that attorneys familiarize themselves with the courtroom before trial; this is especially true of Hawthorne, where it should take about 15 seconds to do so. A cursory inspection will reveal that the witness stand is on wheels and is located inside the well, between the judge and counsel's tables. While portable in nature, the stand is difficult to configure so that witnesses can be simultaneously facing both the jury and anything projected via the overhead projector; projected images are almost always directly behind the witness stand. Some jurors complain they can't see the witness at all because the court reporter is obstructing their view.

What you may not notice upon initial inspection of Hawthorne is that train tracks run directly behind the school. Be prepared to pause hourly as freight trains blare their horns and roar by the building.

There are no judge's chambers per se. Rather, discussions that would normally be heard in chambers or at side bar are likely to be heard outdoors, on a walkway that runs alongside the building between the classrooms. Naturally, the court reporter is not present, as it would be too cumbersome to bring the machine, etc., outside.

The Jury

It has been my experience, although perhaps this varies depending on the judge, that jury selection is done in the courtroom and not in a jury assembly room. This will probably have little effect on your voir dire; however, it could be a surprise if you are not expecting it. Additionally, I got the impression that counsel and jurors alike were taken aback by the school-like atmosphere of the court; we all had to take pains to inform the jury that, while the Hawthorne Court lacked the hardwood, marble, and tall ceilings of other courtrooms, matters heard in it were no less serious or important than matters heard in more aesthetically impressive forums. Unfortunately, I am doubtful as to the effectiveness of this admonition.

Limited Privacy

Be mindful that, when court is not in session, the jury will be milling about the area just outside the courtroom. The jury assembly room and courtrooms are separated by a small courtyard, with picnic tables in between. It is in this courtyard that the jurors usually gather during breaks and before court. It is through this same courtyard that you, your clients, and your witnesses will have to walk should you wish to use the children's restrooms, also shared with the jurors. If you wish to talk to your clients or meet with witnesses, you will have to walk behind one of the various buildings or stand in the parking lot. Likewise, there is no area designated for witnesses to wait prior to being called. A jury selection room may be available, but this, again, opens onto that same courtyard where the jury is waiting. Prepare your witnesses for the idea that they will be testifying at an elementary school, and perhaps have them wait in the parking lot until you are ready for them to be called. They will likely be shocked at the courtroom configuration and witness stand.

With respect to parking, it is important to note there are essentially two parking areas. You will want to park in front of the school, near the area where school buses picked up and dropped off children in years past. You will likely be instructed to have your clients and witnesses do the same. This is because the jurors park in the dirt lot on the east side of the school grounds. Having your clients and witnesses park in front of the school will keep contact with the jury to a minimum.

Suggestions for Improvement

I have spoken with several attorneys about their experiences at the Hawthorne Court. Despite the negativity of their responses, all were mostly tolerant of their experiences, and each had similar suggestions as to ways in which the court could be improved. These were:

- **Larger courtrooms:** Many of the attorneys who had been in the judge's offices adjacent to the courtrooms had noticed that these offices are significantly larger than the courtrooms. It appears the offices were enlarged by removing the wall along the back of the classroom and extending the offices into the other side of the building. Similarly extending the courtrooms in this fashion would yield courtrooms double the present size and probably make them adequate. They are not adequate now. As a (very) temporary approach, they were tolerable. It is time to make them at least adequate.
- **Space to meet with clients and/or witnesses:** This was probably the most common criticism. Again, there is no place to meet with clients or witnesses out of the jury's view. A simple room provided for this purpose, away from jurors' and others' prying eyes and ears, would be greatly appreciated.
- **Area for preparation/research:** Several attorneys indicated they wished to have facilities available for last-minute preparation or research – especially during lunch. Currently, there is no place to do this other than at picnic benches with the jurors or in your car. Some room(s) should be provided, perhaps with internet access, such that preparation, communication with the office, or legal research could be conducted. Such a room is a small request and should be a mandatory consideration.

The Temporary Nature of the Court Should Be Reassessed

Every courthouse has its idiosyncrasies, and I intend this article not to highlight only the shortcomings of the Hawthorne Court. When the court was opened in January 2008, it was intended as a temporary (six-month) solution to the judicial backlog in this county. Now, more than two and a half years later, the temporary nature of the court is questionable and the shortcomings are increasingly difficult to overlook. This is not to speak ill of the court staff, who were all very accommodating and extremely professional. Clearly, we still need the Hawthorne Court to help alleviate the civil trial backlog in Riverside; however, permanent changes to the court are needed to make adequate this "temporary" solution.

Jean-Simon Serrano, a member of the Bar Publications Committee, is an Associate at Heiting & Irwin. Mr. Serrano is also the Secretary of Barristers and a member of the Leo A. Deegan Inn of Court.

Hello, New Lawyers

by Arthur K. Cunningham

When I was asked to prepare an article for this issue, my first question was: What topic? I'm told that this article will be provided to newly admitted members of the State Bar. So you new lawyers are the audience for this piece, and with that in mind, I have a few observations based upon over 25 years of practice, and what I hope is a useful perspective on starting out as a practicing lawyer.

Like a large minority of lawyers, I attended law school part-time and had a full-time job that on only rare occasions required that I wear a tie. I didn't have the opportunity to clerk in a law practice; the first time I went into a lawyer's office other than as a client was when I arrived for my first day in practice, newly hired. Fish out of water? Definitely. I'd never used a dictating machine, never seen a lawyer's file, never read a three-foot high stack of medical records. My boss had to come into my office at 11 a.m. on my first day and advise me that it was okay not to wear my suit jacket while seated at my desk.

I had the good fortune of working for lawyers, in my early years in practice, who had high expectations, both for the quantity and the quality of work done, and a well-developed sense of what a responsible lawyer does. I never had to unlearn a lot of bad habits later on.

I was also fortunate enough to work for lawyers who believed that civility was important in practicing law. In Orange County in those days, and in the Inland Empire even now, in the course of your career you are going to run into, work with, and contend against the same community of lawyers over and over again. Gain a reputation early for being unreasonable, untrustworthy, obnoxious or otherwise hard to get along with, and that reputation will follow you for a lifetime.

An example of doing things the right way: Early on during my stint at my first firm, a local plaintiff's firm suffered a tragic fire that destroyed their offices and claimed the life of one of their young lawyers. Beyond the human tragedy, there was also the catastrophic effect this had on their practice at a time when no one used computers and every file was nothing but paper. They no longer had their calendars or their files – everything had been destroyed. So they called our office, and the other local defense firms, and all of us copied out of our own files every scrap of correspondence, every pleading, and every deposition transcript, and did what was necessary to help them reconstitute their practice. No one, to my knowledge, made even a passing attempt to use this tragedy as a way to gain an advantage over the opposition.

Looking back, the best lesson I learned, from my earliest days in practice, was that the attorney for the opposition was an opponent, not an enemy. I learned that it was possible to represent a client zealously and aggressively, without making the dispute personal between the lawyers, and that comity creates opportunities to resolve even fierce disputes between parties. I have a lot of respect for attorneys I've never agreed with about just about anything involved in our shared cases – so long as disagreements are honorably conducted, mutual respect is not hard to come by.

Professional courtesy should be a given, not an exception. When an attorney needs more time to provide discovery responses, my reaction, unless there's absolutely compelling reason otherwise, is to accommodate. I have been on the receiving end of innumerable acts of professional courtesy, particularly over the years, but also in the recent past, and I attribute that to a built-up reservoir of good will among the lawyers with whom I contend, and their own good character. I firmly believe that if a lawyer's word is no good, getting his or her confirmation in writing is not worth much, either (I ask for the confirming letter or email only because I have a bad memory, not due to a lack of trust.)

Taking that concept of mutual respect into the courtroom, remember that judges, and juries, don't want to watch the attorneys snipe at each other. One way to earn a judge's disdain is by spending most of your time, during argument on a motion, taking ad hominem shots at the attorney for the other side. Spending your time in argument attacking the other attorneys is a tipoff that the law, the facts, or both don't support your position. Jurors don't generally empathize with the attorneys; they empathize with the clients, and the witnesses. An attorney making a spectacle of himself or herself by whining about what the other attorney is doing (as opposed to making a forceful, but professional, argument to the court about that conduct, if it's called for) makes no friends on the bench, or among the jurors.

Show the court staff the same courtesy and respect you'd show the judge – and you'd better show the judge plenty of respect.

And, most important (take this from the husband of a former legal secretary): Treat your secretary, and the people in your office, like gold. An unhappy secretary can make your life as a lawyer a living hell; a secretary who is appreciated as a vital part of your practice makes you look good to clients and opponents, and makes you a better lawyer.

Lawyering can be stressful and demanding, but it also is interesting, challenging, and rewarding.

Good luck.

Trial Skills from the Masters

by Bruce E. Todd

"You have such strong words at command, that they make the smallest argument seem formidable." – *George Eliot*

Listening to those who are blessed with silver-tongued eloquence can sometimes be a humbling experience. This was how I felt when I recently attended a seminar entitled "Mock Trial with the Masters," which was sponsored by the La Verne University College of Law. The presentation featured some of the top civil litigators in the Inland Empire and, for that matter, the entire country.

I have had the honor in the past to square off against some of these individuals, many of whom have inherited the gift of gab, and it has oftentimes been a challenging experience indeed. They are some of the best orators in our profession, and one can learn immensely from their vast trial experience.

As the vehicle for their discussion, the featured speakers presented a mock trial in a personal injury lawsuit that resulted in the tragic death of a young girl who was a pedestrian on a busy city street. She was struck by a truck that allegedly ran a red light (or unsafely entered against a yellow). The facts of the case were based on an actual accident, and subsequent lawsuit, that occurred in San Francisco.

The Honorable Douglas P. Miller and the Honorable Stephen G. Larson (retired) presided over the mock trial. Nationally recognized attorneys such as Thomas Girardi and Michael Bidart were among the featured trial counsel. The case was presented, as is typical with a mock trial, with the plaintiff and defense perspective on voir dire, opening statement, direct and cross-examination, and closing argument.

The following trial tips were expressed by the participants in their own individualized styles. Some of the points may seem basic, but are often forgotten or overlooked by many attorneys during their participation in a trial.

Voir Dire ("vwar dir")

Tom Girardi, who was introduced by Justice Larson as "the best trial attorney in America," started by humbly thanking the jury for its service. He spoke in an amiable, almost folksy, manner and gained a commitment from the jury that it would be fair. He pointed out that his comments during voir dire were not to be considered as admissible evidence. He then told the jury that he would need to ask them some questions that were "normally none of my business," but that he was obligated to obtain this information, which might be considered private, from them in order to adequately represent his client.

Since he was representing the plaintiff in this mock trial, he inquired of the jury about whether it felt that "jurors give away too much money." He pointed out to them that it is "kind of important" for him to know how they felt about this issue in order to represent his client. He emphasized that all he desired of the jurors was for them to "give both sides a fair shot," and, in a style that established that his client was not a money-grubber, he instructed the jury that, if they determined that his client was not entitled, they should not decide in his client's favor. He also made a point of seeing if any of them had a problem with awarding a large sum of money by asking, "If we are entitled to a large verdict, will you give it?"

Phillip Baker, on behalf of the defense, then had his opportunity to question the jury. He is a partner in the Los Angeles law firm of Baker, Keener & Nahra. Under the factual scenario of this mock trial, he was representing the driver of the truck and his employer (the city).

Baker has a humorous and witty style, which, if used improperly by a lawyer, can backfire, because a jury will feel that the lawyer is not treating the proceedings with proper gravity. Baker's approach, however, was quite successful.

He started his discussion by referring to Mr. Girardi as "his good friend." This comment was obviously made to establish to the jurors that, although they were adversaries in this case, they have a good professional relationship.

Since the plaintiff goes first in presenting the evidence in a civil case, Baker inquired of the jury if they would be able to listen to all of the evidence before making up their minds. He reminded them that the plaintiff has the legal burden of proof. He emphasized that, from the plaintiff's perspective, this would be a very sympathetic case, and he asked them whether, if they found on liability in favor of the defendants, they could "look Mr. Girardi's client in the eyes and not award any damages."

Following their questioning of the jury, Girardi and Baker made the following observations. Girardi said that, generally, unemployed people, ones in the military and those in management are not good for the plaintiff. He said that teachers and "artsy" people often make good jurors for a plaintiff. He said that "body language" is important to making a decision about whether to keep a particular juror. In fact, he said that he will often have "a law clerk or two" from his firm sit in the back of the audience during voir dire

so that they can voice their opinions to him about which jurors to keep.

Girardi also opined that jury selection is the most important part of a trial. He indicated that, if a juror appears not to want to serve on the jury, he will generally not keep that individual, because he believes that the person will want to rush through deliberations in order to finish their service.

Opening Statement

Brian Panish, a former California Trial Lawyer of the Year with the firm of Panish, Shea & Boyle, made the opening statement on behalf of the plaintiff. He did not use written notes during the presentation. He also did not employ the often used phrase, "The evidence will show . . . ." This may have been a ploy, frequently used by trial counsel, to have the jury believe that what he was saying was indeed evidence, even though comments made during opening statement are clearly not admissible evidence.

Panish utilized a visual presentation to introduce the facts to the jury. While some of the horribly graphic images may have been extremely prejudicial and bordered on closing argument, they were quite moving and evoked sympathy for his client. He told the jury that the defendants had created a "debt" to his client and that "your job is to square that debt."

Cases often settle once the trial actually commences. Panish explained to the audience that one reason for presenting such graphic evidence during opening statement is to possibly convince the defendant to reevaluate the case and consider a settlement.

Linda Miller-Savitt, with the Glendale-based law firm of Ballard Rosenberg Golper & Savitt, made the opening statement on behalf of the defendants. Her technique was to try to minimize the obviously sympathetic case by reminding the jurors to look "objectively" at all of the evidence. She also attempted to take the "emotion" out of the case by explaining to the jury that she will be presenting expert testimony, which will provide an independent, unbiased analysis of the facts, rather than relying upon the emotional testimony from eyewitnesses to the accident (in fairness to her, the facts of this case were highly favorable to the plaintiff).

Following the opening statements, Justice Miller commented that he probably would not have allowed Panish to utilize some of the more graphic images during opening statement, as they could be very prejudicial. He said that he usually tries to get counsel to work these issues out, but, if they cannot do so, he will generally lean toward excluding such graphic evidence during opening statement.

Direct and Cross-Examination

During the mock trial, there were demonstrations of how to perform the direct and cross-examination of several witnesses. They included the plaintiff, the defendant and the respective experts for each side.

William Shapiro, a prominent San Bernardino personal injury attorney, performed the direct examination of the plaintiff (the mother of the little girl who was killed in the accident). He utilized graphics to depict the tragic accident scene, the decedent herself, and the decedent's relationship with her mother. His questioning was designed to reveal the horror that the mother must have felt from observing the death of her daughter at the accident scene and to garner sympathy from the jury regarding the special relationship between the mother and her deceased daughter. Shapiro later explained to the audience that his direct examination focused primarily on damages rather than liability, since he felt that this testimony was the most important part of this particular case.

Deborah DeBoer, a noted medical malpractice defense attorney from Indian Wells, demonstrated to the audience that prior deposition testimony can be utilized to impeach a witness. She also had the plaintiff admit that she had previously needed to use a Spanish interpreter during her deposition, but now the plaintiff was somehow miraculously able to provide her testimony in English in front of the jury.

The examination of this witness exhibited that, when good lawyers properly frame their questions, there are few, if any, objections to the questioning.

The plaintiff's liability expert was initially examined by Ricardo Echeverria, who is a nationally recognized insurance bad faith lawyer with the Claremont-based law firm of Shernoff Bidart Echeverria. He demonstrated how to properly qualify an expert and then asked the court to deem the witness qualified to provide expert testimony. In order to minimize the appearance that the witness was merely a paid proponent for the plaintiff, Echeverria had the witness acknowledge that he was indeed getting paid and that he had previously been hired by the defense attorney on this case, for the same rate of pay, on other matters.

Echeverria then had the witness explain to the jury about all of the evidence (such as examining the vehicles and the accident scene) that he had analyzed to form his opinions. This testimony was designed to demonstrate to the jury that the witness' ultimate opinions were based upon a thorough analysis of all of the evidence. While the witness was providing his testimony, Echeverria asked permission from the judge for his expert witness to leave the witness stand so that he could stand by the pertinent exhibits while explaining his reconstruction of the accident. This was helpful in compelling the jury to focus solely on the expert as he was giving his analysis of the facts. In fact, Echeverria later told the audience that he will often stand a great distance from a witness while questioning him so that the jury

can devote its entire attention to the testimony coming from the witness.

Jack Marshall, a prominent insurance defense attorney with Riverside's Thompson & Colegate, had the plaintiff's expert witness acknowledge that much of his analysis was based upon the observations of various eyewitnesses. He then had the witness admit to the jury that many people can see the same event and yet perceive it differently. He also had him admit that the recollections of witnesses can change over time.

Andrew Hollins, who performed the direct examination of the defense liability expert, noted to the audience that some experts have ivory-tower knowledge but limited practical field experience. He said that, when cross-examining an expert who has limited real-world experience, it is critical to bring out that fact from the witness.

Closing Argument

The importance of closing argument has always been a debated topic. There is one school of thought that closing argument (summation) has minimal importance because the jurors have already made up their minds based upon the evidence and they are sophisticated enough to realize that the attorneys are simply attempting to persuade them. There are others who feel that a strong closing argument, particularly in a close case, can ultimately determine the outcome.

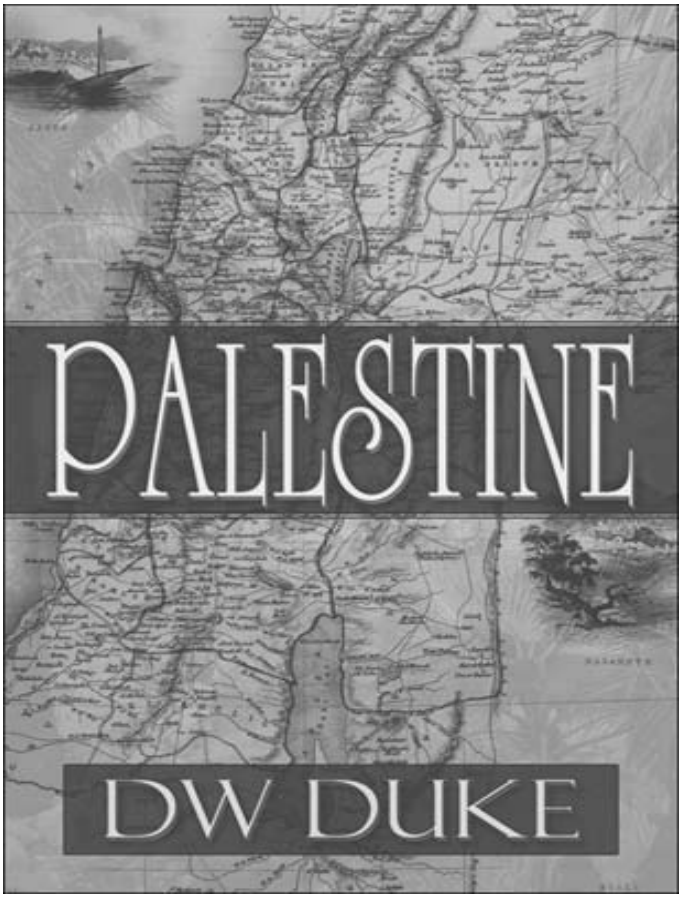
Many attorneys develop a theme for use during closing argument. In this case, closing argument on behalf of the plaintiff was delivered by Michael Bidart, who is one of the nation's leading insurance bad faith attorneys. As his theme for how much the jury should award his client, he calculated for them the life expectancy of his client in terms of the remaining "minutes" of her life. He suggested that it would not be unreasonable for them to award her a dollar for each remaining minute. Of course, the remaining minutes of her life were in the millions, and thus Bidart was essentially asking the jury to award many millions of dollars to his client for tragic death of her daughter. He reemphasized that such an award would "square the debt" that the defendants had created.

Jack Marshall, during his closing argument, reminded the jury that Mr. Bidart's closing argument (as well as the original opening statement) was not "evidence" to be considered by them. He also reminded them that it is the plaintiff, not the defendant, who has burden of proof of establishing both liability and damages.

Summary

The lessons to be learned from these highly skilled trial attorneys are invaluable to those who want to be successful litigators. Each of them has, over time, developed his or her own unique and characteristic style. If there was one thing to be learned from this excellent presentation, it was that every attorney should develop their own style based upon their personality and specific skills. An attorney will be much more credible to a jury by so doing.

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



Palestine

by DW Duke

Product Details

ISBN: 978-1-4489-4611-2

 # Pages: 160 pages

Dimensions: 5.5 x 8.5

Format: Softcover

Palestine **is about a Jewish boy named Aaron Levy who, at the age of five, is traveling with his family in Israel when the vehicle in which they are riding is attacked by Palestinian terrorists. His entire family is killed in the attack. Aaron is traumatized and emotionally scarred.**

Many years later, Aaron enrolls in medical school in the United States and meets a beautiful female Palestinian medical student named Al Zahra who is a descendant of Mohammad, the founder of Islam. They become very close but their religious and ethnic differences place them into a forbidden romantic relationship. After four years of medical school, they part ways, and many years later, they meet again when Aaron, as an Israeli Defense Forces medical officer, comes face to face with Al Zahra, who is now a Palestinian doctor working in a hospital in the municipality of Gaza. Under the pressures of a combatant situation, their religious differences and their human strengths are put to the ultimate test. Described as an "action romance," this book will keep you on the edge of your chair from beginning to end.

DW Duke is the managing partner of the Inland Empire law office of Spile, Siegal, Leff & Goor, LLP and has published numerous books and articles on various topics of law. He is extensively involved in matters of human rights with emphasis in the Middle East and in particular Israel and Iran. While trying to develop a way to get his message to the public he decided to write a novel called "Palestine" to address the Israeli/Palestinian crisis.

Palestine **will be available soon at Amazon.com and your local bookstore.**
To order directly from the publisher call 301-695-1707.

Mediating the Civil Case: Great Expectations or Reality Check

by Donald B. Cripe

"There are an infinite number of generalizations that are consistent with any set of observations, and no strictly logical basis for choosing among them."
– Anonymous Scientist

My model for mediation, the person who inspired my decision to become a full-time professional mediator is Judge Charlie Field. In my experience with him, Judge Field always made thought-provoking comments during mediation that seemed to keep the process moving. A paraphrase of the one I best remember--and use--is that it seems most people want "justice" through the system of litigation and, it seems, most people's view of justice is, "I win."

The majority of mediations that I have conducted in which at least one party is represented by counsel, at least one of the attorneys (or sometimes the party) wants to convince the "bonehead" on the other side just how wrong she is. Another significant number involved attorneys who want a neutral to help convince the parties to settle. I have been much more successful in the latter situations. My observations and experiences during mediation create within me a desire to communicate to the advocates and parties those things that I believe will help them to be successful in mediation.

It is my experience that though no cost court sponsored mediation programs seem to be extremely successful within the guidelines currently in effect, those parties who select private mediation, as opposed to a no-cost program, have a greater incentive to settle. First, they have elected to mediate which suggests a desire to settle, but they need to have an experienced neutral help them get to an agreement. Also, people want value for money so those who have a private mediator seem to be more motivated since it is costing them for the service. I have also seen that there are a fair number who trigger and invest in private mediation just to get the process started and to evaluate the opposition's resolve. The feedback I have received from mediation clients has been that the latter is an effective use of time and money as it better helps the parties to prepare for further mediation, private settlement, or trial and it certainly gives both sides the opportunity to see how the opposition has evaluated the case.

The trend toward court sponsored mediation programs is a very good development. I have found that many times counsel or the parties in litigation aren't aware that settlement is an option in their case. Perhaps it is a lack of communication or benign neglect, but when a settlement option is presented to an unsuspecting litigant (or counsel); it is a pleasure to see the lights come on.

The dark side of court programs is that all too often cases are either not ready for mediation or are simply not right for mediation. I believe, based upon my experience, that most cases are amenable to a mediated settlement when the time is right. But the court sponsored programs should not be clogged with cases that are either not ready or those in which counsel are reasonably certain that a mediated settlement is unlikely. I suggest that the best approach for bench officers in these programs would be for cases not to be referred to mediation until all of the relevant boxes are checked on the CMC statements that all litigants are required to file in which they declare that they have met and conferred and have discussed ADR with the clients (see, *California Rules of Court* 3.221, 3.720-3.730 and particularly 3.724). All this means is that counsel need to be honest with the judge at the time of the case management conference. It is more difficult and expensive for everyone if the parties engage in mediation without being properly prepared which, in my view, includes at least some dialogue beforehand regarding settlement.

Professional negligence cases, most particularly the generic group of cases known as "medical malpractice" create a special problem for mediators. Many times in these cases the insured has the right to prevent his insurance carrier from offering money to settle a case. Though I see nothing wrong with this prerequisite, if there is a "consent" issue, counsel representing the insured must tell the court so the judge can evaluate whether or not mediation is appropriate. I believe that this should also be information included in the CMC statement. I also believe that the court should ask, for example, "if the [insured] consents, and knowing the range of the plaintiff's demand, will there be authority that you reasonably believe will be sufficient to settle this case?" If there is authority but no consent, the case may be appropriate for court mediation but the insured must be ordered to be physically present along with, I propose, the person who actually has settlement authority. If the defense reports at the CMC, "no authority, no consent," perhaps a referral to private mediation would be appropriate but my experience suggests that with the limited time and financial resources available to the court, the court mediation program may not be appropriate.

Most of the time an experienced mediator can handle a blustering party since mediators can appeal to the self interests or, as Abraham Lincoln used to say, the "better angels" of a party's nature. However, there are some instances in which

there are too many layers between the mediator and the parties. The major examples will be briefly discussed.

THE SUCCESSFUL LAWYER — Too many times mediators hear something like, "I can do much better at trial," or "I know we will win on (choose one) issue at trial." Of course, the attorney may be right, but all too frequently that position places neither the client's desires nor best interests at the center of the comment. On the other hand, it may be true that the lawyer will do better at trial because the opposition's position is unreasonable. Mediation is a process that requires thoughtful concentration and patience by all parties and the mediator. In those cases where settlement is possible but impeded by ego, the experienced mediator will respectfully elbow past the lawyers to find out what the parties want without the fog generated by counsel.

THE RECALCITRANT OR INSECURE CLAIMS REPRESENTATIVE — Another predominant issue involves cases in which an insurance carrier is in control of one side. The problem also arises in those cases in which the plaintiff's evaluation and demand is more a reflection of plaintiff's hope rather than reality. It is also a problem when the defense (carrier) evaluates the case based solely upon cold data and, consequently, fails to bring the human side to the mediation table. In cases such as a personal injury case, it is fair for both sides to evaluate the case based upon the facts. Most of the time an experienced mediator will be able to overcome, or at least deal with, the former problem. But the latter is many times insurmountable. I have personally had some difficult exchanges (mostly by phone) with claims supervisors over, quite literally, a few hundred dollars. In cases in which an insurance carrier who controls the "purse strings" is involved (it is usually identified in the CMC statement) the court should require both sides to serve good faith's demands and offers (pursuant to *Cal Evidence Code* §1152 et. seq.) upon each other not less than two weeks before mediation. Those demands and offers should take into consideration all relevant factors, including the opposition's evaluation of the case, so that the mediation has a viable starting point and the parties can prepare to support their position and/or dispute the opposition's before the mediation begins. Then, for court programs, the court should order[1] the individual who has the actual ability to make the decision to settle in an amount sufficient for the opposition's offer or demand (even though the case might not be worthy of that demand), to be physically present. Perhaps making a high-level plaintiff or a higher-than-local-level claims person travel in from distant locations will cause the parties to take the mediation and the opposition's position more seriously.

In all cases the party should be prepared to mediate appropriate to the level the case has been developed. Sometimes when the parties have a clear realization early on that liability exists and the case should be settled quickly, early mediation can save the litigants significant money. However, in most cases, both sides should be prepared to present supporting documents and evidence (per *California Evidence Code* §§ 1115-1128 and 703.5) at mediation and to have all discovery completed that either party feels is necessary (depositions, IMEs, etc.) before the mediation. If the parties have expert reports, etc., they should also be available. In most cases it is a waste of time for everyone to show up only to hear that one side or both still needs something. For the parties this can be an inconvenience and more expensive (chances are that subsequent sessions will be at the parties' expense) than being ready the first time around. It is my understanding that most judges will listen and give the parties extra time to get ready, if asked, since the bench officers did not want the parties "spinning their wheels" and wasting court resources.

CLIENT PREPARATION — Mediation will be far more productive if counsel prepare their clients with a "reality check" so the "great expectations" of the client can be brought into control. This is frequently a very difficult task. If the client is made to believe that she has a $1 million case if she wins at trial, but no one explains the risks of an adverse judgment, higher expenses, etc. it will be more difficult bringing the client into a zone of potential agreement. I recall early in my career as an attorney when I would give a client my evaluation of the case as being somewhere between $10 and $10,000, the client invariably heard the $10,000 and ignored the $10. It is a good idea to refresh your evaluation shortly before your mediation. Insurance defense counsel should do likewise, clearly expressing the risks of under valuing the case to the carrier.

Mediation, both private and court sponsored can be and is very effective in resolving cases where the parties are motivated and prepared. Those cases in which the expectations and preparation of the parties reflect the actual facts and a reality check is provided before mediation are far more successful.

NEW DEVELOPMENT — Recently, the holding upon which many of us relied in *Wimsatt vs Superior Court*, (2007) 152 Cal.App.4th 137, 61 Cal.Rptr.3d 200, discussing *Cal.Evid. Code* § 1115 et seq., was modified in a substantial manner. The 2nd DCA, in *Cassel v. Superior Court*, (November 12, 2009) 179 Cal.App.4th 152, 101 Cal.Rptr.3d 501, tightened up the "dome of confidentiality" provided by mediation. In simple terms, the Court held that in post mediation disputes between client and attorney, only discussions held IN mediation, before the mediator, were protected by confidentiality. Discussions between client and counsel outside the presence of the mediator, even during the mediation proceedings, may be admissible in a dispute between client and attorney.

Donald Cripe is a former Trial Lawyer and currently a Professional Mediator who operates "Just Results Mediation Services" mediating civil and family law cases in Southern California. Mr. Cripe is also a panel member of the RCBA Dispute Resolution Service.

1 Mediation is and must be a voluntary process. However, once the parties have stipulated to submit to mediation, the Court should be free to see to it that at least the basic mechanics are in place to give the mediation the best chance for success.

Opposing Counsel: Arthur K. Cunningham

by L. Alexandra Fong

A Teacher at Heart

Arthur K. Cunningham was born in Massachusetts. When he was five years old, his family moved to California, and he lived in Redondo Beach and Costa Mesa for 20 years before settling in Riverside. He attended Estancia High School before heading to the University of California at Irvine, where he graduated with a Bachelor's of Science degree in biological sciences and a teaching credential. While in college, he worked for his father as a machinist in a steel fabricating company.

Arthur K. Cunningham

He was a student teacher at Fountain Valley High School before becoming a long-term substitute teacher there. After one year, he was laid off due to budget cuts and was unable to find any other teaching jobs.

Mr. Cunningham returned to work for his father as a production manager. Due to the items that were manufactured by the company (scaffolding), it was difficult to obtain liability insurance. On the rare occasion that the company was sued, Mr. Cunningham also acted as litigation coordinator and interacted with the attorneys who were hired to defend the company. Inspiration struck and he took the Law School Admissions Test. After achieving a great score, he decided to go to law school.

He attended Western State University School of Law at night while continuing to work for his father. Every day, he would awake at 5 a.m. for the long drive to Wilmington to work, followed by a drive to Fullerton for law school. He would not return home until midnight.

After graduating from law school in December 1980, Mr. Cunningham sat for and passed the February 1981 bar exam. He became licensed in May 1981 and ultimately found a job working at the Law Offices of Dimitrios Rinos (now Rinos & Martin) in Orange County. He began practicing as a defense attorney in the field of medical malpractice. Although his first job as an attorney paid less than half the amount he earned as a production manager, he persevered.

Seeking a change, he moved to the now-dissolved firm Hagenbaugh & Murphy in Santa Ana, which handled hospital malpractice cases and had a large general liability practice, where he was able to learn new areas of law.

In 1985, tired of making the long commute from Riverside to Orange County, Mr. Cunningham began looking for a job at a Riverside-based firm. Recalling that he had met Bill Roberts at a mediation, he sent a resume to Roberts & Morgan and was immediately hired. At Roberts & Morgan, he learned insurance coverage defense from Bruce Morgan. He further expanded his areas of practice and also began handling public entity defense. He met his two law partners at the firm, John M. Porter, one of the pre-eminent defense attorneys in police misconduct cases, and James C. Packer, another top-notch general liability defense practitioner.

When Roberts & Morgan dissolved in 1999, Mr. Cunningham, Mr. Porter, and Mr. Packer moved to Lewis D'Amato Brisbois & Bisgaard LLP (now Lewis Brisbois Bisgaard & Smith LLP), where he continues to practice.

Throughout his career, he has had the advantage of working with people who are first-rate practitioners in their respective fields of law. He has also been privileged to have the same secretary, Sharon Moore-Duncan, work with him for the past 20 years.

Since Mr. Cunningham began practicing law, he has worked exclusively as a civil defense attorney. He currently handles public entity, general liability, and products liability cases, although his primary focus is defending public entities in various areas of litigation, including, but not limited to, employment law (harassment, discrimination, and wrongful termination), premises liability, property damage, police misconduct, and jail medical malpractice cases. Representative clients include the City of Riverside, the County of Riverside, the Regents of the University of California, the City of San Bernardino, the City of Beaumont and the City of Banning.

He enjoys his broad experience as an attorney. Although many attorneys start with a firm and wind up focusing in great detail on a particular area of law, he considers himself fortunate that he never had to limit his focus to one area of law to the exclusion of other areas because of the firms with which he has worked.

Mr. Cunningham became an associate with the American Board of Trial Advocates (ABOTA) two years ago. In order to gain entrance into ABOTA as an associate, one must try at least 20 civil jury trials to verdict. He also serves as a

judge pro tem, mediator, and arbitrator for the Riverside Superior Court.

One of his recent cases, involving a fatality in police custody, ended in a defense verdict after almost two weeks of jury trial at the federal court in Riverside. One of his favorite cases involved allegations of a tainted batch of seedlings for seedless watermelons, which reminded him of his undergraduate days when he majored in biological sciences. Adding to the charm of that case, he traveled to Monterey and San Luis Obispo for week-long depositions.

Mr. Cunningham believes that the practice of law is very similar to teaching. As attorneys and litigators, we teach our clients and claims representatives about the facts of the case. We teach the court the facts and law applicable to the case. We teach the jurors about the case and try to persuade them to understand our position. If we take a case to trial, all we need to do is explain our position in a manner that makes sense to the judge and jury, and once they understand, they will find in our client's favor. If the law or facts of your case are such that this approach isn't going to work, the case should be resolved in a way other than trial.

He is a strong believer in civility and has been fortunate that the two partners he has worked with for the past 25 years (Mr. Porter and Mr. Packer) were each recipients of the Civility Award of San Bernardino/Riverside ABOTA Chapter.

In the past, Mr. Cunningham served as a coach for the Mock Trial team at Notre Dame High School. This year, he served as a scoring attorney for the 2010 Mock Trial Competition in Riverside.

In his spare time, he enjoys traveling with his family. He has been to Ireland, England, Scotland, the Caribbean, Canada and Mexico. In the past, he enjoyed rock climbing with his son, Patrick, who now lives in Florida. His daughter Katie is in medical school in Nevada and his youngest daughter Emma is a freshman at Poly High School. Emma is involved in Irish dancing and is the most likely of his children to become an attorney like her father. He and his wife also have been annual passholders to the Disneyland Resort for over 20 years.

He enjoys reading Lee Child's Jack Reacher novels, Robert B. Parker's Spenser novels, and noir fiction.

L. Alexandra Fong, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside. The author had the pleasure of working with Mr. Cunningham during her first five years of practice at Lewis D'Amato Brisbois & Bisgaard.

Judicial Profile: Commissioner Pamela Thatcher

by Bob Lind

There is always someone new in the Riverside courts. Some are just passing by, while others will make a real difference. I want to introduce one who is making a difference, Commissioner Pamela Thatcher. I know I am a bit biased (she is my wife), but anyone who has worked with me knows that I am unbiased in my decision-making and that everyone gets an even chance in my courtroom.

Commissioner Thatcher with her husband, Retired Commissioner Bob Lind, and son Lucas

Pam started looking at the law when she experienced the poor treatment unscrupulous attorneys gave her family during a difficult time in their lives, the probate of her grandmother's will. She had been born a fourth-generation California girl, blue-eyed and blonde, in the City of Angeles. The family was good farming stock, hard-headed and able to face adversity with their heads held high. They farmed in what is now Diamond Bar and Walnut. Her father later left the farm to learn a trade, plumbing. He always worked long hours and took side jobs to raise his family and save for the education of his children. He wanted more for them than he had – just another American dream. Pam's mother raised her and her handful of a brother. Mom could be tough, but was always a good homemaker.

Pam's grandfather had been "taken to the cleaners" by those who used law as a means for their own ends, to the detriment of the public. This made a lasting impression on Pam and provided a focus. She strongly believes people are entitled to and deserve fair treatment by the law. How could she insure that?

Pam's uncle, one of the good guys (as opposed to good old boys), went to law school and worked his way up to be the district attorney of Los Angeles. Pam had worked on his campaign and saw that the system could work if everyone did their part with hard work and compassion. With that experience and background, she met the challenges of college at the University of La Verne, double-majored in three years, maintaining a 4.0 GPA, and graduated with honors. What next, teaching or the law? Teaching or the law? You got it, law school.

Law schools vary. Loyola Law School was a hope she worked for and attained. She went forward with her dogged determination to make straight A's. Pam was on law review, she clerked with American Title and became somewhat of an expert in title issues, and she learned that you can always learn more from others, no matter what you think you know. There were some smart puppies in that school. She didn't get the 4.0, but she made it through. So, like many of us, now what?

You ladies know, "It jest ain't the same." You apply, interview and get passed over in favor of a male. It was pretty bad back then. When a woman finally got a good job, often she then suffered being called by cute names and asked to make the coffee. Pam persevered. She eventually started with Maurer, Higginbotham & Harris. They made her work like she had never imagined. She began to shine, and after spending her first day in federal court, turning around what seemed to be a loser, she found her stride. The respect grew for her and she eventually opened up a new office for the firm in Orange County.

There comes the time to get out of the nest and test yourself in the real world. When that time came for Pam, she became the managing partner of a new firm formed by some of her old friends from Higginbotham. They found a real niche in the field of representing mental health professionals. The firm became well noted for its hard work, diligent efforts and successes on behalf of its clients.

Pam and I met and married during this time. She bore our son Lucas and decided that being a good mother demanded more time. She and her partners closed their three offices and dissolved the firm, each going their own way and each being successful in their own way. At that time I had been appointed as a commissioner of the Riverside court and we moved to Corona. The Inland Empire was good to us, and Pam opened her own office in Corona. She came to be a recognized expert throughout the State of California. She became an author and has been published in several books that are still required reading for mental health professionals. In the meantime, she expanded her knowledge into other fields and represented the State of California in foster care litigation. I have to say, she knows discovery better than most attorneys I have dealt with over the years. Just a hint, when you appear in her courtroom, know your stuff.

Change is everywhere, and it hit us big time in 2001. Pam was diagnosed with breast cancer and would face

years of surgery, chemotherapy and radiation. She took it in her own strong way. She insisted on going forward and doing her best under the circumstances. Flying home overnight to get her chemotherapy and still announcing, "Ready for trial" the next morning in San Jose, bald head tastefully bewigged: That is Pam. She has always said, "I will do the very best job I can in the time allotted." I have always seen that to be true.

I had to retire early and encouraged Pam to seek the bench. She had 23 years of legal experience and had always been involved in law with the intent of helping others. It seemed to me that she could do even more in the courtroom than in private practice. The judges of the Riverside Superior Court interviewed her, evaluated her and hired her in 2005. Smart group, those judges.

Pam started in the Hemet court, covering traffic, small claims and, eventually, an added family law calendar. She found the Hemet court to be a great family within the system and enjoyed every minute (with the exception of the commute). Pam then rotated to family law in Riverside and spent three years giving her best to make difficult circumstances bearable for the litigants. She helped a lot of people. Pam's next rotation sent her to criminal in the Hall of Justice. Having never practiced criminal law, she had to hit the ground running, and that she did. She made a difficult calendar work as well and as smoothly as those massive calendars are able. Pam's present position in Moreno Valley is handling small claims and unlawful detainers. This allows Pam again to have more time with the people and to let them each know they are being heard.

Our son, Lucas, is currently attending UCLA and has just been accepted to the School of Art and Architecture. Pam enjoys her free time to the fullest. She has two gardens, with over 70 rose bushes (you will always see some of the roses on her bench), and reads at least two books a month in addition to all the courtroom reading required to be a good bench officer. Then there are the children. Pam loves to work with children and teens. She volunteers to preside over Youth Court, assists with judging and scoring Mock Trial and, of course, on the weekend, she gets to take care of babies at the church.

Pam makes a difference. We are one lucky court.

Bob Lind was a commissioner with the Riverside Superior Court from 1991 to 2005, when he retired; he practiced law for 15 years prior to that time, mainly in a real estate practice.

Metadata Mining and Scrubbing: Potential Ethical Pitfalls California Attorneys Need to Know

by Charity Schiller and Curtis Wright

Metadata affects all attorneys and their clients. This is especially true given that the practice of law is increasingly reliant on creating and transmitting electronically stored information (ESI). In fact, a growing number of jurisdictions, including some federal and state courts in California, now *require* litigants to submit and exchange documents electronically. Attorneys have a duty to protect their clients, which may include the duty to prevent inadvertent disclosures of metadata.

As an example, imagine you are a corporate attorney working for a drug manufacturer. Your client is being sued for knowingly manufacturing and distributing a harmful drug. Your client denies any prior awareness of the potential harmful effects of the drug and even emails you research reports corroborating its position. Believing the reports to be strong vindicating evidence, you electronically submit them to the court and opposing counsel. Somehow – using something called metadata – opposing counsel discovers information deleted from the reports that proves your client was actually well aware of the potential harmful effects of the drug prior to distribution!

How did this happen? Is it your fault for supplying the evidence? Are you liable for malpractice? Did opposing counsel break any rules by looking for and using evidence that you didn't intend to disclose?

I. What is Metadata?

Metadata is hidden electronic data that is attached to almost all forms of ESI, including everything from emails to electronically transmitted documents (MS Word, WordPerfect, PDF, PowerPoint, Excel, etc.). Most metadata is harmless, but occasionally it may include highly confidential and privileged information that can be detrimental to your case and your client.

Metadata encompasses all of the information about ESI other than what appears on the face of the electronic document itself. Typical metadata includes information such as: when the file was created or modified; the names of anyone accessing the file; and the path name where the file has been previously stored. Metadata can also reveal more sensitive and highly damaging information, such as: the name of, and length of time that, each attorney worked on the document; hidden or deleted text, notes, and comments; and even previous versions of the same document.

Metadata can be easily discovered by any users who know what they are looking for or who have metadata "mining" software. Likewise, most metadata can be removed by simple techniques such as converting a document to PDF format, properly utilizing the creating software's options settings, or using metadata "scrubbing" software.[1]

II. Ethical Concerns in California

Although one of the most technologically advanced states in the nation, California has no bright-line rule on the acquisition and use of metadata. In the absence of a clear rule, California practitioners need to consider whether metadata mining, or the failure to scrub documents of their metadata prior to transmittal, violates any ethical rules.

Assume, for example, that opposing counsel sends you ESI. You carefully review the ESI for metadata, and you discover comments from the opposing counsel's client. Clearly, opposing counsel had no intention of disclosing their client's comments, which makes this an inadvertent disclosure of an attorney-client privileged communication. Although there may be no rule governing your metadata search, you should consider whether existing ethical rules limit your use of that privileged information. California's rules provide that upon inadvertently receiving confidential and privileged information, a lawyer should: (a) refrain from examining the materials any more than is essential to ascertain if the materials are privileged; (b) immediately notify the sender that the lawyer possesses material that appears to be privileged; and (c) proceed to resolve the situation by agreement with the sender or resort to the court for guidance.[2] In this example, existing ethical rules seem to preclude you from using the metadata against the opposing counsel's client.

In contrast, suppose that – following your unsuccessful defense of a case in which all briefs were served electronically – you receive a motion for attorney's fees. The motion

1 E.g., Metadata Assistant, available at http://www.payneconsulting.com/products.

2 *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817; see also State Bar California Attorney Guidelines of Civility and Professionalism, § 9.b.3.

states that a partner at the opposing law firm prepared the main briefs and billed those hours at the "partner rate." However, your review of the metadata from the electronically served briefs reveals that the only person who worked on the briefs was actually a junior associate whose rate is half that of the partner. In this case, it may be permissible to use the metadata. The Rules of Professional Conduct, rule 4-200, states that a lawyer must charge fees that are not unconscionable. Among the factors used to determine whether a fee is conscionable are (1) the amount of the fee in proportion to the value of the services performed and (2) the experience, reputation, and ability of the lawyer or lawyers performing the services. Arguably, the attorney's fees charged in this case would be unconscionable and the metadata could likely be used to establish this fact.

On a broader level, the issue of metadata raises further ethical concerns. For example, should the duty of scrubbing metadata from ESI fall on the sender, or should the recipient have the duty to refrain from mining the ESI for metadata? Furthermore, if the duty falls on the sender, would it be malpractice if the sender failed to scrub the ESI of its metadata? Moreover, if the duty is on the sender to scrub out metadata, would it be malpractice on the part of the recipient if he or she failed to mine for metadata that might help promote a client's interests? Conversely, if the duty is on the recipient to forego mining for metadata, how is that recipient to determine whether information on a file was inadvertently disclosed metadata or intentionally disclosed information?

Adding to this complexity, California has very broad discovery rules. One could argue that those rules require the disclosure of unscrubbed files when cases call for production of electronic records (accounting records, databases, etc.). Some might even argue that intentionally scrubbing metadata from electronic files is an impermissible destruction of evidence – a misdemeanor under Penal Code section 135.

Until a clear rule is delineated in California, the metadata issue should be governed by the interests of justice. Thus, although the use of metadata is presumptively permitted, one must ensure that its use does not violate any ethical rules or our profession's long-established tradition of fair play. Similarly, those who transmit ESI should be aware that it may carry hidden pieces of metadata.

III. Metadata Rules in Other Jurisdictions

Although California does not have a clear rule regarding metadata, a number of other jurisdictions have addressed the issue. These jurisdictions break down into two major categories.

Jurisdictions in the first category put the duty of preventing the disclosure of confidential metadata on the sender, leaving the recipient generally free to mine for and use any metadata lawfully received.[3] In these jurisdictions, the recipient's only duty is to notify the sender of inadvertently disclosed confidential metadata. Colorado has a call-back exception, which allows a sender to prevent the mining and use of metadata if the sender notifies the recipient of the inadvertent disclosure before it has actually been exposed. West Virginia and the District of Columbia have made an exception that prevents a recipient from mining or using metadata if the recipient has "actual knowledge" that it was inadvertently disclosed by the sender.

Jurisdictions in the second category place a duty on both attorneys – the sender has the duty to take "reasonable care" to prevent disclosure of confidential metadata, and the recipient has a duty not to mine for or use confidential metadata.[4] In these jurisdictions, metadata is treated as always being an inadvertent disclosure. Thus, a receiving attorney is typically required to abstain from reading or using metadata, to notify the sender of any confidential metadata inadvertently disclosed, and to return the confidential metadata in accordance with the sender's instructions.

IV. Conclusion

The ethics of metadata mining and scrubbing remains an issue about which much discussion, and even heated debate, continues. Until California adopts a clear governing rule, the proper ethical use of metadata is difficult to enunciate. It would seem that the acquisition and use of metadata is permissible, provided that it complies with applicable ethical rules. However, practitioners need to be alert to the fact that sometimes the electronic files you send, for the sake of convenience, can carry very inconvenient confessions about the document's history. In short, use common sense when transmitting ESI and consider whether using metadata scrubbing software, converting files to PDF format, or even mailing a good old fashioned hard-copy letter, might be a better option.

Charity Schiller is a senior associate in the Environmental Law and Natural Resources practice group of Best Best & Krieger LLP. Curtis Wright is a law student at the University of La Verne College of Law. *The authors are grateful to the members of Team Jackson of the Leo A. Deegan Inn of Court who helped research and discuss the issues raised in this article.*

3 This includes the ABA, the District of Columbia, Colorado, Maryland, Vermont, and West Virginia.

4 This includes New York, Florida, Arizona, Alabama, New Hampshire, and Maine.

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.

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.

Office Space – Downtown Riverside

Offices starting at $250 per month. Close to all courts and government offices. Auxiliary services are available; copy, fax, conference room, etc. Call John at 951-683-1515 or john.matheson@thefreemanco.com.

For Sale

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

Seeking Attorney

Associate attorney to split contingency cases. Will train. Please call for interview appointment. (951) 662-8920.

Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective June 30, 2010.

Beverly Ann Bradshaw – Best Best & Krieger LLP, Riverside

Donald S. Dench – Sole Practitioner, Rancho Cucamonga

Brandi L. Harper – Wagner & Pelayes, Riverside

Diana L. Martinez – West Coast Mediation, Chino

Raymond Miller (A) – Intelligent Ops International Inc., Yucca Valley

Victor A. Raphael – Berger & Raphael LLP, Riverside

Dana Christy Reimus – Lubrani & Brown APC, Riverside

Brian D. Roberts – Sole Practitioner, Mira Loma

Samah Shouka – Office of the District Attorney, Riverside

Connie Marie Stringfellow – Sole Practitioner, Moreno Valley

(A) – Designates Affiliate Member

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