Riverside Lawyer

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In This Issue:

The official publication of the Riverside County Bar Association


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

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve its members, and indirectly their clients, by implementing programs that will enhance the professional capabilities and satisfaction of each of its members.

Serve its community by implementing programs that will provide opportunities for its members to contribute their unique talents to enhance the quality of life in the community.

Serve the legal system by implementing programs that will improve access to legal services and the judicial system, and will promote the fair and efficient administration of justice.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in Riverside Lawyer.

The material printed in Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

Calendar

SEPTEMBER

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

14 **PSLC Board of Directors Meeting**
RCBA – Noon

Landlord Tenant Section Meeting
Cask 'n Cleaver, 1333 University, Riverside – 6:00-8:00 p.m.
Speaker - Sergeant Richard Waitschies, San Bernardino County Sheriff's Office
"Bankruptcy Issues as They Affect Lock-outs in San Bernardino County".
(MCLE)

16 **Solo & Small Firm Section Meeting**
California Pizza Kitchen – Riverside Plaza – Noon
(MCLE)

17 **RCBA Board of Directors Meeting**
RCBA – 4:00 p.m.

22 **Environmental Law Section Meeting**
RCBA – John Gabbert Gallery - Noon

Federal Bar Association, Inland Empire Chapter
Mission Inn, Galleria Room – 5:30 p.m.
André Birotte, U.S. Attorney for the Central District of California
*FBA Members – No charge; Non-Members – $25.00
***Applications for FBA membership will be available at the event.**

22-25 **2010 FBA Annual Meeting and Convention**
New Orleans, Louisiana

23-26 **State Bar of California 83rd Annual Meeting**
Monterey, California

27 **Continuing Mediation Education for Court-Connected Mediators**
Presented by Riverside Superior Court & Desert Bar Association
Classic Club, 75-200 Classic Club Blvd., Palm Desert
12:00 – 1:30 p.m.
(MCLE)

28 **Continuing Mediation Education for Court-Connected Mediators**
Presented by Riverside Superior Court & Riverside County Bar Association
RCBA – John Gabbert Gallery – 12:00 – 1:30 p.m.
(MCLE)

30 **RCBA Annual Installation of Officers Dinner**
5:30 Social Hour, 6:30 Dinner & Program
Mission Inn, Music Room

OCTOBER

6 **Bar Publication Committee Meeting**
RCBA - Noon

President's Message

by Harlan Kistler

I want to begin by stating that it is an absolute privilege and honor to serve you as your incoming bar president. I will earnestly and humbly work to ensure that the ideals of our great bar organization are promoted and that the benefits continue to flow to its members. I believe we all share a blessing, in that we enjoy practicing law in this legal community with attorneys who have high standards of civility and professionalism. I will encourage more members to participate in our organization through its various sections and committees to impart the lessons of honor, devotion and insight to this noble profession and to the community.

By way of background, I was raised in Riverside after my dad was stationed at March Air Force Base in 1960. I attended school at Emerson Elementary School, Riverside Christian Day School and Notre Dame High School. After I graduated from high school, I wrestled for UCLA. When the wrestling program was dropped, I transferred to Arizona State University with my older and younger brothers. One year later, I transferred to the University of Iowa to join my youngest brother, who was on the Hawkeye wrestling team. (I became a sports trivia question years ago as the college athlete who won three conference titles while competing for three different colleges; these were two Pac-Ten Championship titles and one Big Ten title.)

While attending the Iowa College of Law, I was fortunate to work as a summer law clerk for Jane Carney at Reid & Hellyer. After graduating from law school, I had the opportunity to work as an associate attorney for Dave Moore for a number of years. I was extremely fortunate to have Dave as my mentor. Not only had he wrestled in college, but he set a tremendous example of how to become a good attorney. Dave and I coached an elite team of wrestlers out of my garage for years in the 1990's. In 1996, I established my own practice, which was predominantly a contingency-fee-based personal injury practice. I will always hold to the ideals regarding civility and professionalism that Dave Moore and other attorneys have taught me.

I have been married to my wife, Lori, for 19 years and we have two children, Harlan II and Nolan. Both will be attending Martin Luther King High School this year and wrestling on the King wrestling team. Over the course of 20 years, I have contributed my time teaching young kids at various Riverside high schools the ancient art of wrestling. Several years ago, I took the head coaching job at King High School, and I have been very passionate about building a successful program there. We have had numerous CIF champions, but we are holding our breath for our first state champion. I also coach a youth group of about 50 kids, ages 5-14, from local elementary and junior high schools. Coaching young kids has been extremely rewarding for me.

I take the baton from Harry Histen, and I thank him for his leadership on the board this past year. I also realize that I follow a long succession of hard-working past bar presidents who have laid a solid foundation by their efforts and commitment to serving its members since the association was established in 1894. Two of the past bar presidents, Jane Carney and Dave Moore, interviewed me for my first legal job. Indeed, this is a tight-knit legal community, and we are all part of it. One of my goals this year will be to bring my enthusiasm and inspiration as a wrestling coach to supporting and maintaining the bar association as we weather challenging economic times and court congestion.

I am currently attending committee and section meetings to gain a better understanding of how I can better support and promote these organizations in my capacity as president. I attended a Bar Publications Committee meeting for the second time, and it has always been a fun and lively crowd. I would encourage everyone to try attending at least one lunch meeting and to consider writing at least one article for the *Riverside Lawyer*.

Our bar organization has generously provided benefits to our local community in many different ways through the altruism and selfless service of our members. As a result, I believe, at least from my own

experiences, that our profession is viewed with more respect and more favorably in this community as compared to other geographical areas. We can gain even more respect from our community during these challenging economic times by participating in the organizations that provide direct benefits to the community. Our efforts will be magnified in the community, as the need is so great.

The RCBA has recently established a mentoring program for new attorneys. This program will pair new or inexperienced attorneys with experienced attorneys practicing in specific areas of the law. The attorneys participating in this program will also be ushered into the Barristers and Inns of Court organizations. This process will help shape our legal environment and continue to make it a more enjoyable place to practice law.

In closing, I want to thank the administration, board members, and members in advance for their support and participation in upcoming bar activities.

Capital Litigation in Riverside County

by R. Addison Steele

All specialty legal practice areas have a community that spans the local geographic area, the state and even the nation. Capital defense practitioners are particularly connected to our colleagues because our training seminars attract practitioners from all across the country. Until a few years ago, those of us from non-Southern states would express our support and profound respect for the attorneys who practiced capital case defense in the Southern "Death Belt." Our perception is that in the South, there are so many cases and so few trial lawyers with the experience and skills for capital litigation that people of color are overwhelmingly the clients for whom death is sought, and that those few experienced and skilled attorneys are severely underpaid and overworked when the ultimate punishment is at stake.

That has changed over the last few years, as Riverside County has joined the Death Belt as a place where, in the eyes of the capital defense community, death is sought with reckless abandon. Our reputation is best described by the nicknames Riverside County has developed over the past few years: the "Little South," the "West Coast's South," and "California's Southern Justice." The raw numbers explain how we are seen by the rest of the nation. Riverside County has a population of about 2,000,000 people and has 54 capital defendants. Los Angeles County, with a population of about 10,000,000, has a number of capital defendants in the 60s. Both San Bernardino County and San Diego County, which have roughly the same populations as Riverside County, each have fewer than five capital defendants. The vast majority of our 54 capital defendants are Hispanic or black.

Perhaps death penalty proponents feel that having our county known across the country as the Little South is something of which we should be proud. That is simply a misguided position to take. The Southern Death Belt is not just an appellation that carries a simple definition as a place where death is frequently sought; what comes with that name is a well-deserved perception of an extremely unjust death penalty machine. And that is what Riverside County is now known for being.

The perception is accurate in some ways, such as the high number of capital cases per capita and the number of minority capital defendants, but the truth is, in fact, very different from the perception in many other aspects, most notably the quality of representation for most capital defendants. There have been extreme examples from the South, and Texas in particular, of injustice in capital cases due to incompetent defense lawyers, such as when Calvin Burdine's lawyer slept at counsel table during critical stages of his capital trial. (See *Burdine v. Johnson* (2001) 262 F.3d 336.) In many Southern jurisdictions, the judge handpicks the defense attorney, which carries with it an implied message that the attorney had best not be too difficult when defending the client if that attorney ever wants to get appointed again. The most frequently cited reason for the poor quality of representation in capital cases is judicially appointed attorneys who are paid on a contract basis per case, as opposed to an established public defender system. With a public defender system, there are safeguards to assure a high quality of representation, such as having direct supervisors who mentor attorneys and evaluate them as they gain experience, and a promotion system in which attorneys work their way up to more and more serious cases. Most importantly, the public defender system provides peer support, which results in clients benefiting from the knowledge and experience base of the many attorneys in the office with whom a client's particular attorney discusses the case to get strategic and legal input; sole practitioner subcontractors don't have that support.

Although the majority of capital defendants in Riverside County are represented by contract counsel, which does carry the inherent risks of subcontractors not having the oversight and support system that deputy public defenders have, the contract system here in our county is quite different from that in most Southern jurisdictions. An administrator appoints the attorney, in contrast to the vast majority of Southern jurisdictions where the subcontracting lawyer is appointed by the judge hearing the case and thus depends on the trial judge for his or her income.

What is also nothing like the South is our Public Defender's office here in Riverside County. In the spring of 2008, we started our Capital Defense Unit, which was made up of four experienced attorneys who could specialize in capital litigation. On June 28, 2010, the Public Defender opened a "glass wall" conflict office for capital cases. Six experienced attorneys (of which I am one) have been assigned to that new office, with the goal of building capital defense units on both sides of the glass so that there is a cadre of lawyers in the Law Offices of the Public Defender who have extensive experience in capital litigation, and so that the Public Defender having to declare a conflict in a capital case can become a rare occurrence.

There is also hope when it comes to the aspects of Riverside County being the Little South that are accurate, such as the sheer number and racial inequality of capital defendants in our county. District Attorney-Elect Paul Zellerbach has said in the press that he intends to review the pending capital cases to determine if they are appropriate cases for seeking the death penalty. For those of us who are opposed to the death penalty, being called the Little South is disheartening, partly because it is not accurate as to the quality of representation that capital defendants receive here in Riverside County, but also because it is so very accurate as to the number and racial inequality of capital defendants in our county. We will continue to hope for change until our nickname of the Little South is no longer accurate in any way.

R. Addison Steele is a Riverside County deputy capital defender.

Proverbial Lessons From a State Bar Suspender

by Jill A. Sperber

When people learn about my line of work, they smile. Most chortle with pleasure. These people are always non-lawyers. You see, I help suspend lawyers who fail to pay a fee arbitration award requiring a refund to the client.

The less amusing reality is that serious consequences await noncompliant lawyers under California's statutory scheme for State Bar enforcement of unpaid fee arbitration awards requiring a refund of attorney fees or costs to the client. The State Bar Court will place an attorney on involuntary inactive status (non-disciplinary administrative suspension) until the award is paid. (Bus. & Prof. Code, § 6203, subd. (d).)[1]

Jill A. Sperber

Demonstrating that a little knowledge is (often) a dangerous thing, in the vast majority of unpaid fee arbitration awards against lawyers that cross my desk, some lawyers make grave procedural errors, thwarting their attempt to prevent the arbitration award from becoming final. Let's consider these mistakes, for our educational purposes here, to be the result of bona fide misunderstandings by those lawyers of post-fee arbitration procedure.

"Losing" a Fee Arbitration Award Is a Relative Term

Mandatory fee arbitration is designed to provide a neutral forum for clients and attorneys to resolve their disputes over attorney fees and costs outside of court in a more informal, speedier, and less costly manner than litigation. Most fee arbitrations are either binding by agreement of the parties or become binding by law after the passage of 30 days from service of the award if neither party has filed a request for a new trial. (Bus. & Prof. Code, § 6203, subd. (b).) The mandatory fee arbitration program successfully resolves many attorney fee disputes without litigation.

Should a lawyer lose in fee arbitration, this could mean several things: (1) the lawyer is awarded attorney fees, but less than the amount claimed; (2) the lawyer keeps what has already been paid, but is awarded no additional fees from the client; or (3) the lawyer must refund "unearned" fees (or costs or both) to the client. The lawyer will need to assess whether losing in fee arbitration is something that he or she can live with, or whether the potential gains of litigation to pursue the fee dispute outweigh the risks presented. Some of the risks go beyond pure financial considerations – airing a fee dispute against a client will be a matter of public record. Protecting one's credibility with the court and reputation in the local legal community is an additional factor to consider.

On occasion, parties initiate post-fee arbitration litigation. Given the potential consequences facing lawyers for nonpayment of a fee arbitration award, however nominal,[2] careful attention should be paid to one's post-fee arbitration rights and responsibilities. Following mandatory fee arbitration, either party can file a request for a trial de novo following non-binding arbitration or a petition to vacate the award following binding arbitration. For a trial de novo, the request must be timely. For a petition to vacate, filing and service must be both timely and based upon one or more of the limited grounds required by statute.

A Minefield for the Misguided

While many lawyers eventually pay a final and binding fee arbitration award requiring a refund to the client, others don't or won't pay. That's where I come in. When the State Bar steps in to enforce an unpaid award that has become final and binding, some lawyers will try to challenge the award, albeit belatedly or incorrectly.

Flawed challenges block enforcement of the award only temporarily. Inevitably, they create more downsides for the unsuccessful lawyer. Litigation encourages the client to seek a judgment confirming the award (assuming the judgment is sought within the four-year statute of limitations, Code Civ. Proc., § 1288). A judgment confirming the award is often higher than the original arbitration award: it may include the prevailing party's attorney fees and costs, as well as post-award interest. The judgment amount is what the State Bar enforces if it remains unpaid. (Bus. & Prof. Code, § 6203, subd. (d).) Apart from State Bar enforcement, a judgment confirming the award carries the same enforcement remedies available to a civil judgment creditor. (Code Civ. Proc., § 1287.)

Based on the procedural blunders I've seen, I share with you the following "pearls" for correctly challenging a fee arbitration award in court.

1. **If you are unhappy with a non-binding award, you must walk the walk.**

There is no crying in fee arbitration. If you wish to reject a non-binding fee arbitration award, you must do something, and do it promptly. To prevent a non-binding award from becoming binding, you must file an action in court within 30 days of the

1 A lawyer may avoid State Bar enforcement of an unpaid arbitration award only by showing that he or she is either: (1) not personally responsible for repayment or (2) unable to pay the award, even in monthly installments. (Bus. & Prof. Code § 6203, subd. (d)(2)(B).)

2 The record for the smallest unpaid award resulting in the involuntary inactive enrollment of an attorney by the State Bar is $387.

date of service of the award. Filing an action in small claims court is simple because filing Judicial Council Form SC-100 [Plaintiff's Claim and ORDER to Go to Small Claims Court] with Form SC-101 [Attorney Fee Dispute After Arbitration] attached commences the action.

For claims in superior court, however, you must file and serve an actual complaint, even if you are seeking only declaratory relief (i.e., rejection of the award but no money damages); you may attach optional Judicial Council Form ADR-104 [Rejection of Award and Request for Trial After Attorney-Client Fee Arbitration]. If you wait past 30 days, the award becomes binding by operation of law. (Bus. & Prof. Code, § 6203, subd. (b).)

2. If you blow it, own it.

There is no Code of Civil Procedure section 473 relief available for excusable error if you miss the 30th day to file an action to reject a non-binding fee arbitration award. (Maynard v. Brandon (2005) 36 Cal.4th 364.) If you miss the deadline, don't try to cover up by filing something else, such as a petition to vacate the award, unless you plan to prove one of the limited grounds set forth in Code of Civil Procedure section 1286.2.

3. An idle lawsuit is the devil's workshop.

After an action for a new trial has been filed following non-binding fee arbitration to prevent the award from becoming binding, the lawyer may fail to prosecute or voluntarily dismiss the action. The courts have not looked kindly on such "mischievous lawyering." They will treat a voluntary or court-ordered dismissal of a de novo action as an effective repudiation of the initial request to reject the award, resulting in a final and binding arbitration award. (Corell v. Law Firm of Fox and Fox (2005) 129 Cal.App.4th 531.)

4. Deliver the goods.

You will have a more leisurely 100 days from service of the award to file and serve a petition to vacate. (Code Civ. Proc., § 1288.) Judicial Council Forms SC-101, for small claims court, and ADR-103 [Petition After Attorney-Client Fee Dispute Arbitration Award], for superior court, are available.

Unlike a request for a trial, a petition to vacate an award must be based on very limited grounds, such as: arbitrator corruption, fraud, or misconduct; substantial prejudice to the party from failure to grant a continuance where good cause existed to postpone the hearing or from failure to hear evidence material to the dispute; or failure of the arbitrator to disqualify himself or herself when required to do so. (Code Civ. Proc., § 1286.2.) These narrow grounds are generally difficult to prove, and deliberately so, since the courts rarely second-guess an arbitrator's rulings.

Before filing your petition to vacate, Grasshopper, summon your most Zen-like state and ask yourself: Can I actually demonstrate one of the limited grounds, or is this angst really about something else?

5. Look before you leap.

Determining which court has jurisdiction after fee arbitration can be tricky. Depending on what you are seeking in terms of relief, your litigation may take place in a court other than the one that has jurisdiction over the amount of the award. When filing an action for a new trial after non-binding fee arbitration, "the amount of money in controversy" determines which court has jurisdiction. (Bus. & Prof. Code, § 6204, subd. (c).) For a petition to vacate, in contrast, "the amount of the arbitration award" controls. (Bus. & Prof. Code, § 6203, subd. (b).) Another nuance is that the former small claims court limit of $5,000 still applies to post-fee arbitration litigation. (Code Civ. Proc., § 116.220, subd. (a)(4).) The statute was never amended to apply the current $7,500 jurisdictional limit for claims by natural persons to post-fee arbitration cases.

6. As in life in general, be wary of getting punked.

Assess the financial risk of not "prevailing" in court. You could end up owing more money than the fee arbitration award requires. In mandatory fee arbitration, an award of a prevailing party's attorney fees and costs is prohibited, notwithstanding a pre-existing agreement between the parties. (Bus. & Prof. Code, § 6203, subd. (a).) However, in post-fee arbitration litigation, all bets are off. The statutes specifically provide for a judicial award of attorney fees and costs to the prevailing party.

After a trial de novo following non-binding arbitration, the party seeking the trial is the prevailing party only if he or she "obtains a judgment more favorable than that provided by the arbitration award." (Bus. & Prof. Code, § 6204, subd. (d).) For post-binding arbitration, the party obtaining judgment confirming, correcting or vacating the award is the prevailing party. (Bus. & Prof. Code, § 6203, subd. (c).)

7. He who fails to update his State Bar address of record shall not cast stones over lack of notice.

The fee arbitration program's rules of procedure require that the lawyer will be served by mail at his or her address listed with the official membership records of the State Bar. Before basing a challenge on your purported lack of notice of the arbitration hearing or failure to receive the award, ensure that your official State Bar membership address of record was current at the time of service.

If the court determines that your failure to appear for the arbitration hearing was willful, you will not be entitled to prevailing party attorney fees and costs, even upon vacation of the award. (Bus. & Prof. Code, § 6203, subd. (c)).

8. If you play, you may need to pay.

When a final and binding award requires a refund of unearned fees and/or costs to the client, the lawyer should promptly pay it. This will avoid formal enforcement proceedings by the State Bar and the client.

The value of a final resolution with a former client over a fee dispute? Priceless.

Jill A. Sperber is an attorney employed as the Director of the State Bar's Office of Mandatory Fee Arbitration, providing mandatory fee arbitration and enforcement of award services, overseeing the state's 44 local bar association programs, and staffing the State Bar's Committee on Mandatory Fee Arbitration.

Barristers President's Message

by Jean-Simon Serrano

There have been significant changes to the Barristers Board this year. New to the board are Ben Eilenberg of Gresham Savage Nolan & Tilden, and Scott Talkov, of Reid & Hellyer – both were elected to serve as members-at-large. Unfortunately, we are also losing our former vice-president, Kirsten Shea, who is leaving the board to spend time with her new family.

We have a particularly energized board this year, and we're hoping to really change things up. For our monthly meetings, we are planning to try a few new venues throughout Riverside. We are also in the process of lining up some new and exciting speakers. Notably, we have confirmed that District Attorney-Elect (and former judge) Paul Zellerbach will be a featured speaker at one of our monthly meetings.

We are also going to try to incorporate a few more social get-togethers throughout the course of the year to encourage networking and mingling among our members. Events like July's social meeting at the Inland Empire Brewing Company, sponsored by Reid & Hellyer, are something we are hoping to hold several times throughout the course of the year.

As a young attorney, my involvement with Barristers has proven to be invaluable. In addition to meeting good friends here, I have made connections to other attorneys in Riverside that have aided my practice of law time and time again. It will be my goal this year to increase the visibility of the organization as well as the number of members. We are further exploring and developing new ways that the organization can really give back to young attorneys and the community as a whole.

As always, our meetings will be held on the second Wednesday of each month and will generally provide one hour's worth of MCLE credit. Anyone wishing to get more information regarding the Barristers and our meetings may feel free to contact me directly or to contact the Riverside County Bar Association. Additionally, Barristers has a Facebook page (look for the "Riverside County Barristers Association"), which will include details regarding upcoming meetings and social events. If you are a young attorney, Barristers is for you, and if your firm has some young associates, please encourage them to join Barristers.

Jean-Simon Serrano is an associate attorney with the law firm of Heiting and Irwin. He is also a member of the Bar Publications Committee.

Proportionality and the Death Penalty

by Chad Firetag

This article seeks to explore the relationship between the death penalty, the Eighth Amendment's ban against cruel and unusual punishment, and the Fourteenth Amendment's guarantee of due process and equal protection. More specifically, the editors of the *Riverside Lawyer* asked me to write this article describing death penalty litigation as it applies in Riverside County. By way of a disclaimer, I have been practicing as a criminal defense lawyer for the last eight years and served as second counsel in two death penalty cases in my career thus far.

The intention in writing this article is not to advance a particular position one way or the other, as the death penalty always engenders strong emotions. Rather, the purpose of this article is to describe in some manner these constitutional principles as they apply to the current state of death penalty litigation in Riverside County.

A Brief History of Proportionality Review and the Death Penalty

Since the Supreme Court reinstituted the death penalty in 1976, after ruling it unconstitutional in 1972 in *Furman v. Georgia*,[1] the Supreme Court has decided numerous capital cases, resulting in an extensive and complex body of death penalty law. These cases have produced a set of core principles that are unique to capital cases.[2]

One of those principles relates to whether it is necessary to require courts to compare the sentence for one crime to that for another. As has been the law for decades in California, the United State Supreme Court and the California Supreme Court have never required what has been characterized as "proportionality review."[3] Proportionality review essentially requires an appellate court to compare the sentence in the case before it with the penalties imposed in other similar cases.[4]

In *Pulley v. Harris*, the United States Supreme Court recognized that while some states require the reviewing court to examine whether, considering both the crime and the defendant, the sentence is disproportionate to that imposed in similar cases, this "does not mean that such review is indispensable."[5]

Thus, the California Supreme Court has indicated that it is unnecessary under either the state or the federal constitution for trial courts to carry out "intercase" proportionality review to determine whether imposition of the death penalty in the case is disproportionate to the penalties imposed on other persons for similar offenses.[6]

Moreover, the fact that the charging discretion to seek death rests with the district attorney does not violate the United States or California Constitution's guarantee of equal protection of the laws.[7] As the court explained in *People v. Crittenden*, prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not, in and of itself, evidence an arbitrary and capricious capital punishment system, nor does such discretion transgress the principles underlying due process of law, equal protection of the laws, or the prohibition against cruel and unusual punishment.[8] This is because ultimately all sentencing power rests with the judicial branch, not the executive.[9]

The Death Penalty in Riverside County

Whether one believes that application of the death penalty is advantageous or not, it is unquestionable that the Riverside County District Attorney's office currently seeks to impose capital punishment on a much greater scale than in other counties. Thus, a defendant in Riverside County accused of a capital offense stands statistically much more likely to be subject to the imposition of the death penalty than a similar defendant charged with a similar crime in a neighboring county.

Earlier this year, on February 4, 2010, in his written State of the Court Address to the Riverside County Board of Supervisors, the Hon. Thomas Cahraman described the current state of death penalty litigation in Riverside County. In that document, he indicated that:

> Another challenge is the pure volume of death penalty cases. Each one will absorb a courtroom for 10-15 weeks, for trial and pre-trial work. We now have more such cases than any other county in the state, including Los Angeles County. Specifically, we have 41 DP [Death Penalty] cases awaiting trial,

1 (1972) 408 U.S. 238.
2 *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357-58 ["[D]eath is a different kind of punishment from any other which may be imposed in this country"].
3 *Pulley v. Harris* (1984) 465 U.S. 37, 50-51; *People v. Dykes* (2009) 46 Cal.4th 731, 813.
4 *Pulley v. Harris*, supra, 465 U.S. at pp. 43-44.
5 *Id.* at pp. 44-45.
6 *People v. Lang* (1989) 49 Cal.3d 991, 1043.
7 *People v. Crittenden* (1994) 9 Cal.4th 83, 152.
8 *Id.* at p. 156.
9 *Ibid.*, citing *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1024.

plus 4 which are in post-verdict proceedings (thus 45 total). In addition, we have 11 cases in which special-circumstance allegations appear, and we are awaiting advisement from the District Attorney as to whether that office will seek death in those cases. By comparison, Los Angeles County, with nearly 8 times as many judges, has 43 DP cases, and San Diego County, with twice as many judges, has only three. Our own inventory has come down from 49 to 45 because we tried 10 such cases last year, and by that effort we made headway despite some new filings.

The high number of death penalty cases in Riverside County versus neighboring counties, particularly those like San Diego County, which has a much greater population than Riverside County but has only a small fraction of the capital cases, is indeed striking. While many counties statewide have reduced their number of death penalty cases, perhaps due to budget decreases, Riverside County has increased its number.

But regardless of the cost, the question remains whether the California or federal courts will take the issue of proportionality up again with respect to capital cases in Riverside County. While of course prosecutors have substantial latitude in choosing which cases should be sought as death, does the disproportionate number of death penalty cases offend equal protection, or is this a matter best left to the elected officials?

It seems likely that this may have been an issue in the recent district attorney election. District Attorney-Elect Paul Zellerbach indicated in a recent interview that he "can't really see a good reason why there are so many death penalty cases [in Riverside County]. It's not like we live on Devil's Island in Riverside County."[10]

It remains to be seen whether the courts will revisit this issue in the future. Courts may very well continue to hold that proportionality review is unnecessary because the California death penalty statute creates a system that contains specific guidelines for how juries should balance aggravating and mitigating factors. Or perhaps, as Justice Brennan stated the opposing view in his dissent in *Pulley v. Harris*, "proportionality review does serve [the] limited purpose" of eliminating "some, if only a small part, of the irrationality that currently surrounds the imposition of the death penalty."[11]

Chad Firetag is a partner in the law firm of Grech & Firetag. During his time with the office, he has represented numerous clients involving a wide range of criminal matters.

10 Press-Enterprise, "Pacheco: Looking forward to private life" June 10, 2010.

11 *Pulley v. Harris, supra,* 465 U.S. at pp. 60-61 (dis. opn. of Brennan, J.).

The Family Justice Center

by L. Alexandra Fong

On April 1, 2010, the grand opening of the newly relocated Riverside Family Justice Center was held. Tours of the facility, located at 3900 Orange Street, were provided by employees of the Riverside County District Attorney's office. The most thought-provoking and memorable images during the tour were silhouettes of individuals representing victims of domestic violence whose lives were tragically cut short.

The Riverside Family Justice Center provides victims of domestic violence with access to public and private resources. This includes assisting with locating emergency shelter, assisting in the preparation and filing of a request for a restraining order, accompanying the victim to court, and giving referrals to other resources.

The Southwest Family Justice Center is located at 30045 Technology Drive, Suite 101, Murrieta, to serve residents of the southwestern part of the County of Riverside. Additional information about the services offered through both Family Justice Centers may be obtained from the Riverside County District Attorney's office at http://www.rivcoda.org. The telephone numbers of the Riverside and Southwest Family Justice Centers are, respectively, (951) 955-6100 and (951) 304-5680.

Domestic Violence Court

by Lori Myers

Domestic violence courts have taken a number of different forms throughout California. Some are very limited – for example, handling personal protection orders – while others have a broader role encompassing serious criminal cases arising out of domestic assaults. Riverside Superior Court has a specific courtroom dedicated to domestic violence cases. Currently, that is Department 33, the Honorable Rafael Arreola presiding.

There are different schools of thought when looking at domestic violence cases. Some look at them as any other criminal matter. Others recognize that there are usually some special needs and dynamics that come into play with the families and children who are victims and witnesses. Some used to believe that criminal assaults should be treated blindly and equally by the justice system and that singling out domestic assaults from assaults by strangers or other non-partners was not warranted. As the domestic violence court movement evolved, the theory of collaborative, problem-solving courts meant that judges were an integral part of the planning and monitoring of the program, together with the prosecutor, defense counsel, probation, victim advocates and the domestic violence staff.

Most specialized courts follow a therapeutic model in which the emphasis is on rehabilitation of the offender, such as in drug court. The premise is that intense supervision and monitoring of the offender, coupled with the provision of treatment and resources, will focus on the accountability of the offender for his or her own misconduct, as well as emphasize the safety of the battered victim and any children who are involved.

Complainants in domestic violence cases have unique needs and concerns; they are often dependent economically on their assailant, have children in common, and may be threatened by the defendant or the defendant's relatives during the course of a case. Therefore, the prompt and effective provision of services to victims is of paramount importance. Moreover, many cases in this courtroom must go to trial even though witnesses have gone "sideways" and are trying to downplay things they said in the heat of the moment.

In the courtroom, Judge Arreola takes the bench promptly at 8:30 a.m. The court expects all clients and attorneys to be checked in by the time the judge takes the bench. To get the case called, an attorney must submit the continuance form and the case print (found in the file bin in the middle of counsel table) to the court clerk. There are Spanish interpreters in court daily to assist attorneys in speaking with clients, victims and witnesses during any and all hearings.

In-custody arraignments will generally be handled in the afternoon, at 1:30 p.m., and the discovery will be provided on the day of the arraignment, in court. The court will generally give an indicated sentence at the arraignment date on a misdemeanor case, if requested. Motions and hearings can be calendared for any day of the week. Trials, too, may be set for any day of the week. If a defendant has a domestic violence case and other active (or probation) cases that are non-domestic violence cases, all of the defendant's cases will be handled in domestic violence court. (This is the general rule; there are, of course, case-by-case exceptions.)

If a defendant is convicted and placed on probation for any crime of "abuse" as defined in Family Code section 6203 and the relationship between the parties is one defined by Family Code section 6211, then certain terms and conditions of probation (felony or misdemeanor) are mandatory under Penal Code section 1203.097. It does not matter what the pleaded charge is; as long as the underlying offense involved abuse, and the required relationship exists, these terms must be imposed. (See Pen. Code, § 13700.) The relationships are present or former spouse, present or former cohabitant (as defined in Family Code section 6209), present or former fiancé/e, person with whom the defendant has or has had a dating relationship, the mother or father of the defendant's child, or a person related to the defendant by blood or marriage within the second degree.

If a defendant pleads guilty to a domestic violence charge, he or

she must be put on a minimum of 36 months' probation, including a year of batterer's counseling sessions. The counseling program must be approved by the Probation Department. The defendant must enroll within a prescribed period of time, attend at least once a week for a minimum of two hours, and submit a progress report to the court at least every 90 days. Additionally, under Marsy's Law (Proposition 9), the victim has a legal right to be present at sentencing; thus, the district attorney's office must notify the victim of the sentencing date and give him or her the opportunity to be present. Many times, this involves putting the case over for five business days.

Progress hearings are usually handled on Mondays. If the defendant is in compliance with the terms and condition of probation, then he or she will be given a new court date for the next progress hearing. If the defendant is not in compliance, he or she will need to explain why to the judge, and the court has the discretion to reinstate the defendant into the classes or not. Felony cases do not return for progress – they report directly to the probation department.

A fine of at least $200 must be paid to the Domestic Violence Fund. (See Pen. Code, § 1203.097, subd. (a)(5)). An appropriate amount of community service must be assigned, and a protective order must be issued that prohibits violence, threats, stalking, sexual abuse and harassment of the victim (a "no negative contact" order). The court may issue a protective order that prohibits any contact with the victim. The court may also order time in custody, if appropriate.

A defendant must pay for the program, and fees cannot be waived, except on a sliding scale, as provided in Penal Code section 1203.097, subdivision (c)(1)(P). Additionally there will be a fine payable to the Restitution Fund. (Pen. Code, § 1202.4.)

A note to defense attorneys regarding pleading advisements: If your clients are convicted of an offense listed in Penal Code section 12021, subdivision (c), advise them that they may not possess a weapon for 10 years, even if they enter a plea to a misdemeanor (e.g., Pen. Code, §§ 242, 245, 417, 646.9). When a protective order is issued, the court may also require the client to surrender all firearms he or she owns or possesses.

And lastly, don't forget that a plea to a misdemeanor or felony violation of Penal Code section 273.5 (infliction of corporal injury on a cohabitant) can be used to enhance the punishment for future domestic violence convictions.

Lori Myers is a private Criminal Defense Attorney who practices in the Riverside area. She is also on the Conflicts Panel and handles the domestic violence cases for the Panel in downtown Riverside.

The Leo A. Deegan Inn of Court

by Robyn A. Lewis

The 2009-2010 program year for the Leo A. Deegan Inn of Court was an exciting one. Under the leadership of President Jeffrey Van Wagenen, the Inn focused on various aspects of litigation, with each team assigned to present a program on such a topic.

The Inn was excited to have student members from University of La Verne College of Law participate as team members. This was the first time that the Inn has extended invitations to student members. The students were selected by Dean Allen Easley. Student members will also join the Inn for the 2010-2011 season.

The Leo A. Deegan Inn of Court is a professional organization comprised of attorneys and judicial officers and organized under the American Inns of Court. The organization focuses on improving the skills and professionalism of the bench and the bar. Each month, the Inn holds a dinner meeting, during which programs are offered that focus on matters of ethics, skills and professionalism. Membership is by invitation only. Applications for membership are considered each summer as the basis for invitations for new membership for the upcoming year. (Applications are available on the RCBA website, www.riversidecountybar.com.)

The Inn was named for the Honorable Leo A. Deegan, a legend of the Riverside legal community. Judge Deegan first began practicing in Riverside in 1946 as a member of the District Attorney's office. After also serving in the County Counsel's office, he became the City Attorney for the City of Riverside in 1958. He was appointed to the bench by Governor Edmund Brown in 1959. He served on the superior court until his retirement in 1975. In the late 1980's, he served for 14 months on the Court of Appeal for the Third Appellate District in Sacramento.

Each year, the Leo A. Deegan Inn of Court recognizes both an attorney and a judicial officer for their outstanding contributions to the legal community as well as for their professional accomplishments. The 2009-2010 recipient of the Terry D. Bridges Award, which honors such an outstanding attorney, was Jacqueline Carey-Wilson, Deputy County Counsel for the County of San Bernardino.

Ms. Carey-Wilson initially practiced criminal law as a deputy public defender for the County of Riverside. She then specialized in appellate work and was a research attorney at the California Court of Appeal in Riverside before joining the County Counsel's office. Ms. Carey-Wilson is the incoming Chief Financial Officer of the Riverside County Bar Association. She is a former member of the Leo A. Deegan Inn of Court and the editor of the *Riverside Lawyer*. She is Past President of the Federal Bar Association (Inland Empire Chapter) and was the Director of the Volunteer Center of Riverside County, a non-profit agency that provides services to seniors, youth, people in crisis, court-referred clients, and welfare-to-work clients. She is also a member of the Executive Committee of the State Bar's Public Law Section.

The Inn bestowed the Elwood Rich Jurist of the Year Award on the Honorable Gloria Trask, particularly for her accomplishments in successfully launching the court's ADR program. After being admitted to the State Bar in 1978, Judge Trask was in private practice in both California and Hawaii, where she is also admitted, before being appointed to the bench.

Charity Schiller, an associate attorney with Best Best & Krieger, and Jeffrey Boyd, an associate attorney with Heiting & Irwin, were the recipients of the annual Biddle Book Award, which is given to outstanding new attorneys in memory of Louise Biddle, former executive director of the Leo A. Deegan Inn of Court as well as of the Riverside County Bar Association.

(L-R) Jacqueline Carey-Wilson was honored with the Attorney of the Year and Judge Gloria Trask was honored with the Judge of the Year by the Inns of Court.

At the final meeting for the 2010 Inns of Court, the members learned of the many achievements of the following legends of the legal community who were also in attendance: (L-R) Art Littleworth, Judge Victor Miceli (Ret.) and Justice John Gabbert (Ret.).

In the upcoming year, the Inn will be headed by its new President, the Honorable David Bristow, with Robyn Lewis, Jeb Brown, Chris Oliver, Chad Firetag, John Michels, Jeffrey Van Wagenen, Jeremy Hanson and Connie Younger serving as Executive Board members.

For more information on the Leo A. Deegan Inn of Court, please contact Sherri Gomez, Executive Director, at sherrigomez4@gmail.com or Robyn Lewis at rlewislaw@yahoo.com.

State of the Court: "Ready for Trial"

by Thomas H. Cahraman, Presiding Judge, Riverside Superior Court

We have recently welcomed new judges Stephen Gallon, Daniel Ottolia, John Davis, Victoria Cameron and Elaine Johnson to our bench. These dedicated individuals will make a huge contribution to the court and the community.

Our friend and valued colleague, the Hon. Carol Codrington, has been elevated to the Fourth District Court of Appeal. This fine jurist will serve with distinction.

Assistant Presiding Judge Sherrill Ellsworth has been elected as incoming Presiding Judge. My two-year term will end on December 31, and I will leave this post with confidence that court leadership remains in good hands. In the meantime, I am actively pursuing certain projects to benefit the bench, the bar, and the people of Riverside County.

Hon. Thomas H. Cahraman

Civil

We have not postponed any civil case for lack of a courtroom since June of 2009. Last year, we handled 99 civil jury trials, plus 47 multi-day court trials and 144 short-cause trials, for a total of 290 civil trials. This is the greatest number of civil trials conducted by our court since 1999. The only reason we did not beat the numbers for 1999 is that we have greatly expanded and improved our civil mediation program, with the invaluable assistance of the bar. We are settling so many cases that we simply did not need to try as many cases as we did in 1999.

Our numbers to date in 2010 parallel those for 2009. For instance, in the first six months of this year, we handled 50 civil jury trials.

There is no longer any need to age a case to get a trial date in this county. Our master calendar system, under the leadership of Judge Gloria Trask, is efficiently assigning civil cases for trial. You will be sent out as soon as both sides are ready. (To give a fair warning, you may be sent out as soon as the judge thinks you *should have been ready!*) Also, please remember that we have a stipulation form that lets you short-circuit the trial setting process and go directly to master calendar if both sides want an expedited trial date.

Considering these points, and the progress made in criminal case management (discussed below), we should be able to make certain changes that will be welcomed by the civil bar at the end of the year, or perhaps in the spring. It would be premature to publish details in this regard, though I have included RCBA President Harry Histen and other bar leaders in the discussions.

You will continue to get your trials out. I believe the court has a constitutional obligation to provide due process to civil litigants. Judge Ellsworth and I speak daily with regard to court administration, and she shares this view. You have our commitment that we will administer the court in a manner that gives practical effect to that principle.

Criminal

Our countywide inventory of pending felony defendants is down by 1,584 since we started tracking that number in March of 2008. No criminal case has been dismissed for lack of a courtroom since June 9, 2009.

Since we are getting the oldest and most serious cases out to trial, beds have opened up in the jail. We still need more jail space, but the number of prisoners released early for lack of a bed has been greatly reduced.

All of our judges in the criminal field are working hard to maintain this progress. Our courageous and energetic calendar judges are making a strong effort to get cases settled early, or if they can't be settled, to get them to preliminary hearing and off to master calendar for trial. Our trial judges are trying cases back-to-back. Our master calendar judges in all three regions are assigning cases with care and practicality, in order to maximize the utilization of trial departments. In fact, we are now frequently sending cases out on the day set for trial, rather than using the grace period allowed by law.

Another crucial index for criminal case management is the number of misdemeanors with a trial date set. Our misdemeanor arraignment judges and commissioners have brought that number sharply under control.

It is not time for complacency in this regard. About 15,000 felonies are filed each year, and about 62,000 misdemeanors. Managing that criminal caseload effectively requires consistent planning and follow-up. Judge Roger Luebs handles criminal master calendar in Riverside and works diligently with the MC judges in the other regions to maximize the use of our resources and avoid problems. It is only by administering the criminal field effectively that court leaders can carve out extra resources that are needed by the other divisions of the court.

Family, Juvenile, Probate, and Community Courts

If you don't regularly appear on any of these calendars, you should visit some time. You will be astonished at the quantity and quality of the work done by the dedicated bench officers in these fields.

Dependency filings are down, so late last year we were able to close one courtroom at Riverside Juvenile. Having freed up one bench officer, we devoted that resource to Family Law. Specifically, we opened another Family Law courtroom in Riverside, and adjusted the geographical delineations for case assignment, so that the Hemet bench can share in the reduced caseload per courtroom.

In addition, last September in Hemet, we adjusted Commissioner Kathleen Jacobs's calendar, so that she could devote two days per week to Probate instead of one.

I was glad to direct these additional resources to Family Law and Probate, but I don't think it is enough. I am working with staff in order to determine if we can take additional steps in this direction without jeopardizing our progress in other areas.

I would like to offer community-court services (traffic, small claims and unlawful detainer) again in Corona, and I am actively engaged in efforts to attain that goal.

The lines at the Moreno Valley court and the Temecula court were much too long, so we have constructed "pay-only" windows that have helped a great deal. In addition, we have improved our internet payment processes for traffic, thereby almost doubling the number of cases that are handled over the net (and further reducing the lines at the courthouses).

In the desert, Judge Samuel Diaz is now handling a Youth Infraction Court on designated afternoons in the Juvenile Court building. This will take some burden off of Commissioner Ronald Lorden, and also provide needed attention to kids who may be slipping down the wrong slope. In order to free up Judge Diaz for that calendar, we have moved the unlawful detainers to Judge Gallon, who is managing those cases efficiently.

As you know, the Palm Springs courthouse is working very nicely, with Judge James Cox handling probate in PS 1 and assigned judges conducting misdemeanor trials in the other two departments.

Construction

Groundbreaking is scheduled for the end of this year on the six-courtroom project slated for Banning. Current plans are to have one courtroom devoted to traffic, small claims, and misdemeanor arraignments, another devoted to a felony calendar, and four more for criminal trials. The building design is traditional and impressive. You will enjoy appearing at that fine new building.

We are commencing the planning phase for a five-courtroom project in Indio, which will house Family Law and Juvenile. This much-needed building will allow us to provide better services for the families involved in dependency and delinquency cases, and also free up two courtrooms in Larson (now handling Family Law) for civil and criminal trials.

The state now indicates that it intends to go ahead with a nine-courtroom project in the area west of Hemet. This is good news, because the Southwest Justice Center has been at full capacity since the day it opened in 2003.

Final Thoughts

It is an honor and privilege to serve the legal community as Presiding Judge. I am proud of the accomplishments of our bench over the last two years, but very cognizant that we could not have done nearly so much without the help of the bar.

I have noticed that leadership has many faces. The experienced litigators who volunteer to mediate cases have helped us hugely, but I equally respect the example set by the young attorneys who step forward to help with pro bono work.

Our profession requires courage at all levels, and properly approached, yields an enormous social benefit, whether one is a lawyer, commissioner or judge. It remains my pleasure to work with bar leaders on a collaborative basis for the benefit of the public we serve.

Judicial Profile: Judge Stephen Gallon

by Donna Thierbach

Should the Riverside County judges decide to field a baseball team, they would now be in pretty good shape. With the appointment of Judge Stephen Gallon, they have almost enough former college baseball players to make up an entire team. In fact, I have a suggestion for the team name – "The Bench Warmers." Given that, I guess it will be no surprise to learn Judge Gallon was a high school and college baseball player. He was born in Baltimore, Maryland, and, at the time of his birth, his father was a pitcher in the minor leagues for the Baltimore Orioles. However, a few years later, a shoulder injury ended his father's baseball career. So, at the age of two or three, Judge Gallon moved with his family to Southern California, and his father became a police officer. Initially, his father was with the Arcadia Police Department, but he then worked for the Pasadena Police Department for 20 years.

Judge Stephen Gallon and family

Judge Gallon grew up in Los Angeles County and, like his father, enjoyed playing baseball. He must have been pretty good, because he was recruited to Cal Poly Pomona as a pitcher. However, he tore his rotator cuff in his junior year, and that ended his professional baseball aspirations. At that point in his life, he was not sure what profession he wanted to pursue. His father was still working for the police department, but was attending law school. At the same time, Judge Gallon was taking a business law class in college, so they decided to study together, and he was hooked. His father taught him to respect the law, and he loved it, so there was no question as to the career he wanted to pursue.

After Judge Gallon graduated from Cal Poly Pomona, he attended Glendale University College of Law. This allowed him to attend law school at night while working during the day. Initially, Judge Gallon clerked for his father, who had retired from the police department by then and had his own law practice. Judge Gallon fondly recalled assisting his father with legal research and writing his first suppression motion, which they won! He then clerked for the Los Angeles County Public Defender's office before obtaining a full-time job as a support representative with the Family Support Division of the Los Angeles County District Attorney's office. From there, he became a Senior Clerk with the Los Angeles County District Attorney's office. His assignments included the Habeas Corpus and Appellate Division, and then the Major Crimes Division. He absolutely loved the work and felt fortunate to have the opportunity to work on some very interesting cases, including the Geronimo Pratt Black Panther case and a massive investigation involving 20,000 wiretapped calls of the Mexican Mafia inside the Los Angeles County jail system.

After Judge Gallon graduated from law school, he was offered a position with the Los Angeles County District Attorney's office. After rotations in Misdemeanor Assignments and Juvenile, he began trying felony cases in the Pomona court. He quickly distinguished himself as an excellent trial attorney, taking more than 30 felony jury trials to verdict in just 18 months. He was invited to join the elite Hardcore Gang Division, specializing in gang homicides. Over the next three years, he handled serious gang murder cases in East Los Angeles and Compton.

So how was Riverside able to steal (notice I am using a baseball term) Judge Gallon away from Los Angeles? A friend of his came to work for the Riverside County District Attorney's office and told him how much he liked the office and the legal community in Riverside. There were also a lot of promotional opportunities in Riverside that Los Angeles lacked, so Judge Gallon decided to check out the office. After he met with District Attorney Grover Trask and Assistant District Attorney Randy Tagami, he was so impressed he decided to make the change. In Los Angeles, he had been the prosecutor in 13 murder and 50 to 60 other felony trials. He came to Riverside in 2003 and was placed in Felony Trials, then Major Crimes and finally the Homicide Unit. In all, in Riverside County he prosecuted two death penalty cases and 21 murder cases. In 2007, he was promoted to Supervising District Attorney and assigned to the Western Region. During his tenure, he supervised the Riverside Homicide Unit and the Gang Unit.

Judge Gallon loved trial work, but becoming a judge had always been something he was interested in. However, he wanted to have a considerable amount of experience before pursuing that goal. In 2008, he felt the time was right and submitted his application for judge. He took the bench in December 2009.

So as we round the turn for home, what about a personal life? Judge Gallon is married. He met his wife in law school through his study partner. At that time, she was a registered nurse, in school earning her Bachelor of Science in Nursing (B.S.N.). They graduated at about the same time and were married in November 1998.

Judge Gallon and his wife have a nine-year old son, and she is now a stay-at-home mom. Their son likes basketball (rather than baseball) and running. Judge Gallon also enjoyed running when he was a child, and he and his father used to run 10K races together. Judge Gallon is continuing the tradition and is now running races with his son. He also enjoys the challenge of running marathons. He ran in the Las Vegas Marathon in 2007 and is currently training to run the Los Angeles Marathon. His wife is the sane one and prefers to remain in the cheering section. As a family, they love to travel and have been to England, Scotland, France and Switzerland. He somehow manages to keep his family life and professional life separate. I was amazed to learn that as a prosecutor, he ran a marathon the day before his opening statement in a death penalty case, and after the jury found the defendant guilty, he and his family went to France during the Christmas recess; the day after he returned from France, he started the penalty phase.

Judge Gallon has found being a judge an even more gratifying experience than he envisioned. He loves watching the lawyers and spending time in the courtroom. He also noted that being on the bench has given him a whole new perspective on and understanding of trials. He said the bench officers, staff and attorneys in Indio and throughout Riverside County have further enhanced the experience. He loves and believes in the judicial system and has a lot of respect for both sides. Since his appointment, Judge Gallon's assignment has been criminal trials and the Unlawful Detainer calendar in Indio. I would say with Judge Gallon's appointment, Riverside hit a home run.

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

Opposing Counsel: L. Alexandra Fong

by Jeffrey A. Boyd

Not just a small town girl . . .

When you first meet L. Alexandra Fong, you might be puzzled. After all, why does someone who's lived, worked, and played in the Inland Empire area her entire life travel to Europe every year? After spending some time with her, you will learn that Alexandra has a love for the small-town feel of Riverside along with a sense of adventure and exploration that was developed by her family's road trips as a child.

At Chateau de Cenoneau in the Loire Valeey of France, 2009

Alexandra, along with her family, moved to California when she was five. Her family settled in Corona (a city she still calls home). After graduating from Corona High School, she attended the University of California, Riverside, majoring in Liberal Studies with an emphasis in English and Creative Writing. She received her J.D. from California Southern Law School in Riverside in 2000.

After passing the bar, Alexandra began practicing law at the San Bernardino offices of Lewis D'Amato Brisbois & Bisgaard LLP (now Lewis Brisbois Bisgaard & Smith LLP), one of the largest law firms in California. She practiced primarily in public entity defense before moving to the Riverside County Counsel's office.

While with the firm, Alexandra relished the opportunity to work for John Porter. She assisted as second chair on two civil rights trials involving the County of Riverside. Her first case pitted the Porter-Fong team against the infamous plaintiff's attorney Stephen Yagman in a one-week civil rights case that resulted in a defense verdict. The second trial also resulted in a defense verdict. The other attorneys responsible for mentoring her at the firm were Joseph Arias, Arthur Cunningham, Ken Kreeble, John Lowenthal, Christopher Lockwood, and James Packer.

After two or three years with the firm, Alexandra's workload transitioned so that approximately 80 to 90 percent of her assignments were for the County of Riverside. And after five years with the firm, the natural progression was to go in-house with the county.

Her work with the county involves appearing regularly at the Board of Supervisors to handle abatements and statements of expense for Code Enforcement. When she first arrived, she worked primarily in litigation and also assisted the regularly assigned attorney in handling code enforcement matters for then-newly elected Supervisor Jeff Stone of District 3 (which includes Temecula, Murrieta, Menifee, Hemet, San Jacinto, and all the unincorporated property to the east just short of Palm Springs and Palm Desert). She continues to handle litigation and code enforcement matters.

In litigation, Alexandra represents the county in personal injury lawsuits (automobile accidents, dangerous conditions of public property, civil rights violations, and damage to property) and petitions for writ of mandate. Recent writ petitions have addressed the Subdivision Map Act (Gov. Code, § 66410 et seq.), the seizure of horses (animal cruelty), and property tax administration fees (alleging the county is charging excessive fees).

In code enforcement, Alexandra regularly appears in front of the Board of Supervisors at the 9:30 a.m. public hearings every Tuesday they are in session. She handles abatements and statements of expense before the board. Code Enforcement asks the board to declare violations of county ordinances to be a nuisance and to order the property owner to abate the nuisance. Should the property owner decline to do so, Alexandra also handles the process for obtaining court approval to abate the nuisance, via a seizure warrant. In the alternative, the property owner may choose to appeal the board's decision and file a lawsuit, which would be assigned to the code enforcement attorney handling the specific district where the property is located. As to statements of expense, Code Enforcement asks the board to order the property owner to pay costs associated with gaining compliance with county ordinances.

Alexandra has become actively involved with the Riverside County Bar Association. She is a member of the Bar Publications Committee for the *Riverside Lawyer* as well as a regular contributing writer. She is also on the CLE Committee and has assisted the Mock Trial program as a scoring attorney.

One of her strongest passions, aside from work, is travel. Alexandra has been to Europe with her older

sister, a pharmacist, numerous times. They've traveled to Italy (northern parts, including Venice, Florence, and Rome), Greece, Switzerland, Austria, Germany, Spain, and France, and are heading back this year to visit Southern Italy and Sicily. She has been to Europe almost every year since 2003, preferring to focus on one country per trip. And if she and her sister miss a year, they make up for it the following year by going twice.

She attributes her love of traveling with her sister to the numerous road trips she took with her family while growing up. They visited many national parks, including Yosemite, Yellowstone, Kings Canyon, Sequoia, Grand Canyon, Lake Powell, Bryce Canyon, Grand Teton, Glen Canyon, Zion, and others throughout the western United States. They also visited overseas locations in Asia – Taiwan and Thailand. After she completes her tour through Europe, she plans to visit the East Coast, Canada, Australia and New Zealand.

At the Palais de Justice in Lausanne, Switzerland in 2005

She enjoys her time with the county and the interesting assignments she receives. While she may not have a minimum billable hour requirement, she still has to account for her hours during these tough economic times, as each county department does indeed have a budgeted amount for legal expenses.

When she's not working or jetting to and from Europe, Alexandra enjoys reading fiction – Lee Child, Robert Parker, James Patterson, Jayne Ann Krentz, Carol Higgins Clark, Jackie Collins, Joanne Fluke, Laura Childs, and Diane Mott Davidson are just a few authors whose novels she has enjoyed. She is also an annual Disneyland Resort passport holder, along with her sister. Her favorite attractions are Thunder Mountain and Indiana Jones Adventure at Disneyland and Soarin' over California and Toy Story Midway Mania at California Adventure. She recently viewed California Adventure's newest attraction, World of Color, within a week of its premiere and enjoyed the water show.

Jeffrey A. Boyd, a member of the Bar Publications Committee, is an associate at the law firm of Heiting & Irwin. Mr. Boyd is also a board member of Barristers.

Preemption Preempted

by Richard Brent Reed

The Supremacy Clause

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> — U.S. Constitution, Art. VI, § 2

Federalism is the sharing of power between the federal government and the several states. Sometimes, state law and federal law conflict. "When Congress exercises a granted power, federal legislation may 'preempt' or override concurrent state legislation."[1] In other words, a federal law may trump a state law when there is an actual conflict. Such a conflict is found where:

1) Congress forbids an act that the state requires, or vice versa; or
2) Congress explicitly "occupies the field"; or
3) Congress impliedly occupies the field.

Recently, the state of Arizona enacted S.B. 1070, which enforces federal law against illegal immigration. The now-famous U.S. District Judge Susan Bolton put the Arizona law on hold to the extent that it:

- requires police to determine the immigration status of a person reasonably suspected of being in the country illegally who has been stopped, detained, or arrested;
- criminalizes an alien's failure to apply for or carry papers;
- makes it a crime for an illegal immigrant to solicit, apply for, or perform work (except for day labor).

The other provisions of the Arizona law remain in effect, including the right of citizens to sue if a governmental entity refuses to enforce the anti-illegal immigration law. Five states, including Virginia, have already[2] introduced similar legislation, and 20 other states are considering it.

The Nelson Test

The test of a preempted law is whether the state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress"[3] when it is found that Congress intended to crowd out state competition by occupying the field. The federal government's intention to occupy a certain field is determined by the three-pronged Nelson test:[4]

1) Pervasiveness of the federal regulatory scheme;
2) Federal occupation of the field as necessitated by the need for national uniformity;
3) Danger of conflict between state laws and the administration of the federal program.

Even so, though the Arizona law does nothing but reinforce federal immigration law, Judge Bolton bought the federal government's argument that the efficiency of Arizona's law would choke the system, require the feds to rearrange their priorities, and tax limited federal resources in processing the resulting inundation of apprehended illegals. In other words, Arizona is being overly helpful.

Though the federal government claims that immigration is an exclusive federal province, the courts have recognized a state's right to help federal efforts along in that area. In 1976, the Supreme Court upheld a statutory scheme that assisted federal policy, where, even though federal law already prohibited the hiring of certain aliens, California adopted federal standards in imposing criminal sanctions against employers who knowingly employed aliens who had no federal right to employment within the country.[5]

The Health Care Debate

Traditionally, the federal government has fallen back on the Commerce Clause to establish plenary jurisdiction over most every subject matter imaginable. The infamous *Wickard v. Filburn*[6] is a case in point. As part of the New Deal, the Roosevelt administration, during the Great Depression, decided to prop up the price of wheat by limiting production. An over-achieving farmer named Filburn exceeded his allotted 11.1 acres by planting another 11.9 acres for his own use.[7] He was subsequently fined and, just as subsequently, refused to pay, arguing that what he did with his own wheat was his own business, as long as it didn't enter the stream of commerce. The court decided that baking your own bread impacts interstate commerce by taking the eater out of it. Federal Commerce Clause powers stood unassailable until 1995.[8]

1 Constitutional Law hornbook, 5th edition
2 Missouri's document-check statute has been on the books for two years.
3 *Hines v. Davidowitz*, 312 U.S. 52 (1941)
4 *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)
5 *De Canae v. Bica*, 424 U.S. 351 (1976)
6 317 U.S. 111 (1942)
7 It was actually for Mrs. Filburn's use, since she baked the bread.
8 In *United States v. Lopez*, 514 U.S. 349 (1995), the Supreme Court finally applied the Giggle Test to the theretofore limitless Commerce Clause. Congress had passed a law forbidding the possession of a firearm within 1,000 feet of a school. When a student in San Antonio brought a .38-caliber handgun to school, he was arrested and charged under Texas law. Then the feds moved in and made Texas drop its case so that Lopez could be charged under the Gun-Free School Zones Act of 1990. Lopez insisted that the federal government's jurisdiction didn't extend to

Comes now the Commonwealth of Virginia, challenging the federal government's authority to compel citizens to purchase health care insurance. Before the Patient Protection and Affordable Care Act of 2010[9] was signed into law, Virginia passed a statute exempting state residents from being forced into heath care coverage. The federal government is claiming jurisdiction through the Commerce Clause.

The constitutional issue is whether Congress has the power to regulate and/or tax a citizen's decision not to participate in interstate commerce. Health and Human Services Director Katheen Sebelius holds that, since everybody needs a doctor at some point, every American is either a "current or future" participant in the health care market and, therefore, subject to taxation. But, as Virginia's Attorney General Ken Cuccinelli puts it, "The government cannot draft an unwilling citizen into commerce just so it can regulate him under the Commerce Clause." More than a dozen attorneys general have followed Cuccinelli's suit by filing their own challenges to the federal health care law on behalf of their respective states.

Federal jurisdiction is not limitless. Ultimately, the federal health care law may be defeated by, ironically enough, Roe v. Wade, where the Supreme Court found a right to privacy lurking somewhere in the penumbra of the Fourteenth Amendment. If medical decisions are protected, then so is the decision to be insured or not. Furthermore, the government cannot compel a citizen to share personal information with a third party without violating the Fifth Amendment's protections against coerced testimony and invasive searches without Due Process. In the words of the Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[10]

According to the concept of Federalism, upon which our Republic was founded, most matters are best left to the States to resolve or for people to work out for themselves, like a Virginian's right to opt out of the stream of commerce or Arizona's prerogative to protect its soil from foreign trespassers. Whether or not the Supreme Court concurs, time will, shortly, tell.

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

school zones. The federal government countered with the Rube Goldberg Commerce Clause Doctrine: guns in schools interfere with education, and therefore national productivity, and therefore interstate commerce. That argument did not withstand the Giggle Test.

9 A/k/a health care reform statute; a/k/a Obamacare.

10 Amendment X, U.S. Constitution.

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Membership

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

Gregory J. Doan – Doan Law LLP, San Clemente
Benson J. Goldstein – Law Offices of Benson J. Goldstein, Lake Elsinore
Rogelio Vergara Morales – Sole Practitioner, Riverside
Daniel R. Shapiro – Law Office of Daniel R. Shapiro, Riverside
Alejandro D. Szwarcsztejn – Law Student, Yucaipa
Rina Wang – Best Best & Krieger LLP, Riverside

Bench to Bar

PROCEDURE FOR CALLING MEDIATOR AS WITNESS

Local Rule 5.0055, subsection C. sets forth the procedure for calling the mediator as a witness. Use of subpoena is not required. The rule reads as follows:

"Mediators are officers of the Court, and shall be available to testify at the request of a party or their counsel without the need for a subpoena. Requests for a mediator to testify shall be made in writing and shall be submitted to the Supervising Mediator at least 5 court days before the hearing. This time period can be shortened if the court determines there is good cause. All parties and attorneys will be notified if the mediator is not available."

It is encouraged that the request for mediator to testify also be filed in the court action with proof of service to all parties in interest.

Riverside County LAWYER

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