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In This Issue:

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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 our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), 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

6 **Swearing In Ceremony**
For the Central District of California
George E. Brown, Jr. Federal Courthouse
8:00 a.m.
RSVP: Julie Cicero at 951.328.4440

Swearing In for New Admittees
Riverside Historic Courthouse
Dept. 1 – 10:00 a.m.

11 **Joint CLE Event with the Civil Litigation Section**
CLE Committee's "Trial Practice Skills" Series
Topic: "Voir Dire: To Speak the Truth. How to conduct an effective examination of jurors"
Speaker: Mark Lester. Esq.
RCBA Gabbert Gallery – Noon
MCLE

14 **General Membership Meeting**
Topic: "Is it Still a Man's World?"
Speaker: Virginia Blumenthal, Esq.
RCBA Gabbert Gallery – Noon
MCLE

18 **Family Law Section Meeting**
Family Law Court, Dept. F501 - Noon
Topic: Substance Abuse, Part 2
Speaker: Sue Ervin & Patrick MacAfee
MCLE

19 **Estate Planning, Probate & Elder Law Section Meeting**
RCBA Gabbert Gallery – Noon
Topic: Magical Mystery Tour: Naming a Special Needs Trust as Beneficiary of a Retirement Account
Speaker: Dennis Sandoval, Esq.
MCLE

Federal Bar Association
George E. Brown, Jr. Federal Courthouse, Courtroom 3
Noon – 1:15 p.m.
Topic: "Municipal Bankruptcies"
Speaker: Franklin C. Adams, Best Best & Krieger
RSVP – Julie Cicero at 951.328.4440

20 **Appellate Law Section**
RCBA Gabbert Gallery – Noon
Topic: "Persuasive Writing: Rhetoric for Fun and Profit"
Speaker: Carmela Simoncini, Lead Appellate Court Attorney, Fourth Appellate District, Divison Two
MCLE

28 **Bridging the Gap**
8:30a.m. - 3:30 p.m.
Office of the Public Defender, San Bernardino Training Room
For more information call the San Bernardino County Bar Association
At (909)885-1986

Bowling With the Bar & Beer
A social for RCBA members & their families
6:00 p.m. to 8:30 p.m.
AMF Riverside Lanes
10781 Indiana Avenue, Riverside
$20/person-beer, bowling & food
$13/person – soft drinks, bowling & food
RSVP & payment due by June 14
(951) 682-1015

President's Message

by Christopher B. Harmon

I am very pleased to report that the Judicial Council has recently voted to adopt a new trial court funding model and allocation process. Funding needs for each trial court will be based on workload, as derived from filings through a specified formula. The new allocation methodology will require shifts in current baseline funding from some courts to others, which are planned to be phased in over a five-year period. Specified elements of the process will be subject to further refinement, but for those of us in Riverside County and for our neighbors in San Bernardino, this looks to be a big improvement in our courts' funding. While this will not be a magic bullet to fix all of our problems, it should be a significant improvement. There is still much to be done on this issue, but this looks to be a good start. I want to thank all of you who have participated in helping to draw attention to the Inland Empire's years of underfunding. Whether you served on a committee, attended a meeting, wrote to your local legislator, or wrote a letter to the editor, your efforts have mattered. It is important, however, that we as attorneys keep up the fight for judicial branch funding and access to justice.

As the summer nears, I hope you are all considering taking some time off and planning those well-deserved family vacations. Throughout the summer, the RCBA will continue to put on valuable programs and meaningful social events. Please keep a lookout for our activity mailings and announcements or check our website and join us. I look forward to seeing all of you at an RCBA event soon!

Chris Harmon practices exclusively in the area of criminal and DUI defense, representing both private and indigent clients.

Barristers President's Message

by Amanda E. Schneider

I can't believe it's already June! I hope everyone had a very enjoyable Memorial Day weekend and is looking forward to the summer months. Last month, the Barristers held a Mediation Panel at ProAbition in Downtown Riverside. Tim Corcoran, founder and president of RAMS, spoke regarding the mediation process and techniques for young attorneys.

This month is our annual Election Social. Nominations were due at the close of the May 23, 2013 meeting, and we are looking forward to electing next year's Barristers board, which will begin serving the community immediately upon election at our June 19 meeting. Remember, to be eligible to vote, you must be a member of the RCBA, under 37 years of age and/or within your first seven years of practice. You also must have attended at least two Barristers meetings prior to the Election Social. We encourage all to come and welcome our new board!

Amanda Schneider is the 2012-2013 President of Barristers, as well as an associate attorney at Gresham Savage Nolan & Tilden, where she practices in the areas of land use and mining and natural resources.

The Limits of Modern Science in the Courtroom

by Debra Postil

Debra Postil

Most people become lawyers because they're neither mathematicians nor scientists. Yet many criminal cases involve forensic science, which is widely accepted by juries and serves as the basis of many crime television shows. A forensic pathologist can tell us the cause of death. A gas chromatograph can tell us a driver's blood alcohol level. DNA can tell us the identity of a sexual assault perpetrator. A polygraph can tell us whether a suspect is telling the truth. A plethysmograph can tell us an offender's sexual preference. Physics can tell us how a collision occurred. Today, scientific evidence is often admitted in court without legal argument; however, it took a long journey for it to become so widely accepted.

In *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, the court addressed the admissibility of polygraph evidence in court. *Frye* resulted in a holding that set forth the standard for determining the admissibility of all scientific evidence. The *Frye* standard required the science involved to be generally accepted in the relevant scientific community. (*Id*. at p. 1014).

In 1993, the United States Supreme Court replaced the *Frye* standard with the *Daubert* standard. In *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, the court outlined the factors determining admissibility of expert scientific testimony, which included: (1) whether the theory or technique on which the testimony is based is capable of being tested; (2) whether the theory or technique has a known rate of error in its application; (3) whether the theory or technique has been subjected to peer review and publication; (4) the level of acceptance in the relevant scientific community of the theory or technique; and (5) the extent to which there are standards to determine the acceptable use of the theory or technique. (*Id*. at pp. 591-594).

Using these factors, state and federal courts throughout the country began to reexamine bans on polygraph tests. In California, Evidence Code section 351.1, subdivision (a) excludes the *results* of polygraph examinations in criminal cases, unless all parties stipulate to admit them. Although polygraph results are inadmissible, Evidence Code section 351.1, subdivision (b) allows the admission of *statements made during a polygraph*, provided they meet a hearsay exception. In practice, the interviewee often makes statements about the crime during a "post-interview," which may be helpful to the prosecution and otherwise admissible as a party admission under Evidence Code section 1220 or a declaration against interest under Evidence Code section 1230.

As legally accepted as science is in the courtroom, it still has its practical limits, as any effective trial counsel appreciates. For example, it is critical to select jurors for a trial who are not biased regarding the use of science in a criminal case. Some people simply don't trust modern-day science and consider it "junk." It is important to help jurors understand that scientific evidence is not gathered and analyzed as quickly or easily as it appears in their favorite television show. Limited budgetary resources often hinder widespread use of scientific analysis in cases.

Crime shows set the bar high when it comes to what juries expect real-life forensic examiners to do and how fast they expect them to do it. Crime laboratories work on a case-by-case basis and must comply with strict regulations and guidelines to maintain their licensing credentials. New cases come into the laboratory and compete for attention with old cases, which are oftentimes cold, having been sitting in evidence vaults for years waiting for analysis. DNA results in the real world are not revealed within the timeframe of a 60-minute television episode. Rather, they may take days, weeks or months, depending on the availability of resources and experts.

Remaining humble about scientific results will help achieve just results in our criminal justice system. Science does not always tell us the motive or intent of a perpetrator. If a suspect's bodily fluid is found inside a victim's sexual organs, it doesn't tell us whether there was consent. Even if a suspect's fingerprint is found inside a store recently robbed, it doesn't necessarily tell us when he was there.

Despite its limits, one of the greatest uses of science is to vindicate a suspect. Polygraph tests are often used early on in investigations or at the suggestion of defense attorneys who believe that passing results will raise doubt in a prosecutor's mind or motivate discussion of a plea bargain. DNA testing can often be used to rule out a suspected perpetrator. Any effective trial counsel will never under or overestimate the value of science, nor lose sight of the importance of old-fashioned police work and eyewitness testimony to corroborate strong scientific findings.

Debra Postil is a veteran prosecutor in Riverside currently handling parole hearings of convicted murderers. She is the cofounder and Executive Director of Women Wonder Writers, a nonprofit life skills and mentorship organization for at-risk youth, and author of the legal thriller The Mamacita Murders.

Best Available Science: The Endangered Species Act's Controversial Standard

by Steven G. Martin

The federal Endangered Species Act (16 U.S.C. § 1531 et seq.) (ESA) provides that species may be listed as either endangered or threatened according to their risk of extinction. Once species are placed on that list, the ESA provides powerful legal tools for protecting them from extinction and preventing adverse modifications to their critical habitats. (See, e.g., *Tenn. Valley Auth. v. Hill* (1987) 437 U.S. 153, 184-85.)

Under the ESA, two federal wildlife agencies – the Fish and Wildlife Service and the National Marine Fisheries Service – are charged with administering ESA-related determinations. Decisions by these wildlife agencies to list and protect species under the ESA depend heavily on evaluating biological and other scientific aspects regarding the species. Because the underpinnings of these determinations can ultimately lead to substantial impacts on development and the use of natural resources, questions regarding the validity of the scientific analyses can often erupt into enormous legal and political battles.

What is commonly referred to as the "best available science" standard applies to such determinations to ensure that the wildlife agencies' decisions were not arbitrary and capricious, but rather were based on credible science. The purpose of the best available science requirement "is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." (*Bennett v. Spear* (1997) 520 U.S. 154, 176.)

Where does the best available science standard come into play in ESA decisions? Essentially from inception to completion of the ESA's tasks with respect to a species. The initial decision to list a species under Section 4 of the ESA must be based "solely on the basis of the best scientific and commercial data available . . . ." (16 U.S.C. § 1533(b)(1)(A).) This occurs through public participation and the collection and review of relevant scientific information. Similar determinations to uplist, downlist, or delist species also must be based on this standard. (*Ibid*.)

Science is also critical in many post-listing decisions. For example, Section 4 of the ESA provides for designating the "critical habitat" of listed species based, in part, on the best scientific data available. (16 U.S.C. § 1533(b)(2).) Section 10 provides that applicants may develop habitat conservation plans for species based on extensive analysis of the available scientific data, which allows them to seek a permit for incidentally taking listed species during their otherwise lawful activities. (16 U.S.C. § 1539(a).)

Also, under Section 7 of the ESA, federal agencies must consult with the wildlife agencies to insure that their acts will not jeopardize the continued existence of listed species or adversely modify their habitat. (16 U.S.C. § 1536(a)(2).) Through good-faith consultation, the agencies analyze the best available scientific data, and the wildlife agency renders an opinion regarding the action's impacts. (16 U.S.C. § 1536(a)(2), (b)(3)(A).) If the action will jeopardize the spe-

cies or result in adverse modification to its critical habitat, the wildlife agencies must suggest reasonable and prudent alternatives that avoid those results and can be taken by the action agency to otherwise implement the action.

But what is the best available science? Opponents of an ESA-related decision will often claim that the best available science was not used, that the science supporting the decision was insufficient, or that the decision was based more on political concerns than credible scientific evidence. ESA compliance is generally governed by the federal Administrative Procedure Act (APA), which provides that a court may set aside an agency decision if it was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. (5 U.S.C. § 706(2)(A).) Under the APA, the wildlife agencies must support their ESA-based determinations by basing them on relevant factors and articulating a satisfactory explanation for their determination that shows "a rational connection between the facts found and the choice made." (*Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.* (1983) 463 U.S. 29, 43.)

Part of the debate over what constitutes best available science is predictable, given that for many species, especially rare ones, scientific information is scarce. Also, scientific knowledge is dynamic and changes as new information becomes available. Generally speaking, the "best available science" standard is founded on scientific knowledge existing at the time of the agencies' decisions. Thus, what constitutes the best available science today will not necessarily be the best available science tomorrow.

Notwithstanding that science will change, wildlife agencies cannot be selective and "cannot ignore available biological information or fail to develop projections" required under the ESA. (*Conner v. Burford* (9th Cir. 1988) 848 F.2d 1441, 1454.) However, the term "best available science" was designed to permit wildlife agencies to issue determinations notwithstanding inadequately available information to allow projects to move forward. Otherwise, the wildlife agencies might be required to issue negative opinions that would unduly impede important projects that depend on a determination regarding species impacts. (1979 ESA Amendments, H.Rep. 96-697 at p. 12 (1979) (Conf. Rep.).)

Considering that thousands of science-based ESA determinations are likely to be made each year, relatively few become controversial enough to incite news headlines. In the broader debate, however, science plays a key role regarding whether the ESA, or a decision under it, provides overprotection or underprotection of species. These debates will continue as new decisions are made concerning natural resource use and challenges are brought regarding whether the wildlife agencies satisfied the ESA's best available science standard.

Steven G. Martin is an attorney in the Environmental and Natural Resources Practice Group at Best Best & Krieger LLP and has been involved with counseling, litigating, and educating related to the Endangered Species Act throughout California.

Personal Injury: The Proof Is in the Science

by James O. Heiting

Costs of prosecuting a personal injury case are going up. More and more, juries distrust the plaintiff's lawyer in personal injury cases. They want to have something more to rely on than the argument of a slick lawyer. They want science; and science means experts, and experts mean money.

How these juries became so skeptical may be worthy of study and debate; but TV ads by plaintiff's lawyers, ad campaigns by insurance companies, and publication of seemingly outrageous verdicts have been effective in making jurors wary of all plaintiff's claims. For these reasons, and others, lawyers representing plaintiffs must be aware of and effectively utilize the science and experts necessary to convince jurors of the liability, causation, and nature and extent of damages that are vital to an appropriate award. Personal injury cases are more complex and demanding than ever.

Much of the need to present experts in a variety of fields has resulted from the defense bar challenging the claims of plaintiffs by presenting scientific "evidence" (often actually theory or "argument by expert"), requiring plaintiffs to match expert for expert in hopes of prevailing. Of course, a simple reading of jury instructions will impress that the expert one chooses must be favorably comparable to the expert chosen by the opposite side. Qualifications, education, and reasons for the opinions given are of paramount importance. Without the right expert, the case may be lost.

Those unfamiliar with personal injury cases may think the only expert necessary would be a doctor to testify as to the nature and extent of the physical injury and possibly causation. However, personal injury cases have many layers of experts that go into a case. For example, engineers (safety, mechanical, human factors, forensic, reconstruction, computer, animation, and other types) and experts in particular fields, careers and occupations may be called to talk about liability.

Medical doctors of every specialty (neurology, internal medicine, orthopedics, neurosurgery, radiology, toxicology, cardiology, vascular, psychology, psychiatry, podiatry, ophthalmology, ENT, OB-GYN, neonatology, pediatrics, burns, physical therapy, prosthetics, etc., etc.) are required to lay out every aspect of the physical (and mental) injuries and how they were caused by the particular incident. They will also testify as to the reasonableness and necessity of medical bills in the past, as well as their prognosis and expectations for future conditions, treatment, and costs.

Rehabilitation experts, accountants, economists, physiologists, and others may be required to testify as to economic damages, loss of earnings, and loss of earning capacity.

It seems that the presentation of science in personal injury cases is limited only by the imagination and the budget of the defense. For example, we handled one case that seemed to be a straightforward personal injury case, with questions of liability that certainly could have been addressed by argument and presentation by the attorneys; however, the defense attorney came up with his own ideas of how this accident occurred, ideas that did not seem to have support from viewing the facts and physical evidence of the accident. In order to gain support for his position, he engaged experts in 12 different disciplines and presented them all at trial. In order to counter those experts, we were required to engage our own experts. This not only drove up the costs of the case tremendously, but we had to make sure that we had the very best stable of experts that could be put together to present the case. We were thankful that we could call on our years of experience and assets to bring this together (and we were thankful that we won the case for a very seriously injured client).

Science plays a huge role in the practice of personal injury law. If you are going to prosecute personal injury cases, you should have a strong grasp of the importance of science, experts, and presentation of scientific evidence to the jury.

James O. Heiting, of Heiting & Irwin, is a former California State Bar President and a past president of the RCBA.

RF Radiation: A Heated Topic

by James Hobson

You are a new city attorney, and on the agenda at your first council meeting is an application to install wireless communications antennas on streetlight poles and on the roof of a two-story elementary school. Signed up to speak are a representative of the applicant cellphone service provider, a school system official, and several members of Citizens United for Radiation Bans (CURB) – the name in bright red on the home-made signs waving at the back of the Council Chamber.

The radiation the citizens are protesting is not x-rays or gamma rays, but a weaker form of non-ionizing radiofrequency (RF) energy associated with wireless transmission of voice, data and, increasingly, video. The CURB members and their seemingly numerous allies are noisy and unhappy. What's all the fuss about?

It's about a scientific debate conducted more quietly but with considerable passion for at least 20 years: What are the effects of RF radiation on the human body? Are they purely thermal and instantaneous, or do they operate at the cellular or molecular level to produce chronic harmful effects? If the sole risk is overheating of tissues, we can mitigate it by, for example, keeping our distance from sources of radiation, putting safety latches on microwave ovens, and posting warning signs on rooftops where antennas are mounted. If thermal harms are not the whole story, how do we know what else is happening to us?

These are questions the Federal Communications Commission (FCC) will be reviewing comprehensively for the first time in nearly 20 years. On March 29, 2013, the FCC released an Order, Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry (NOI), all in a single document (FCC 13-39, Dockets 03-137, 13-84). Once the NPRM and NOI are published in the Federal Register, comments on them will be due in 90 days and replies in 150 days.[1] The NPRM assumes that the human biological effects of RF radiation are thermal only; the NOI asks whether, in light of the latest research and experience, the thermal-only assumption remains valid. The principal rules at issue may be found at 47 Code of Federal Regulations sections 1.1307, 1.1310, 2.1091 and 2.1093.

When the FCC opened its prior rulemaking in 1993, it drew a crowd of witnesses who were convinced, even then, that non-ionizing radiation causes deeper and longer-lasting harms than overheating of tissues. Some of these persons consider themselves "electrosensitive" and can produce affirmations of their conditions from their doctors. They complain of sleeplessness, tinnitus (ringing in ears), debilitating headaches, joint and muscle pain, muscle cramping, elevated blood pressure, irregular heartbeat, insomnia, and an intermittent buzzing or tingling sensation in legs and feet – effects that allegedly disappear upon separation from RF radiation sources.[2]

Such complaints, of course, are not reliable scientific evidence. The research record is conflicting, but there is modest (yet inconclusive) recent evidence that RF radiation may produce non-thermal effects.[3]Nevertheless, the FCC remains confident that the present policy of safeguarding against thermal harms is sufficient.

The FCC acknowledges (FCC 13-39, ¶ 6) that it is not a health and safety institution with expertise in human biology and therefore must rely on other federal bodies such as the EPA and the FDA in its review of the RF radiation protection standards. However, based on the experience of the 1993 rulemaking, more knowledgeable agencies are unlikely to venture opinions that might intrude on the FCC's mission as enforcer of the regulations. If they remain on the sidelines again, the FCC will be forced to repeat that, while not expert in the subject, it is capable of making independent determinations based on the record evidence. (FCC 13-39, ¶ 215.)

The opening of the RF radiation review seems likely to energize electrosensitive individuals and others advocating for stricter controls on RF radiation. Their energy will be applied not only to the FCC, but also to city councils and county commissions wherever and whenever public agendas include applications to install wireless antennas or equipment using or emitting electromagnetic radiation.

As in the recent past, schools will be a focus of interest because of their open spaces and convenient locations of poles and light standards, which can be sources of rental revenue. Schools and playgrounds will be a focus of concern for parents who believe that, whether the harms of RF radiation are thermal or non-thermal, their effects are likely to be exacerbated in children.

What can you do, in your roles as city attorneys or municipal advisors, to channel future debates over RF radiation into positive discourse and useful outcomes? First, it is important to understand that the FCC's RF radiation protections are only partly preemptive. Section 332(c)(7)(B)(iv) of the Communications Act (47 U.S.C. § 332(c)

1 As of this writing, Federal Register publication remained pending.

2 These complaints are collected as sworn declarations in the Opening Brief of the EMF Safety Network (July 2012) in CPUC Docket A11-03-014. While this proceeding concerned radiation from power company "smart meters," the list of ailments matched those attributed in the FCC 1993 rulemaking to communications antennas and receiving equipment.

3 In March 2011, the California Council on Science and Technology released "Health Impacts of Radio Frequency Exposure from Smart Meters." (ccst.us/publications/2011/2011smart-final.pdf.) A unit of the World Health Organization has classified RF radiation as a possible carcinogen. (monographs.iarc.fr/ENG/Monographs/vol102/index.php.)

(7)(B)(iv)) applies only to "personal wireless services" as defined elsewhere in paragraph 7. These include cellular telephony but not the emissions from smart meters. Thus, if and when the wireless industry applicant asserts preemption, you should determine whether the application involves personal wireless services. Even if it does, there is nothing in the Communications Act that precludes your planners and zoners and health officials from satisfying themselves that the applicant will meet FCC safeguards.[4]

4 The FCC's equivocal discussion of this enforcement question may be found at FCC 13-39, ¶ 57, and Appendix H.

Perhaps most importantly, local governments carrying out their responsibilities for planning and zoning and public health and safety should consider participating directly in the FCC proceeding when it opens. Municipal staff or retired citizens (physicists, radio engineers, doctors) may have a lot to contribute. And you as lawyers need to advocate for a clearer understanding of the limits of local action on RF radiation protection.

James Hobson is of counsel with Best Best & Krieger LLP in Washington, D.C. He is a member of the firm's Municipal Practice Group.

Communicating Statistical Information Accurately

by Christopher J. Buechler

Lawyers are typically known for being two things: infamously adept at communicating and infamously inept at math. One would hope that if a lawyer had to communicate statistical information to a finder of fact, these two traits would cancel each other out and the lawyer would at least be okay at relaying important statistical information. As it turns out, even people who are good at math have trouble communicating statistical information to lay people in such a way that they can properly assess the risk or probability that influences the judgments they make. Consider this example:

The probability that a woman aged 40 has breast cancer is about 1 percent. If she has breast cancer, the probability that she tests positive on a screening mammogram is 90 percent. If she does not have breast cancer, the probability that she nevertheless tests positive is 9 percent. What are the chances that a woman who tests positive actually has breast cancer?

Most of us will probably have difficulty dealing with the percentages in the problem and just come up with our best guess. It will probably be close to the 90 percent accuracy rate for the test, but it will also account for the false positive rate – something around 85 percent. Now consider the same scenario explained as follows:

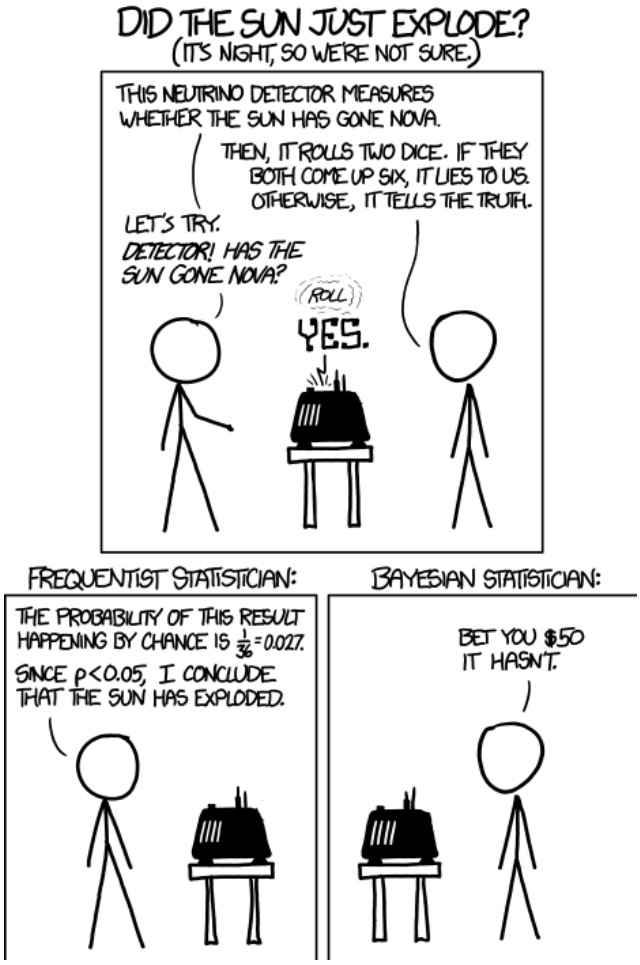
Think of 100 women over 40. One has breast cancer, and she will probably test positive. Of the other 99 women, 9 of them will also test positive. Thus, a total of 10 women will test positive. How many of those who test positive actually have breast cancer?

In this case it is clearer to see that the probability of having breast cancer after having a positive test is around 1 in 10, or 10% - way off from our 85-90% estimate.

There are two issues in the above scenario that lawyers need to understand in order to effectively communicate statistical information: first, understanding Bayes' Theorem and its application to interpreting probability, and second, the importance of using natural frequencies (e.g., one person out of every 100) as opposed to percentages.

Bayesian Interpretation of Probability

Simply put, a Bayesian interpretation of probability holds that to evaluate the probability of a hypothesis based on some prior probability, we must update our evaluation in the light of new, relevant data. In the scenario above, we use this theory to evaluate the probability that someone has breast cancer in light of the fact that she receives a positive mammogram. However, the application of the theory presents challenges.



The first challenge is that classic evidentiary dilemma, "What new evidence is relevant?" The answer: it depends on our ability to observe a correlation between two (or more) events. In his book, *The Signal and the Noise: Why So Many Predictions Fail – But Some Don't* (2012, Penguin Group), Nate Silver explores the difficulty we have in making this specific linkage in our probabilistic analysis. We either ignore or downplay the importance of a certain strongly correlated event ("the signal") or we give too much credence to an event that is weakly correlated ("the noise"). Fortunately, science is working to provide us with more accurate data to enable us to filter out more signals in a world of ever-increasing noise.

Natural Frequencies Versus Probabilities

The second challenge in applying Bayes' Theorem is presenting the new, relevant data to people in a way that will best enable them to evaluate risk and act upon that evaluation based on a proper cost-benefit analysis.

Bayes' Theorem can best be expressed as a simple mathematical formula in which P(A) is the probability of an event, A, occurring and P(A|B) is the probability of an event, A, occurring given that an event, B, has occurred:

$$P(A|B) = P(B|A) \times \frac{P(A)}{P(B)}$$

So in our breast cancer scenario:

$$P(\text{Cancer}|\text{Positive}) = \frac{P(\text{Positive}|\text{Cancer}) \times P(\text{Cancer})}{P(\text{Positive})}$$

Or:

$$P(\text{Cancer}|\text{Positive}) = \frac{0.90 \times 0.01}{(0.01 \times 0.90) + (0.99 \times 0.09)} \approx \frac{0.90 \times 0.01}{0.10} = 0.09 \text{ or } 9\%$$

The point of the example at the beginning of the article was to show that it is more effective to communicate these probabilities in terms of natural frequencies, that is, to show the relevant subpopulations by taking the percentages of a sufficiently large general population. By using natural frequencies, almost anybody – even lawyers (and judges), with their limited math skills – can understand statistical information presented to them.

For further reading on Bayes' Theorem and the importance of communicating statistics in terms of natural frequencies, with specific examples of interest to lawyers (DNA evidence, domestic violence and murder, the "prosecutor's fallacy," etc.), I highly, highly, highly recommend *Calculated Risks: How to Know When Numbers Deceive You* by Gerd Gigerenzer (2002, Simon & Schuster).

Christopher J. Buechler, a member of the RCBA Publications Committee, is a sole practitioner based in Riverside with a focus on family law. He is also the 2012-13 chairperson of the RCBA Solo/Small Firm section. He can be reached at Christopher@riversidecafamilylaw.com.

The Science of Good Judgment

by Anne Brafford

Anne Brafford

In our personal and professional lives as lawyers, we make thousands of decisions every day: Which job offer should I accept? Should I quit? Does this corporate acquisition make sense? Should I decorate my biceps with a scales of justice tattoo? Remarkably, despite the large volume of decisions that we process daily, we rarely feel stumped. Even as to challenging questions, we feel confident that our conclusions are reliable. But are we deluding ourselves?

Psychological research shows that countless preconceptions populate our minds and shape our subconscious thought processes. They are stealth spoilers of our ability to accurately perceive the world and make good decisions. The upshot is that we often make decisions that we abandon or regret. Seven in 10 lawyers responding to a 1992 *California Lawyer* magazine poll said that they would change careers if the opportunity arose. A study of corporate mergers and acquisitions showed that a whopping 83% failed to create any value for shareholders. An estimated 61,535 tattoos were removed in the United States in 2009.

The bad track record of human judgment has become a trendy topic in social science literature and popular books. Take, for example, *How to Make Better Choices in Life and Work* by Chip Heath and Dan Heath – respectively, a professor at Stanford Graduate School of Business and a Senior Fellow at Duke University's CASE center – published in March 2013. Relying on decades' worth of social science research, the book provides practical advice for improving judgment. According to the Heath brothers and other social science authorities, some of the primary culprits that rob us of our good judgment are the following:

Confirmation Bias. Research shows that humans are significantly handicapped by "confirmation bias," which is the tendency to quickly develop a belief and then seek out information that bolsters our belief. A big problem with confirmation bias is that it doesn't affect only what information we *look for*, but also what we notice in the information before us. We also apply different standards to the information before us – favoring confirming information twice as much. A dangerous feature of this bias is that it can look and feel very scientific. We think we're impartially collecting and analyzing data. We don't even realize that we're cooking the books. One expert has identified confirmation bias as "the single biggest problem in business" because even the most sophisticated people fall under its spell.

Overconfidence. Like all humans, lawyers are over-confident. We think that we know more than we do about how the future will unfold. Even highly educated experts (including lawyers) have very poor accuracy in predicting future outcomes – but they refuse to believe it. In his landmark book, *Expert Political Judgment: How Good Is It? How Can We Know?*, psychology professor Philip Tetlock compared the accuracy of expert predictions to that of a chimp throwing darts.

Cognitive Conservatism. Even the most educated people – and perhaps *especially* lawyers – are reluctant to acknowledge that they're wrong. Humans tend toward cognitive conservatism – a reluctance to admit mistakes and update beliefs when proven wrong.

Reasoning Style: Hedgehogs vs. Foxes. Individual differences in reasoning style also impact accurate decision-making. People who value closure and simplicity (called "hedgehogs" by Tetlock in *Expert Political Judgment*) are less accurate in complex social perception tasks and are more susceptible to overconfidence and confirmation bias. "Hedgehogs" are contrasted to "foxes" – those who are content to improvise ad hoc solutions.

The result of these cognitive traps is that that we can get stuck repeatedly making the same mistakes. Research shows that trusting our gut or conducting a rigorous analysis won't fix these pervasive problems in our decision-making. But a good process will. In Decisive, the Heath brothers cite one study showing that a good process mattered more than a good analysis – by a factor of six. They suggest four tactics as the basis of a process to reduce bias and improve decision-making.

1. Widen Options.

Consider multiple options, and always distrust "whether or not" questions. How we frame questions is shaped by our unconscious biases. We tend toward narrow "whether or not" questions – whether or not to discharge our paralegal; whether or not to switch practice areas. One study of business decisions showed that executives considered more than one alternative in only 29% of the cases. The study also showed that decisions were far more likely to be successful when at least two alternatives were considered.

Instead of narrowly focusing on a "whether or not" question, generate multiple options and ask whether it's possible to pursue "this AND that" rather than "this OR that." Consider multi-tracking, in which multiple options are considered simultaneously. Studies reflect that you'll learn more about the problem this way. The conclusion also may be more reliable because egos are kept in check – rigidity and defensiveness are more likely when egos are tied up in a single option.

To stimulate more options, consider the Vanishing Options Test. Imagine that the current option under consideration is *not* available. What else would you do? For example, if your paralegal is under-performing but you cannot fire her, what would you do? Can you transfer some administrative duties to a secretary to free up more training time?

2. Reality-Test Assumptions.

To offset confirmation bias, it is important to reality-test your assumptions. For example, always consider the opposite by asking, "What is the best case *against* the decision we're considering?" To ensure honest responses to this question, make it easier for people to express disagreement.

As noted above, CEOs keep deciding to pursue mergers, even though they are rarely profitable, failing to generate value for shareholders 83% of the time. Further studies showed that the explanation for this *Groundhog Day* phenomenon is overconfidence by the CEOs, who often insulate themselves from any real criticism. The antidote is to promote disagreement. Establish a culture where criticism and disagreement are noble functions – not career suicide. Ask questions that are more likely to produce contrary information. For example, ask the following: "Imagine that it is a year from now and we have failed. What are the most likely reasons for the failure? What are the most likely reasons we did not uncover the information we would have needed to predict or avert this failure?"

The ultimate way to reality-test your options is to do a trial run – called "ooching" in *Decisive*. The idea is to take your options for a spin before fully committing to them. While ooching intuitively seems like a good idea, it often is overlooked. It does not occur to most of us to try out an idea on a small scale because we feel (falsely) confident about our choice and don't perceive ourselves as being in a state of confusion. In light of the studies showing that even the most educated and specialized experts are terrible at predicting the future, incorporating ooching into our decision-making repertoire makes sense.

3. Attain Distance Before Deciding.

Short-term emotions can have a significant, harmful impact on our ability to make good long-term judgments. This may include a rush of positive feelings that blinds better judgment – e.g., "This job applicant is so charming and funny!" Short-term emotions may also be caused by subconscious biases such as "mere exposure" (we like what's familiar to us) and "loss aversion" (losses are more painful than gains are pleasant). Some studies suggest that, psychologically, losses are twice as powerful as gains. The combination of these two biases can leave us apprehensive about acting and attached to the familiar status quo.

Decisive suggests the "10/10/10" tool to help attain emotional distance. Ask yourself how you will feel about this decision in ten minutes, ten months, and ten years. Also try looking at your situation from a third party's perspective. For business decisions, consider what your successor would do if you were fired. For personal decisions, perhaps the most powerful question to help attain distance is, "What would I tell my best friend to do in this situation?"

4. Prepare to Be Wrong.

No matter how diligent our decision-making process, we are going to be wrong sometimes. Therefore, we should prepare for the reasonably worst and reasonably best outcomes. Because overconfidence likely will make us underpredict the likelihood and breadth of bad outcomes, build in a safety net.

After a decision is made, avoid slipping into autopilot – drifting along without evaluating the impact of the prior decision. To stop the trajectory of a bad decision before it becomes devastating, set "tripwires" that will wake you up and make you realize you have a choice to make. Tripwires can be deadlines or measures, for example, and can be especially useful when change is gradual. For example, if the decision is to start your own law practice, the tripwire may be that, in two years, if you have not made a profit, you will reconsider your choice. Tripwires can actually create a safe place for risk-taking. They (1) cap risk and (2) ease anxiety until the trigger is hit.

Conclusion. Lawyers trade in good judgment and therefore have a strong interest in making any possible improvements. Social science research has shown that, although our decisions are never going to be perfect, they can be better. The right process can act as guardrails, keeping us on a path toward better decisions.

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Riverside County Law Library's Indio Branch Finds New Home

With the expansion of services at the Larson Justice Center, the law library has found a new home in the Desert Courtyards center. In 1996, after leaving the County Administration Building, the branch moved into the Larson Justice Center. The new location is a temporary change, as the branch will return to its original home in the new County Administration Building when built. The branch is now open for business at 46-900A Monroe Street, Indio, CA 92201. Library hours will remain the same, Monday- Friday 8 a.m.-4 p.m.

Judge Harold W. Hopp

To coincide with National Law Day, the Indio branch's Grand Re-Opening event was held on May 1. Guest speaker Judge Harold W. Hopp spoke eloquently on this year's Law Day theme, "Realizing the Dream: Equality for All." Law libraries play a vital role in creating equal access to the law. The RCLL's resources have benefited judges, attorneys, students, and pro pers across the county. Many law library patrons have found its access to legal resources and services to be a necessary component of their cases. How has the law library helped you?

Some of the RCLL's resources include free access to databases such as Westlaw Next, LexisNexis, HeinOnline, CEB OnLaw, and CCH Intelliconnect; extensive California and federal print collections of primary law and secondary materials, including practice guides; MCLE programs and self-study material; and monthly workshops. The RCLL has two branch locations, Riverside and Indio, as well as a satellite branch in Temecula. Visit rclawlibrary.org for locations and hours.

Superior Court of California
County of Riverside

May 20, 2013

COURT ANNOUNCES INTENTION TO CLOSE TEMECULA COURTHOUSE

The Riverside Superior Court is considering the closure of the Temecula courthouse, located at 41002 County Center Drive, #100, as of a date to be determined, but no sooner than July 22, 2013.

Pursuant to California Rule of Court 10.620(d)(3), the court is seeking input from the public regarding the planned closure before making the final decision.
Pursuant to California Rule of Court 10.620(e), any interested person or entity who wishes to comment must send the comment to the court in writing or electronically. Written comments should be directed to the court at P.O Box 1547, Riverside, CA 92502. Those interested in submitting comments electronically should e-mail them to webassistance@riverside.courts.ca.gov.

Comments must be submitted by 5:00 p.m. on Friday, July 19, 2013, in order to be considered as part of the final administrative decision.

Superior Court of California
County of Riverside

May 20, 2013

COURT ANNOUNCES INTENTION TO CLOSE BLYTHE COURTHOUSE

The Riverside Superior Court is considering the closure of the Blythe courthouse, located at 265 N. Broadway, as of a date to be determined, but no sooner than July 22, 2013.

Pursuant to California Rule of Court 10.620(d)(3), the court is seeking input from the public regarding the planned closure before making the final decision.
Pursuant to California Rule of Court 10.620(e), any interested person or entity who wishes to comment must send the comment to the court in writing or electronically. Written comments should be directed to the court at P.O. Box 1547, Riverside, CA 92502. Those interested in submitting comments electronically should e-mail them to webassistance@riverside.courts.ca.gov.

Comments must be submitted by 5:00 p.m. on Friday, July 19, 2013, in order to be considered as part of the final administrative decision.

The Troubled Marriage of Law and Science in the Clean Water Act's Storm Water Program

by Shawn Hagerty

In 1972, Congress enacted comprehensive revisions to the Federal Water Pollution Control Act that have now commonly become known as the Clean Water Act (Act). At the time, Congress, betting that water quality science and technology would catch up to the stringent requirements of the new law, established the ambitious objective of restoring and maintaining the chemical, physical and biological integrity of the nation's waters. It intended to eliminate the discharge of pollutants into navigable waters by 1985.

The main legal structure Congress created to achieve these lofty goals and objectives is the National Pollutant Discharge Elimination System (NPDES). In accordance with the NPDES program, the discharge of any pollutant by any person is unlawful unless done pursuant to, among other things, an NPDES permit. NPDES permits include technology-based effluent limitations that limit the amount of a pollutant that may be discharged from a point source. If the technology-based effluent limitations are insufficient to meet state water quality standards, the NPDES permit must also include more stringent water quality-based effluent limitations as necessary to meet water quality standards.

Thus, Congress mandated a technology-focused, "end-of-pipe" approach, while maintaining a water quality standards backstop. This approach has worked very well for defined systems, such as publicly owned treatment works and industrial facilities, where the pollutant load is well-defined and the flows through the system are predictable. Under these circumstances, both technology-based and water quality-based effluent limitations can, in most cases, be established and implemented.

In 1987, however, Congress amended the Act to expressly apply the NPDES program to discharges of storm water from municipal separate storm sewer systems ("MS4s"). The problem with this approach is that storm water is episodic and storm water flows vary widely. In addition, the range of pollutants in storm water is highly variable and notoriously difficult to monitor. In other words, Congress unfortunately chose to use a "point source" legal system to regulate what is really a "non-point source" problem. For MS4s, this approach has led to a troubled marriage between the NPDES law and the complexities of water quality science.

This article first discusses two specific examples of this troubled marriage – the strict application of state water quality standards to MS4 permits and the development of Total Maximum Daily Loads. It next provides an illustration, based on a recent case, of how the Act's legal structure actually conflicts with the water quality science and forces an approach that may not result in optimal water quality results. Finally, the article urges caution regarding the continued imposition of stringent numeric requirements in MS4 permits.

Water Quality Standards and MS4 Discharges

The Act requires states to develop state water quality standards for the navigable waters within each state. A water quality standard consists of the designated uses of the navigable waters and the water quality criteria for such waters based on such uses. Designated uses include such things as full water-contact recreation, cold-water aquatic habitat, and municipal water supply. Water quality criteria are narrative or numeric requirements that must be achieved to support the designated uses.

When Congress adopted the Act in 1972, states moved quickly to adopt water quality standards, partly because they wanted access to the federal funding available through the Act. As might be imagined, the development of numeric water quality criteria can be a complex scientific exercise. Often, they are based on the best available, but incomplete, science. Unfortunately, once adopted, water quality standards are difficult, if not practically impossible, to change. Thus, even if the science underlying the water quality standard proves to be faulty, the law prevents easy fixes to its scientific shortcomings. A recent example of this dilemma is the efforts of stakeholders within the Santa Ana Regional Water Quality Control Board's jurisdiction to revise the standards for full water-contact recreation for certain waters within the region. Despite rigorous scientific analysis supporting amendments to the standards and Regional Board support, the stakeholders have thus far not been able to make changes to the standards, although efforts continue.

In addition, the state standards were designed to address the types of numeric criteria that could likely be achieved through traditional end-of-pipe controls. Stated differently, most water quality standards were not developed with storm water regulation in mind.

The problem for MS4s is that the water quality standards developed somewhat hastily in the 1970s are now becoming de facto effluent limitations in MS4 permits. This problem is the result of how recent case law has interpreted the State Water Resources Control Board's precedential MS4 permit language on receiving water limitations. The State Board requires that MS4s contain a provision that prevents MS4 discharges from "causing or contributing" to exceedences of water quality standards in the receiving water. Most MS4s understood this language to be limited, from a liability perspective, by the iterative process that requires the application of ever-increasing best management practices to address exceedences. In *NRDC v. County of Los Angeles* (9th Cir. 2011) 636 F.2d 1235, however, the Ninth Circuit Court of Appeals interpreted this language as requiring strict compliance with water quality standards. Because such standards are difficult to reach even in controlled systems, this interpretation places MS4s in the untenable position of having to achieve what many believe to be the unachievable when applied to storm water.

As noted above, it is almost impossible to change state water quality standards. To address this problem, the State and Regional Boards must develop new MS4 permit language that recognizes the difficulties faced by MS4s. Until this occurs, MS4s remain in a very difficult position.

Total Maximum Daily Loads

A second example of the difficult relationship between the law and science as applied to MS4 permits is the increasing use of total maximum daily loads ("TMDLs"). A TMDL is basically a pollutant budget for an individual body of water. The TMDL establishes the total amount (referred to as a "load" or "loading") of a pollutant that the body of water can receive and still meet designated uses. TMDLs must be established for waters that are not currently meeting state water quality standards and that are listed on what is known as the 303(d) list of impaired waters. The load established by a TMDL is then allocated to known point-source dischargers through a wasteload allocation and to non-point sources through a load allocation. Jointly, achieving these wasteload and load allocations is intended to restore and maintain the quality of the water in the body of water.

The development of TMDLs is a very complex exercise and must occur even if the underlying scientific data are limited or uncertain. The Act, as interpreted by courts, requires the development of TMDLs even when the science may not by ready for them. An example of this problem is the Pesticide TMDL that is being developed by the Central Coast Regional Water Quality Control Board. Among other things, this TMDL seeks to establish wasteload allocations for a variety of pyrethroid pesticides. There is not a wealth of scientific data for the development of limitations for such pesticides, but the board thus far has used the limited data available to develop very low proposed limitations, even ones that are below currently available detection levels. It is commonly recognized that the numeric limits originally proposed would not be achievable.

In addition, once adopted, the wasteload allocations of TMDLs are used to develop effluent limitations for MS4 permits. Again, this puts MS4s in the very difficult position of having to achieve what is often the unachievable. A recent example of this problem is the incorporation of the Bacterial TMDL in the recent Regional MS4 Permit adopted by the San Diego Regional Water Quality Control Board. That permit includes water quality-based effluent limitations involving a TMDL that many believe is based on outdated science and will be difficult, if not impossible, to achieve.

The Use of Surrogates for Pollutants

An extreme example of the disjunction between science and the law in storm water regulation is the use of surrogates for pollutants. In the late 2000s, the U.S. Environmental Protection Agency (EPA) requested that the National Research Council (NRC) review the EPA's current permitting program for storm water discharges under the Act and provide suggestions for improvements. The NRC concluded that the EPA's current approach to regulating storm water is unlikely to produce an accurate or complete picture of the extent of the storm water pollution problem, nor is it likely to adequately control storm water's contribution to body of water impairment. Instead of the current pollutant-specific, end-of-pipe approach, the NRC recommended that the EPA use storm water flow or related parameters like impervious cover as surrogates for pollutant loading. According to the NRC, use of such surrogates would provide specific and measurable targets and would avoid expensive and technically impossible attempts to determine pollutant loading from individual discharges.

In response to the NRC report, the EPA attempted to develop TMDLs that used storm water flow as a surrogate for pollutant loading. One such TMDL involved Accotink Creek in Fairfax County, Virginia. This TMDL regulated the amount of sediment loading to Accotink

Creek by using storm water flow as a surrogate. Specifically, the TMDL established a limit on the rate of storm water flow into Accotink Creek of 681.8 ft3/acre-day. The TMDL was designed to regulate, through flow, the amount of sediment in Accotink Creek, and thereby solve the benthic impairment in the creek.

Fairfax County and the State of Virginia sued the EPA, contending that the EPA lacked the legal authority under the Act to regulate a pollutant such as sediment by using a non-pollutant surrogate such as storm water flow. The United States District Court for the Eastern District of Virginia agreed, holding that the Act allows the EPA to develop TMDLs only for pollutants, not for non-pollutants such as storm water flow. (*Virginia Dept. of Transp. v. U.S. E.P.A.* (2013) [2013 WL 53741].) The court reached this conclusion even though it acknowledged that the EPA's approach may well be a better approach to regulating storm water. In light of this decision, the EPA has abandoned, for now, its efforts to implement the scientific recommendations of the NRC on this issue.

Conclusion

The science of water quality is complex and constantly evolving. Coupling it with the Act and its point-source regulatory system makes for a relationship that is challenging enough. This challenging relationship becomes very troubled when applied to MS4s because of the fundamentally non-point source nature of such systems. In light of these difficulties, regulators should take a measured approach to imposing numeric conditions on storm water permits. To do otherwise would lock MS4s into the untenable position of having to achieve the unachievable.

Shawn Hagerty is a partner with Best Best & Krieger LLP, where his practice focuses on water quality issues for municipal and private clients.

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The Effect of Bankruptcy on Rights to Intellectual Property: Important and Unclear

by Mary D. Lane

Previously, only "creative" businesses had to be concerned about intellectual property. They owned rights to literary works, films, television, music, or designs or had been granted rights to use or market such material. Usually, transfers occurred by way of "licenses" for certain territories, time frames, and uses. Law firms either specialized in transactions involving intellectual property or didn't touch the subject.

As computers became ubiquitous and technology proliferated, most companies began to obtain licenses to use material that is or could be the subject of a patent, copyright, or trade secret. Small businesses in fields not commonly considered creative began to acquire rights to use special-purpose computer systems or other state-of-the-art technology. Other companies created technology and contracted with businesses that wanted to use the technology for certain purposes, places, and times. And many, if not most, businesses developed trademarks that helped in branding their products.

Perhaps as a function of the rapid change in technology or the all-pervasive nature of technology, today, more substantial companies entering Chapter 11 exit after having conducted a section 363[1] sale of substantially all their assets, undertaken at an early stage in the case.[2] The seller and potential buyers must understand what rights the debtor has, what it can transfer, and what cure, if any, will need to be made.

Even lawyers working with companies with hard assets like machinery must have a basic understanding of what can happen to intellectual property in bankruptcy. Transactional lawyers should insert appropriate, and enforceable, provisions in contracts and licenses. Bankruptcy lawyers must be familiar with the Bankruptcy Code provisions relating to intellectual property, if only to know when to seek advice from a specialist.

Assumption or Rejection of Executory Contracts in Conjunction with a Section 363 Sale

Generally, the Bankruptcy Code allows a debtor to assume or reject an "executory contract," which is a contract under which some material performance remains to be undertaken by both parties.[3] A debtor's decision to assume or reject is approved by the bankruptcy court under the lenient "business judgment" standard.[4]

In a section 363 sale, the debtor moves the court for approval of the sale procedures. Any stalking-horse purchaser will have decided which of the important contracts it wants to assume, and its purchase will be conditioned on successfully assuming those contracts. The procedures will allow, or disallow, potential overbidders to change which contracts are to be assumed. But even if changes are allowed, potential overbidders who were not deeply involved with the debtor pre-petition do not have time to review the contracts.

Assumption

Assumption is straightforward. The debtor may assume, subject to limited exceptions,[5] if it (1) cures or gives adequate assurance that it will promptly cure any defaults, (2) compensates or gives adequate assurance that it will promptly compensate the counterparty for any actual pecuniary loss resulting from the default, and (3) provides adequate assurance of future performance.[6] Concurrently with assuming a contract, a debtor may assign its rights in a contract to a third party, if that third party provides adequate assurance of future performance.

Although most contracts still contain language that the commencement of a bankruptcy case constitutes a default, such "ipso facto" clauses are not enforceable. Even when a debtor must cure a default in order to assume or assume and assign a contract, it is *not* required to cure a default occasioned by the filing of the bankruptcy case or the state of the debtor's finances as of the filing of the case.[7] Were it other-

1 Unless otherwise noted, all statutory references are to the Bankruptcy Code, Title 11, United States Code.

2 See generally *Section 363 Sales: Mooting Due Process* (Dec. 2012) 29 Emory Bankr. Dev. J. 91.

3 Section 365(a). Whether a contract is executory is a question beyond the scope of this article.

4 See, e.g., *In re Orion Pictures Corp.* (2d Cir. 1993) 4 F.3d 1095, 1099.

5 A debtor cannot assume or assign a contract when applicable nonbankruptcy law allows the counterparty to refuse performance from a third party, but most contractual obligations are not typically the kind of personal services obligation that cannot be assumed and assigned. An exception would be a contract that calls for a performance by, for example, Billy Joel; if Billy Joel was in bankruptcy, he could not assume the contract and assign it to, for example, Billy Idol, unless, of course, the counterparty agreed to the substitution.

6 Section 365(b)(1).

7 Section 365(b)(2).

wise, the impossibility of curing ipso facto defaults would nullify the debtor's right to assume under the Bankruptcy Code. (Transactional lawyers routinely put such clauses in contracts. This is harmless, so long as their clients aren't fooled into believing they are enforceable.)

Rejection

If the debtor rejects a contract, the counterparty gets a prepetition unsecured claim for rejection damages that is payable at as many cents on the dollar, if any, as allowed unsecured claims.[8] That, in itself, is usually an undesirable result for the counterparty.

What happens to the rights that the counterparty had under the contract? Often recipients of contract rights have invested substantial sums in reliance on their contracts and are concerned that their rights will vaporize, as happened in the shocking 1985 *Lubrizol* decision.[9] In *Lubrizol*, the Fourth Circuit allowed a debtor licensor to reject a fully paid-up technology license so that it could sell or license the technology to another party for one reason alone – more money. The court ruled that the license vaporized; the licensee could no longer use the technology; and all the licensee had was an unsecured claim for damages, payable at the unsecured claims percentage.

Most everyone found the *Lubrizol* decision appalling for many reasons, especially because the license had been fully paid-up and arguably the transaction was in substance a completed sale documented in the parlance of a license. Reacting to the outrage, in 1988, Congress enacted section 365(n), which provides that, upon rejection of a license of "intellectual property," the licensee has the option of (1) treating the contract as terminated or (2) retaining its rights by continuing to make royalty payments without exercising any right of setoff or recoupment.

Unfortunately, the definition of "intellectual property," which includes patents, copyrights, and trade secrets, does not include trademarks.[10] Some courts have found some equitable basis to treat trademarks like other intellectual property, but most courts have followed the literal language. Whatever Congress was thinking, the result has been that recipients of rights to patents *and* trademarks or copyrights *and* trademarks have faced different treatment of their patents or copyrights under section 365(n) than of their trademark rights.

In 2012, the Seventh Circuit held in *Sunbeam*[11] that the licensee of patents and trademarks could keep both the patents *and the trademarks*. It concluded that the Fourth Circuit had wrongly decided *Lubrizol* and the *Lubrizol* licensee should have been able to keep the licenses. Reasoning from nonbankruptcy law, not from section 365(n), it concluded that, when a licensor breaches its contract, the licensee has the option of treating the breach as ending its own obligations under the license or continuing to sell the product under the license. In other words, rejection does not vaporize the contract, but rather it merely frees the estate from the obligation to perform further affirmative acts.

Of course, *Sunbeam* in itself raises a number of issues. If a licensee can continue to sell the product based on general rules of rejection rather than section 365(n), why would it choose to make the election to retain its license under section 365(n), which requires that licensees pay royalties without setoff? It seems that if a licensee does not make the section 365(n) election in a *Sunbeam* jurisdiction, it can still keep the rights under the general rules of rejection (rendering section 365(n) superfluous). In December 2012, the Supreme Court declined to resolve the conflict between the Fourth Circuit's *Lubrizol* decision, which controls at least in the Fourth Circuit as to trademarks, and the Seventh Circuit's *Sunbeam* decision. Only time will tell which other circuits agree with *Sunbeam*.

The Ninth Circuit has not addressed the issue. A Northern California bankruptcy court,[12] whose decision is not binding even on other California courts, concluded that licensees are not entitled under 365(n) to retain trademarks, and the licensee's remedy is to vigorously contest rejection of the license, *before* rejection occurs, on the grounds that all the licensor can be is a spoiler: if the licensee gets to retain the patent, copyright, and trade secrets associated with the same product, what use are the trademark rights to the licensor? However, under the business judgment standard, the debtor's decision is upheld unless there is no justification whatsoever for the proposal. This conundrum is ripe for negotiation, under which the spoiler licensor gets paid for agreeing to assign the trademark rights to the licensee (who already had them) and the licensee, seething at paying twice for the same rights, reluctantly agrees that some payment is better than outright loss of the trademark license.

Conclusion

Although assumption of "intellectual property" rights is often straightforward, rejection creates minefields through which a counterparty must pick its way, preferably with the assistance of bankruptcy counsel knowledgeable in the area.

Mary D. Lane is Chair of the Restructuring and Bankruptcy Department at Mitchell Silberberg & Knupp LLP. In her 14 years of restructuring and bankruptcy practice, she has written and spoken about entertainment, intellectual property, healthcare, labor, and non-profit issues and has represented business debtors, creditors, trustees and purchasers.

8 Section 365(g)(1).

9 *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)* (4th Cir. 1985) 756 F.2d 1043.

10 Section 101(35A).

11 *Sunbeam Products, Inc. v. Chicago American Mfg.*, 686 F.3d 372 (7th Cir. 2012), cert. denied ___ U.S. ___ [133 S.Ct. 790].

12 *Rai-Ma UK Ltd. v. Centura Software Corp. (In re Centura Software Corp.)* (Bankr. N.D. Cal. 2002) 281 B.R. 660, 668.

3D Printing: New Challenges for Our Legal System

by Michael Trenholm

Recently, 3D printing has become headline news as a company called Defense Distributed uploaded files onto the World Wide Web that would allow someone to manufacture an all-plastic firearm using a 3D printer. The principal of Defense Distributed also uploaded a video in which a plastic firearm printed with the uploaded files was test-fired. In response to the uploading of the plans, the federal government sent Defense Distributed a cease-and-desist letter arguing that uploading these plans may violate various export control laws relating to firearms, as the files were accessible internationally. Defense Distributed then pulled the files from their website, although the files have now gone viral and are still readily accessible to anyone who wants to go and look for them.

This story underscores the considerable new challenges that will face our legal system as 3D printing technology develops. 3D printing has been around for a while and has usually been used to fabricate cheaper plastic prototypes of new products. Basically, a 3D printer prints successive layers of plastic to create a 3D plastic object. These printers can print plastic objects at a fraction of the cost of building a mold to make the plastic parts through existing plastic molding technologies. As with most technology, the cost of 3D printers has been coming down, to the point where an individual can purchase a 3D printer on Amazon.com for less than $2,000. Consequently, technology to create plastic components that was once reserved for larger companies that could afford to have molds made is now going to be available to individuals. It's also reasonable to assume that the cost of this technology will continue to decrease over time, while the capabilities of this technology increase.

As the plastic gun issue demonstrates, the ready availability of this technology poses problems for our legal system, as this technology will allow for the in-home manufacture of items that the legislature may have banned. One example of a product that could very well be made with 3D printers is high-capacity magazines for firearms, which are banned in a number of states. These issues have caused some to call for regulation of these printers. Given the value that these printers will have in many applications other than firearms, it seems unlikely that strict controls or registration of these printers will find widespread acceptance.

While the plastic gun plans were pulled in response to federal action, the World Wide Web is, of course, worldwide, and plans and files for items regulated or banned in this country can be posted in jurisdictions beyond the effective reach of U.S. authorities, which will complicate efforts to police access to these items. The past 10 years have seen a proliferation of websites in foreign countries that allow for the illegal downloading of music and video that is, for practical purposes, beyond the ability of the U.S. legal system to effectively restrict.

Even with private goods, 3D printers will pose challenges to our intellectual property laws. Artistic designs may be the subject of copyright protection, which will allow a U.S. copyright holder to enforce its rights against individuals who are creating copies with 3D printers. This, of course, presupposes that the copyright owner will be able to determine who may be trying to copy one of its copyrighted designs. If counterfeits are being made using older molding technologies, often enough products are introduced into the marketplace that there is a trail that leads to the counterfeiter, as the counterfeiter has to produce enough products to cover the cost of the mold. However, if only a small number of counterfeits are being made using a 3D printer, then the trail to the infringer is much harder to discern. Similar issues will also exist with respect to trademarked items, as 3D printers may allow for easy counterfeiting, but again on such a small scale that it may be difficult for trademark owners to determine who is actually infringing their rights.

Non-artistic items may not be subject to any intellectual property protection if they are not patented. Making spare parts for broken components of devices may be a very versatile use of 3D printers that may not be subject to any intellectual property law. However, if the spare parts are being made by individuals or on a very small scale, it may be difficult to determine the source of the parts. If the spare parts are defective, it may then be even more difficult to determine the source of a product failure in product liability cases.

The computer revolution has resulted in some very impressive technologies. 3D printing is just one example, and it will likely result in a manufacturing revolution, as the cost of development of new products will be significantly less. Further, the ability to manufacture products in small batches or even custom products will improve, as the investment needed to make a new product will be so much smaller. However, the increasing capability of this technology and its apparently decreasing cost will make it easier for individuals or organizations to manufacture products in violation either of the law or of others' legal rights, and it seems that our legal system may have to evolve to address these issues.

Michael (Mike) Trenholm is one of the Inland Empire's preeminent attorneys practicing in the area of patent, copyright, and trademark matters and is the managing partner of Knobbe Martens' Riverside office.

APALIE Inauguration Dinner

by Sophia H. Choi

APALIE, which stands for Asian Pacific American Lawyers of the Inland Empire, held its inauguration dinner on April 18, 2013 at the Mandarin Garden in downtown Riverside. With the growing number of Asian Pacific American lawyers in Riverside and San Bernardino Counties, it was surprising to us that, until the formation of APALIE, there had been no Asian Pacific American lawyers association in the Inland Empire that we were aware of. Within four months of our first meeting, we organized APALIE's inauguration dinner, with a guest list composed of some of the Inland Empire's greatest dignitaries.

We had our first meeting on December 4, 2012, attended by just me and eight others. At that time, we thought we accomplished so much: we had discussed and narrowed down the potential names for our organization. Slowly but surely, the membership grew. By our second meeting in January, we decided that we would hold our inauguration dinner in April 2013. Our goal was to have each of us ask one other person to attend the dinner, with a very hopeful, optimistic goal of 40 people total. At that time, we did not know how much support and love we would receive from the Inland Empire's legal community and the community in general. By April 18, 2013, we had a guest list of over 120 people. As the venue could not accommodate any more people, we had to close our ticket sales! The hard work of all the board members was evident.

Our keynote speaker was the Honorable Jackson Lucky, who made lasting impressions on us all. He said, "My life has been characterized by a series of happy accidents." His optimism and charisma really made it a wonderful inauguration dinner. APALIE recognized Judge Lucky as the first Asian American judge in Riverside County and showed its appreciation for his great support to APALIE as its judicial advisor by giving him its Trailblazer Award. We also had a wonderful and engaging emcee: Assistant District Attorney of San Bernardino County Michael Fermin, who kept the attention of the guests during the entire dinner.

The inauguration dinner's success was attributable not only to all the members of the organization, but also to our very generous sponsors, including various legal associations and law firms.[1] We are so honored and grateful to have so many dignitaries give their support and attention to APALIE, as well. The inauguration dinner was a great success with leaders from the bench, the bar, and the community. From the Court of Appeal, Fourth District, Division Two, Presiding

1 We would like to thank our sponsors, the Riverside County Bar Association, the Orange County Korean American Bar Association, the South Asian Bar Association, Best Best & Krieger LLP, Welebir Tierney & Weck, Aleshire & Wynder, LLP, and Gresham Savage Nolan & Tilden. Our full table sponsors were the Orange County Korean American Bar Association, As You Like It Catering, Wheatley & Osaki, New York Life, and Liberty Capital Management. Our half table sponsors were U.S. Bank, the Inland Empire Asian Business Association, Page Lobo Costales & Preston, the Filipino American Chamber of Commerce Inland Empire, the Asian Pacific American Women Lawyers Alliance, and the Asian Pacific American Bar Association Los Angeles County. Susan Roe and James Toma donated tickets on behalf of the Japanese American Bar Association.

Sophia Choi and Honorable Jackson Lucky

Michael Fermin, Michelle Lauron, Judge Lucky, Deborah Lucky

Sophia Choi, Presiding Justice Manuel A. Ramirez

Michael Fermin (Assistant DA of SB County), Sophia Choi, Judge Lucky

Steve Harmon, Presiding Justice Manuel A. Ramirez, Lloyd Costales, Justice Betty A. Richli

Justice Manuel A. Ramirez, Justice Betty A. Richli, Justice Douglas Miller, and Justice Carol D. Codrington were present. From the United States District Court, Central District of California, District Judge Virginia Phillips, Magistrate Judge Oswald Parada, and Magistrate Judge Sheri Pym joined us. From the Riverside County Superior Court, we had Presiding Judge Mark Cope, the Honorable Jackson Lucky, the Honorable Jacqueline Jackson, the Honorable John W. Vineyard, and the Honorable Richard T. Fields present. From the San Bernardino Superior Court, Presiding Judge Marsha Slough and the Honorable Lily L. Sinfield attended. Judges from Los Angeles County even drove through traffic to support APALIE, including Los Angeles County Superior Court judges the Honorable Holly Fujie, the Honorable Cynthia Loo, the Honorable Paul Suzuki, and the Honorable Charles Horan. Rafael Elizalde, Senior Field Representative for Congressman Mark Takano's office, also attended and awarded the board with certificates. Riverside County Bar Association President Chris Harmon and President-Elect Jacqueline Carey-Wilson, as well as San Bernardino County Bar Association President Kevin Bevins, came to support us. Riverside U.S. Attorney's Office Chief Antoine F. Raphael, Deputy Chief Joseph Widman, and Deputy Chief Corey Lee also attended. Riverside City Attorney Gregory Priamos, San Bernardino Assistant District Attorney Michael Fermin, Riverside Public Defender Steve Harmon, and Interim Public Defender Brian Boles supported our efforts and attended the dinner. President Paul Claudio of the Filipino American Chamber of Commerce Inland Empire, President Linda Kwon of the Orange County Korean American Bar Association, President Rachel Rola of the Inland Empire Asian Business Association, President Iris McCammon of the Orange County Asian Business Association, Director of Business Relations Bekele Demisse of the Orange County Transportation Authority, President David Kwak of the Inland Korean American Association, and Past President Mia Yamamoto of the Asian Pacific

APALIE Board of Directors
Front Row Left to Right: Justin Miyai, Ricky Shah, Eugene Kim, Sophia Choi, Judge Lucky, Lloyd Costales
Back Row Left to Right: Julius Nam, Warren Chu, Young Kim, Jean Won, Rosemary Koo, Ami Sheth, Niti Gupta, Angela Park, Sylvia Choi, Justin Kim
Not pictured people are Jerry Yang, Kerry Osaki, Kay Otani, Jason Oei, and Honorable Cynthia Loo

American Women Lawyers Alliance also supported our efforts. We are so honored that such dignitaries and community leaders shared this day with us.

We were also very fortunate to have law students, the future of the growth of the Asian Pacific American Lawyers, join us, including students from La Verne, UCI, Loyola, and Southwestern.

I am truly honored to be the Inaugural President of APALIE and am committed to the organization growing and becoming a positive influence on the Inland Empire community. We have a wonderful and diverse group on the board, who have worked so diligently and with great energy. Our Executive Board members are President Sophia Choi, President-Elect Eugene Kim, Secretary Lloyd Costales, Treasurer Ricky Shah, and Judicial Advisor the Honorable Jackson Lucky. Our board of directors includes the Honorable Cynthia Loo, Sylvia Choi, Justin Kim, Warren Chu, Julius Nam, Jerry Yang, Justin Miyai, Angela Park, Rosemary Koo, Young Kim, Ami Sheth, Jean Won, Niti Gupta, Kerry Osaki, and Kay Otani. As the board consisted mostly of Riverside County attorneys, we, apologetically, were not able to reach out as much as we wished to the San Bernardino County bench and bar. Fortunately, some attorneys from San Bernardino County were able to join the inauguration dinner, including Justin Oei, who has now also joined the board. Additionally, as we were planning the formation of our organization and the inauguration dinner during a time span of only four months, we did not reach out to as many people in the Inland Empire as we desired. As a team, we will work together to continue to learn and improve.

We encourage *all* lawyers with any ties to the Inland Empire to join APALIE. Please contact me at SophiaHChoi1024@gmail.com for membership information and/or suggestions.

Sophia Choi, a member of the Bar Publications Committee, is a deputy county counsel with the County of Riverside.

Opposing Counsel: Charity B. Schiller

by Sophia Choi

I am extremely happy to be writing the attorney profile this month on Charity Schiller, because she is one of my best friends and an attorney whom others should know about. Charity and I first met in 2009 when we were on the same team, Team Jackson, in the Leo A. Deegan Inn of Court. Since then, Charity and I have participated in many community and social events together, and we have become very close friends!

Charity B. Schiller

Charity was born in Hemet. When she was two years old, she and her family moved to southern Oregon, where Charity grew up and attended college. Charity has two brothers and one sister. As her family is from Norway, her Scandinavian heritage is very important to her. She attended Oregon's Scandinavian festivals as a child and now continues that tradition as an adult by attending the Scandinavian festivals in California.

Charity graduated from the University of Oregon in 2000 with a biochemistry degree. Her honors include the University Presidential Scholarship Award, the Howard Hughes Medical Institution Fellowship, and membership in Phi Lambda Upsilon, a national honorary chemical society. She then earned a graduate degree in biochemistry and molecular biology from the University of California, Riverside in 2001. While at UCR, she received an award for student teaching, graduated at the top of her academic class, and met her future husband, Matthew – who likewise was enrolled in the biochemistry graduate program and received a student teaching award. At the time, Matthew's father was the dean of UCR's graduate program. As Charity's diploma is hanging on the wall of her office, she sees her father-in-law's signature on her diploma every day. Charity has been happily married to Matthew for ten years.

Coming from a science background, Charity grew up wanting to be a science teacher. However, she found that pipetting DNA back and forth during laboratory experiments was too tedious for her. As she really enjoyed speaking and writing, pursuing a career in law was perfect for her. In 2004, Charity received her Juris Doctorate degree, *cum laude*, from the Pepperdine University School of Law. She served as lead articles editor for the *Pepperdine Law Review* and was awarded the Sorenson Award for Writing Excellence.

With her extensive science background, Charity decided to pursue the practice of environmental law. Loving the outdoors yet promoting environmentally responsible development, she is dedicated to helping public agencies and private developers construct their projects in an environmentally sensitive way. Charity joined the firm of Best Best & Krieger LLP in 2004 and was made a partner in the firm's Environmental Law & Natural Resources practice group in 2013. She assists clients in complying with the California Environmental Quality Act, the National Environmental Policy Act, and other related environmental laws.

In addition to her law practice, she has taught environmental law courses at UCR for the last eight years. She also is chair of the Riverside Downtown Partnership and works with numerous other community service organizations. Charity has published various articles in the *Riverside Lawyer*, *Public CEO, Riverside,* the *Los Angeles Daily Journal*, the *California Water Law & Policy Reporter*, and the *Pepperdine Law Review*. She has also had various speaking engagements at different universities and organizations.

Charity is dedicated to her work and her community. With all her accomplishments and involvement within the community, one may wonder what her hobbies are. I am happy to say that I am able to share some of her hobbies with her. She enjoys musicals and the arts, wine tasting, spas, reading and writing, cooking, and outdoor activities, including fishing, hiking, and rafting. Charity also loves animals and is a supporter of the Mary S. Roberts Pet Adoption Center; most recently, she fostered a stray Chihuahua, which has now received a good home with a new family.

In the words of William Menninger, "Six essential qualities that are the key to success: Sincerity, personal integrity, humility, courtesy, wisdom, *charity*." Charity Schiller embraces each and every one of these qualities. The words "success" and "humility" do not always go together. However, I admire Charity's true humility even through all her successes. She is a sincere friend whom I am very fortunate to have. Charity is a real asset to the Riverside legal community.

Sophia Choi, a member of the Bar Publications Committee, is a deputy county counsel with the County of Riverside.

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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 June 30, 2013.

Timothy Almond (S) – Law Student, Grand Terrace

Chad J. Conley (A) – Chad Conley Bail Bonds, Laguna Beach

Cora Connolly (S) – Law Student, Moreno Valley

Gary E. Cripe – Cripe & Graham PC, Palm Springs

Gian N. Ducic-Montoya – Albertson & Davidson LLP, Ontario

Ashley M. Dutchover (S) – Law Student, La Verne

Byron K. Husted – Albertson & Davidson LLP, Ontario

Jessica R. Lesowitz – Law Offices of Christian Schank & Assoc, Riverside

Nima Namdjou – Sole Practitioner, Irvine

Issa M. Nino (S) – Law Student, Beaumont

Kapesh Vithal Patel – Law Offices of Kapesh V. Patel, Irvine

Alison L. Soltysiak – Sole Practitioner, Temecula

Mark A. Sutherland (A) – Mark Sutherland Private Fiduciary, Palm Springs

Fernando D. Vargas – Law Offices of Fernando D. Vargas, Rancho Cucamonga

(A) – Designates Affiliate Member

ATTENTION RCBA MEMBERS

If you are not getting email updates/notices from the RCBA and would like to be on our mailing list, visit our website at www.riversidecountybar.com to submit your email address or send an email to lisa@riversidecountybar.com

The website includes bar events calendar, legal research, office tools, and law links. You can register for events, make payments and donations, and much more.

Classified Ads

Office in Rancho Mirage

Nice, large, window office w/ optional secretarial space. Partial law library, conference room, lounge, phone system, built-in cabinets, copier/fax privileges, part-time reception, other amenities. Near Palm Springs & Indio Courts. Thomas A. Grossman, PLC (Desert ADR), (760) 324-3800.

Office Space – Downtown Riverside

1 block from the Court Complex. Full service office space available. Inns of Court Law Building. Contact Vincent P. Nolan (951) 788-1747, Frank Peasley (951) 369-0818 or Maggie Wilkerson (951) 206-0292.

Office Space – Grand Terrace

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Office Space – RCBA Building

4129 Main Street, downtown Riverside. Next to Family Law Court, across the street from Hall of Justice and Historic Courthouse. Contact Sue Burns at (951) 682-1015.

Office Space – Downtown Riverside

Nice office space available for rent located in the Wells Fargo building. Walking distance to the Courts. Full access to conference room. Please contact us today for a tour, (951) 779-0221. Law Office of Rajan Maline.

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.

Riverside County LAWYER

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