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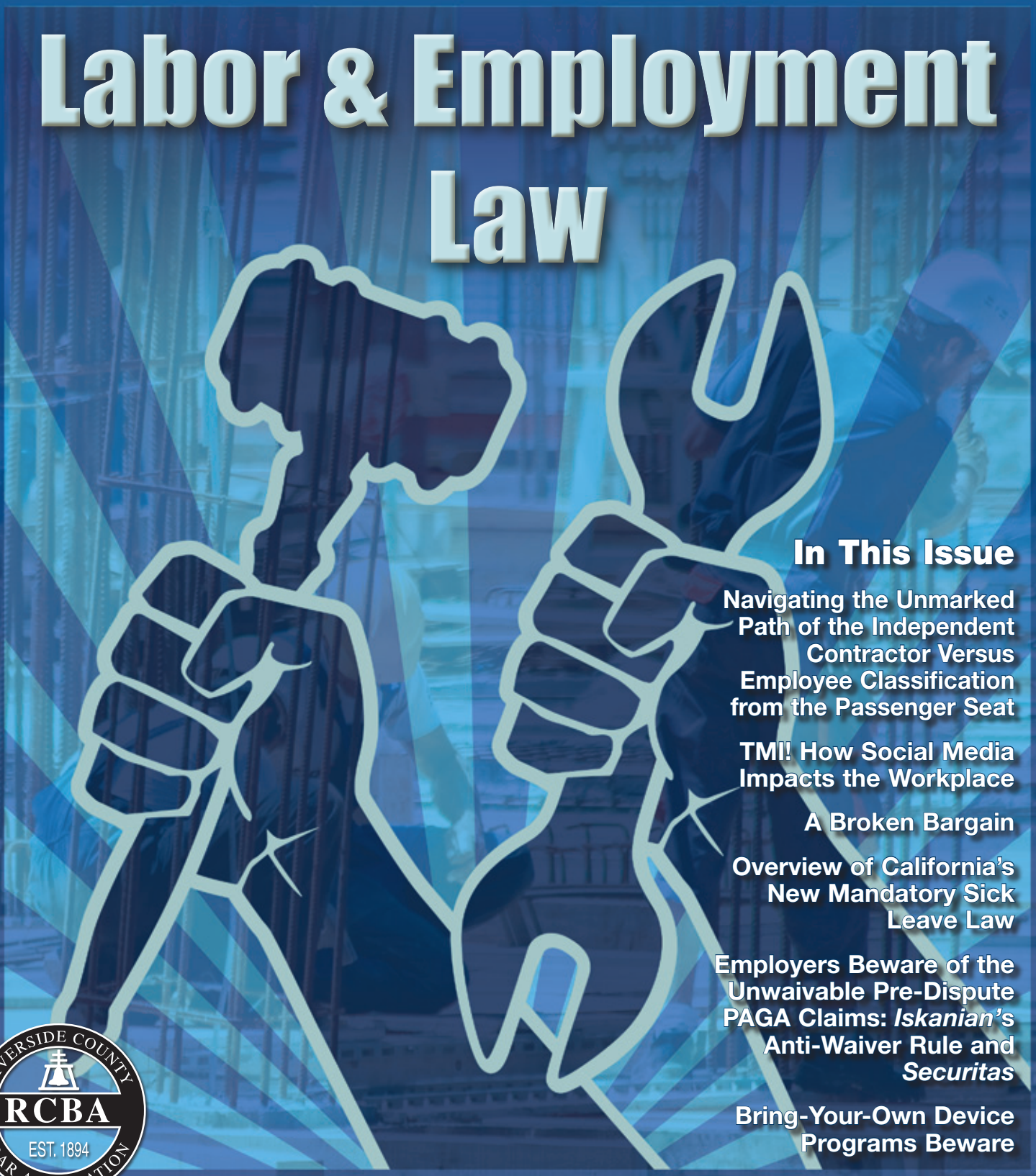
MAGAZINE

Labor & Employment Law



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The official publication of the Riverside County Bar Association

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Editor ..... Jacqueline Carey-Wilson
Copy Editors ..... Yoginee Braslaw & Juanita Mantz
Design and Production ..... PIP Printing Riverside
Cover Design ..... PIP Printing Riverside

Officers of the Bar Association

President
Chad W. Firetag
(951) 955-6000
cwfiretag@co.riveride.ca.us

President-Elect
Kira L. Klatchko
(760) 568-2611
kira.klatchko@bbklaw.com

Vice President
Jean-Simon Serrano
(951) 682-6400
jserrano@heitingandirwin.com

Chief Financial Officer
L. Alexandra Fong
(951) 955-6300
lafong@co.riverside.ca.us

Secretary
Jeffrey A. Van Wagenen, Jr.
(951) 955-1309
JVanWagenen@rivcoeda.org

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

Directors-at-Large

Sophia H. Choi
(951) 955-6300
sochoi@co.riverside.ca. us

Neil D. Okazaki
(951) 826-5988
nokazaki@riversideca.gov

Jack B. Clarke, Jr.
(951) 686-1450
jack.clarke@bbklaw.com

Brian C. Unitt
(951) 682-7030
brianunitt@holsteinlaw.com

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

Officers of the Barristers Association

President
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(951) 682-1771
stalkov@rhlaw.com

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

Telephone 951-682-1015
Facsimile 951-682-0106
Internet www.riversidecountybar.com
E-mail rcba@riversidecountybar.com

RIVERSIDE LAWYER MAGAZINE

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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.

The 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 the* Riverside Lawyer.

The material printed in the 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

May

8 **Minor's Counsel Training-Day 1**
8:00 a.m. – 5:15 p.m.
RCBA Building – Gabbert Gallery

13 **Environmental & Land Use Law Section**
Noon – 1:00 p.m.
RCBA Building – Gabbert Gallery
A meeting to plan events for the upcoming year; for members to brainstorm new presentation, who/what areas to delve into, etc. All are welcome.

14 **Criminal Law Section**
Noon – 1:15 p.m.
RCBA Building – Gabbert Gallery
Speaker: Virginia Blumenthal, Esq.
Topic: "Cross-Examining a Sexual Assault 'Victim' and How to Incorporate in Closing Argument"
MCLE

15 **General Membership Meeting**
Noon – 1:15 p.m.
RCBA Building - Gabbert Gallery
Speakers: Judge Craig Riemer, Judge Gloria Trask & Judge John Vineyard
Topic: "The Difficult Job of Being a Judge"
MCLE

20 **Estate Planning, Probate & Elder Law Section**
Noon – 1:30 p.m.
Hyatt Place – Riverside/Downtown
3500 Market Street
Speakers: Paul Fisher, Juli Adelman, Jessica Uzcategui
Topic: "Identifying & Managing Dismissive & Bullying Opposing Attorneys"

21 **Solo & Small Firm Section**
Noon – 1:15 p.m.
RCBA Building-Gabbert Gallery
Speaker: David Gehring
Topic: "Freedom of the Press, Free Speech, and The Espionage Act of 1917"
MCLE

22 **Minor's Counsel Training-Day 2**
8:00 a.m. – 5:15 p.m.
RCBA Building – Gabbert Gallery

27 **Appellate Law Section**
Noon – 1:15 p.m.
RCBA Building-Gabbert Gallery
Speaker: Lisa Jaskol, Esq.
Topic: "Appellate Self-Help Clinic for Low Income Civil Litigants"
MCLE

President's Message

by Chad W. Firetag

Our Labor

A great way to get to know someone is to find out what their first job was. When you think about it, that first job tells a lot about where the person came from, whether they had to support loved ones in their youth or what struggles they experienced growing up. I believe that the struggles we endure when we are young are what define us when we are older. No one woke up one day and instantly became a successful doctor, lawyer or professional. All of us had to start somewhere, and usually, we all started from humble beginnings.

Some of the most successful people I know had very difficult jobs growing up. My good friend Steve Harmon, who is the Public Defender of Riverside County, first started working at a chicken ranch in Upland feeding chickens at the crack of dawn, collecting eggs and shoveling who-knows-what for $1.25 an hour when he was a teenager. My father, who today owns a successful business and employs over a dozen people, worked at a gas station when he was 12 years old for even less than Steve made.

My first job came when I was 16 and my father told me that he wanted me to find work for the summer. Up to that point, my summers were filled mostly with TV reruns, swimming pools and late evenings. Although watching endless reruns was dull and tedious, the prospect of having to actually work, make money and be responsible was certainly daunting. Nevertheless, I donned my best button-up shirt and traveled around town applying at restaurants, shops and small businesses inside the Riverside Plaza, (when the Plaza had a covered roof for those from this area.)

After what seemed like a million applications, I got nothing. No one wanted me. I have to admit, it was hard to be rejected.

Finally in desperation, I applied at my local McDonalds. And, much to my surprise given my recent spate of rejections, they hired me. I started working the early morning breakfast shift the following Saturday at 6 a.m. I was that kid in the back you see at a fast food restaurant, wearing a funny hat and making Egg McMuffins for the breakfast crowd, only to shift very quickly to burgers and fries when the clock struck 10 a.m.

Although this was clearly not a very glamorous assignment, having a job like that taught me so many things. First, I will never, ever, begrudge or look down on someone because of their work. Standing on your feet all day over a hot grill is backbreaking work. When someone works for a living to provide for either themselves or their family, it is something to be honored, no matter what their job might entail.

Second, it taught me that I should appreciate hard work. Working hard, whether in a law office or in a fast-food restaurant, has value no matter what our job may be. Many of my messages have recognized how hard lawyering can be, but ultimately, if we work hard we can and will add value because our work can make a positive impact in our community.

To that end, as we recognize labor law in this month's edition, I think it is a good idea to remember the importance of labor. The issues surrounding labor are certainly a hot-button topic in politics today. As the presidential primaries are shaping up, we see candidates on both sides of the aisle debating the topics of labor daily. On one end of the political spectrum is Scott Walker, the governor for Wisconsin and potential Republican candidate for president, who has clashed with labor unions for the past several years. On the other side, Democrats have lobbied heavily for raises in the minimum wage. Meanwhile, there remains a gross chasm between what the female workforce population earns compared to their male counterparts.

Whatever particular belief one espouses on labor, all people know that hard work has inherent value. A hard-working lawyer is better able to represent her clients in court, which ultimately helps the system. And despite the fact that this is a difficult profession, I know that by working hard we can make great contributions to our society.

Which leads back to my main point – that although the practice of law can at time be trying, we should all recognize that our hard work is not in vain. The novelist James Baldwin once wrote that "Fires can't be made with dead embers, nor can enthusiasm be stirred by spiritless men. Enthusiasm in our daily work lightens effort and turns even labor into pleasant tasks." If we are enthusiastic about our work, we can do great things.

As we celebrate and examine the legal aspects of labor, let us always remember the important work we do and the contributions our profession can make to our community.

Chad W. Firetag is an Assistant Public Defender for the Law Offices of the Public Defender, Riverside County.

Navigating the Unmarked Path of the Independent Contractor Versus Employee Classification From The Passenger Seat

by Jeff Olsen

Two roads diverged in a wood, and I told the Uber driver to take the road less travelled. One metaphorical road represented the independent contractor classification, the other the employee classification, and although I had the benefit of riding shotgun, we were both uncertain of which road to take. While we still may not know where these roads lead, this article will survey recent California case law to help understand the importance and complexity of this issue.

Background and Traditional Notions

Workers are traditionally classified by businesses in one of two general legal categories: independent contractors or employees. Depending on which category the worker falls into, different legal standards and requirements are applied. Generally, it is an accepted notion that employers benefit from classifying their workers as independent contractors rather than employees, because among other things, those workers who are designated as employees are afforded additional legal rights in California such as overtime, meal and rest breaks, expense reimbursement and health benefits, while independent contractors are not. Employers also avoid paying taxes on payments to independent contractors.

Different courts and administrative agencies have different legal tests to determine whether a worker should be deemed an independent contractor or employee. These agencies do not control each other, and often, the same set of facts can result in different outcomes depending on which forum decides the issue. For example: the IRS has an 11-factor test[1] that focuses on behavioral control, financial control and relationship; California state courts generally use the common law test[2] of "right to control" factors, and other states along with California federal courts use an "economic realities" test,[3] which all have overlapping factors.

1 http://www.irs.gov/pub/irs-pdf/p15a.pdf
2 *S.G. Borello & Sons v. Dept. Of Industrial Relations*, (1989) 48 Cal. 3d 341
3 *Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F. 2d 748

State Court: *Dynamex Operations West v. Superior Court*

Recently decided in October 2014, the Court of Appeal in *Dynamex Operations West v. Superior Court*[4] gave employers a scare by affirming an *extremely* liberal disjunctive test to find that delivery drivers were employees rather than independent contractors as far as their wage and hour claims were concerned. Following precedent set by the California Supreme Court in *Martinez v. Combs*,[5] the *Dynamex* court held that classification of workers for *wage and hour purposes* should not follow the common law *Borello* test, but should be controlled by the wage order definitions by the Industrial Welfare Commission (IWC), which defines the term "to employ" in one of three vague alternative ways: (a) "to exercise control over the wages, hours or working conditions"; *OR* (b) "to suffer or permit to work; *OR* (c) "to engage to work" (emphasis added). Under this extremely "employee-centric" standard, the court in *Dynamex* easily found that the company's relationship with its workers fit these definitions and that the delivery drivers should have been classified employees rather than independent contractors.

Employer-side attorneys were left holding their collective breath as to what this new test could mean for the future, because under those IWC definitions, who wouldn't be considered an employee "engaged to work"? The court gaffed at the company's notion that under this test, "independent contractors [would] no longer exist in California." Rather, the court felt its test "fill[ed] the gap between the common law employer-focused approach and the need for a standard attuned to the needs and protection of the employees."

After much controversy and push for depublication, the California Supreme Court granted review of the *Dynamex* case on January 28, 2015.[6] Pro-business advocates are hoping that this review will result in a new test, or at least a strong limitation on the IWC Wage Order definitions used in *Dynamex*.

4 179 Cal. Rptr. 3d 69 (October 15, 2014)
5 49 Cal. 4th 35 (2010)
6 *Dynamex Operations West v. S.C.* (Lee) (Cal. 2015) 182 Cal. Rptr.3d 644

District Court: *Uber/Lyft* Cases

On March 11, 2015, judges in the U.S. District Court, Northern District of California, heard a pair of tandem cases against ride-for-hire companies *Uber*[7] and *Lyft*.[8] These judges denied the respective employers' summary judgments and instead ordered that the juries will determine if the Uber and Lyft drivers are employees or independent contractors. U.S District Court Judge Vince Chhabira from the *Lyft* case stated: "[B]ecause the numerous factors for deciding whether a worker is an employee or an independent contractor point in decidedly different directions, a reasonable jury could go either way."

For now, these drivers are classified as independent contractors, and do not have access to unemployment insurance, workers compensation, or minimum wage protections. Moreover, drivers are required to pay for their own gas and car maintenance without reimbursement. The companies argue that they offer little control over the drivers and allow them to enjoy their own flexible schedules while merely providing the online mobile app platform to connect the driver to the passenger.

As these cases shift into drive toward trial, the clouded nature of the independent contractor employee classification is not lost on the Federal judiciary, which has now entrusted the evolving law to private citizens (two juries). Summed up quite nicely, Judge Chhabira stated that the drivers do not easily fit into either classification and "the jury in this case will be handed a square peg and asked to choose between two round holes." One thing is for certain, whatever way these juries decide, the results will be met with much opposition.

Conclusion

Classifying workers in California as independent contractors or employees is an important business decision with heavy legal ramifications. As seen from recent case law, there is no bright-line rule. Employers will have to continue to look to ever-evolving case law to help make their determinations. To this day, the issue remains an area of confusion and contention.

The last time I was in an Uber, I only-half joked about re-routing the trip to Las Vegas and asked how long it would take. "Three and half hours. A straight shot, no stops," the driver said, innocently bragging about the fuel economy of his hybrid. No stops or breaks for three and a half hours? Instantly, I panicked at the thought of having a front row seat to the missed meal and rest breaks and the accompanying violations that would result. Then, I took a pause to consider the independent contractor alternative, and having decided that neither seemed quite right, I sat back in my seat and took solace in the ability to Uber another day.

Jeff Olsen is an associate in the labor and employment department of Gresham Savage. He graduated from Pennsylvania State University Dickinson School of Law, receiving his J.D. in 2011 and his Master of Science in Human Resources and Employment Relations in 2012.

7 *O'Connor v. Uber Technologies, Inc.* (N.D. Cal., Mar. 11, 2015) 2015 WL 1069092

8 *Cotter v. Lyft, Inc.* (N.D. Cal., Mar. 11, 2015) 2015 WL 1062407

In Memoriam

JUDGE ELWOOD M. RICH

(1920 – 2015)

LETTER TO THE EDITOR...

Jackie,

I would like to compliment you on the great work you do editing the Riverside Lawyer, and particularly on this issue (April, 2015). I spent many hours with Judge Rich and it was a walk down memory lane to read the accounts of others who had similar experiences. He truly was one of a kind and was the most effective mediator I ever encountered.

Thanks again,

Bart W. Brizzee
Principal Assistant County Counsel
San Bernardino County

TMI! How Social Media Impacts the Workplace

by Cynthia O'Neill

The use of social media by employers and employees has grown exponentially in just a few short years. Although social media can take many forms, online social networks are arguably the most popular. Estimates of Facebook's user base range from 550 million to 1.3 billion and growing, and Twitter is estimated to have reached 289 million users, producing 65 million "tweets" per day. Social media is ubiquitous and its pervasive use has led to growing awareness of the workplace risks arising from its misuse. A 2013/2014 global survey conducted by the law firm Proskauer Rose LLP, shows that 90% of businesses use social media for business purposes and 80% of businesses have a social media policy.

For employers, social media can be an important tool to communicate with employees and clients, develop potential clients, and for the recruitment and hiring of new employees. However, employers must proceed with caution when regulating or imposing discipline for employee use of social networking.

Employers are understandably reluctant to inquire about an employee's personal and private posts, and California law now restricts employers' ability to look at employees' personal social media. In 2012, Governor Brown signed Assembly Bill 1844 which added section 980 to the California Labor Code, preventing an employer from requiring or requesting that an employee or applicant provide a username or password in order to access social media, access personal social media in the presence of the employer, or divulge any personal social media unless it is relevant to an investigation.

However, if a posting on social media lawfully comes to the attention of an employer, disciplinary action can be taken in certain situations. An employer's policy, and resulting disciplinary action, must consider the rights of workers to engage in certain protected concerted activities, such as organizing co-workers and objecting to working conditions. Further, employers can't interfere with any employee's exercise of such rights. Any workplace policy about social media shouldn't be so narrow as to "chill" such protected employee activity.

Employees also enjoy First Amendment protection for certain types of speech. An employee is allowed to speak about matters of public concern, and address issues of public safety or a breach of public trust. A recent Fourth U.S. Circuit Court of appeals decision found Sheriff's Department employees who were terminated for expressing support for the Sheriff's opponent engaged in protected speech when they "liked" the candidate's Facebook page. The Court found that "liking" the page was the "internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."

Employees should also be wary to not fall into the trap of misusing social media. The lines between business and personal use in the workplace can easily blur. Employees have been known to bully and harass colleagues, release confidential information, disseminate negative comments about their employer and avoid the performance of meaningful work. Social networking allows users to share everything from great triumphs to photos of their next meal and the mistake of "over sharing" is easy to make.

Not every posting is an innocent blast of personal information, and social media can be a convenient outlet for disgruntled employees. A comment that your boss is a "jerk" and your client is a "redneck" that would have been made at the water cooler fifteen years ago are now made on social networking sites, and one doesn't need to look far for reports of employees disciplined due to postings of vulgar or negative comments about their employer or co-workers.

Another captivating topic is whether the use of social media on personal devices impacts employee productivity. Cruise the halls of your office on any given afternoon and you may find your colleagues quickly hiding cell phones after passing some "down time" on their social networking site of choice. While employers can certainly track an employee's personal internet and email use on employer-owned devices, should they block an employee's ability to access social networking on personal devices on the employer's Wi-Fi? Again, an employer should proceed with caution, as blocked access could be seen to infringe on the rights of employees to engage in protected concerted activities.

Are employees who access social media at work truly unproductive? A study conducted at the University of Melbourne suggests that workers who reward themselves between the completion of one task and the start of another with a visit to a social networking site are more invigorated and get more done. Dr. Brent Coker, of the University of Melbourne's Department of Management and Marketing, states that employees who use social media at work are approximately 9% more productive than employees who do not engage in such access. Dr. Coker suggests that employers allow for these breaks rather than spend millions on software to block employees' internet access.

While you may not care what your high school classmate ate for dinner or the score of your co-worker's son's Little League game, social media is here to stay. For now, it doesn't have to ruin the workplace if everyone uses a little moderation and discretion.

Cynthia O'Neill is a Deputy County Counsel in the San Bernardino County Counsel's Office practicing labor and employment law.

A Broken Bargain

by Robert B. Taylor

Until the last decade, injured workers could rely on a bargain struck in the early 1900's by which they gave up the right to sue their employer for damages in exchange for a no-fault system that would provide injured workers with prompt medical attention to cure or relieve them from the effects of their injuries, temporary disability while they were unable to work, and permanent disability benefits to aid them with their residual disability. In 1975, vocational rehabilitation was added to the benefit package, to aid injured workers return to gainful employment when their residual disability prevented them from returning to their pre-injury job. This benefit was effectively eliminated in 2004.

In April 2004, SB 899 allowed employers to set up exclusive Medical Provider Networks (MPN) and the process of Utilization Review (UR). Each carrier or self insured employer was allowed to set up their own program of UR to determine the medical necessity of the treatment prescription of the doctors, including those in their hand-picked Medical Provider Network.

If a dispute arose as to the UR decision, the parties could agree to use an Agreed Medical Examiner (AME) or a Qualified Medical Examiner (QME) provided by the state. If the dispute could not be resolved, the matter would proceed to hearing before a Workers' Compensation Judge (WCJ), under the jurisdiction of the Workers' Compensation Appeals Board (WCAB), to determine medical need based on the medical evidence presented.

In July of 2013, SB 863 took effect. It required a Primary Treating Physician (PTP) to put all prescriptions for treatment on a special form, Request for Authorization (RFA). The RFA was sent to the UR physician for review. The UR physician may or may not be licensed in the state, and is often times not of the same specialty as the PTP. UR has five business days to accept, modify or deny the RFA. The UR doctor makes no physical examination and is often provided with insufficient records to make a decision. In the vast majority of cases, UR denies or modifies the RFA. Upon denial or modification, except in untimely denials or modifications,[1] the only appeal is to Independent Medical Review (IMR). The IMR reviewer (identity, specialty and status unknown) is given the authority to determine the "medical necessity" of the proposed treatment[2]. Current statistics indicate IMR upholds in excess of 80% of the UR denials and modifications.

Although the failure to timely complete UR within five business days may result in the injured worker receiving the treatment prescribed,[3] there is no such remedy to the injured worker if IMR takes in excess of 30 days to make a decision.[4] IMR often takes many months to respond.

In 2011, a woman's placement in an assisted living facility for an unlimited time by her doctor was subjected to UR which limited her stay. When the time limit expired, the facility transported her to Los Angeles and dropped her off on skid row.[5] This claim predated SB 863's IMR process. Since SB 863 took effect the WCAB has declined to hear numerous similar cases.

Insidiously SB 899 limited the amount of temporary disability an injured worker could receive to 104 weeks. This combined with the limitation of 24 lifetime physical therapy visits, the loss of vocational rehabilitation and the substantial delays associated with SB 863's UR/IMR process, have taken the promise of prompt benefits intended to return an injured worker to the work-place and stood it on its head.

This problem is not exclusive to California. A ProPublica and NPR investigation[6] confirmed that the cutbacks have been so drastic in some places that they virtually guarantee injured workers will plummet into poverty.

These changes, under the banner of reforming out of control costs, have been pushed by large employers and insurers. The study showed that employers are paying the lowest rates since the 1970s, and that in 2013 insurers enjoyed their most profitable year in over a decade. Yet as premiums and benefits fall, a 2014 report of the Workers' Compensation Insurance Rating Bureau found that claims adjusting costs are increasing.

1 see *Dubon v. World Restoration Inc.* (2014) 79 CCC 1298 (Appeals Board En Banc opinion) (writ denied as moot 80 CCC 192; Rev. Den. 4/1/2015 S224450.

2 LC § 4610.5(c)(2), (c)(3), k, §4610.6 (a), (c), (e).

3 *SCIF v. WCAB (Sandhagen)* (2008) 44 Cal.4th 230, 238.

4 LC § 4610.6(d).

5 See *TIG v. WCAB (White)* (2013) 78 Cal.Comp.Cas. 178, writ denied.

6 http://www.propublica.org/article/the-demolition-of-workers-compensation.

If employers have found a way to provide far less in benefits for work injuries, someone else must be picking up the tab. That someone are American taxpayers, and private health insurers who pay tens of billions of dollars a year through Social Security Disability Insurance, Medicare Medicaid, and group or individual health insurance for lost wages and medical costs no longer covered by workers' compensation. These changes, and the extent to which taxpayers are paying the costs of workplace accidents, have attracted almost no attention, in part because the federal government stopped monitoring state workers' compensation laws more than a decade ago. For injured workers and their families, though, they are a matter of increasing frustration and misery.

Robert B. Taylor is a shareholder in the Riverside firm of Holstein, Taylor and Unitt. He has represented injured workers for over 30 years.

In Memoriam: Boyd E. Briskin
February 9, 1932 – October 6, 2014

by Randy Briskin

Boyd E. Briskin

The definition of a renaissance man is one who is knowledgeable, educated, or proficient in a wide range of fields. By any measure, Boyd Briskin was a renaissance man. Born in Los Angeles in 1932, he moved to Riverside as a 12 year old, after having attended a one room schoolhouse in Lancaster, California. When World War II broke out, Boyd's father joined the Red Cross and in 1944 he was stationed in Riverside. His Dad, Paul, became a Scout Master and Boyd enjoyed his years as a scout, eventually reaching the rank of Eagle Scout. His association with the Scouting movement lasted into adulthood as he was awarded the Silver Beaver for his work on the Scout Executive Board. This was especially meaningful to him as his father had received the same award before him. For many years, if you were a Scout in the Riverside area and wanted to earn your citizenship merit badge, your final test was to meet with Mr. Briskin and convince him that you were qualified to earn it.

His Dad was an attorney and his office was in the Lewis Building across from the original Court House. The two of them were to have their law practice in the same office, but unfortunately, Boyd's father passed away in 1956 before that dream could be realized. Boyd started in that office on his own in 1957.

His interest in serving his community extended to many civic organizations including serving on the board of the Riverside County Bar Association and being elected as the president in 1986. His picture that year showed him holding a pipe, which he was seldom without. His attitude toward justice prompted him on many occasions to take pro bono cases. He was the driving force behind the Tel-Law program. Most people in the legal community were aware of his professional expertise and leadership qualities, which he also displayed as president of Temple Beth El. He was well read on so many different subjects as well as being fluent in Spanish. One of the significant facets of his life was music. He was an accomplished clarinetist and he also liked to play guitar, accordion, harmonica and lately had taken up the saxophone. He could identify most classical works after hearing just a few beginning notes. He was also on the board of the Riverside Philharmonic Symphony and he, along with his wife Sylvia, sponsored the clarinet chair. Additionally, having eclectic tastes in music, they were two of the original members of the Riverside Folksong Society back in the early 60s.

Another of his passions was woodworking. What started as a quest to make his own picture frames morphed into constructing furniture and eventually blossomed into a family project to build a mountain cabin that he designed in the Idyllwild-Pine Cove area of the San Jacinto Mountains. This wasn't his first attempt at architecture; he also designed the family's Spanish-style house in Riverside.

Boyd was a foodie before the term ever existed. He was a gourmet cook, always trying recipies from different lands and cultures. He had the ability to stare into a pantry and fridge, see what was available, and create a delicious meal. Conversely, if eating someone else's cooking, after a few tastes, he could list all the ingredients and seasonings used. When planning family vacations, the itineraries were decided, not by location of the attractions, but by which restaurant would be chosen for lunch and dinner.

Anyone who spent even a few short minutes with him was exposed to his sense of humor and fast wit. Rarely a chance was missed by him to make some sort of wry comment or pun. Even though he was diminutive in stature, Boyd Briskin will be looked up to for his accomplishments and the contributions he made to his community, his congregation, his friends, colleagues, clients and most especially his family.

Boyd is survived by his wife of 54 years, Sylvia, his sons Randy and Paul (Tammy) and five grandchildren – Jennifer, Allison, Michael, Channa and Micah.

Randy Briskin is Boyd's eldest son. He lives in Atlanta Georgia and works as an investment counselor for ICMA.

Overview of California's New Mandatory Sick Leave Law

by Sarah Mohammadi

California employers are not strangers to new laws governing the employer-employee relationship. The most recent and notable of these laws is AB 1522, the Healthy Workplaces, Healthy Families Act, which provides for mandatory sick leave. While AB 1522 technically went into effect on January 1, 2015, along with various notice requirements, the provisions governing accrual and usage of sick leave go into effect on July 1, 2015. Prior to July 1, 2015, all employers should review their current sick leave policies and make sure they are in compliance with the new law.

Scope of the Law

Before addressing the specific requirements of the law, it is important to consider its scope. This particular law is far reaching, in that it applies to both public and private employers. Additionally, and notably, it applies to all employees, regardless of their status as full-time, part-time, temporary, seasonal, per diem, exempt, non-exempt or any other classification. With very limited exceptions, all employees in the state of California will now be entitled to sick leave. Some exceptions to the law are providers of publicly funded In-Home Supportive Services, employees covered by collective bargaining agreements with specific provisions, and individuals employed by an air carrier as a flight deck or cabin crew members, if they received compensated time off at least equivalent to the requirements of the new law.

Aside from the aforementioned exceptions, the only other limitations on applicability of the law are based upon the length of time that an employee works in California and the length of time that the employee works for the employer. Specifically, an employee must work thirty or more days in California within a year in order to be entitled to sick leave. Furthermore, despite the fact that employees begin to accrue sick leave on July 1, 2015, or their first day of employment if they are hired after July 1, 2015, the law does not require that they be able to access that sick leave until they have been employed for ninety days.

Lump Sum v. Accrual

After considering the scope of the law and who it applies to, the next issue employers should consider is whether they want to provide employees with sick leave in a lump sum, or on an accrual basis. The first option allows the employer to provide each employee with sick leave in a lump sum at the beginning of each calendar year. If the employer elects the lump sum, then the employer must provide at least three full days of sick leave for each employee. At the end of the year, if the employee has unused sick leave, the employer does not have to roll over any remaining balance to the next fiscal year. The lump sum is a "use it or lose it" policy.

The second option is to provide sick leave based on an accrual system, where an employee earns sick leave as he or she works. This system requires sick leave to accrue at the minimum rate of one hour of sick leave per thirty hours worked. For the purposes of exempt employees, the law provides that those employees will accrue sick leave based on the assumption that the employee worked a forty hour week. There is an exception to the extent that the exempt employee regularly works less than forty hours. The law allows for employers to still limit the use of those sick leave days to three per year, regardless of whether more time has accrued. The employer has the option to cap accrual at forty-eight hours. However, unlike the lump sum approach, the employer must roll over the remaining balance at the end of the year. The rationale for the roll-over approach is to ensure that an employee has access to sick leave if he or she needs it at the beginning of the year, whether it is given to them in a lump sum, or whether it rolls over from the previous year.

Other Issues

Many employers likely already have sick leave policies in place that either meet, or exceed the standards set forth by AB 1522. If that is the case, the employer is not required to establish a new policy. However, if the current sick leave policy does not meet the standards, the policy will need to be amended.

Even if the employer is currently offering enough sick leave to satisfy the new law, and even if the employer is offering sick leave to all of its employees, employers must exercise caution. There are still a series of other requirements to consider in order to ensure compliance. These requirements include, but are not lim-

ited to how to request leave, when leave can be taken, and how to keep employees apprised of how much leave they have accrued. The law is complex, and full of far more nuance than can be addressed in one article. Employers should contact their legal counsel to discuss their current policies and ensure they are compliant by July 1, 2015, when the law goes into effect.

Sarah Mohammadi is an attorney in the Labor and Employment Practice Group at Best Best & Krieger, LLP. Sarah's litigation practice encompasses, but is not limited to, wage and hour, discrimination, harassment, wrongful termination and contract disputes. Sarah also spends a substantial amount of her practice advising employers on how to comply with California laws.

Bench to Bar

RIVERSIDE COUNTY SUPERIOR COURT ANNOUNCES OPENING OF NEW BANNING JUSTICE CENTER – MAY 4, 2015

RIVERSIDE COUNTY:

The new Banning Justice Center will open to the public on Monday, May 4, 2015. The new courthouse is located at 311 E. Ramsey Street, Banning, CA 92220.

The new court facility will house four trial courtrooms, one large traffic/small claims courtroom, one large arraignment courtroom, in-custody holding cells, jury assembly space, a staff training room, clerks' offices, public service windows, judicial chambers, jury deliberation rooms, and judicial library/conference rooms. The new courthouse replaces an existing and severely over-crowded nearby two-courtroom facility that long ago outgrew the needs of the community. Exponential population growth in the Banning Pass over the past 10 years, coupled with an increase in criminal filings, interstate traffic flow directly through the city, and civil disputes, has increased the caseload far beyond the capacity of two courtrooms and two judges.

The Banning Justice Center, in addition to being a much needed courthouse in a now bustling county, is also an asset to the local community. The courthouse is constructed of concrete on a 5 acre site in the heart of the city. The facility provides pedestrian links to existing and future Banning Civic Center developments, including City Hall and the Banning Police Department. The public's experience of the facility will include an axial progression through the parking area to a large steel canopied entryway and into a dome covered lobby, all of which will assist the public, jurors, witnesses, agency representatives and court staff with an easy navigation throughout the building.

The new courthouse is designed to achieve a certification in accordance with sustainability requirements from the United States Green Building Council. In addition, design using the principles of CPTED (Crime Prevention through Environmental Design) helped shape the landscape and site work. Strategic placement of integrated concrete benches and a formal stepped plinth further enhance security in and around the courthouse.

Court operations will commence at 7:30 a.m. Monday, May 4, 2015. Law enforcement and other public agencies previously appearing in or citing to the old Banning Court should plan to redirect services to the new justice center accordingly. Jurors called for service on that day should also plan accordingly.

"We are grateful to Judge Mark Cope, who has led this project for several years, and to the staff of the Judicial Council of California for all of the time and effort they put into making this project a success. We look forward to this splendid new courthouse serving the Banning Pass community for decades to come," said Riverside County Superior Court Presiding Judge Harold W. Hopp.

Employers Beware of the Unwaivable Pre-Dispute PAGA Claims: *Iskanian*'s Anti-Waiver Rule and *Securitas*

by Jennifer Barlock

California's Private Attorneys General Act of 2004[1] ("PAGA") allows a private citizen to pursue civil penalties on behalf of the State of California Labor and Workforce Development Agency ("LWDA") for various violations of law, provided the formal notice and waiting procedures of the law are followed. Counsel for employees often bring representative PAGA lawsuits alleging wage and hour violations, either in conjunction with a class action or in lieu of a class action.

California employers routinely used arbitration agreements to require that all wage and hour claims be heard through arbitration and often included pre-dispute waivers of both class actions and representative PAGA actions. Accordingly, employers cringed in 2014 when the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC*,[2] that public policy prevents pre-dispute waivers of representative PAGA actions, and that the FAA does not preempt this rule in California state court.[3]

Iskanian stands in state court but the future of pre-dispute PAGA waivers remains cloudy in federal court. A number of federal district court judges in California have rejected the state high court's position and ruled that pre-dispute PAGA waivers are enforceable.[4] To add to the confusion, one federal trial judge in the Northern District found *Iskanian* persuasive and held that the FAA does not preempt the anti-waiver rule.[5] Within the Central District of California, however, because the holdings to date reach the consensus that the FAA preempts the ruling in *Iskanian* and pre-dispute waivers of PAGA claims are enforceable.[6]

Although the U.S. Supreme Court recently refused to weigh in on *Iskanian*, another petition for review involving the same issue (California's view that PAGA representative action waivers are unenforceable) is currently pending before the U.S. Supreme Court in *Bridgestone Retail Operations v. Milton Brown*.[7] Further, if review is not granted in *Bridgestone*, there is also an appeal before the Ninth Circuit which would at the very least solidify the issue for the lower courts in California.[8]

Because of disparity in rulings and the possibility of review, many employers have arbitration agreements that still include a provision where employees agree to waive the right to file a lawsuit under PAGA. Recently, the California Court of Appeal decision in *Securitas Security Services USA, Inc. v. Superior Court of San Diego County*,[9] gave employers a reminder that pre-dispute PAGA waivers are invalid in California and they must review their arbitration agreements!

The Appellate Court in *Securitas* took *Iskanian*'s holding a step further and eliminated any hope that a voluntary pre-dispute PAGA waiver could be salvaged. In *Securitas*, the employer presented the employee with a voluntary arbitration agreement and provided the employee with a 30-day period to opt out.[10] The employee opted in and subsequently filed a lawsuit alleging meal and rest breaks violations.[11] The lawsuit consisted of both class action and PAGA claims.[12] The employer, Securitas Security Services USA, Inc., asked the trial court to (1) compel the lead plaintiff to arbitrate her individual claims; (2) dismiss and/or sever and stay the lead plaintiff's class claims; and (3) dismiss and/or stay the PAGA claim.[13] The trial court ordered

1 Cal. Labor Code §§ 2698, et seq.
2 59 Cal.4th 348 (2014).
3 *Id.* at 384.
4 *See, e.g.*, See *Ortiz v. Hobby Lobby Stores, Inc.*, No. 2:13–cv01619, 2014 WL 4691126, at *11 (E.D.Cal. Oct. 1, 2014); *Fardig v. Hobby Lobby Stores, Inc.*, No. SACV 14–00561 JVS, 2014 WL 4782618, at *4 (C.D.Cal. Aug.11, 2014); *Langston v. 20/20 Companies, Inc.*, No. EDCV 14-1360 JGB SPX, 2014 WL 5335734, at *6 (C.D. Cal. Oct. 17, 2014); *Lucero v. Sears Holdings Mgmt Corp.*, No. 14-cv-1620 AJB (WVG) at *6 (S.D. Cal. Dec. 2, 2014); *Chico v. Hilton Worldwide Inc.*, No. CV 14-5750-JFW SSx at *12 (C.D. Cal. Oct 7, 2014).
5 *Hernandez v. DMSI Staffing, LLC.*, No. C-14-1531 EMC, 2015 WL 458083, at *6 (N.D. Cal. Feb. 3, 2015).
6 *Fardig v. Hobby Lobby Stores, Inc.*, No. SACV 14–00561 JVS, 2014 WL 4782618, at *4 (C.D.Cal. Aug.11, 2014); *Langston v. 20/20 Companies, Inc.*, No. EDCV 14-1360 JGB SPX, 2014 WL 5335734, at *6 (C.D. Cal. Oct. 17, 2014); *Chico v. Hilton Worldwide Inc.*, No. CV 14-5750-JFW SSx at *12 (C.D. Cal. Oct 7, 2014).
7 *Bridgestone Retail Operations, LLC, fka Morgan Tire & Auto, LLC v. Milton Brown, et al.*, No. 14-790, Supreme Court of the United States.
8 *Hopkins v. BCI Coca-Cola Bottling Company*, No. 13-55126.
9 234 Cal.App.4th 1109 (2015).
10 *Id.* at 1113.
11 *Id.*
12 *Id.*
13 *Id.* at 1114.

the parties to proceed with arbitration as to plaintiff's entire complaint, including her PAGA claims, observing that plaintiff had voluntarily elected to resolve her PAGA claims in arbitration along with her class claims.[14]

The Court of Appeal upheld the class action waiver but reversed the trial court decision regarding the parties' pre-dispute PAGA waiver, finding it wholly unenforceable regardless of whether the plaintiff's ability to opt out.[15] The *Securitas* court reasoned that *Iskanian* goes farther than simply saying an employee cannot be "required" to enter into such agreement, and instead held that *Iskanian* broadly precludes pre-dispute private agreements to waive the right to bring a representative PAGA action.[16]

To make the blow more painful to employers, the *Securitas* court invalidated the entire arbitration agreement because it included a non-severability clause. Thus, the class action waiver could not be severed from the agreement as a whole.[17] The Court of Appeals vacated the trial court's order and directed it to enter a new order denying the motion to compel arbitration, rendering none of the claims arbitrable, including the class action and representative PAGA claims.[18] So much to the likely surprise of the employer, its non-severability clause deprived it of any benefit under that arbitration agreement.

While *Securitas* stands for the proposition that a predispute PAGA waiver will likely be found invalid in California state court, regardless of whether the agreement is voluntary or coerced, it is also a cautionary tale about reviewing current arbitration agreements and drafting concerns in general. The *Securitas* case also is the first to hold that an opt-out right does not make a PAGA representative action waiver enforceable. Finally, the *Securitas* case demonstrates the importance of well-crafted severability provision to maximize the potential for enforceability of an arbitration agreement, even where a portion of it is deemed unenforceable.

It remains to be seen whether other courts will agree with the ruling in *Securitas* but it stands now as good law. While the law evolves, employers should review their arbitration agreements, in light of *Iskanian* and *Securitas*, because merely leaving a pre-dispute PAGA waiver in an arbitration agreement might be dangerous (in state court, at least), particularly if the clause is not severable.

Jennifer Barlock is an associate in Gresham Savage's Labor and Employment Department.

14 *Id.* at 1115.
15 *Id.*
16 *Id.* at 1122.
17 *Id.* at 1126.
18 *Id.* at 1127.

Delegation to Sacramento

by Jacqueline Carey-Wilson

On March 23, 2015, a delegation from the Inland Empire legal community travelled to Sacramento to lobby legislators for more court funding and specifically to pass SB 229, a bill introduced by Senator Richard Roth, which would fund ten new judges statewide. Under SB 229, the new judges would be allocated to the superior courts pursuant to the uniform criteria approved by the Judicial Council, the governing body of the state courts, and based on current workload — a significant component of allocation. Under these standards both Riverside and San Bernardino counties would each receive three additional judges. The bill also funds one appellate court justice in the Fourth District, Division Two. Each additional jurist position would come with $1.25 million dollars in funding to provide for the jurist position and support staff. These new resources are critical to ensure access to justice for the residents of the Inland Empire.

The delegation then attended Chief Justice Tani Cantil-Sakauye's State of the Judiciary address and a reception at the renovated Stanley Mosk Library and Courts Building. Governor Jerry Brown was among the honored guests at the reception.

Photos courtesy of Brian Simeroth.

Chief Justice Tani Cantil-Sakauye, Governor Jerry Brown, and Jacqueline Carey-Wilson

Riverside County Presiding Judge Harold Hopp, Chad Firetag, Jacqueline Carey-Wilson, Chief Justice Tani Cantil-Sakauye, Judge James Latting, and Judge Wilfred Schneider.

The RCBA Elves Program 2014: You Did It! You Broke the Record.

by Brian C. Pearcy

On December 24, 2014, the RCBA's Elves Program concluded its annual program of helping needy families in Riverside County. This year marks a major milestone for the Elves Program; our outreach jumped from 45 to a record 53 families served. This exceeded our expectations. Your Elves provided Christmas gifts and a holiday dinner to 150 children (123 last year) and 67 adults (69 last year).

This year we worked with some previous organizations and some new. The Victim Services Division of the Riverside County District Attorney's office, YMCA of the Desert, Light House Social Services, and the PW Enhancement Center (Community Emergency Outreach Programs).

For the thirteenth year now, the success of the RCBA Elves Program is due to the great support and generosity of our membership. Helping others is infectious, and Elf participation continues to grow beyond the immediate membership, their office staff, their families, their clients, their friends. This year we included one of our local high schools (Poly High School had several students pitch in). Now for some recognition.

The Money Elves

Last year the Money Elves generated one of the largest donations ever! Our funds came from direct donations and monies raised during several bar association events held throughout this past year. The money provided gifts for each family member, along with a Stater Brothers gift card to buy their holiday dinner fixings and a Union 76 gas card to help out the family's holiday travel. I'd like to thank the following Money Elves for their support:

Ruth Adams; Judge William Bailey (Ret.); Commissioner Paulette Barkley (Ret.); Vicki Broach; Carolyn Confer; Bernard Donahue; Michael and Vanessa Douty; Judge Becky Dugan; Susan Exon; Daniel Greenberg; Dan Hantman; Judge Chris Harmon; Ralph Hekman; Judge Dallas Holmes (Ret.); Holstein Taylor & Unitt; Diane Huntley; Tanushri and Kusum Joseph; Patricia A. Law; Sandy Leer; Judge Jean Leonard (Ret.); John Michels; Judge John Monterosso; Chad Morgan; Mona Nemat; Jeffrey Nocket; Shilpa Patel; Mary Jean Pedneau; Riverside County Attorney's Association; Laura Rosauer; Diane and Andy Roth; Rob Schelling; Commissioner Pamela Thatcher; Julianna Tillquist; Judge Gloria Trask; Judge Richard Van Frank (Ret.); Judge John Vineyard; Ward & Ward.

Once again I would also like to provide a very special "Thank you" to Mark Easter and all of his colleagues at Best Best & Krieger. Their outstanding firm donation really makes for a formidable "KickStart" to the fundraising process.

Kevin Abbot; DaNeal Bailey; Peggy Barnes; Kim Byrens; Lisa Cambio; Marvin Cohen; Kyle Davidson; Scott Ditfurth; Daisy Duarte; Dario Frescas; Cynthia Germano; Howard Golds; Mike Grant; Robert Hargreaves; Tim Haynes; Kathy Holmes; Tammy Ingram; Roxana Jimenez; Ron Kauffman; Craig Keller; Diane LaRochelle; David Lucas; Andrea McAreavy; Alex Mendoza; Jean Nakatani; Juan Ornelas; Michelle Ouellette; Casey Owen; Glen Price; Lucas Quass; Stephanie Ramos; George Reyes; Eddie Robles; Isabel Safie; Danielle Sakai; Charity Schiller; Haviva Shane; Lauren Strickroth; Luis Tapia; Mandy Villareal; Debbie Vivian; John Wahlin; Kim Weakley; Darric Williams; Joyce Zimmerman.

The Shopping Elves

This year, we had the largest group of shopping elves and yet, it was still one of the smoothest sessions ever! Thanks to the help of the numerous Shopping Elves, my assistant Veronica, Charlene and a very helpful Kmart staff. We were able to shop, bag, tag, and deliver hundreds and hundreds of presents to the bar association in just over three hours, a new record. It was a joy to experience the festive mood of various individuals, firms, and families as they put on their Elf hats (a big shout out to the Bratton firm!) and their best bargain-hunting caps to find deals for our families. This year's Shopping Elves were:

Carmen Adams; Amber Arias; Judge William Bailey (Ret.); Gabrielle Beaudoin; Adrienne Bennet; Yoginee and Maya Braslaw; Bratton & Bratton; Rita Butrus; Nury Castillo; Ben Clymer Jr.; Lachelle Crivello and family; Stanley Dale; Dylan Desrood; Jeannie Deshazo; Vanessa Douty and family; Yvette Espinoza; Veronica Flores; Jeannette and Reina Guerra; Maria Hale; LaShon Halley; Harry Histen and family; Meg Hogenson; Jo Larik; Marisa Lazo; Light House Social Services; Jesse Male; Socorro and Rodrigo Marquez; Laura Mau; Adrian Mazarreges; Andrea Mihalik; Anika Montalbono and family; Chad Morgan; Judy Murakami and Andy Graumann; Cassandra Navarro; Jessica Oaks; Tonalli Orona; PW Enhancement Center; Diana Renteria; Krystal Reynoso; Katelyn Slebon; Christina Sovine; Matthew Strickroth; Brittney Stroup; Chayamard T.; Barbara Tren; Maribel Vergara; Erin, Heather and Rebecca Wright.

As always Big Kmart stepped up to the plate providing us with an additional discount on every item purchased.

This year to help with the ever growing bundle of gifts to be transported to the RCBA building, Walter's Auto Sales & Service donated the Elves a sleigh for the night. The use of their very large Sprinter van made the transport so much easier. A great big thank you to General Manager Steve Kienle and his parts manager Scott Eisengberger.

The Wrapping Elves

After the shopping was finished, all the gifts were delivered to the Bar and filled the RCBA Board Room and several other workrooms. Over the course of two evenings, the Wrapping Elves wrapped the largest number of items (toys, clothes and household goods) ever. This year's Wrapping Elves were:

Wrapping elves (l-r): Jerry Yang, David Kim, Justin Kim, Eugene Kim and Ricky Shah

Commissioner David Gregory and wife Tammy with Santa

Santa with RCBA President Chad Firetag and Immediate Past President Jacqueline Carey-Wilson

Mona Amini; Pam Bash; Jaime Bourns; Jacqueline Carey-Wilson; Sophia Choi; Sylvia Choi; Daisy Deanda; Dylan Desrood; Jocyline Diaz; Kathleen Dougherty; Susan Nauss Exon; Chad Firetag; Dana and Catherine Fischel; Christina Garcia; Commissioner David and Tammy Gregory; Dan Hantman; LaShon and Matt Halley; Judge Dallas and Pat Holmes; Hyde & Swigart; Antoniette and Angelica Jauregui; Kusum and Tanushri Joseph; David Kim; Eugene Kim; Justin Kim; Alexander Lim; Judge Jack Lucky; Carlos Mathus; Andrea Mihalik; Roxana Moatamer; Laura Moreno; Marika Myers; Marty Nicholson; Helen and Kimi Palacios; Brynna Popka; Jenece Pritchard; Kathy Rooney; Ricky Shah; Robin Shea; Shumika Sookdeo; Katelyn Stephens; Tyler & Bursch LLP; Barry and Colleen Woltz; Jovanna Yahuaca; Jerry Yang.

Delivery Elves

Our Delivery Elves spread throughout Riverside and San Bernardino Counties, including Corona, Norco, Lake Elsinore, Perris, Hemet, Riverside, Moreno Valley,

the Coachella Valley, Ontario, and San Bernardino. This year we went above and beyond and headed to our local homeless shelter and March Air Reserve Base housing in Moreno Valley. This year's Delivery Elves who donated their time and gas were:

Joy Ashwood; Isabel Cesanto; Ben Clymer Jr.; Arlene Cordoba; Daisy Deanda; Michael and Vanessa Douty & family; Christina Garcia; LaShon Halley; Benjamin Heston; Melissa Jacobson; Kira Klatcho; Judge Charles Koosed and family; Gina Maple; Brandon Mercer; Margeaux Mernick; John Michels; Andrea Mihalik; Heber Moran; Cindy Moran-Aquirre; Laura Moreno; Chad Morgan; Jessica Oaks; PW Enhancement Center; Diana Renteria and family; Riverside County D.A. Victim Services Group; Margie and Julia Valdez; Barry Walker.

Wrapping Elves (l-r): Roxanna Moatamer, La Verne College of Law Assoc. Dean Susan Nauss Exon, Brynna Popka and Kathleen Dougherty

Special Thanks

Once again, big kudos to my assistant Veronica, whose dedication and organizational skills made this a very efficient and fun experience for all involved; to the Riverside County Bar Association staff, especially Charlene Nelson and Lisa Yang, for all their energy and assistance; to the management and social workers of Light House Social Services, and the PW Enhancement Center (Community Emergency Outreach Programs) and Lachelle Crivello of the Victim Services Division of the Riverside County District Attorney's Office for spreading the word and making sure we help the most needy families in the county. Once again, "Thank you" to Tom Rynders and his staff at the Big Kmart at Mission Grove in Riverside.

Finally, a jumbo sized "Thank you" to the Elves themselves. Your wonderful spirit and camaraderie, which are represented in the photos accompanying this article, make this entire endeavor so rewarding to yours truly.

For those of you who still have not yet volunteered as an Elf, I suggest you put it on your agenda for next year. Ladies and gentlemen, I submit to you, this is a wonderful opportunity for you, your family, and your staff to share the joy of the holiday season.

Brian C. Pearcy was President of the RCBA in 2002 and is the chairperson (i.e. "Head Elf") of the Elves Program.

Bring-Your-Own Device Programs Beware

by Sarah Mohammadi

On August 12, 2014, the California Court of Appeal decided *Cochran v. Schwan's Home Service, Inc*., which changed the way employers ought to be thinking about their cell phone policies, and potentially business expenses in general. Given how recent the decision is, there have yet to be any cases interpreting its meaning. Therefore, employers are left to operate solely within the language of the opinion which, standing alone, raises several red flags to all employers who currently have bring-your-own device programs in place.

Labor Code Section 2802(a) requires that "an employer… indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties…". The *Cochran* case interprets that statute as it relates to an employee's use of a personal cell phone for business purposes. Specifically, the Court was faced with the question of whether an employer always has to reimburse an employee for the business use of a personal cell phone, regardless of whether or not any actual expense was incurred. The Court held that employers were required to provide reimbursement for the "expense", regardless of whether any additional cost was actually incurred by the employee. The Court explained that Section 2802 is not limited to reimbursing employees for out-of-pocket expenses. Rather, it is also intended to prevent employers from shifting their costs of business to their employees.

The practical implication of this ruling is that if an employee has a personal cell phone, and he or she is required to use the cell phone for a business call or business purpose, the employer must provide reimbursement, even if the employee has an unlimited plan. It is irrelevant that the use of the phone had no actual monetary effect on the employee's bill. It is similarly irrelevant whether the employee pays for the phone bill, or a third party, like a family member, pays for the bill.

The *Cochran* case leaves some significant questions unanswered. Under Section 2802, reimbursement is only for a "necessary" expenditure. However, it is currently unclear what type of use would be considered "necessary". On one end of the spectrum, you may have an employer who provides a business phone to an employee to use for business purposes. If the employee then goes on to use his or her personal phone for business, despite having access to the business phone, there is a strong argument that the use isn't "necessary". On the other end of the spectrum would be an employee who is required to be reachable on his or her cell phone after work hours, but the employer doesn't provide a business device. Any use of the employee's personal phone for business purposes in that scenario would be deemed "necessary." However, the issue becomes complex as the hypotheticals drift more into the grey area.

Additionally, there was no mention in *Cochran* of how reimbursement or damages should be calculated. Rather, the only explanation of reimbursement in the case is that when an employee needs to use a personal cell phone for work purposes, "the employer must pay some reasonable percentage of the employee's cell phone bill." It is presently unclear what reasonable percentage means, and how an employer should come up with that figure. Despite this, the Court did note that the reimbursement should be the same, regardless of whether the employee has a limited or unlimited phone and data plan. It is also unclear what type of effect the decision will have on other forms of work-related expenses.

Despite these unanswered questions, there are certain steps that employers should take to make sure their policies don't run afoul of the Court's ruling in *Cochran*. Employers can start by identifying the employees who need a cell phone or other mobile device in order to do their jobs. Then, employers can consider whether they wish to offer those employees company-issued devices, or if they prefer to structure reimbursement plans. If the employer opts for the reimbursement plan, they should ensure that the plan covers all employees when use of a personal cell phone for work purposes is "necessary", and that the reimbursement is a "reasonable percentage" of the employee's cell phone bill. Employers may also want to consider incorporating a reimbursement scheme to address employees who do not typically require reimbursement, but on a specific occasion need to use their personal cell phone for business purposes. Until additional cases interpret the ruling in *Cochran*, it may be in employers' best interests to err on the side of caution, especially considering the potential for class action lawsuits.

Sarah Mohammadi is an attorney in the Labor and Employment Practice Group at Best Best & Krieger, LLP. Sarah's litigation practice encompasses, but is not limited to, wage and hour, discrimination, harassment, wrongful termination and contract disputes. Sarah also spends a substantial amount of her practice advising employers on how to comply with California laws.

Hemet High School Wins First Mock Trial Title

by John Wahlin

People v. Shem, a case involving the theft of a valuable painting, was the subject of the 2015 Riverside County Mock Trial Competition. Arguing for the prosecution, Hemet High School prevailed over the defense team of King High School in the championship round of the competition. The final round was the culmination of seven rounds of trials over the course of four weeks with a field of 28 teams competing. As in the past, the first round matched regional teams in Riverside, Southwest and Indio Superior Courts. The remaining rounds were held in Riverside.

Rounds five through seven were a single elimination tournament of the eight highest ranked teams after four rounds (the "Elite 8"). The Elite 8 included two newcomers to the Elite 8, Patriot High School from Jurupa Valley and Citrus Hill High School from Perris. Rounding out the Elite 8 were the following schools: Hemet, Great Oak High School from Temecula, Xavier College Prep. from Palm Desert, Santiago High School from Corona, and King and Poly from Riverside. Emerging as semifinalists were the same teams as last year: Poly, King, Great Oak and Hemet. Hemet and King moved on to the final round where Hemet became the County champion and moved on to the State competition held in Riverside on March 20 through March 22. In that competition, neighboring Redlands High School finished in first place and will go on to the national competition.

Volunteer Superior Court judges presided over the first six rounds and Federal District Judge Virginia Phillips was the presiding judge for the championship round. Local attorney volunteers scored the first six rounds while the final was scored by a distinguished panel which were Presiding Superior Court Judge Harold Hopp, Superior Court Judge Gloria Trask, District Attorney Michael Hestrin, Public Defender Steve Harmon, and RCBA President Chad Firetag.

Following the first four rounds, the annual awards ceremony was held at the Riverside Convention Center. Awards for individual performances by pre-trial attorneys, trial attorneys, witnesses, clerk and bailiff were announced by the RCBA Steering Committee. In a departure from previous years, awards were given to individual students for first, second and third place. Paid internships were also awarded to the best pre-trial attorney, prosecuting attorney and defense attorneys. An internship with the Superior Court was presented to the best pre-trial attorney by Judge Helios Hernandez while District Attorney Michael Hestrin and Public Defender Steve Harmon presented the prosecutor and defense attorney awards.

Riverside County has one of the most outstanding mock trial programs in the state. The support of volunteer Superior Court judges and practicing attorneys is critical to its success. Attorney coaches, in particular, are in demand. Attorneys interested in assisting should contact the RCBA for more information.

John Wahlin, Chair of the RCBA Mock Trial Steering Committee, is with the firm of Best Best & Krieger, LLP.

First Place: Hemet High School

Second Place: King High School

Third Place (tie): Great Oak High School

Third Place (tie): Poly High School

Judicial Profile: The Honorable Sean Lafferty

by Sophia Choi

Judge Sean Lafferty is a perfect example of the qualities a judge should have. Having served the public as a prosecutor for seventeen years, it may come as a surprise to some that Judge Lafferty is just as liked and respected by defense attorneys as he is by prosecutors. As we all know, this is not an easy status to attain, but Judge Lafferty's patience, understanding, and pride in truly helping others has led to the Riverside legal community's love and respect for him.

Judge Sean Lafferty

Judge Lafferty was born in Contra Costa County in California and raised in the Bay Area. His family is of Irish descent and Catholic. He is the eldest child of three and has two sisters. Judge Lafferty's father is a teacher, and his mother is employed in education as well. As a child, Judge Lafferty wanted to be a teacher.

He attended De La Salle High School, a private Catholic school in Concord, California that is famous for football. He participated in sports, including baseball and wrestling. After graduating from high school in 1986, Judge Lafferty applied to various colleges and universities, one of them being the University of California, Riverside (UCR).

Initially, Judge Lafferty wanted to become a police officer. In fact, he had even worked at the Police Department at UCR. However, he felt that his vision and hearing problems prevented him from doing so. His grandfather was a lawyer in Alameda County so it was always in the back of his mind that he could become an attorney, but he had not given it much thought until college. Thus, he decided that the next best thing would be to become a prosecutor. By the time he declared his History major in college, he knew law school was in his future. Judge Lafferty graduated from UCR in 1991 with a Bachelor of Arts in History.

Riverside was definitely a place he fell in love with AND a place where he fell in love. Judge Lafferty met his wife in college while he was a Resident Advisor at UCR, and his wife happened to be in his hall. However, Judge Lafferty patiently waited until the end of the school year to ask her out. On their first date, they went to El Gato Gordo in Riverside, and he still remembers that he ate a large wet burrito. They were married in 1993 at Saint Andrew's Catholic Church in Pasadena, the same year that he started law school.

Judge Lafferty attended McGeorge School of Law, University of the Pacific, obtaining his Juris Doctorate degree in 1996. He immediately started his legal career as a post-Bar clerk at the District Attorney's Office in Contra Costa County. Upon being sworn into the California State Bar in December of 1996, Judge Lafferty stayed with the Contra Costa District Attorney's Office for four years. Eventually, Judge Lafferty was searching for a place to buy a home at a reasonable price and a nice place to raise a family, and this brought him back to Southern California. His boss at Contra Costa County, Mr. Yancy, helped him with this task by arranging an interview with the District Attorney at the time, Mr. Grover Trask. After a successful interview, Judge Lafferty started working with the Riverside County District Attorney's Office in February of 2001.

Judge Lafferty served as a prosecutor for seventeen years, prosecuting numerous types of cases with 65 jury trials. His favorite unit was the Sexual Assault/Child Abuse (SACA) unit as he had a sincere concern for the damages done to the victims of these crimes. One of his most memorable cases was one he did in the SACA unit, *People v. Armando Cordova*, a case of rape, sodomy, and abduction of an 11-year-old girl. Judge Lafferty described this victim as a brave girl that he could never forget, and the picture she drew right after the incident of the crime was something that left a lasting impression. It helped him realize that a picture can truly speak louder than words and can sometimes be stronger evidence than DNA itself. His most challenging case as a deputy district attorney was *People v. Brooke Rottiers, Omar Hutchinson, & Franchunne Epps*, a capital murder case in which one of the defendants received the death penalty. This was a difficult case involving three juries.

Whether a case was big or small, Judge Lafferty invested his time and effort to helping others and seeking justice. His grandfather was a positive role model in his life as he inspired him to seek the law and love the law and taught him how he should use the law to help others.

Judge Lafferty moved up quickly in the District Attorney's Office, as he understood the obligations and roles of a prosecutor and possessed leadership qualities.

He also had the ability to be efficient and effective in what he did, and these qualities were recognized by the office. Accordingly, he was named Felony Prosecutor of the Year twice and he quickly moved from a deputy district attorney to a supervisor. His reputation preceded him as a highly respected and loved supervisor, as he sincerely enjoyed helping and listening to others. This led to his quick promotion to Chief Deputy District Attorney and Assistant District Attorney shortly thereafter.

As an Assistant District Attorney involved in management, Judge Lafferty missed the interaction he had with people through handling cases in court. He wanted to have a direct effect on cases in court. He also wanted to challenge himself with wide areas of the law and so he decided to run in a contested election to become a judge.

Judge Lafferty was elected judge and was sworn in on January 5, 2015 by San Bernardino County Judge Janet Frangie, his wife's cousin, who had recently been named Judge of the Year by the San Bernardino County Bar Association. Judge Lafferty had his formal enrobement ceremony on February 20, 2015. Judge Lafferty said that his judicial role model is Riverside County Retired Judge Dennis McConaghy, who he described as a judge that did not care what case or what person appeared before him as he treated everyone well and respectfully; he was in control but was still able to be kind to everyone. In the same way, Judge Lafferty treats everyone that enters his courtroom with respect and kindness. He currently presides over the misdemeanor calendar in the Southwest Justice Center Department S104.

Having established his life in Riverside County, Judge Lafferty lives with his family in Murrieta. He and his wife have two children, one daughter and one son. His daughter is currently attending the University of California, Berkeley, and his son is a sophomore in high school. His wife is a hardworking homemaker. His daughter is considering a career as an attorney, but Judge Lafferty is avoiding being suggestive about her career choice. His son is on a science or math path. In his spare time, Judge Lafferty enjoys spending time with his family. One of Judge Lafferty's hobbies is "honey do," i.e. doing things that his wife tells him to do. He enjoys reading, and has recently read *The Outliers* and *Angela's Ashes*, as well as *11/22/63* by Stephen King. He enjoys exercise, such as running, weightlifting, and hiking. Judge Lafferty is known as a big music fan and enjoys concerts, especially heavy metal and hard rock, and his favorite band is Metallica (which his daughter also likes). Watching television is another pastime of his and he enjoys many shows, including *House of Cards*, *Better Call Saul*, and *Mad Men*. Judge Lafferty is also vegan and enjoys eating bean or vegetable-based foods.

Judge Sean Lafferty's qualities of patience, understanding, and kindness led him to a role very fitting for him: Judge of Riverside County, where he considers his home.

Sophia Choi, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside. She also serves as a Director-at-Large on the RCBA Board of Directors.

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Opposing Counsel: Jamie E. Wrage

by Stefanie G. Field

Jamie E. Wrage, a Shareholder at Gresham, Savage, Nolan & Tilden, PC (Gresham Savage), is one of the Inland Empire's preeminent attorneys practicing in the areas of employment law, business litigation, and construction contract disputes.

Jamie E. Wrage

Although she was raised in Florida, Jamie came to California under a fellowship to obtain a Master in Public Administration from the University of Southern California. She stayed in California because of employment opportunities in her chosen profession and ended up working as a civilian Contract Specialist for the U.S. Navy. The contract work was not particularly fulfilling, but it did allow her to interact frequently with their legal department. One of the attorneys with whom she worked suggested that she become a lawyer, so she took the LSAT and the idea of becoming a lawyer took hold.

Jamie entered Loyola Law School in its night program, where she could obtain her degree while keeping her job. She managed to successfully juggle a job, school and marriage, graduating in the top 15% of her class in December 1996. She was then clerking with the appellate firm of Horvitz & Levy in Encino. From there she made the move to the Inland Empire, taking her first job as a practicing attorney with Stream & Stream, Inc. as a litigation associate, successfully avoiding any more contract review work.

Always one to work hard and perform quality legal work, Jamie caught the eye of Mayer, Brown, Rowe and Maw, LLP. She defected from the Inland Empire to Mayer Brown in Los Angeles until 2005. While she enjoyed the complex litigation work available with the international firm, the hours and the commute (she was still living in the Inland Empire) took their toll. In 2005, her friend and mentor, Ted Stream, convinced her to return to Riverside to work with him at Gresham Savage, focusing on general business and employment litigation and appellate work. As the need grew at Gresham Savage, her employer-side employment law practice has expanded. She now routinely advises employers in state and federal labor and employment law, regulations, and compliance matters; defends wage-and-hour and exempt status class action litigation; and handles employment contract, wrongful termination, harassment and discrimination, and unfair trade practices disputes.

The move was fortuitous. Through Gresham Savage, Jamie became involved with Olive Crest, an organization that helps abused, neglected, and at-risk children and their families. She and her husband, Michael, had volunteered at the organization in the late 1990s, attending events with the children and visiting them in the group homes. She knew that the children in Olive Crest needed love and support and jumped back in as a volunteer once she was working in the area again. Later, when she decided to start a family of her own, she and Michael made what was, to them, an obvious choice. They decided to become foster parents through Olive Crest and ultimately adopted the siblings that they had been fostering. Now, with nine-year-old daughter Kayla and seven-year-old son Ayden, she counts that decision as one of the best that she has ever made. To this day, she remains involved in Olive Crest, currently as a member of their Inland Empire Board of Trustees and is pleased to discuss the foster/adopt issues with anyone who has an interest in learning about the process.

While work and family consume much of her time, she also still makes some time for hobbies. A self-confessed "super geek," Jamie is a 4th degree black belt in Tae Kwan Do and a science fiction aficionado. She also employs the use of video games to take out her aggressions on villains who truly deserve it. But, please, do not mistake her for the violent type. She is a vegetarian with a love for animals, to which her three dogs and parrot can attest. She also has a wicked sense of humor, often startling a laugh out of her companions.

There is no doubt that behind Jamie's (sometimes) gruff exterior is a woman of compassion and humanity. As an attorney, she is one of the finest around. Her intelligence, work-ethic and experience make her a great choice for legal counsel and a formidable opponent. The quality of her work is first class. We are very fortunate to have her as part of our community.

Stefanie G. Field, a member of the RCBA Publications Committee, is a Senior Counsel with the law firm of Gresham Savage Nolan & Tilden.

The Wrage Family (l-r) – Ayden, Jamie, Michael and Kayla

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The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective May 30, 2015.

Blerta Julianna Braho – Law Student, Redlands

Sean A. Davitt – Earl Carter & Associates, Riverside

Sarah E. Harding – Burke Williams & Sorensen, Riverside

Suzie Kersh – Law Student, Riverside

Harrison Le – Law Office of Harrison Le, San Diego

Claudia Lopez – Inland Empire Latino Lawyers Association, Riverside

Tonica Lucas – Law Student, Moreno Valley

Shawn P. Patterson – McClellan & Wilson, Banning

Allison Roach – Office of the District Attorney, Riverside

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