# Riverside Lawyer

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## In This Issue



The Official Publication of the Riverside County Bar Association

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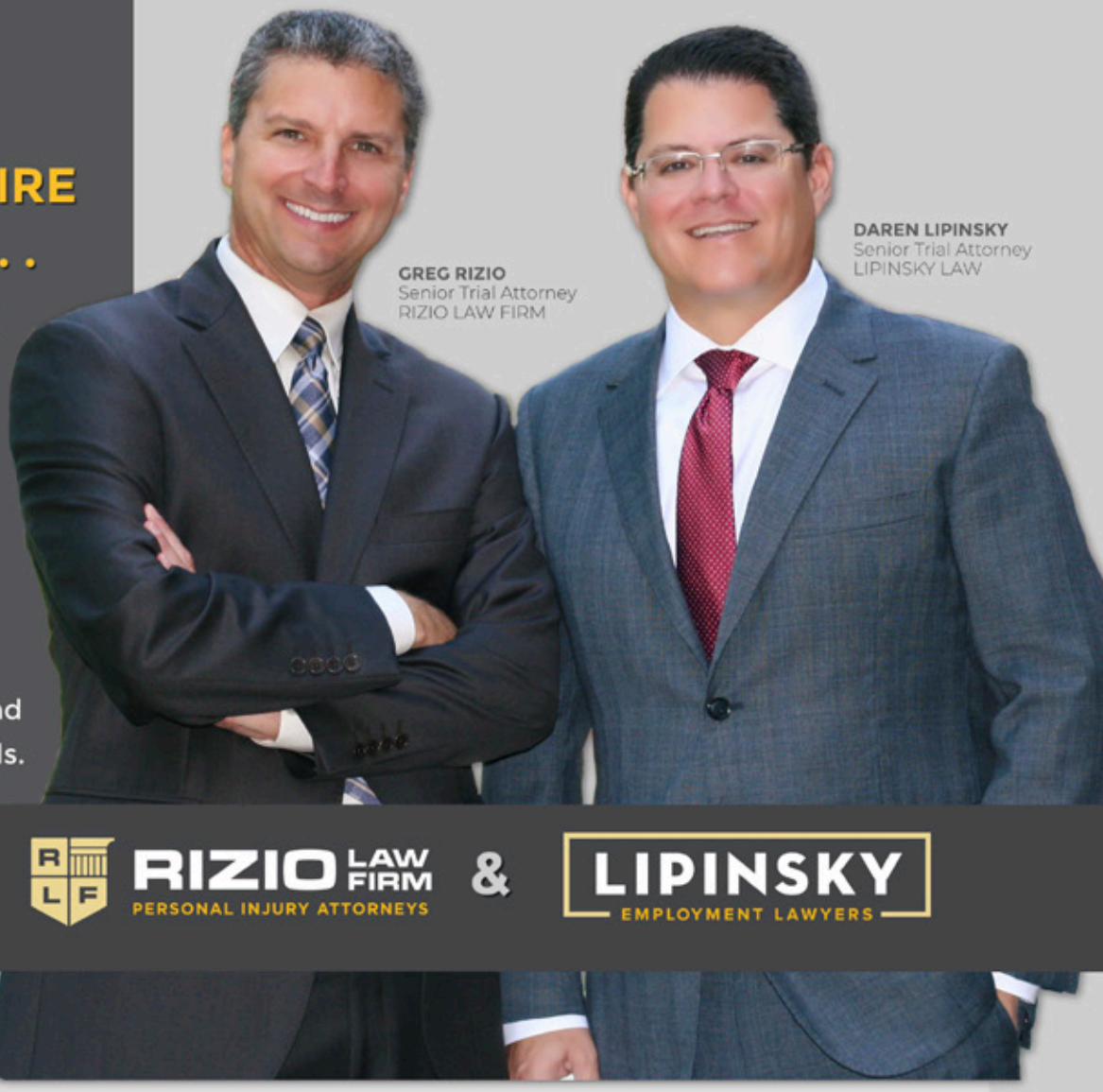


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# RIVERSIDE LAWYER MAGAZINE


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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), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, and the RCBA - Riverside Superior Court New Attorney Academy.

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, 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.

*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

## March

**11** **Juvenile Law Section**
Noon – 1:15 p.m.
Location: 9991 County Farm Road, # J-5, Riverside.
Topic: New Laws in Juvenile Dependency: What You Need To Know"
MCLE – 1 hour General

**12** **Civil Litigation Section Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Judge Jackson Lucky
Topic: "It's On My Phone: Electronic Evidence in the Courtroom"
MCLE – 1 hour General

**13** **Criminal Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Lori Myers
Topic: "Law Office Practice Management"
MCLE – 1 hour General

**Juvenile Law Section**
Noon – 1:15 p.m.
Location: 9991 County Farm Road, # J-5, Riverside
Topic: "New Laws in Juvenile Delinquency: What You Need To Know"
MCLE – 1 hour General

**15** **General Membership Meeting**
Noon – 1:30 p.m.
RCBA Gabbert Gallery
Speakers: Susan Exon, Brian Pearcy and Charles Schoemaker
Topic: "How to Make the Most of Your Court Ordered Mediation Session"
MCLE – .50 hour General

**19** **Family Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Jennifer Jank
Topic: "Social Security and Other Divorce Income Changes"
MCLE – 1 hour General

## April

**1** **Court Holiday – Cesar Chavez Day**
RCBA Offices Closed

**EVENTS SUBJECT TO CHANGE.**
*For the latest calendar information please visit the RCBA's website at riversidecountybar.com.*

**ON THE COVER:** Jacques-Louis David's *The Death of Socrates* 1787 Oil on canvas/Metropolitan Museum of Art, New York https://www.metmuseum.org/collection/the-collection-online/search/436105, Public Domain https://commons.wikimedia.org/wiki/File:David_-_The_Death_of_Socrates.jpg

# President's Message

*by Jeff Van Wagenen*

What is the most important part of a trial? It is a question that all trial lawyers will ask themselves, and each other, at some point. And, since we are an opinionated and argumentative bunch by nature, there is little agreement.

Some will say you are only as successful as your pre-trial investigation. (You can't launch your arrows if you haven't filled your quiver, right?) Others will highlight the importance of pre-trial motions. (Forget about the arrows, don't you want to shape the battlefield?) A significant number will highlight jury selection. (We ask folks to decide our case and we should be focused on who those people are, wouldn't you agree?) Traditionalists will shake their head and tell you that it's the opening statement that wins cases. (If you haven't won by the time you sit down, haven't you've lost?) Some purists will point to direct examination. (Does no one care about actual evidence?) An especially feisty group will extoll the virtues of cross examination. (Haven't you ever heard that it is the greatest legal engine ever invented for the discovery of truth?) Some lawyers will describe, in great detail, the importance of jury instructions. (The truth is such a quaint notion, but isn't it really about the applicable law?) Appellate lawyers all agree one thing, even if they don't agree on this one thing: the record. (A win isn't a win until it's final, no?)

How do you argue with any of those positions? Isn't every part of a trial equally important? Can you win without any of these? Isn't this an impossible question to answer? It seems like a no-win scenario.

Whenever I find myself in this debate, I pull a Kirk in the *Kobayashi Maru*. (Shout out to the geeks in our group who get the reference. Everyone else can "google" it.)

Alec Baldwin is known for many performances, on and off the screen. But, for me, his brief performance in *Glengarry Glen Ross*, a movie about real estate salesmen (not about trials, or even lawyers), informs my answer. Although his scene only lasts seven minutes, it is powerful. For those of you who know the movie, you know where I am going with this. For the uninitiated, fair warning: the language used is as inappropriate in 2019 as it was in 1992. Here is a heavily edited version:

> Let me have your attention for a moment … Let's talk about something important. Are they all here? … Well, I'm going anyway. Let's talk about something important. Put that coffee down. Coffee's for closers only … You can't close them. And you go home and tell your wife your troubles. Because only one thing counts in this life. Get them to sign on the line which is dotted. You hear me …
>
> A-B-C: A – ALWAYS, B – BE, C – CLOSING. Always be closing. Always be closing.
>
> A-I-D-A: Attention, interest, decision, action. Attention – do I have your attention? Interest – are you interested? I know you are … You close or you hit the bricks. Decision – have you made your decision? And, action. A-I-D-A.

What is the most important part of a trial? The closing argument. Why? Because, if you are doing it right, you will always be closing. And, if you are always closing, and closing is the most important part of the trial, then whatever you are doing is always the most important part of the trial.

By way of example, the American Bar Association has an article on their website for young advocates entitled "Closing Arguments: 10 Keys to a Powerful Summation."

1. Prepare the outline of your closing argument before your opening statement.
2. Condense your argument.
3. Employ a three-act structure.
4. Know which points to emphasize.
5. Do not ignore problems.
6. Use the evidence.
7. Cast yourself as a steward, not an advocate.
8. Identify integral jury instructions and discuss any special verdict form.
9. Do not read your closing argument.
10. Conclude with a memorable phrase, sentence or anecdote.

I would argue that these ten keys to a successful closing are also the ten keys to a successful trial. Why? Because you should always be closing.

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*Jeff Van Wagenen is the assistant county executive officer for public safety, working with, among others, the District Attorney's Office, the Law Offices of the Public Defender, and the courts.*

# Barristers President's Message

*by Megan G. Demshki*

For many of us, our dreams of becoming a lawyer involved getting into the courtroom and trying cases. We imagined riveting opening statements, dramatic cross-examinations, and tear-jerking closing statements. However, as new and young attorneys, we do not often begin our careers sitting first chair at trial.

To some, this may be discouraging or disappointing. What I have learned is that every trial I have had the opportunity to second chair makes me a better advocate in my day to day practice and prepares me to someday sit first chair. Participating in trials has further illustrated to me the interconnectedness of every step of discovery in the eventual presentation of your case at trial. Sitting as second chair has helped me develop my own strategy and style in the discovery and pre-trial phases.

In this "Trial" issue of *Riverside Lawyer* magazine, I want to share with you my top ten tricks for being an indispensable second chair:

1. **Organization:** As second chair, I make it my priority to be the most organized person in the room. Whether it be exhibits, depositions, pretrial documents, or supplies, keeping organized will allow you to think clearly under pressure and provide stability when the first chair has misplaced a document or forgotten something at the office.
2. **Do your homework:** I recommend preparing to sit second chair at trial as if the first chair might not show up one day and it will be on you to carry on. While that would likely never happen, that level of preparation will give you the knowledge of the matter and confidence you need to be an effective addition to the trial. By scouring the records, discovery, depositions, and exhibits, you can assist in the preparation and execution of the trial in meaningful, and often vital, ways. Whether it be quickly pulling up deposition testimony for cross-examination or locating an unanticipated exhibit, your knowledge of the materials will be vital in keeping cool under pressure.
3. **Know your first chair:** When I sit second chair, I see my most important role as being the right hand to the first chair. In order to be useful, and not be in the way, that requires anticipating the needs of the first chair and knowing how they like to work. For some attorneys, that might mean simply executing the instructions they give you directly. For others, your ability to anticipate the documents they want to publish to the jurors or that it is time for a snack, will make your presence invaluable.
4. **Technology:** For many of us (shout out to my fellow misunderstood millennial peers) technology comes second nature to us. It may not be perfect or flawless like the kind of presentation a trial production team can give you, but we know how to plug in a laptop and get exhibits on the screen. (And we can figure out how to use the elmo if we really must.) Ask the clerk or courtroom attendant if there is a time prior to the start of trial where you can come into the courtroom and test all your equipment. Again, this is just one simple step that will reduce stress and problems once it is go time. Plus, this is an easy item to take off the first chair's plate. (Also—saving all of your exhibits to Dropbox or another cloud-based document sharing system keeps everyone organized and updated. Plus, if you have a laptop issue, you can easily switch to another device.)
5. **Supplies:** Trial is a marathon. I always try to come prepared in ways that are easy to control and manage. For example, it is easy to load up your trial bag with supplies that you will need along the way. It had earned me the nickname "Staples." You may not be able to anticipate everything you will need (for example, my last trial we were in desperate need of a protractor! Time to dust off that one from 8th grade.), but it still reduces unnecessary anxiety to be as prepared as possible. My trial bag is always loaded with the following items:
    a. Pens of assorted colors
    b. Sharpie markers
    c. Highlighters
    d. Post it notes

e. Tape
f. Stapler
g. Three-hole punch
h. Rubber bands
i. Paperclips
j. White out
k. Pads of lined paper
l. Plain white paper
m. Extra exhibit tabs
n. Business cards
o. Tissues
p. Chapstick
q. Eyedrops
r. Small compact mirror
s. Advil
t. Lint roller

6. **Snacks:** I do not know about you, but I have yet to have a normal lunch during trial. That invaluable time is normally spent putting final touches on the afternoon presentation. So, I bring snacks, all kinds of snacks: pretzels, nuts, fruit snacks, beef jerky, bananas, granola bars, etc. Find out what your first chair can stomach during trial and try to keep a few favorites on hand. (Everyone is happier when they are not hungry.)
7. **Water:** It sounds simple and silly, but bring along more water bottles than you think you need. I normally have half a case tucked into a box under counsel table. (Again, everyone is happier when they are hydrated.)
8. **Moral Support:** Trial is stressful, especially for the clients. In our office, we are normally representing individuals who have never watched a trial before, expect maybe watching *Perry Mason* or *My Cousin Vinny*, let alone been a party to one. It is emotionally tiring for them and taxing for the attorneys. Lend moral support as needed. Keep a package of tissues in your bag in case your client gets upset. Step in to explain what is going on to the client or calm her nerves as needed. Again, by assisting in this way, the first chair can focus on the next line of questioning and stay focused.
9. **Be courteous:** Treat everyone in that courtroom with kindness and courtesy. From the clerk and the courtroom attendant to opposing counsel, the trial will be a smoother and more pleasant experience if you treat those around you with respect.
10. **Learn:** There is so much to learn at trial! Try to take a step back from the stress to soak in the experience. Watch the other attorneys, the jurors, the judge, and take good mental notes. Sitting second chair is a priceless and rewarding experience.

## Upcoming Events:

- Meet up with the Barristers for Happy Hour at Lake Alice on **Friday, March 15 at 5:30 p.m.** This event is kindly sponsored by Melissa Baldwin Settlements.
- Justice Carlos R. Moreno (Ret.) will present a Fireside Chat MCLE on **Tuesday, March 26 at 5:30 p.m.** at the Riverside Public Defender's Office. This event if co-hosted with the Barristers by JAMS.
- Save the date! The Barristers will host our annual Judicial Reception on **Thursday, May 2 at 5:30 p.m.** in the Grier Pavilion.
- Learn more about upcoming events by following @RCBABarristers on Facebook and Instagram or visiting our website, www.riversidebarristers.org.

## Looking to get involved?

Whether you are eager to start planning the next great Barristers gathering or just looking to attend your first event, please feel free to reach out to me. I would love to meet you at the door of a Happy Hour, so you do not have to walk in alone, or grab coffee to learn more about how you want to get involved. The easiest ways to get ahold of me are by email at Megan@aitkenlaw.com or by phone at (951) 534-4006.

*Megan G. Demshki is an attorney at Aitken Aitken Cohn in Riverside where she specializes in traumatic personal injury, wrongful death, and insurance bad faith matters. Megan can be reached at megan@aitkenlaw.com or (951) 534-4006.*

# Conducting an Effective Voir Dire

*by Darryl L. Exum*

The Voir Dire is one of the most critical steps toward success in a criminal trial. Most of the time we will not change individual jurors mind. Still you must educate them on the theory of the case. You will need to get the opinions of the jurors that relate to your theory of the case. Then select those jurors that will be more likely to render a verdict in your favor. The Voir Dire process remains fertile ground for sowing the seeds of success in a criminal trial.

To conduct a successful Voir Dire, the first thing that must be done is to be thoroughly prepared in your case. This means having a theory of the case. That means a rendition of the facts. The facts, which if the jury concludes are true, they will render a verdict in your favor. Although it is obvious, be cognizant of how much time you have to conduct your Voir Dire. This will allow you to prioritize what you want to discuss. Understanding how much you can do in the allotted time is also critical. You must also identify the dominant emotion in your case. For example: sadness, regret, remorse, jealousy, anger, etc.

The three issues that the Voir Dire should focus on are:

- The theory of the case
- Reasonable doubt
- Credibility

The credibility that we are talking about here is not of any witness, but the lawyer and the defense. This can be done in a variety of ways. For example, telling a juror what scares you about a case, discussing something personal about yourself, stories that illustrate the themes, theories, and issues in your case are also effective.

The theory of the case is by far the most difficult to discuss in Voir Dire. Most of the time we cannot give the jury our verbatim theory. You can discuss the sub themes. For example: why witnesses lie, people who lie to get something (snitch), confusing one person for another (eyewitness identification). Tying generalized concepts like these to juror experiences will allow you to educate the jury panel and make advocates for your cause out of jurors. This is accomplished by asking jurors if they have had similar experiences.

Voir Dire has an introduction, middle, and an ending. Consider that the introduction in the Voir Dire process is where you establish your credibility. Talk about your client using only his or her first name. Consider the middle is where you will question individual jurors and as a group about specific issues. Burden of proof, presumption of innocence, and theory of the case. Ending your Voir Dire with a statement related to how important it is that they be fair can be effective. You must leave the jurors empowered to do justice.

The jurors must feel that you are serious about your case and the important duty it is for them. One of the best ways to empower a juror is to relate an issue in your case to personal experience. Keep in mind if the experience is ideal, the prosecution probably will challenge the juror, but not before you had the opportunity to educate your prospective panel.

Use the introduction of Voir Dire to establish the dominant emotion you want the jury to have in your case. Keep in mind the jurors may have their own emotion that drives their decisions. Many lawyers believe what drives the court room is emotion. A jury can shut you down because of emotion. For example, if they are angry at your client. Understanding why they are angry and diffusing that anger in Voir Dire is key. As lawyers we must understand that perception is filtered by emotion. You can also use this segment to talk about any special issues with your client. For example, race, sex, nature of the charges, age of the case, type of victim, etc. Also, consider explaining to the jury how important it is to be fair in your case. Explain to them that the principles you are about to discuss are very important, and if at any time they feel they cannot follow them, they should tell the judge in order to be excused from the jury. Make sure jurors understand at any time during the course of the trial this can happen and that their ability to be fair in your case is very important.

The middle or the heart of the Voir Dire is reserved for what I call the commitments and the theory of the case. The commitments are burden of proof and presumption of innocence. Defendant may not testify, reasonable doubt, and any other basic legal points the jurors must accept in your case. Here is the time to use the open-ended questions. Keeping in mind the goal is to get more information. Your ending should allow jurors to voice their concerns about serving on your jury.

Having prepared and conducted a thorough Voir Dire, the jury will be more understanding, accepting, and receptive to our opening statement. You will have then created an atmosphere conducive to a successful result. Whether you have five minutes or an hour, educating the jurors on your cause can make all the difference in your case.

*Darryl L. Exum is a State Bar of California Certified Criminal Law Specialist who has taught trial skills for over twenty years.*

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# How to Get a Document Before the Court of Appeal

*by Donald A. Davio, Jr.*

Attorneys in a civil case generally think of one thing when they think about an appeal—the briefs. However, before briefing starts, you must have a record. An appeal with a defective record is like a house with a bad foundation – very shaky and of questionable value. Thus, to bring a successful appeal, the practitioner must focus on both a complete record and good briefs. This article will help you ensure that your appeal has the necessary foundation.[1]

An appellate record consists of documents and transcripts of oral proceedings, and in a civil appeal, the record must be designated by the appellant.[2] The best way to designate the record is to serve and file optional form APP-003, which sets forth the choices to be made for both the documents and transcripts necessary to a resolution of the appeal.

We find at the court of appeal that attorneys have the most difficulty with the documentary portion of the record, and that the source of the problem occurred *before* the filing of the notice of appeal during the superior court proceedings. The first step towards avoiding documentary record problems is to recognize that every document utilized in the superior court process must be handled in a specific manner to ensure its inclusion in the appellate record.

In this article I address six not-necessarily-discrete categories of documents: (1) documents that are filed or lodged with the superior court clerk; (2) exhibits offered for admission into evidence; (3) administrative records; (4) depositions; (5) electronic recordings; and (6) documents used to take judicial notice or that are judicially noticed. I will explain the basic procedures for creating a documentary appellate record with these different categories of documents and then discuss some special problems.[3]

## 1. Filed or Lodged Documents

The bulk of the documents that ultimately become part of the appellate record are those that are filed or lodged with the superior court clerk.[4] Most of these documents are file-stamped by the superior court clerk and physically placed in the superior court file. Occasionally, a document will not be file-stamped, but will nevertheless be retained in or with the superior court file—this is what is meant by "lodging" a document in the superior court file.

The first way in which filed or lodged documents are placed before the appellate court for consideration is by clerk's transcript or appendix. To use a clerk's transcript, you must serve and file a notice designating the record within 10 days after filing the notice of appeal.[5] The best way to do that is using the Judicial Council notice of designation.[6]

The second way in which filed or lodged documents come before the court of appeal is by an appendix in lieu of a clerk's transcript.[7] Instead of a notice of designation, a notice of election to file an appendix in lieu of clerk's transcript is filed within 10 days of the filing of the notice of appeal. In contrast with the clerk's transcript, which requires no effort by appellate counsel, the appendix in lieu of clerk's transcript requires the attorney, or the attorney's staff, to perform all of the functions normally done by the superior court clerk. In effect, the attorney must produce a clerk's transcript, and it is important for the attorney to think of the appendix as a clerk's transcript in complying with the requirements in Rule 8.124, as well as Rules 8.122 and 8.144, for preparing the appendix.[8] In appellate records, the clerk's transcript represents

1 All citations to a "rule" refer to the California Rules of Court; all citations to a "local rule" refer to Court of Appeal, Fourth District, Local Rules of Court; all form citations refer to the Judicial Council Forms.

2 Rules 8.120, 8.121(a).

3 If a document that was offered to the superior court is not properly handled, the problem can usually be remedied by stipulation. (Rule 8.155(c)(1).) However, if the parties will not stipulate then the only remedy is a hearing in the superior court. (Rule 8.155(c)(2).) The hearing will generally delay preparation of the record by two or three months. The agreed (Rule 8.134) and settled (Rule 8.137) statements are not discussed--they are rarely used. Also not discussed because so rarely made and almost never granted are the motions to take additional evidence and make findings on appeal. (Rule 8.252(b), (c).)

4 See Rule 8.122(b)(1) [required documents listed characteristically filed], (3)(A) ["Any other document filed or lodged"].

5 Rule 8.121(a).

6 Optional form APP-003, section 1a.

7 Rule 8.124; form APP-003, section 1b.

8 See: Rule 8.124(g) [appendix may only include "accurate copies of documents in the superior court file"; Advisory Com.com., Rule 8.124(g) [culpability for sanctions depends only on "nature of the inaccuracies and the importance of the documents they affect"].

the gold standard, and you should carefully check the accuracy of your own and your opponents' appendices.

The e-filing procedures both simplify and complicate the process in ways beyond the scope of this article. However, I will note that the single most frequent mistake in electronic submissions is in failing to include a description of the exhibit or attachment in its bookmark.[9]

The third way in which a document filed or lodged in the superior court becomes a part of the appellate court record is by augmentation. After the clerk's transcript or appendix in lieu of clerk's transcript has been filed and while counsel is preparing the appellant's opening brief or the respondent the respondent's brief, it is not uncommon for the attorney to discover that a document necessary to the court's review of the issues to be raised in the appeal has been erroneously omitted from the appellate record. Augmentation occurs in one of three ways. The first way is by a motion or application for a supplemental clerk's transcript.[10] This procedure generally takes 30 days after the order for augmentation is granted. The second way is to attach copies (with pages consecutively numbered throughout the one or more document copies attached and preferably showing the date or dates filed with the superior court clerk) to the motion. (Rule 8.155(a)(2).) This way has the advantage of avoiding any delay beyond the issuing of the court's order deeming the copies to be part of the record on appeal, and the court prefers this method. The third way is for a party to notify the superior court clerk of any omission from the record designated by the party.[11] Send a courtesy copy of the notification to the appellate court clerk as well. The superior court clerk then files a supplemental clerk's transcript, taking less time than filing a motion but more time than attaching a conformed or file-stamped copy. Send a copy of the notification to the clerk of the appellate court as well.

Having an overall idea of the principal means by which documents find their way into the appellate record, I now proceed to the narrower paths by which documents come before the court of appeal.

## 2. Exhibits Admitted, Refused, or Lodged

A documentary exhibit must be admitted into evidence, refused, or lodged in the superior court to be brought before a court of appeal.[12] Note that I am not talking about the exhibits that are attached to pleadings and motions–those exhibits appear in the clerk's transcript or appendix as documents that were filed or lodged in the superior court file. What I am talking about are exhibits introduced into, or excluded from, evidence at a trial or evidentiary hearing. Documentary exhibits differ from documents filed with the clerk in that the trial court, and occasionally the appellate court, want to see the original document. The appellate court wants to see an original only when it is different from a copy in a way significant to an issue in the appeal, a rare circumstance. So, Rule 8.122(b)(3)(B) permits copies of all original exhibits designated by a party to be included in a clerk's transcript, and Rule 8.124(b)(4) permits copies of exhibits in an appendix and a mechanism for obtaining copies of exhibits possessed by other parties.[13]

When seeing the original exhibit is important to an issue in the appeal, Rule 8.224 facilitates the designation and transmission of original exhibits in time for consideration by the court at the critical point when the draft opinion is being prepared. That Rule allows a party to notify the superior court within 10 days after the filing of the last respondent's brief to transmit the specified original exhibits to the appellate court within 20 days.[14] Furthermore, recognizing the practice of most superior courts to return exhibits to the parties, any party in possession of original exhibits must transmit them to the appellate court.[15] Unlike the clerk's transcript, appendix, or augmentation, which become permanent parts of the appellate court record, original exhibits are returned to the superior court or party that sent them to the appellate court.[16]

However, this court prefers another way provided by Rule 8.224 to place original exhibits before the appellate court, and this court provides notice and a form to encourage counsel to use this third method. Rule 8.224(d) authorizes the appellate court at any time to direct the superior court clerk, or a party in possession of an exhibit, to send the exhibit to the appellate court. So, when the record on appeal is filed, the clerk of this court includes a notice "(1) to discuss in your briefs any trial exhibits . . . that are important to a resolution of the appeal and (2) to serve and file with the clerk of this court the enclosed form requesting early transmission of any exhibits . . . mentioned in your briefs . . ." The form directs the parties to return the form with their initial brief, and to include on the form the exhibits to be transmitted. Directing counsel to request transmission of relevant original exhibits at the time of filing their *initial*

9 See: Rule 8.124(g) [appendix may only include "accurate copies of documents in the superior court file"; Advisory Com.com., Rule 8.124(g) [culpability for sanctions depends only on "nature of the inaccuracies and the importance of the documents they affect"].
10 Rule 8.155(a)(1).
11 Rule 8.155(b).
12 Rule 8.122(b)(3)(B).
13 Rule 8.124(c)
14 Rule 8.224(a)(1), (b)(1).
15 Rule 8.224(b)(2).
16 Rule 8.224(d), 3d sent.

brief allows counsel to do so at the time counsel is most likely thinking about the documents needed to support their contentions in their briefs. This earlier start gives the appellate clerk more time to make sure the exhibits have arrived by the time the court starts to consider the appeal.

Counsels' assistance is requested in thoughtfully determining the exhibits that this court needs to review– the court does not want to review every exhibit, only those that pertain to issues raised in the briefs. At the same time, the court does not want to have to interrupt its consideration of an appeal to obtain exhibits crucial to a determination of the points raised when copies have not already been included in the appellate record.

## 3. Administrative Record Admitted, Refused, or Lodged

Similar in some ways to exhibits, administrative records must be admitted into evidence, refused, or lodged in the trial court to be considered on appeal.[17] To land before the appellate court, the administrative proceeding must be identified by title and date in the notice designating the record.[18] The superior court or party in possession transmits the record to the court of appeal. (Rule 8.123((c), (d)).) The record does not become a permanent part of the record and is returned to the transmitter when the remittitur issues.[19]

## 4. Deposition Transcripts

Deposition transcripts are sometimes lodged with the superior court, but that alone will not suffice to place it before the court of appeal. Rule 8.122(b)(4) provides in pertinent part: "Unless the reviewing court orders or the parties stipulate otherwise: [¶] (A) The clerk must not copy or transmit to the reviewing court the original of a deposition . . . " The court of appeal generally will not consider portions of depositions that were not presented to the superior court for consideration.[20]

Relevant portions of deposition transcripts are frequently brought before the superior court by attaching excerpts from the deposition transcript as exhibits to a motion, often a motion for summary judgment. Then the route to the appellate court's record is through a clerk's transcript or appendix. However, if a trial or evidentiary hearing generated the judgment or order appealed, counsel must have put the deposition before the trier of fact, either judge or jury, using a variety of methods.[21]

17 Rule 8.123(a).
18 See form APP-003, section 3 [section exclusively for administrative proceedings].
19 Rule 8.123(e).
20 See, e.g.: *Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 962-963 [entire deposition lodged, but only excerpts offered].
21 See, e.g., Code Civ. Proc., § 2025.620.

## 5. Electronic Recordings (Including Depositions)

The introduction into evidence of electronic recordings, including depositions, is often mishandled. This is unfortunate, especially respecting recordings of deposition, because proper handling provides automatic (without the stipulation or order Rule 8.122(b)(4)(A) requires) paths to the appellate record for the recording as an original exhibit[22] and for the transcript as a filed document.[23] [24] The price for this special treatment is: (1) to lodge the entire deposition (or other prior testimony) transcript before offering or presenting the recording; (2) identify, when the recording is played, where in the transcript the portion or portions played appear; and, (3) by the close of evidence or, if later, within five days of offering or presenting the recording, a transcript of the portion or portions offered or presented.[25] The second and third transcript requirements need not be met if the court reporter takes down the portions offered or presented; the court reporter is not required to do so unless ordered to do so. (Rule 2.1040(d).) The requirements respecting non-prior-testimony electronic recordings differ slightly. (Rule 2.1040(b).)

## 6. Documents Used To Take Judicial Notice

Occasionally a document comes before the court of appeal that has been used to take judicial notice. A specific Rule deals with judicial notice, Rule 8.252(a), referring to Evidence Code section 459, which authorizes a reviewing court to judicially notice any document that could be judicially noticed by a trial court.[26] The Rule requires a separate motion (Rule 8.252(a)(1)) and the attachment of copies of the documents to be used or noticed unless they are already in the appellate record[27].

Generally speaking, the court of appeal will not judicially notice a document unless a judicial notice request was made in the superior court.[28] If a party feels that the reviewing court should judicially notice a document that was not judicially noticed by the superior court, the motion for judicial notice should establish "exceptional circumstances" justifying a departure from the general rule. (*Ibid.*) The best way to place the document before

22 See Rule 8.224 [transmission to appellate court]
23 8.122(b)(3)(B) [clerk's transcript] or 8.124(b)(1)(B) [appendix]
24 See Rules 8.1040(c) [clerk must mark recordings for identification and file transcripts], 8.122(b)(4)(A) [excepting deposition portions complying with Rule 2.1040].
25 Rule 2.1040(a)(1), (2).
26 See 1 Witkin, Cal. Evidence (5th ed. 2012) Judicial Notice, § 47 et seq., p. 154 et seq.
27 Rule 8.252(a)(3).
28 *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3, second par.

the court of appeal is to have it filed or lodged in the superior court file, which is appropriate regardless of whether the superior court grants the judicial notice request.

As to procedure in the court of appeal, this court automatically notifies opposing counsel to file opposition, thereby complying with notice requirements for appellate judicial notice.[29] Unless the request for judicial notice should obviously be granted and is unopposed, ruling is generally reserved for consideration by the panel who will decide the appeal. The parties may discuss in their briefs the matters to be judicially noticed, so that additional briefing is not required when the panel decides whether to take judicial notice. If the court declines to take judicial notice, the portions of the briefs discussing the matters of which judicial notice had been requested will simply be ignored. The reason ruling is reserved is that the court of appeal will not judicially notice matters which are not relevant to its consideration of the issues raised in the appeal, which is best determined after a full review of the record and briefs.[30]

29 Evid. Code, §§ 455, subd. (a), 459, subds. (c), (d).

30 *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.

A typical reason for taking judicial notice is to place before the court of appeal documents which were filed in a different superior court case that are nonetheless relevant to the court's determination of an issue in the present appeal. Such documents cannot be designated, included in an appendix, or augmented, because those avenues are limited only to documents which were filed in the superior court case out of which the appeal arises. Again, if the documents were not offered for judicial notice in the superior court, the appellate court will want to know why not.

In summary, the important point made by this article is that every document must fall into one of these six categories to be eligible for inclusion in the documentary portion of the record on appeal. In any trial proceeding, to preserve the client's right to appeal based on a complete record, for every important document counsel must use the appropriate method to make it part of the appellate record.

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# The Trial of Socrates

*by Abram S. Feuerstein*

The trial of Socrates in 399 BCE, history's most famous trial – until CHP officers chased a white Ford Bronco around Los Angeles' roadways in 1994 – resulted of course in a death sentence for Socrates. A cup of hemlock.

But, the trial also created a sort of secular martyr, with the punished Socrates becoming a symbol purportedly of what happens when a society and its intolerant majority repress freedom of thought or speech. Towards the end of Plato's *Apology*, Socrates predicts that the city of Athens will be given an "evil name" by its detractors, "who will say that you killed Socrates, a wise man."[1] Indeed, Socrates hurls the following at the Athenians: "And I prophesy to you who are my murderers, that immediately after my departure punishment far heavier than you have inflicted on me will surely await you."[2] Then there is this parting shot: "The hour of departure has arrived, and we go our ways – I to die, and you to live. Which is better God only knows."[3]

Alas, after these words, rightly or wrongly, the poor Athenians didn't stand a chance, and they have been recovering in the eyes of history ever since.[4]

There is a lot to unravel in trying to understand Socrates' trial and death. However, for most non-philosophy majors, the central question always has been how the Athenians, who treasured their freedoms and the diversity of thought in their culture, could convict and kill their greatest philosopher.[5] As I.F. Stone asks in his comprehensive *The Trial of Socrates*, "How could (it) have happened in so free a society?"[6]

## Pre-Trial Events

The events surrounding Socrates' trial were set in motion years earlier.[7] The decades-long Peloponnesian War had de-stabilized the Athenian democracy. One of Socrates' former pupils, the hated Alcibiades, had engineered an initial effort to overthrow the democracy in 411 BCE.[8] Subsequently, upon Athens' final defeat in 404 BCE, the Spartans installed an oligarchical regime, known as the Thirty Tyrants, to rule Athens. The regime banished and brutally executed thousands of Athenians.[9] Another Socrates follower, Critias, played a leading role in the terror.[10] Although the democracy had been restored in 403 BCE, it seems that the anti-democratic forces were preparing another attack in 401 BCE – just two years before the trial. The Athenians mobilized and successfully resisted that effort.[11]

Socrates had been well known to most Athenians. A fixture in the agora – the commercial and civic center of Athens – he seems never to have lost an opportunity to engage his fellow citizens in philosophic discussion. They mostly viewed him as an eccentric, albeit a harmless one, an image reinforced by his comic portrayal in plays such as *The Clouds*, by Aristophanes.[12] But they also grouped him, disparagingly, with the Sophists, paid teachers of young men of the richer classes, who could "make the worse appear the better cause."[13] Also, Socrates' teaching method, a type of cross-examination typically ending in the subject re-canting strongly held views, did not win many friends.

In the struggle to maintain a democracy after their war defeat, Athenians' views of Socrates changed. Socrates had never championed the common man or embraced ideas of egalitarianism.[14] Indeed, he criticized the average Athenian as not possessing the knowledge or virtue to be capable of participating in a democracy.[15] Moreover, Socrates appeared to remain silent in the face of the terror implemented by the oligarchs, and some of his young followers took part in squads, a private army of sorts, organized to bully the citizenry and maintain order.[16] Suddenly, the harmless Socrates no longer seemed so harmless. Athenians identified Socrates with the anti-democratic forces threatening their society, if not as the intellectual godfather of those forces.

1 *Plato: Euthyphro, Apology, Crito*, p. 63 (Classic Books America ed. 2009) (hereafter, "Plato CBA").
2 Plato CBA, p. 64.
3 Plato CBA, p. 6
4 As John Stuart Mill observed in his *Essay on Liberty*, "Mankind cannot be too often reminded that there was once a man named Socrates."
5 See Douglas O. Linder, *Famous Trials: Trial of Socrates* (399 B.C.) (hereafter, "Linder: Famous Trials"), retrieved at: *http://www.famous-trials.com/socrates/833-home*. The University of Missouri-Kansas City Law School, where Professor Linder teaches, maintains a website that explores history's greatest trials, and The Great Courses features a well-regarded lecture series by Linder that includes his fine summary of the trial of Socrates.
6 I.F. Stone, *The Trial of Socrates*, p. xi (Anchor Books, 1989) (hereafter, "Stone"). Stone's work is a thorough exploration of the trial and death of Socrates, and after Plato's dialogues should be the next source consulted by anyone interested in a fuller understanding of the trial.
7 Stone, p. 140.
8 Linder: Famous Trials.
9 *Id.*
10 *Id.*
11 Stone, p. 156.
12 Linder: Famous Trials. In the play, Socrates sits in a hanging basket so that he can better mingle with the ether.
13 Plato CBA, pp. 46-47. At trial, Socrates resisted the Sophist label, and insisted he had never been paid for his teachings.
14 Linder: Famous Trials.
15 *Id.*
16 Stone, p. 144.

## Socrates on Trial

In this environment, an Athenian named Meletus, an obscure poet who likely fronted for other enemies of Socrates, delivered an oral summons to Socrates.[17] Athens did not have a "public prosecutor," and citizens themselves initiated criminal proceedings.[18] Upon hearing from Meletus and two other accusers who surfaced, and Socrates, a magistrate determined that the prosecution could proceed to what today would be characterized as a preliminary hearing.[19] From that point, a formal charging document emerged in which Socrates was accused of impiety in "refusing to recognize the gods recognized by the state, and of introducing new divinities. He is also guilty of corrupting the youth. The penalty demanded was death."[20] The authorities posted a public notice of the upcoming trial.

Trials in Athens took place over a single day, outdoors, in the agora.[21] Although well-to-do litigants could and did hire professionals to draft their speeches,[22] at the actual trial parties represented themselves. A judge presided, but otherwise had no meaningful role; juries determined a defendant's guilt and penalty. Socrates' jury consisted of 500 citizens.[23] To avoid corruption, juries purposefully were large (bribing one or two jurors might be possible, 500 a near impossibility). In delivering their speeches, accusers and defendants equally divided the available trial time, regulated by a water clock – likely a ceramic vessel with a hole that allowed water to drip from its bottom. At the trial's conclusion, jurors placed their metallic ballots into one of two jars depending on whether they voted to convict or acquit a defendant. Upon a vote for conviction, the jury would re-use the jars to choose between two possible punishments – one proposed by each side.

There are no records of the trial speeches made by Socrates' accusers. From non-verbatim accounts written years afterwards by Plato and Xenophon, another youthful Socrates disciple, we have narratives of the moving defense Socrates presented in the three hours allocated to him.[24] Apparently, Socrates did not share the litigiousness of his fellow Athenians, so he starts by asking the jury to excuse his lack of trial experience. "For I am more than seventy years of age, and appearing now for the first time in a court of law, I am quite a stranger to the language of the place," he says.[25]

Socrates devotes the next part of his speech to attacking the caricatures that exist about him in the public mind, "slander(s) which (have) lasted a long time."[26] He knows "only too well how many" enemies he has created over the years, noting that they will be the source of his "destruction" if he is found guilty.[27] The famous Socratic Method is then turned on the specific charges leveled at him by his accusers. The charges are vague and, sure enough, Socrates underscores their weaknesses. As the inconsistencies mount, Socrates makes his accusers look ridiculous.

But, the trial really was never about the specific crimes of impiety or corrupting the youth – a fact Socrates himself acknowledges when he accuses Meletus of having put those charges "into the indictment because you had nothing real of which to accuse me."[28] This is a show trial – for the accusers and the accused. The Athenians believe that Socrates is a danger, and that to protect their society and its democratic way of life, he has to be silenced. For his part, Socrates knows that he is an agitator and understands the influence he has had on the young men of Athens' richer classes. He has expressed disdain for the false teachings embraced by the Athenians. Further provoking them, Socrates insists his actions are inspired if not compelled by God. Finally, he repeatedly has told the Athenians that he will not accept exile and, further, that he will never "hold his tongue" even if it means his death.

## The Judgment

The jury votes. 280-220 for conviction. Even Socrates expressed surprise at the close outcome. "I had thought that the majority against me would have been far larger; but now, had thirty votes gone over to the other side, I should have been acquitted," he observes.[29] In commenting on the jury's vote, I.F. Stone notes that a shift of 6 percent would have resulted in acquittal, hardly "the mathematics of a mob verdict."[30]

For the penalty phase, each side could propose a penalty. Impiety was a capital offense so, predictably, the prosecution

17 Linder: Famous Trials.

18 *Id.* Stone, p. 140. As a safeguard, accusations that did not achieve a 20 percent "guilty" vote by the presiding jury could subject the accuser to significant sanctions. In the *Apology,* Socrates describes the fine as "a thousand drachmae" for failing to attain "a fifth part of the votes, as the law requires." Plato CBA, p. 61.

19 Linder: Famous Trials.

20 *Id.*

21 A good description of trial procedures relevant to the Socrates trial is contained in The Great Courses 24-course lecture series, *Living History: Experiencing great Events of the Ancient and Medieval World*s, by Colgate University Professor Robert Garland. Additional information about Garland's course is available at: *https://www.thegreatcourses.com/courses/living-history-experiencing-great-events-of-the-ancient-and-medieval-worlds.html.*

22 These "lawyers" were called *logographoi*, or professional drafters of legal pleadings. Stone, p. 153. Socrates appears to have refused an offer by a friend and well-known professional speechwriter, Lysias, to help Socrates write a response to the charges.

23 Linder: Famous Trials.

24 At one point Socrates is somewhat critical of the trial time periods, noting that "if there were a law at Athens, as there is in other cities, that a capital cause should not be decided in one day, then I believe that I should have convinced you." Plato CBA, p. 62.

25 Plato CBA, p. 40.

26 Plato CBA, p. 41.

27 Plato CBA, p. 53.

28 Plato CBA, pp. 52-53.

29 Plato CBA, p. 61.

30 Stone, p. 181. Stone suggests that Socrates expressed surprise because Socrates *wanted* to be convicted. Had the jury voted acquittal, Socrates' plans would have been frustrated.

proposed a death sentence. Instead of a meaningful, alternative sentence, the martyr-bound Socrates tells jurors that he believes he is owed a reward. After all, he has expended years of his life instructing his fellow citizens. For such beneficial services, he proposes that the state give him free meals in the community's food hall – the Prytaneum– an honor reserved for victorious Olympic athletes.[31] At a time when most defendants could be expected to parade their family members into court and seek leniency, Socrates' proposal further infuriated the jurors. Sensing their anger, Socrates begrudgingly makes a last-minute offer to pay a small fine.[32] That suggestion falls on deaf ears. The margin against Socrates increased: 360 for death, 140 for the fine.[33]

Great trials frequently present great questions. In Socrates' case, the passage of centuries has not made it easier to answer the question of why in Stone's words a free and democratic Athens had been "so untrue to itself."[34] Those horrified by the trial result and Socrates' death, may be blaming the Athenians, unfairly, for not embracing an abstract concept of an open society (which ironically Socrates himself certainly did not embrace).[35] The Athenians were running a society of course and in that context believed they were acting prudently when confronted by a threat to their way of life. They listened to Socrates. In fact, they had listened to and tolerated him for decades, until concluding it was dangerous to continue to do so. Maybe they overestimated that danger; maybe not. Sure, one could simply wish they had been a little more tolerant of an old man. The fact that they were not, however, gave Socrates what he wanted – to be elevated from a footnote in history to one of its martyrs.

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31 Plato CBA, p. 62. According to Stone, the Prytaneum, as the seat of the city's executive government, itself was a place of honor and had a sacred character. Stone, p. 188.

32 Plato CBA, p. 63. Socrates' friends said they were prepared to act as sureties for a larger fine.

33 Linder: Famous Trials.

34 Stone, p. xi.

35 Willmoore Kendall, a conservative political philosopher, in a 1958 article entitled, "The People Versus Socrates Revisited," published in *Modern Age*, championed the idea that the Athenians have been faulted unfairly for not fitting into an "open society" construct of civil liberties. Kendall's article, an important counterpoint to orthodox views about the trial and death of Socrates, can be retrieved at: *https://isistatic.org/journal-archive/ma/03_01/kendall.pdf*.

# Jacques-Louis David's *The Death of Socrates*

*by Abram S. Feuerstein*

*The Death of Socrates*, housed at New York's Metropolitan Museum of Art, which Jacques-Louis David painted in 1787, two years before the French Revolution, is proof that if you stare at a great painting long enough, it will begin to reveal its truths. Or its falsehoods.

The scene that captures David's imagination is not the actual trial of Socrates, but its aftermath. The trial has long ended. Socrates is in prison,[1] the implementation of the death sentence delayed because of the intervention of a religious observation that required a ship to travel to and return from the sacred Aegean island of Delos.[2] Public executions could not take place during this holy season. But the ship has returned and the end is near.

Although over 70 years old, David portrays Socrates in a decades-younger, muscular body. Socrates is surrounded by his loyal followers. They are the young, affluent men of Athens who have been his pupils – the ones that Socrates had been accused of corrupting. After the guilty verdict, they proposed to pay a fine on Socrates' behalf,[3] but the jury, by an even greater number than voted for his guilt, opted for the death sentence.

Socrates now has refused his friends' offer to help him escape. They are in agony. With the painting's light source illuminating him, heroically Socrates points skyward with one hand while reaching matter-of-factly with the other for the hemlock cup. Socrates may not be focused on the hemlock, but we are: the cup, handed to Socrates by a red-cloaked executioner, is at the exact center of the canvas. The painting is a little unclear as to whether Socrates is trying to reassure his young followers, stiff upper lip so to speak, or if to his last breath he is continuing to insist that he possesses the truth – *the* truth – and that the Athenians are the unrighteous. No matter. Paralysis will soon set in. Plato is in the painting, too. Oddly, although Plato is only 27 at the time of the trial, David depicts him as an old man, at the foot of the deathbed, with his back to Socrates, seemingly recalling from memory the events he later will describe in the dialogues.[4]

Classically trained, David's incredible talent enabled him to study as an art student in Rome from 1775 to 1780. There, Italian Renaissance art reinforced his view that history painting could and should teach a moral lesson. He filled sketchbooks with classical imagery. Upon returning to France, David's work swiftly received critical success. With his 1784 painting, the enormous *Oath of the Horatii*, he increasingly was seen as the leading proponent of a new school of painting, the Neoclassical style.

The French version of the enlightenment embraced Socrates as one of its heroes, a person who resisted authority and died for a just cause, a person who chose to die rather than give up his beliefs.[5] With the French Revolution around the corner, David increasingly became politicized. As historian Simon Schama has observed, David realized he could help create a new France by re-educating people with art.[6] Not only did the death of Socrates possess great drama, but the dying hero could serve a political cause. Socrates, on his prison "throne of reason," surrounded by his followers, provided the perfect subject; David captured the scene perfectly, and the painting received immediate praise. Thomas Jefferson, in Paris at the time, said the painting was "superb."[7]

David's political activities in short time would lead him to close associations with Robespierre. And Jean-Paul Marat. And other Jacobins. When the royal family was seized, as a member of a committee, David voted for King Louis XVI's execution. But old friends and patrons were seized, too. Dr. Guillotine's invention was particularly busy. Revolutions ultimately consume their most passionate adherents, and when the terror and bloodshed

1 The prison's alleged ruins today are a popular tourist attraction in Athens. *See generally, https://www.triphobo.com/places/athens-greece/socrates-prison.*

2 At the beginning of Plato's *Crito,* upon seeing Crito Socrates asks: "What! I suppose the ship has come from Delos, on the arrival of which I am to die?" *Plato: Euthyphro, Apology, Crito*, p. 70-71 (Classic Books America ed. 2009) (hereafter, "Plato CBA").

3 Plato CBA, p. 63.

4 For a short video that makes this point and otherwise does an excellent job describing the painting, *see* Nerdwriter (Evan Puschak), "Understanding Art: Case Study, The Death of Socrates," available at: https://www.youtube.com/watch?v=rKhfFBbVtFg.
A lengthier video from Kathryn Calley Galitz, an educator and art historian affiliated with the Metropolitan Museum of Art, which discusses the *Death of Socrates*, is available at: *https://www.facebook.com/metmuseum/videos/2163881127004777/* (hereafter, "Galitz Video"). Viewers should determine whether this is an authorized recording.
In his extraordinary art history series, *The Power of Art*, British historian Simon Schama devotes an episode to Jacques-Louis David and focuses on the political content of David's work (hereafter, "Schama Video"). The author's analysis of *The Death of Socrates* has been significantly informed by the Schama Video. *The Power of Art* is available for purchase through Amazon and other sources.

5 *See* Galitz Video.

6 *See* Schama Video.

7 *See* Galitz Video.

ended, Robespierre and Marat were dead and David himself had been imprisoned. No worries. Upon his release, David's art would be put to good use creating larger than life images of his new patron and France's next dictatorial force, Napoleon.

When David painted *The Death of Socrates* in 1787, the Age of Reason had not yet become the Tyranny of Reason, and the tragic events of 1789 were not yet visible in the story told by David's painting. Then again, maybe there is a glimpse of them. Almost unseen, climbing a staircase in the painting's deep recesses, are the members of Socrates' family, including his devoted wife, Xanthippe. The family had been ushered into the prison and almost as quickly out.[8] For years, while Socrates philosophized here and there and everywhere in Athens, he left poor Xanthippe with the financial, physical and emotional burdens of raising the family.[9] One wonders, did Socrates spend any time trying to comfort her and their children, or did he reserve all of his fond farewell feelings for his disciples? The artist did not intend it, but surely Xanthippe and the children – not Socrates – are the true victims of Socrates' unrelenting pursuit of an abstraction, and his willingness to sacrifice himself for a "greater good" no matter the cost.

8 I.F. Stone, *The Trial of Socrates*, pp. 192-93 (Anchor Books, 1989).
9 *Id.*

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# Strategic Decisions in Opening Statements

*by Souley Diallo*

The dramatic climax of every great courtroom drama is the powerful closing argument scene. There is nothing more satisfying to a trial lawyer than the performance of a devastating cross examination. However, even though the cross examinations and closing arguments are the headline acts of a trial, an effective opening statement is equally as important to the outcome of the case. An effective opening can guide the jurors' views of the case through a lens most favorable to the party's desired outcome. A poorly delivered opening could establish a bad impression in the mind of the jurors that is difficult to overcome. As such the importance of strategic decision making in formulating and delivering an opening cannot be overstated.

There are two schools of thought when it comes to how detailed a lawyer should be in opening statement. The first, more traditional approach advocates less detail in opening. The theory behind giving a less detailed opening is that too much specificity may improperly set the juror's expectations regarding the case. Many lawyers have been burned by a promise made in opening statement that was ultimately not delivered by the evidence. Even a first year law student would be able to take advantage of such an error by highlighting it to the jury in closing argument.

Further, a recitation of the evidence that is too detailed restricts the attorney's ability to change strategy based upon unanticipated events at trial. Trail is a dynamic process where witnesses change their stories, recant testimony, or crumble under relentless cross examination. A less detailed opening statement allows the trial attorney to take advantage of these surprises and incorporate them into the theory of the case. It is not unprecedented, especially for criminal defense attorneys, to change an entire theory of the case based upon the unanticipated testimony of one witness. An opening statement that is too detailed presents a difficult choice under these circumstances; either the attorney fails to fully take advantage of surprise evidence or the attorney must explain to the jury a complete change in trial strategy from the one previewed in opening statement.

A more modern approach to opening statements advocates a vivid, detailed presentation of the anticipated evidence at trial. Advocates of a detailed approach argue that jurors start making impressions about the case at the commencement of the trial. As such if jurors are forced to wait until witness testimony to hear about a party's favorable evidence, that evidence may not be able to penetrate the jurors' impressions already formed about the case.

Further, a detailed approach to opening statement allows the trial attorney to script and direct the movie that is the jury trial. Through opening statement, the director/attorney casts the characters of the trial – assigning witnesses the roles of villains, foils, and heroes, consistent with the theory of the case. A vague opening statement robs the attorney of the ability to frame the story of the trial at the outset on the terms most favorable to their side.

In criminal cases, defense attorneys are also often presented with a third choice, whether to defer or waive opening statement. Often times, either based upon the strength of the prosecution's evidence or uncertainty about how the evidence will be presented at trial, the attorney is left without a clear or consistent defense strategy. Under these circumstances, defense lawyers may choose to either defer or waive opening statement; preserving maximum flexibility in developing a theory of the case during trial. However, even under the daunting circumstances of a seemingly insurmountable prosecution case, there are those that advocate giving some sort of opening. As the theory goes: a vague opening, bereft of any facts, requesting that the jurors "keep an open mind," is better than letting the prosecution's opening go completely unchallenged.

There are also strategic decisions in terms of how to structure an opening statement. The textbook, law school approach is to begin opening with a theme statement, which is a concise sentence that communicates the theory of the case in a vivid and memorable way. A successful theme statement, like a sensational newspaper headline, grabs the attention of the jury and clearly communicates why a party should win the case.

Beyond the theme statement, the opening should be structured in a way to give preview of the evidence in the case, highlighting the evidence most favorable to the party's winning argument. Classic approaches organize the opening chronologically or by witness.

However, more than any other aspect in the trial, an opening statement is an exercise in the art of storytelling. Thus, trial lawyers should consider approaches that go beyond a linear recitation of the facts. For example,

building the case around the personal story of a party or witness is a creative way to engender empathy from the jurors. Beginning with a vivid description of the scene of the incident involved in the case can capture the juror's attention in a powerful and unique way. Using demonstrative evidence can add a visual dimension that reach the jury in ways that words alone could not.

One of the most difficult decisions that trial lawyers face in opening statements is how to deal with potential landmines in the trial – prejudicial evidence, problematic witnesses, or logical holes in the case. One approach is to ignore the landmines in the opening, focusing the juror's attention towards the stronger aspects of the case. The other approach is to directly address the landmines in your opening in an effort to minimize their impact. As with many strategic decisions during trial, there is no one fits all approach. The failure to address clearly prejudicial matters that will certainly be admitted into evidence would be a mistake. However, spending too much attention rebutting unfavorable collateral matter could also prove to be problematic; distracting the jury away from the stronger aspects of the case.

Finally, navigating around the legal prohibition against argument is a potential handcuff to presenting a persuasive opening statement. On one hand, rigid adherence to a "just the facts, ma'am" presentation, limits the persuasive impact of the opening, and restricts the trial attorney's ability to address the landmines of the case. On the other hand, an opening that makes direct legal arguments and contains opinionated characterizations of the evidence will likely be met with a sustained objection. As with other aspects of a trial, judges will vary widely in what is considered an improper argument for opening. Best practice is to utilize descriptive language to the maximum extent possible, while avoiding direct legal arguments, a measurement that will differ depending upon the tolerance of the trial judge.

Like a good preview for a movie, an effective opening statement will transport jurors into the story that is the trial. Trial counsel's careful consideration of key strategic decisions will maximize the effectiveness of the opening statement and set the tone for the entire case to come.

*Souley Diallo is a deputy public defender with the County of Riverside, where he practices in the Complex Litigation Unit.*

# Jury Selection

*by Dr. David Cannon*

## Jury selection is intimidating for many jurors.

If there is one thing that Americans hate, it is public speaking. After high school and perhaps college, it is something that many Americans no longer have to do. Once we join the workforce, many of us no longer have to face public speaking. So, it should come as no surprise that jury selection can be a very unnerving process. Many jurors are coming into a courtroom for perhaps the first time. They walk into a courtroom only to see many eyes from behind the bench watching them as they are seated. As they walk into the courtroom, they see attorneys, a bailiff, a court reporter, and a judge, all of which can be intimidating. They are among other community members that they do not know and they are be asked very personal questions in front of a room full of strangers. Many have not done public speaking in a while and this is an extreme example of it.

## Most jurors don't really want to talk.

I started observing jury selections during my first year in graduate school. Back then, I rotated through courtrooms during jury selections. I noticed that around 5-10 jurors seemed to raise their hand and/or respond to almost all of the questions. In the meantime, there was a room full of other potential jurors who stared blankly ahead, looked down during questions, and sometimes nodded off during the process. They didn't seem to want to talk. I also noticed that many of those who spoke were struck by one of the sides, leaving many of the quiet jurors to sit on the jury. While those who spoke invariably said something that made one or both sides nervous, the quiet jurors also likely had strong attitudes and relevant experiences that they simply had not disclosed. So, the result was a jury consisting of largely unknown people.

## Researchers have found that jurors are often looking for reasons not to have to answer questions.

Research has shown that a significant percentage of jurors do not respond to questions that actually apply to them. Many jurors have disclosed, after the fact, that they didn't respond to a question because they didn't think the question was important; didn't believe that a particular attitude would influence their opinion of the case; or simply because they didn't want to have to respond in front of others. Jurors sometimes even actively rationalize why a question may not apply to them, so they don't have to respond.

## Jurors are more likely to disclose information under certain conditions.

Jurors are twice as likely to disclose information to an attorney than to a judge. So, if you are in federal court and only the judge is asking questions, chances are very good that members of the venire are not going to disclose some pertinent and potentially important information. Jurors are most likely to respond to questions on a written jury questionnaire, and they may be even more likely to disclose information when they complete those questionnaires in the privacy of their own homes.

There are only so many things within your control. What can you do if you are conducting voir dire, but no one seems to be raising his or her hand? What if a judge denies your request for a jury questionnaire in a case that involves highly personal issues?

## Try to get past these limitations by making jurors use their own words.

Jurors will take the easy way out when they can. That is, if you ask a "yes" or "no" question, they will often respond accordingly with little to no explanation unless they are encouraged to do so.

- This is your time to establish rapport. Jurors are forming impressions of you, just like you are of them. Don't take notes. Take someone to help you take notes and organize juror responses.
- Start with easy questions.
- Tell jurors they can explain their responses in private.
- Make a small disclosure to personalize yourself.
- Take a "talk show" approach. When someone keeps raising his or her hand, praise that person for responding and say something like, "I know Ms. Johnson isn't the only one who feels that way. Who else agrees with Ms. Johnson." If no one responds, call on jurors that concern you and ask, "How do you feel about that? Do you agree or disagree with Ms. Johnson?"
- For key concerns, have every juror respond to open ended questions regarding those concerns. That way, you hear each juror address those issues in his or her own words.

What if you are in federal court with a judge who conducts all voir dire, what can you do?

## Social media and background checks can help you learn what you don't find out in the courtroom.

Whether you are in federal court or not, social media and background searches are incredibly informative. But, when time is limited, social media and background checks are particularly important.

These background checks can help to overcome juror unwillingness to disclose information. We are also able to answer important questions through these searches. How does the juror's online portrayal comport with how the juror presents in the courtroom? What kind of content does the juror post? What are the juror's likes? What is his or her political bent? Has the juror posted about anything relevant to your case? Has the juror posted about his or her jury service? Does the juror have a troubled financial and/or legal history? Does anything about the juror's background contradict something the juror has said in voir dire?

We have had luck having jurors removed for cause for failing to disclose information, such as their arrest histories. While they denied any such history, we were able to find information to the contrary.

## Use social media wisely.

Following are some suggestions for making the most out of your searches:

- Go into jury selection with a plan. Create a list of positive and negative characteristics. Don't be as concerned about the positive characteristics as you are about the negative ones. We are not selecting; we are deselecting.
- Use a team of individuals and train them prior to the first jury selection. Do a practice, dry run before the jury selection.
- Use "Google Sheets" to update juror search information because this creates a live document that updates across all users' computers.
- Shade problematic jurors in red, so those jurors are not missed when it comes time to use strikes. Use red text for problematic findings and green for positive findings.
- Staff accordingly (e.g., 10 researchers for one federal case because voir dire time is so limited that we will have little time to complete all of the searches).

*Dr. David Cannon is a litigation consultant based in the Los Angeles area who has done litigation work locally and throughout the country.*

# Expecting the Unexpected in Competency Trials

*by Monica Nguyen*

I began trying cases as a misdemeanor deputy public defender for Riverside County in 2007. It is a tough craft to learn and was unlike any other job I had ever had. But, I found a formula to the process – learn the charges against my client, discover my client's defense, and present his story to a jury. Over the years, my cases became more complex, but the basic formula held static. This formula provided predictability to the process.

That predictability depends largely on the unchanging nature of the facts of the case. Criminal trials are focused on what happened in the past, which allows all of the parties to know the facts going into trial. Knowing the facts of my case informed all of my trial decisions, including counseling my client on whether to proceed with trial and deciding on a trial strategy.

About eight years ago, I began working in the mental health unit of my office, and, over time, I have developed a specialty in competency to stand trial cases. Unlike criminal trials, competency trials are very unpredictable. The reason for the unpredictability is that competency cases focus on the present mental condition of the client, not on facts that occurred in the past. In addition, the verdict in a competency trial does not provide any closure to the parties.

Competency law begins with Penal Code section 1367, and focuses on the mental condition of the accused. The factfinder in competency trials must decide whether the mental disorder of the accused impairs his/her ability to understand and appreciate the proceedings and whether the mental disorder impairs the accused's ability to rationally assist the defense attorney in the case. The factfinder must judge the accused's mental competency at the time of the trial, not in the past.

The irony is that all of the facts that I present in competency trials happened in the past. This is because the evidence that I present at trial is usually expert witness testimony from witnesses who evaluated the accused in the past. When a court starts the competency inquiry, it usually appoints two forensic psychologists to interview the defendant and return reports to the court within a month. The psychologists opine about whether or not the accused is competent to proceed with the criminal process. The psychologists frequently agree, but oftentimes do not. When they do not agree, the court may appoint a third psychologist to "break the tie." This causes another month-long delay to wait for the third examiner's report.

If all goes smoothly, the parties can stipulate to the opinions in the examiners' reports. When we cannot reach a stipulation, the court schedules a competency trial. It typically takes an additional one to three months to go to trial. During the wait, the accused's mental condition can drastically change.

Mental health is not static. For example, one symptom of bipolar disorder is tumultuous mood swings. I have witnessed many clients with this condition who seem elated one day, then profoundly depressed on another day. These periods of elation are often referred to as manic episodes. During these periods of mania, my clients can be very irrational about their expectations of the criminal process. Some have grandiose delusions that compel them to believe that it is impossible for them to be convicted of the alleged offenses. Others, may experience paranoia and believe that I am trying to harm them, which causes them to refuse to assist me. In my experience, it is nearly impossible to have rational discussions with an accused in a severely manic state, which causes their incompetence.

These clients are equally irrational when they are suffering from a depressive period. I have witnessed clients so profoundly depressed that they lose all interest in what is happening to them. It is impossible to get assistance from clients in this state of mind because they cannot assist in helping with trial strategy, naming witnesses, or even making choices about whether to plead guilty or not. They have no ability to attend to a discussion, nor do they care at all about the process.

Curiously, my clients suffering from bipolar disorder can sometimes appear perfectly fine. This happens when they are in between a manic period and a depressive period. It is extremely common for psychologists who evaluate a client suffering from bipolar disorder to have wildly different opinions, because their opinions reflect the client's mood on the day that they interviewed the client. If the client was manic, he/she may appear very incompetent. However, if the client was in between phases, he/she may appear perfectly competent.

Bipolar disorder is not the only mental health condition that changes frequently. I have witnessed similar fluctuations in those affected with schizoaffective disorder, schizophrenia, anxiety disorders, post-traumatic stress disorder, dissociative disorders, and substance-related disorders. The only consistency of symptoms

among my mentally disordered clients is that there is no consistency. Each client's symptoms are unique.

Another significant way in which my competency trials differ from criminal trials is that the verdict in competency trials does not bring closure to those involved. The trial ends with a verdict of competent or incompetent. If my client is found competent, he/she proceeds with the criminal process, just like any other defendant. If my client is found incompetent, the court orders him/her into competency treatment. Restoration of competency will occur in the jail or in a state hospital, like Patton State Hospital in San Bernardino. Most defendants return to court within six months of receiving competency treatment. When the client's competency is restored, the court resumes the criminal process right where it left off. But, this time, my clients go through the process with stable mental health.

I have grown accustomed to mitigating variables in my world. Consequently, I find tremendous satisfaction in specializing in competency law because of the constant fluctuations with my clients. My best guess for the reason that I love this work is because I believe in the ideal of fairness in the criminal justice system. I believe that fairness requires that a person accused of a charge must be of sound mind to engage in the criminal process. I believe that those impaired by a mental disorder have the right to understand what is happening to them and to be stable enough to make rational decisions for themselves. I believe that my work in this area is my contribution to a just and fair system for everyone.

*Monica Nguyen has been a public defender with the Law Offices of the Riverside County Public Defender since March 2007. She has focused on Mental Health law in Mental Health Court since November 2010.*

# IELLA Fundraiser

*by Judge Helios Hernandez*

Riverside, Dec. 6, 2018 – The Inland Empire Latino Lawyers Association (IELLA) held its annual fundraiser at the Riverside County Library. The proceeds will go to support the seven clinics the group operates. The main clinics are in Riverside, Corona, Ontario, and Colton. IELLA has a very small administrative staff. The board of directors and all of the attorneys at the clinics are volunteers.

IELLA was founded in 1978. The first clinic was founded in 1984. The current IELLA president is Laura Robles, who is a deputy district attorney with the County of San Bernardino. IELLA has helped thousands of clients with legal issues and has won awards for their efforts. Recently, one of those awards was presented by Assemblyman Jose Medina and Assemblywoman Eloise Reyes. Note: Ms. Reyes was past president of the IELLA board of directors.

Volunteers are always needed. Please contact IELLA Executive Director Sylvia Quistorf. IELLA is located in the Cesar Chavez Center at 2060 University Ave., Riverside, 92507. Phone: 951-369-3009. Website: IELLA.org.

*The first several presidents of IELLA are well known in the Inland Empire. The above photograph shows four of them: Attorney Carlos Juarez, Attorney John Vega, Judge Helios Hernandez, and Judge John Pacheco.*

# Book Review: *Justice in Plain Sight*

*by Theresa Han Savage*

## *Justice in Plain Sight: How a Small-Town Newspaper and Its Unlikely Lawyer Opened America's Courtrooms* by Dan Bernstein

In *Justice in Plain Sight*, author Dan Bernstein, a former columnist for the *Press-Enterprise*, shares how Riverside's hometown lawyer, Justice James Ward (ret.), successfully argued before the United State Supreme Court in two landmark First Amendment cases in the 1980s. The book weaves a compelling story about the hard-fought legal battle to open up the courts in capital cases, but you do not need to be a lawyer to enjoy it. The book transports the reader back in time to Riverside and the legal community in the 1980s, and makes you feel like we were "in the room where it happened."

The book begins by summarizing three heinous crimes that pushed the *Press-Enterprise* to seek access to pre-trial proceedings in capital cases. The cases included a bank robbery gone awry in Norco, involving the death of a deputy sheriff in 1980; the rape and murder of a white high school student involving a black male defendant, Albert Brown, in 1980; and multiple deaths in a nursing facility where a nurse, Robert Diaz, was charged in 1981. In each of these cases, the prosecution sought the death penalty. The *Press-Enterprise* intended to cover the entire course of each trial. However, three months after the Norco bank robbery, the California Supreme Court handed down the *Hovey* ruling "that many California trial judges would interpret as a green light to close their courtrooms during jury selection in death penalty cases."[1] In essence, the *Hovey* court stated that in future death penalty cases, voir dire of prospective jurors "should be done individually and in sequestration."[2] With this green light by the Supreme Court, Riverside judges closed the public and the *Press-Enterprise*'s access to pre-trial proceedings in all three of the cases. In fact, "[b]etween June 1981 and January 1982 alone, five Riverside County judges banned the public and the press from all or part of voir dire in death penalty trials, denying the pleas of *Press-Enterprise* lawyers to keep their courtrooms open."[3]

1 pp. 6-7.
2 p. 7.
3 p. 8.

The two men who ran the paper during the 1980s, Normal Cherniss, the executive director, and Tim Hays, the editor, believed that the public had a right to open court proceedings. The managing editor, Mel Opotowsky, had a personal interest in the Norco robbery case because he was a friend of the deputy sheriff who was killed. When the judge in the Norco robbery case closed the voir dire proceedings to the press, Cherniss contacted Ward and asked, "They can't do that, can they?"[4] Bernstein frankly states "Ward didn't have a clue. He was bright; there was no doubt about that. And conversant in a kaleidoscope of subjects. He was also a networker well before the word ever networked its way into the lexicon."[5] Anyone who knows Ward would nod and agree with Bernstein's description of Ward. Ward, as any business lawyer asked about the First Amendment would do, responded that he would look up the answer. Many questioned the paper's decision to let Ward lead its First Amendment battle since he was not a constitutional scholar or well known outside of California. Many tried to convince the paper to hire more learned attorneys regarding the First Amendment. Cherniss and Hays refused. They saw something in Ward. At the end, their faith in Ward paid off.

The paper's first attempt to have the Norco robbery case heard by the United States Supreme Court was unsuccessful. "At least four Supreme Court justices must vote to hear a case, but the newspapers only got three[.]"[6] Then, the very next day, a Riverside judge "permanently sealed the jury selection transcript in the Albert Brown death penalty case[.]"[7] Instead of feeling discouraged, Ward and the paper believed they could convince the United States Supreme Court to grant review and eventually rule in the paper's favor. The book carefully and entertainingly summarizes the steps Cherniss, Hays, Opotowsky, and Ward successfully took in *Press-Enterprise I* to open up voir dire in the Brown case, and later, where the court opened up preliminary hearings in the Diaz case in *Press-Enterprise II*, all the way to the United States Supreme Court.

4 p. 7.
5 p. 8.
6 p. 24.
7 p. 41.

Aside from the necessary legal research to be conducted, in both *Press-Enterprise I* and *Press-Enterprise II*, Cherniss and Ward recognized that they needed powerful allies to file amicus briefs to be successful in the Supreme Court. "[Ward] and Cherniss worked the phones and wrote letters enlisting newspaper editors and lawyers to submit briefs on behalf of the Press-Enterprise. 'The more high-powered, the better,' thought Ward. [fn.] Prominent newspapers and reputable First Amendment lawyers would complement the less prominent Riverside paper and its virtually unknown attorney."[8] Bernstein frankly gives credit where it is due, often mentioning the associates who assisted Ward with drafting the briefs and fine-tuning the legal issues, John Boyd and then-attorney Sharon Waters. Waters was later appointed to the Riverside County Superior Court in 1998 and was presiding judge in 2005 and 2006.

In addition to the legal strategies involved in both the Brown and Diaz cases, Bernstein's summary of Ward's two trips to the United States Supreme Court for oral argument makes you feel like you are in the courtroom. The questioning by the justices and Ward's responses were at times interesting and intense, and at other times comical. I could feel my muscles tense up when difficult questions were posed by the justices, and smile when Ward tried to crack jokes with the justices or gave an inspiring response. I savored reading Ward's last words to the court in *Press-Enterprise II*: "Three times this Court has called for openness of various judicial proceedings, at least three times. Twice the California Supreme Court since 1982 [voir dire and preliminary hearings] has not heeded that admonition at all but has instead found for closure of proceedings and provided an easy standard for closure which we believe will result in a denial of the rights of the citizens of the State of California. . ."[9]

For everyone who thinks practicing law is glamorous and the battle is in the courtroom, the book gives a glimpse into the real lives of lawyers – spending endless hours doing research in a library to find a "needle in a haystack," and writing and re-writing briefs to craft the perfect argument. Most civil lawyers would agree that hours spent researching and writing far exceed the hours that litigators spend in the courtroom. For non-lawyers reading the book, the non-glamorous aspect of practicing law may come as a surprise.

Whether you're a lawyer or a history buff, you will enjoy reading about how an unlikely small-town Riverside newspaper and lawyers successfully fought to open public access to criminal proceedings in the United States.

Please join us for the RCBA general membership meeting on May 17, noon, in the John Gabbert Gallery, when Dan Bernstein, Justice James D. Ward, and Mel Opotowsky will discuss Bernstein's new book and answer questions. The book will be available for purchase at the meeting.

*Theresa Han Savage is a senior research attorney at the California Court of Appeal in Riverside and past president of the RCBA.*

8 pp. 76-77.

9 p. 184

# Classified Ads

**Office Space – RCBA Building**

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

**Office Space – Downtown Riverside**

Riverside Legal & Professional Center. Downtown Riverside walking distance to Courthouse. Private Executive Suite offices, virtual offices and conference rooms rental available. We offer a state of the art phone system, professional receptionist and free parking for tenants and clients. Accessible from the 91, 60 and 215 freeways. (951) 782-8089.

**Civil Litigation/Premises Liability Attorney**

Seeking attorney to join our Civil Litigation/Premises Liability team. Potential candidates must possess a strong background in litigation matters (at least 3 years of civil litigation, premises liability and insurance defense experience). The following are requirements for this position: excellent written and oral communication skills, excellent organizational and interpersonal skills, acute attention to detail and ability to multi-task and must have initiative, be able to act decisively, work independently and exercise excellent and ethical judgment. Please send resumes to vb@varnerbrandt.com.

**Conference Rooms Available**

Conference rooms, small offices and the Gabbert Gallery 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.

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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 March 30, 2019.

**Bianca N. Alfaro** (A) – Manufacturers Bank, Brea
**Suyi Chen** (A) – Manufacturers Bank, Brea
**Maria T. Delgado** – Sahagun Law, Riverside
**Renee S. Fahrendholz** – Elder Law Center, Riverside
**Robert H. Gottlieb** – Solo Practitioner, Menifee
**Vincent S. Hughes** – Law Student, Grand Terrace
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