

RIVERSIDE LAWYER

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MAGAZINE

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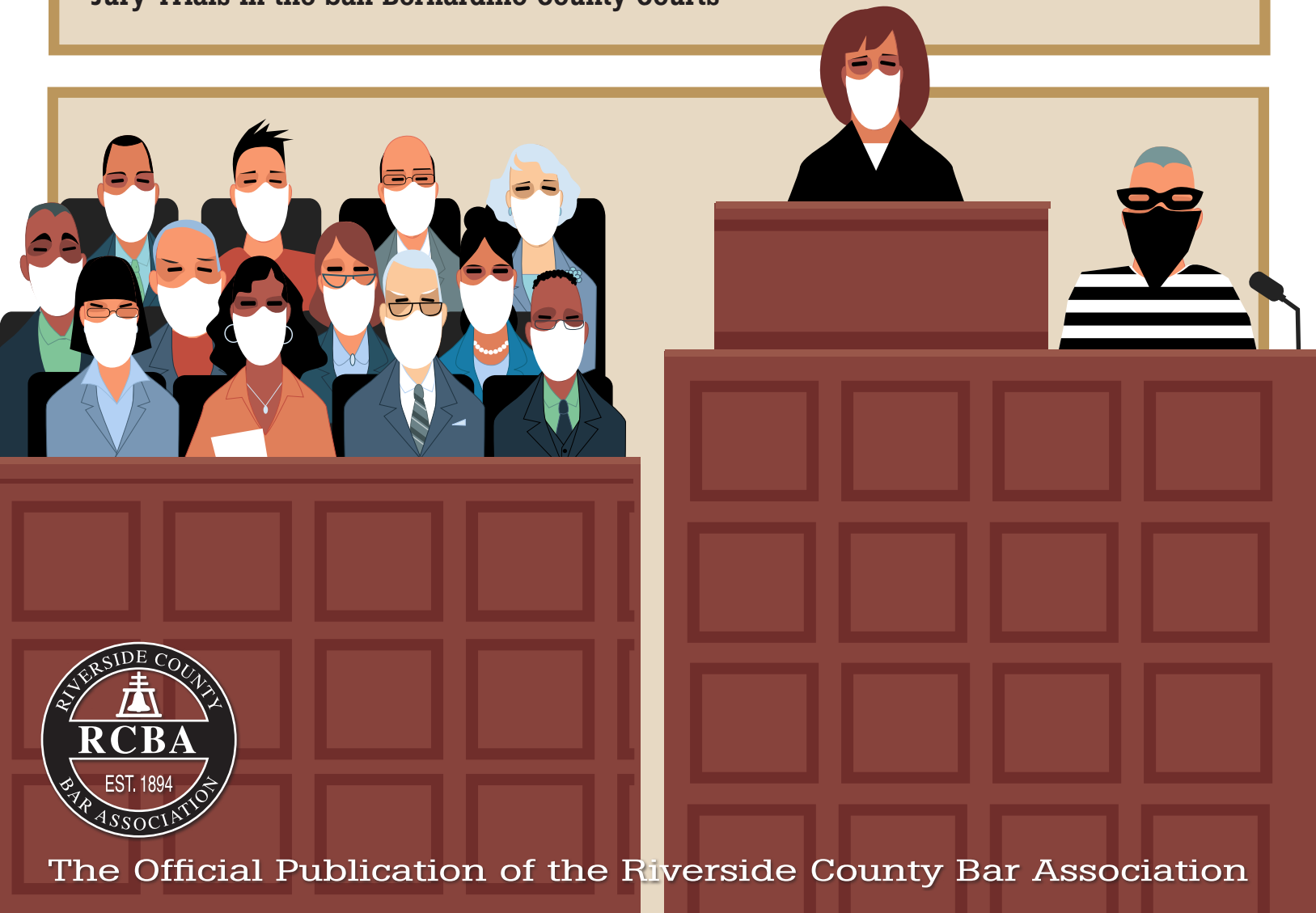
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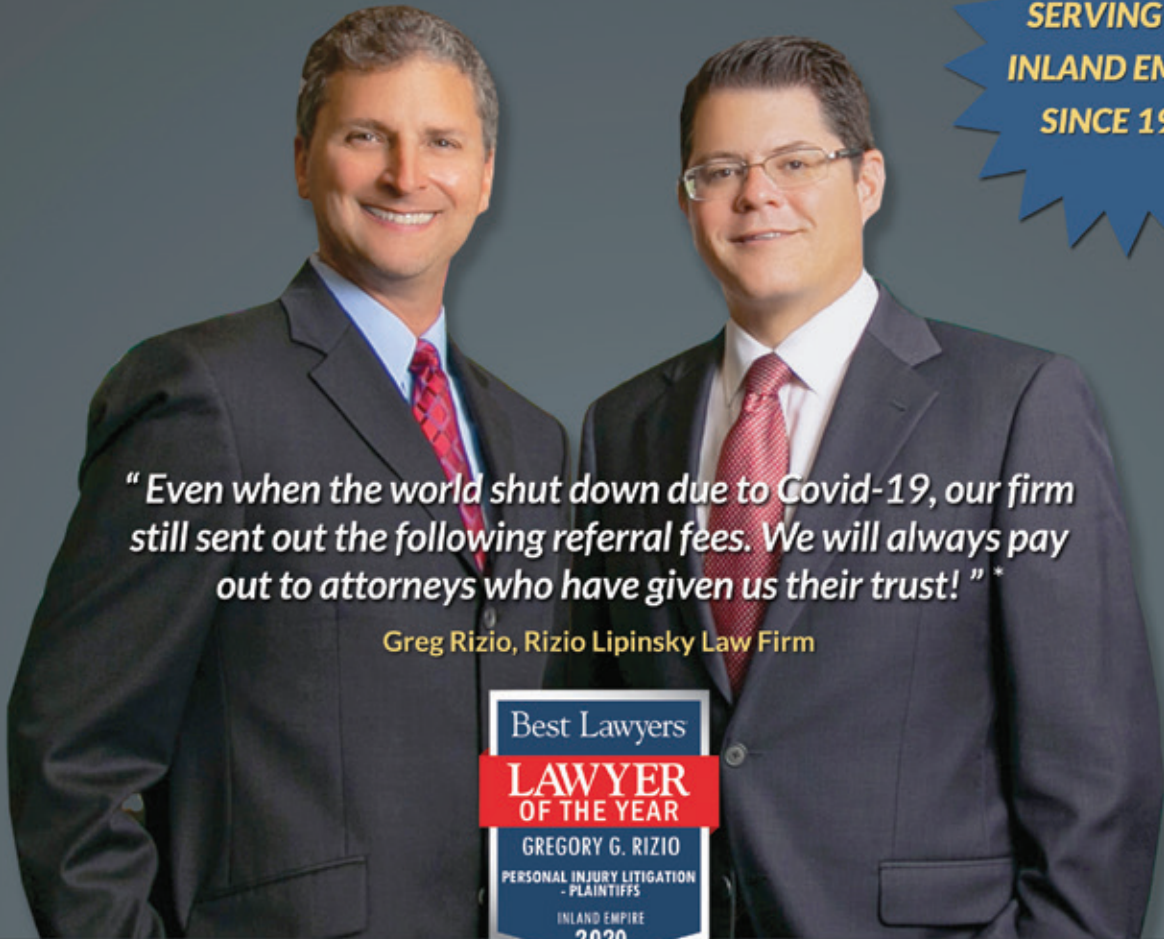
Jury Trials in the San Bernardino County Courts





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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 \$30.00 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

January

15 MCLE Marathon

Zoom
10:00 am – 11:00 am
Topic: “Covid, Chemicals and Competence”
Speakers: James Heiting & Michael Razo
11:10 am – 12:10 pm
Topic: “Implicit Bias: Say What? That’s Shocking!”
Speaker: Justice Richard T. Fields
12:20 pm – 2:20 pm
Topic: “Tips and Trends in Professional Responsibility 2021”
Speaker: Robert Hawley

22 General Membership Meeting

Noon – 1:15 p.m.
Zoom
Speaker: Mohamad Khatibloo PhD
Topic: “Ethics in the Criminal Justice System”
MCLE

27 Juvenile Law Section

Co-Sponsor – Riverside County Public Defender
Noon – 1:15 p.m.
Zoom
Topic: “Interstate Compact for the Placement of Children, Part 1”
Speakers: Carol Perez, Deputy County Counsel for County of Riverside, & Bruce Rudberg, Social Services Supervisor and ICPC Coordinator for Riverside County DPSS-CPS
MCLE

Please see the calendar on the RCBA website (riversidecountybar.com) for information on how to access the Zoom meetings.

EVENTS SUBJECT TO CHANGE.

For the latest calendar information please visit the RCBA's website at riversidecounty-bar.com.





President's Message

by *Sophia Choi*

Happy New Year! We made it to 2021. I hope everyone enjoyed the holidays and concluded 2020 in good spirits. Despite all the challenges 2020 brought, all in all, it was a blessed year for me.

The RCBA Elves Program in 2020 was extremely successful and another reminder of how giving the Riverside community of lawyers are. I cannot thank enough Brian Percy for chairing this wonderful program and making it so successful, especially in a year in which many families needed that extra holiday spirit. RCBA's Executive Director Charlene Nelson has also orchestrated the logistics of the program so effectively and cannot be acknowledged enough for her efforts. As usual, RCBA members served as money, shopping, wrapping, and/or delivery elves. Due to our generous group of members, we had an abundant number of members participating in these roles. The generosity of the money elves was in an amount exceeding \$16,000.00. Much appreciation to RCBA Secretary Mark Easter for his essential role in collecting a huge portion of that amount by reaching out to his firm's attorneys and staff. The shopping this year was done at Walmart (instead of Kmart as we did in past years), and so many members went to pick out gifts for the 70 families that the elves were providing holiday gifts to this year. Although the wrapping elves were probably looking forward to the comradery and socializing while wrapping together, this year, we had to make adjustments due to COVID-19. Wrapping elves had to pick up the presents and wrapping paper to wrap socially distanced and to bring back the wrapped gifts, which did not stop our members from volunteering their time to do so. Finally, the delivery

elves delivered all the wrapped gifts to the 70 families. Thank you to everyone serving as an RCBA elf this year.

As we begin the 2021 membership year, membership certificates and/or physical membership cards are now available for all members. Please contact the RCBA office to request yours. As we have started the RCBA Members' Discount Program, these certificates and cards can be presented at the participating businesses as your proof of membership.

We are also happy to inform you that the RCBA building has upgraded its security. New security cameras have been installed, and new locks and keypad accesses have been added for the stairwell and the elevator. With the RCBA building's renovations, security enhancements, and upgraded furniture for the Gabbert Gallery, we look forward to gathering in person once again, and I hope that can safely happen in 2021.

I cannot believe that one-third of my term has already been completed. I am hoping the board can collectively work towards common goals and accomplish many tasks with the remaining two-thirds of my term as president. I also hope that before my term is up, we will be able to safely have at least one in person event!

Happy New Year, and I wish everyone a happy, healthy, and prosperous 2021!

Sophia Choi is a Riverside County deputy district attorney, past president of the Leo A. Deegan Inn of Court, inaugural president of APALIE, and past vice president of the Korean Prosecutors Association.



MCLE

Attorneys with last names beginning with **H-M** (Group 2).

Compliance Period: **2/1/18 - 1/31/21**

Deadline to Report: **Feb. 1, 2021**

MCLE Marathon

Friday, January 15, 2021
10:00 a.m. to 2:15 p.m. (via Zoom)

4 hours total credits, including:
2 hours of Legal Ethics
1 hour of Elimination of Bias
1 hour of Competence Issues

Contact RCBA for more info.

BARRISTERS PRESIDENT'S MESSAGE

by Goushia Farook



Jumanji Season 2

Welcome to 2021! A new year that will hopefully not mirror the last in most ways! Many things in this new year remain uncertain. In the legal field, one major unknown is the future of trials and how they will be conducted, especially in family law. Pursuant to

Emergency Rule 3(1)(a), courts may require judicial proceedings and court operations be conducted remotely.¹

In family law, trials set for early this year have been vacated and converted into Trial Readiness Conferences. If and when in-person trials happen remains unknown at this time. Alternatives can be explored, but due process considerations must have the utmost attention. Clients want resolution and closure, but they also want their day in court, literally. Most practitioners anxiously await the balance that courts will settle upon, as well as how we might best navigate new systems to ensure proper advocacy for our clients.

Despite the uncertainty this new year may hold in the many facets of our profession, I do wish you all a wonderful and happy new year and hope it is full of joy and happiness!

Furristers FUR Life!

Last year, my Barrister-in-Chief, Paul Lin, was unable to do a hike at Mt. Rubidoux at the end of his term due to COVID-19 restrictions. I wanted to make sure we did one this year, situation permitting! The goal of this recurring hike is to have everyone participate in an outdoor activity and bring along their pets. I am happy to say this is one goal that has been successfully achieved this year. We had a great turnout for our 2020 Furristers hike! Thank you to all who attended and I hope to have another excursion next year. It is also my hope that next year's hike can include a post-hike brunch. During a term where many events have been canceled or remain a mere hope, it was wonderful to see this event happen. It was also wonderful to see friends come together in person. Being able to have the hike keeps my optimism charged!

¹ www.courts.ca.gov/documents/appendix-i.pdf.



Winner's Circle

We had a wonderful virtual happy hour on November 12, 2020. Using Jackbox, we were able to incorporate games into our social hour. Breathe Easy generously sponsored prizes, which included Amazon gift cards. We had several lucky winners. While it is not the same as in-person, it was a wonderful way to see everyone and catch up. Most exciting for me was seeing new faces! For me, new participants at our events means future board members to carry on our work, so that Barristers continues to be a foundation for newer attorneys. Thank you to all first-time attendees and I hope to see you and more new faces at future events!

Elves of Joy

I was ecstatic to participate in the RCBA Elves program in December. There was concern the event may be canceled, but fortunately it was not. Historically, Barristers have participated in the Elves wrapping night with a happy hour afterwards. Sadly, wrapping at the RCBA Building was not an option this year and neither was happy hour. Nevertheless, the true objective of the program was not foiled by the 2020 grinch! The wonderful individuals from my office participated in shopping on December 15, 2020, alongside Barristers and the many





others who generously contributed their time. Charlene Nelson was amazing, as always, coordinating our Elves' gift-wrapping efforts in the days that followed. To know we were able to make Christmas a memorable, happy occasion for so many families is the best gift I could have asked for! I look forward to Barristers being able to participate more fully in our traditional manner – next year!

Upcoming Events

January 22, 2021: 2-hour MCLE marathon. Topics and times are being arranged now. Keep an eye out for updates regarding this event!

Date TBD: Virtual Happy Hour in the New Year! Date and time are pending!

Follow Us!

For upcoming events and updates:

Website: RiversideBarristers.org

Facebook: [Facebook.com/RCBABarristers/](https://www.facebook.com/RCBABarristers/)

Instagram: [@RCBABarristers](https://www.instagram.com/RCBABarristers)

If there are any events you would like to see the Barristers host, MCLE topics you would like to see covered, or community outreach options, please contact us and we would love to explore those ideas with you. You can also reach me personally at goushia@brlfamilylaw.com.

Goushia Farook is an attorney at Bratton, Razo & Lord located in downtown Riverside where she practices exclusively in the area of family law. She is a member of the board of directors of the Inland Counties Legal Services (ICLS) and a member of the Leo A. Deegan Inn of Court and Asian Pacific American Lawyers of the Inland Empire (APALIE). Goushia can be reached at goushia@brlfamilylaw.com.



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THE CHALLENGES OF TRYING A CAPITAL MURDER CASE

by Marcus King

Capital Punishment has been around since the beginning of our country. Even before the United States gained its independence, executions were recorded as far back as 1608 in the Jamestown colony of Virginia. Today, 28 states still carry out the death penalty. Other states have abolished the death penalty. Colorado abolished the death penalty in 2020, and other states have done the same in previous years, including New Hampshire, Maryland, Connecticut, Illinois, and New Mexico.

The state of California has not abolished the death penalty. Or has it? In 1972, California did abolish the death penalty. In the case of *People v. Anderson* 6 Cal. 3d 628 (1972), the California Supreme Court interpreted the wording of the California State Constitution, which differed from the similar wording in the Eighth Amendment of the United States Constitution. Rather than cruel and unusual punishment, like the Eighth Amendment prohibits, California prohibits cruel or unusual punishments. The court found that the death penalty met that criteria and was therefore impermissible.

That abolishment of the death penalty was very short-lived. After the California Supreme Court's February 17, 1972 decision in *People v. Anderson*, a referendum was placed on the ballot to reinstate the death penalty by amending the state constitution. The referendum, Proposition 17, was passed with 67.5% of the vote. The death penalty was no longer unconstitutional in California, and although California could inflict the death penalty, and people were sentenced to death in California, the next execution carried out in California was on April 21, 1992, when Robert Alton Harris was put to death for the murder of two young boys in San Diego.

How do Californians feel about the death penalty now? What voters have shown in the California ballot referendums has been an opposition to replacing the death penalty with life without parole. In 2012, such a measure was defeated (Proposition 34), receiving just 48% of the vote. In 2016, a similar measure was defeated (Proposition 62), this time receiving only 47% of the vote. However, the other death penalty referendum that year (Proposition 66) passed with 51% of the vote, which sped up the appeals process for death penalty cases to be decided in 5 years. These slight margins of victory for keeping the death penalty and speeding up the process show that people are more on the fence than the super-majority of Californians who voted to bring the death penalty back over 40 years ago.

Today, California is not currently carrying out executions. The last executions carried out in California were in December 2005 and February 2006. On March 13, 2019, Governor Gavin Newsom signed Executive Order N-09-19, which established a moratorium on the death penalty in California. This makes California have a bit of a conundrum. Are people really safe from the death penalty?

The death penalty is a punishment reserved for some of the most heinous crimes. The moratorium does not stop the death penalty from being a punishment at sentencing. It stops the punishment of the death penalty from being carried out.

A death penalty trial requires a "death-qualified jury" to be in place. In a death penalty case, jurors are asked questions during *voir dire* in order to determine that they are willing to consider all of the sentencing options. If any of their opinions prevent them from considering any of the sentencing options in the case, then they are not allowed to serve on the jury, as they are deemed to not be "death-qualified" for the trial.

The conundrum that now exists in trials where the death penalty is a potential punishment is whether the moratorium has an impact on the willingness of jurors to sentence a person to the death penalty. Is a juror more likely to approve of the death penalty in a trial if they believe the person will ultimately not be put to death? A juror could potentially vote for the death penalty under a false assumption that the person's death sentence will never be enforced. Which is not the case.

In addition, attorneys face many challenges when conducting a trial where the death penalty is a possible punishment. An attorney may essentially be pleading with the jury, saying that "even if my client did this heinous crime, they do not deserve to be put to death." And in such cases, how receptive will the jury be to a defense that includes that sentiment? One might also speculate that the jury may be predisposed to put a defendant to death when they make it onto a death-qualified jury. One thing is certain: in a state where executions are on pause from being carried out, capital cases are about much more than simply a life or death issue.

Marcus King is a third year law student at the University of La Verne College of Law and has clerked with the Public Defender's Office of Riverside for the past two summers.





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THE BENEFITS OF LOW EXPECTATIONS IN CRIMINAL JURY SELECTION

by Souley Diallo

Imagine the proverbial campground fire surrounded by veteran criminal trial lawyers. One would expect to hear stories of the riveting closing argument, the devastating cross examination, or the underrated value of effective opening statement. Trial lawyers have been discussing and honing these techniques since their first trial advocacy class in law school.

When the conversation turns to the subject of jury selection – the chatter is quickly replaced by the sound of crickets. The technique of picking a jury is developed through a frustrating process of trial and error — less art, less science, more voodoo. Even the French term of art for jury selection – *voir dire*, suggests a byzantine and foreign endeavor. There is no exact template – there are as many opinions as to the perfect way to pick a jury as there are trial lawyers. So much so that some lawyers throw their hands up in frustration and adopt the “pick the first twelve” strategy.

Few would question the notion that the composition of the jury has a significant outcome on trials. If we had the benefit of a full psychological profile, FBI background investigation, and a polygraph test, picking the perfect jury would be an easy task. But the unfortunate reality is that the process of jury selection is a poor vehicle for achieving the ideal jury. There are several hurdles that make the task difficult.

The initial hurdle of jury selection is one of attention span. We ask prospective jurors to leave their jobs and their families to fight traffic, parking, and arrive on-time to a place that few people voluntarily choose to go – a courthouse. Then we ask them to be questioned in a room full of strangers by lawyers and judges. We ask them to divulge personal information about their employment, their families, their hidden biases, and their belief systems. We ask them to do it in time for the lunch break.

Another hurdle is the law. In civil cases there is a higher tolerance for the art of attorney-driven *voir dire* with the aim of ideal jury composition. Fairness is achieved through the adversarial system in which both parties have an equal chance of influencing the jury.

In contrast, in criminal cases, the use of *voir dire* is limited for the purpose of developing challenges for cause. Accordingly, judges reign in lawyers’ questions

into the attitudes and beliefs of jurors, unless they have a clear nexus to a legal challenge. This heavy-handed approach to attorney-lead *voir dire* has been relaxed by recent statutory reforms. Judges no longer can impose arbitrary time limits on attorney *voir dire*. Further, courts must allow for “liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case or the parties before the court.”¹

Notwithstanding these hurdles, attorneys can effectively use *voir dire* with lowered expectations for what it can accomplish. Picking the perfect jury is chasing a unicorn. Instead lawyers should focus on avoiding those poison-pill jurors that can drive a negative result in the deliberation room. Instead of “jury selection,” think “*jury de-selection*.”

Judges vary greatly in their procedures for jury selection, so it is important to get an understanding of the court’s procedures in the pre-*voir dire* conference. Consider requesting the court cover certain subjects in its questioning of jurors to maximize attorney *voir dire* time. The use of a questionnaire can be an effective way of getting more information from jurors in highly complex, lengthy, or inflammatory cases – where questioning on certain subjects in open court has limited value. Also, it may be appropriate to get permission of the court to question on certain subjects to avoid objections in front of the jury.

Jury selection should be a “judgment free zone.” Attorneys tend to be preconditioned to seek answers from jurors that are favorable to their side of the case. When attorneys display judgmental attitude – jurors will clam up; only answering questions with platitudes and socially acceptable answers. These “stealth jurors” may end up on the panel – only to reveal their true attitudes in the sanctity of the jury deliberation room. Therefore, counsel should avoid making comments or displaying negative body language that indicates displeasure with a prospective juror’s answer.

An unsuccessful *voir dire* is one where the attorneys do all of the talking. Therefore, it is incumbent upon attorneys to ask provocative questions that spark discus-

¹ Cal Code Civ. Proc. § 223

sion. To the extent that they are relevant to the case, lawyers should not avoid subjects like race, law enforcement attitudes, mental health, drugs and alcohol, domestic violence and sexual offenses. If counsel has done a proper job creating a non-judgmental environment – this questioning should produce fruitful responses.

In contrast, counsel should avoid giving speeches or civics lessons that will not reveal any actionable information about your jurors. Close ended, interview-style questions also get glazed eyed, limited responses.

Lawyers also mistakenly avoid negative aspects of their case during *voir dire*. To the extent permissible by law, counsel should delve into inflammatory charges, graphic evidence, uncharged misconduct evidence, and prior convictions. Such evidence should be discussed in *voir dire* for two reasons. First, it is necessary to discover prospective jurors who have negative attitudes to such evidence, so that they can be removed for cause or through the use of pre-emptory challenges. Second, disclosure of such evidence at an early stage ultimately desensitizes jurors when such evidence is ultimately presented at trial.

The exercise of pre-emptory challenges relies upon the intuition of the experienced trial lawyer. Every trial is different and every lawyer has their own process that

leads to a favorable jury composition. Using pre-emptory challenges in a fishing expedition for “favorable jurors” inevitably leads to disaster. Instead, the focus should be getting rid of bad jurors. Accordingly, counsel should avoid exhausting pre-emptory challenges and accepting the panel when the bad jurors have been eliminated.

After trial most judges allow counsel to interview jurors regarding their opinions and attitudes about the case. Lawyers often take advantage of these interviews to gather feedback about their trial presentation. However, an underrated value of these post-trial interviews is testing the lawyer’s intuition regarding jury selection.

Jury selection can be a frustrating process with mixed, unpredictable results for even the experienced trial lawyer. The key is lowered expectations of what *voir dire* can realistically achieve. A focus on jury “de-selection” revealing negative attitudes of prospective jurors and removing them from the panel, provides the most consistent path to a favorable jury composition.

Souley Diallo is a deputy public defender for the County of Riverside. Mr. Diallo works as a trial attorney in the Complex Litigation Unit, where he represents clients in capital cases, homicides, and other serious felonies.



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THE SILVER LINING TO THE COVID PANDEMIC: BRIAN'S STORY

by Jennifer Amato

Litigating a criminal jury trial under the best of circumstances can often present as a challenging and daunting task. These challenges have now been exacerbated by the COVID-19 pandemic. One area of our already overworked and overloaded justice system that was hit the hardest by the effects of the pandemic is our criminal jury trial system.

At the start of March, the criminal courts in Riverside County did a partial shutdown in response to the overwhelming numbers of infected individuals and deaths within our county related to the pandemic. During that period, the Chief Justice of the California Supreme Court issued several emergency orders extending the statutory last day for trials, even over the defendant's objection. As a deputy public defender with many in-custody clients who were effectually trapped behind bars with little or no protection from the virus, these extensions and unwanted delays were met with extreme frustration. Many of my clients could not afford to bail out and at the same time they seemingly had no control of when or if they would get to exercise their Constitutional right to a jury trial. One such client was Brian Stough. Brian is a 52-year-old man who was charged with assaulting his neighbor, inflicting great bodily injury, and committing criminal threats in October 2018. Both charges were strike offenses and the district attorney sought to send Brian to prison.

In September 2020, Brian's case made its way over the many COVID related hurdles and our trial began. There was so much unknown about how the court would operate with the newly implemented safeguards and whether these protections would truly be enough to protect us all from the virus. There were questions about just how many prospective jurors would show up for jury duty and I wondered myself if I were in their shoes, would I show up? I anticipated that those jurors who did appear would likely say anything to get out of service and considering the situation, would anyone blame them?

That first day of jury selection, Brian and I watched as the jurors shuffled into the courtroom wearing their masks and visibly curious about just what this process would look like in the midst of COVID. What I realized in talking with these jurors is that there was a sort of warmth and kindness in the room that I did not expect. In retrospect, I believe that the general feeling within the courtroom was centered around the reality that we were all in it together. Whether you were the judge, defendant, defense attorney, prosecutor, court reporter, deputy, clerk, or prospective juror, we were all human beings facing extraordinary personal and professional challenges amid a global pandemic.

As the trial progressed, we all adjusted to make the situation as safe as possible. There were only six jurors seated in the jury box and the remaining six and alternates were seated in the gallery behind counsel table. Everyone wore masks and

witnesses testified behind a plexiglass shield and could remove their mask, only if they chose to. *Voir dire* with masked jurors was a challenge that I had never faced before. I could not see their reactions to questions, whether that be a smile or frown. This was a huge disadvantage in that the evaluation of prospective jurors is critical to selecting what you believe are the most favorable jurors to your defense. Would they be able to connect with me or Brian since we were also masked? The other main concern was how would the jurors be able to effectively evaluate the masked witness' testimony.

On day nine of the trial, the jury began deliberating and after just over two hours, they had reached verdicts. As Brian was brought back into the courtroom, I informed him that they had reached verdicts. His head hung low and he said, "That's way too fast. I'm going to prison." I could not respond as I had no idea what was to come. All we could do was wait in silent anticipation. Brian and I stood for the verdicts and you could hear a pin drop as the clerk began to read from the verdict forms. The jury found Brian not guilty on all counts. After over two years in custody for crimes he did not commit, he was a free man.

Some jurors waited patiently outside the courtroom after the verdicts to speak with counsel although they were free to go. After his arrest Brian lost his housing, vehicle, and personal belongings. He had nothing. They talked about how Brian was the true victim and how they believed he had acted in self-defense.

Since his acquittal, a juror gifted Brian a vehicle and \$500 in cash. Another gifted him a gift card and many other people who heard Brian's story have since reached out and made donations to help Brian get back on his feet.

Brian has since secured fulltime work with a local cabinet maker. He spent almost two months in a homeless shelter and just this week he rented his own place. Brian shared with me that it had been over two years since he had slept alone in a dark place of his own; both the jail and shelter required that the lights remain on throughout the night.

While we as a world are all going through such a devastating and trying time, these jurors and the many people who reached out to help Brian in his time of need are true examples of what is right with this world. The silver lining is that acts of humanity and kindness are just what allowed Brian to find peace in darkness and time alone for healing.

Jennifer Amato is a deputy public defender with County of Riverside, currently assigned to litigate felony trials in our Indio office. She is passionate about her representation of clients and ensuring that they are given an opportunity to have their voices heard and that their rights are protected.



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CIVIL JURY TRIALS IN RIVERSIDE COUNTY: BEST LAID PLANS...

by Honorable John Vineyard

As the COVID-19 pandemic extended through the Summer of 2020, and experts predicted longer and greater impacts, it became clear that the Riverside Superior Court would not be conducting live civil jury trials until mid to late 2021. As I write this article (December 23, 2020), vaccines are in the early stages of deployment, with projections of wide distribution by late Spring or early Summer of 2021. Until the vaccines have made the impact on the pandemic that we all hope for, social distancing and other pandemic mitigation measures will be necessary. Several months ago, civil judges began working on plans to conduct virtual jury trials beginning in January 2021.

We are also in the throes of the COVID-19 “Thanksgiving Spike,” heading into the Christmas and New Year’s spikes. It appears that the pandemic will get worse before it starts to get better. In early December, Governor Newsom issued a new Stay at Home order to address the scarcity of Intensive Care Unit (ICU) beds and the general impact of COVID on the healthcare system in California. In response to that order, I consulted with our court leadership and we made the decision to suspend new jury trials until at least December 29, to reduce the risk to jurors and others in our courthouses. Since we were only conducting jury trials in our criminal division, only criminal trials were affected by that order. The new orders will not be lifted until ICU capacity in our region exceeds 15%. As of today, that capacity is 0%. Today, I signed an order extending the suspension of jury trials through January 2021. That order will impact civil jury trials.

Some context and background will be helpful in understanding why we cannot conduct civil jury trials live and why we will not be able to do so for quite some time. Before the pandemic, the Riverside Superior Court had twenty-five criminal trial departments operating throughout the county. At the end of November, we had twelve, and that was our maximum capacity. Why? And how does that impact civil trials?

In response to the pandemic, as we reopened our courtrooms over the summer, we took several steps to avoid the spread of COVID-19 that have significantly reduced on our ability to conduct live trials. The most

direct impact is caused by social distancing. Instead of calling a panel of seventy-five jurors to a courtroom for *voir dire*, we can now call only eighteen at a time. Our jury assembly rooms which, pre-pandemic, could accommodate hundreds of jurors at a time, can now accommodate fewer than one hundred. Jurors still report for jury duty when they are summoned, but at a rate 5-10% lower than pre-pandemic and many more request to be excused for hardship. With these logistical limitations, we can barely keep twelve trial courtrooms operating. We have also added more misdemeanor and criminal calendar courts to reduce the number of people in those traditionally high-volume courtrooms, so we have fewer courtrooms and judicial officers available for trials.

What does that have to do with civil trials? First, we simply cannot process the additional jurors that would be needed for civil jury trials. In Riverside and Murrieta, civil and criminal share the same jury assembly rooms. In Palm Springs, the jury room, and the building in general, are inadequate to accommodate social distancing (which is why the Palm Springs Court is not yet open to the public). Second, in the Riverside Historic Courthouse, and to some degree in Palm Springs, the courtrooms are not large enough to seat a full jury with social distancing.

So, what is the plan for civil jury trials? Virtual jury trials. A committee of judges, beginning with Judge Angel Bermudez who laid the initial ground work, followed by Judges Russell Moore and Craig Riemer, with input from the entire civil bench, has developed protocols and procedures to conduct civil jury trials via WebEx. Judge Bermudez and Judge Moore have presented several webinars to the bar to introduce the virtual trial plan. Emergency Rule of Court No. 3 authorizes the use of remote technology for all civil proceedings. Several of our civil judges have successfully completed bench trials via WebEx, and other California courts (notably Alameda County) have successfully completed virtual jury trials. While we understand the drawbacks to virtual jury trials, and understand that they are not optimal, they are, for the foreseeable future, the only viable option for Riverside County. While, each judge

has the discretion to set, conduct, continue or stay trials, the consensus of our bench is that we will be conducting virtual jury trials until we can begin live trials again.

Until today, civil jury trials were still scheduled to begin, virtually, in January. However, since our plan requires civil jurors to report initially to the jury room to take the juror oath and fill out a questionnaire, civil jury trials are now suspended until January 29 (at least). Each civil judge will exercise his or her discretion to continue, trail or otherwise address trials set in January. Personally, as I return to Department 7, I intend to use the trial calendar as an opportunity to make sure parties and counsel are prepared for virtual trials, so that they are ready to go when we can start virtual jury trials. In the meantime, civil bench trials and all other civil proceeding will go forward as scheduled, via WebEx.

As I write in December, I can't predict when virtual jury trials will begin, other than that they will begin, and that they will continue as long as social distancing is necessary.

Additional information, including details, department rules, and orders for virtual jury trials are available on the Court's website.


Honorable John Vineyard just completed his term as presiding judge of the Riverside Superior Court in Riverside County on December 31, 2020. He is a past president of the RCBA.



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RIVERSIDE, THE WILD WEST: THE CUMMINGS CASE

by Chris Jensen

John W. Cummings and his brother Caesar, both of El Monte, leased an 800 acre ranch along Pigeon Pass in the Box Springs Mountains of Riverside County. Their landlord was T. C. Naramore, a Civil War veteran and survivor of the infamous Confederate prison at Andersonville.

In 1884, the Naramore family migrated to Southern California to take advantage of the then Los Angeles real estate boom. Naramore had acquired a ranch in Box Springs, lived on it for a short while and became somewhat known in the Riverside community.

The Cummings brothers leased the Naramore ranch as sharecroppers, raising barley hay. By August 1, rent was due Naramore. However, the Cummings were not in a position to pay their landlord even though the crop was in and sold in neighboring San Bernardino. Apparently the Cummings brothers lost a check in the amount of \$250, half of the rent due their landlord.

In an effort to find out when payment would be made, Naramore visited the two brothers on the ranch that 3rd day of August. The lost check was found, funds were delivered to Naramore, and a receipt was given to the Cummings brothers.

Caesar Cummings, believing the business with their landlord over, hitched a horse to a cart and with Juan Lopez for company, started down the hill to the city of Riverside.

Caesar, having arrived in Riverside about 7:30 p.m., undertook his business. About 11 o'clock that night, Caesar and Juan Lopez set off back to the ranch. Caesar and Juan arrived at the ranch about midnight where

they found Naramore bound, gagged, and dead. John Cummings was also found bound and gagged, but uninjured.

John related to Caesar that after cooking and eating supper, John and Naramore had a conversation about an adjoining ranch owned by the Adams family. During that discussion, two men burst into the ranch house. Both of the intruders wore dark clothes; one man had a black mustache, the other had sandy whiskers. The sandy-whiskered man had two guns, one in each hand. He ordered John and Naramore to put their "hands up!"

According to John, both he and Naramore stood as ordered. John raised his hands, as ordered, but Naramore refused. The taller of the two rogues struck Naramore for his non-compliance. The man with the guns demanded again, "throw up your hands, you son of a bitch, or I'll blow your head off."

John was instantly spun around, tied from behind, and then thrown to the floor. John's feet were then tied. A handkerchief was thrown into John's mouth and then tied behind his head.

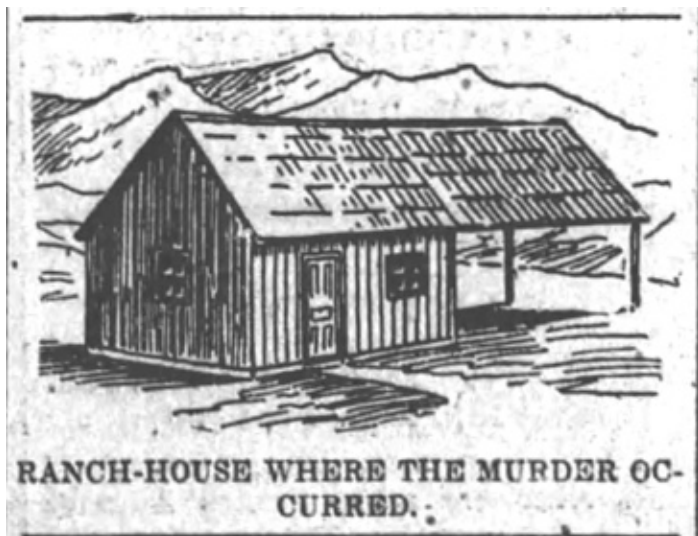
John could no longer see the events with Naramore, but heard extensive scuffling. John begged not to be killed. John heard rattling of money then the sound of the two scofflaws running out the door.

John could hear Naramore trying to speak, apparently begging for John to come over. John was not able to comply. All he could do was lay there and listen to Naramore breathing heavily. After about an hour all was still.

Eventually, about midnight, Caesar and Juan Lopez returned. Juan untied John. Caesar went to Naramore, pulling out a flask of whiskey then pouring some of it down Naramore's throat thinking he'd revive Naramore. Caesar put the bottle of whiskey on the table. John picked it up, turned to Caesar and asked if it had touched Naramore's mouth. John drank the rest of the whiskey and threw the bottle away; the bottle striking a rock and breaking. John kicked the pieces of the bottle under the house.

The three men went to the corral, caught a horse and hitched it to the cart. Juan Lopez was sent to the neighboring Adams house to tell them what happened. Caesar then started for Riverside to notify the officers.

It was 4:00 Sunday morning, August 4, when Caesar arrived at the Sheriff's office in downtown Riverside.



Deputy Sheriff Dickson, accompanied by Marshal Wilson and Officer Baird, as well as Justice Mills, acting coroner, and a few other concerned citizens, mounted their horses to proceed to the ranch with Caesar. It was about 8:00 a.m. that Sunday morning when the party arrived at the Naramore Ranch. Naramore was still lying where he had fallen, in a pool of blood.

Something just wasn't right.

A Coroner's inquest was rapidly held at the murder scene, with seven citizens constituting the Coroner's Jury. The site was scrutinized as were the Cummings and Lopez examined for their take on the tragedy. Naramore had a revolver in his pocket, only one chamber loaded, unused.

The group returned to town with the body. A post mortem examination took place. Two wounds to the head; no fracture. However, it was felt a temple artery was cut resulting in Naramore's death. Interestingly, marks were found on Naramore's arms apparently from being tied which would not have existed if Naramore was tied after his death. Moreover, there was no whiskey in Naramore's stomach suggesting to the Coroner the whiskey was poured after death.

The Coroner's Jury returned a verdict that Naramore died "from blows inflicted on the head by parties unknown to the jury, yet from the evidence before us we think there are circumstances so suspicious as to justify the detention of the parties now in custody, for further examination."

John and Caesar Cummings, along with Juan Lopez, were officially under arrest.

E. Ford, Mr. Naramore's son-in-law, went to the ranch on the 5th of August to look around. He did not investigate closely; just looked around. Yet, Ford opined to the *Los Angeles Herald* reporter that it is "the general opinion in Riverside [] that the Cummings boys are alone concerned in the murder." All Ford knew was circumstantial, but was positive the brothers would be held for trial. Ford described the Cummings brothers as "adventurous, reckless characters, and not the sort that would have been likely to give up so promptly. . . ." "Cummings is a man who is not afraid to face a gun and has repeatedly engaged in fights with big odds against him, and that his nerve should have left him Saturday night is very strange."

On Monday, August 12, the preliminary hearing was held in the city courtroom located in the Loring Building. The defendants were represented by W. J. McIntyre and the people by Assistant District Attorney Crowe. Legal advisors for the Naramore family also participated. The witnesses gave nearly the same testimony they voluntarily provided at the Coroner's inquest, although the press

reported the same story was not told twice. New evidence provided was that a neighbor passed the house in the dark and there was no light to be seen and the dog didn't bark; the dog always barked. But then. . .

The District Attorney, having just dismissed Juan Lopez from the case, called him to the stand. Lopez, described as a "young man possessed of more than ordinary intelligence," required an interpreter.

"[W]ith Caesar's steely blue eyes hard upon [Lopez] continually," Juan described how Caesar told him they, Caesar and Juan, were going to town and after John paid Naramore, Caesar would go to El Monte. After Naramore arrived, Juan saddled his horse for the trip into town. Apparently anxious to get started, not wanting to be too late that night, Juan sought out Caesar to speed up the business. Caesar directed Juan to go ahead stating he would catch up. Naramore asked Juan to wait for the money counting to conclude so he could ride back with Juan. Juan chose not to wait sensing the Cummings urgency for him to leave. Juan stated he thought there was going to be trouble with "the old man" and didn't want to be around for it.

Juan recounted a supper discussion, some six weeks prior, with the Cummings wherein they voiced a plan to steal their rent back from Naramore professing having worked too hard to give up \$500 in rent. The "plan" included dividing the money three ways to which Juan told the Cummings he wanted nothing to do with it.

On the dreaded night, Juan departed the ranch alone, only having witnessed Naramore giving a receipt for the rent payment. A bit down the road to town, Caesar caught up to Juan and passed him. Juan chased him down finding Caesar off his horse purportedly having been thrown. Juan recalled seeing nothing to support a throw. Caesar hopped back on his mount and he rode hard to town. Juan worked hard to keep up. When they arrived about 9:00 p.m., they went to the billiard hall and had sodas. Then they went to the Salvation Army for the evening meeting. Caesar was acting strangely. About 11:00 p.m., when the Salvation Army meeting was out, they started home. With the trains gone for the day, Caesar changed his mind about El Monte. They returned to the ranch about 2:00 a.m.

As Juan continued to testify, the scene at the ranch was as all described earlier. Caesar had Juan cut John loose. The ropes on John's hands were not tight, but the ropes on his feet were tight. Then, unsolicited, John and Caesar told Juan he must tell the officers the story as recited by John, including that Caesar and Juan rode to town together. John then volunteered, "I may go to jail, but Caesar will not."

The prisoners were held over for trial, no bail was allowed.

On August 18, Detective George Insley, along with Sheriff W. D. Johnson and Under Sheriff Dickson, searched the ranch as part of their continued efforts to close the case.

It was discovered at the ranch a cave dug into a ravine supported by timbering and cleverly hidden to secret items. Noticed therein were imprints of boxes now gone. Juan Lopez told the Detective that the Cummings belonged to an organized gang of thieves. Detective Insley was also able to track down the Cummings revolvers removed from the crime scene. The Cummings brother, Burr, had them in El Monte. The revolvers were Colt Navys one of which had a repair on it which matched the mark on Naramore's head. The final item was an informant who heard the Cummings would not hesitate to hold up anyone for \$20.00.

Insley opined the Cummings had committed other murders and were leaders of a desperate gang which infested El Monte.

Trial started September 19, 1884. Riverside County Bar Association President A. A. Adair was appointed to take over the case just one week prior. The previous defense attorney had withdrawn his representation and had also taken all the money provided for the defense. Adair did not ask for a continuance, which was considered a justified request but Adair, cognizant of the expense the County would incur if there was a continuance, agreed not to ask for such provided his examinations could be lengthened to accommodate his needs. The court agreed.

Ten panels of jurors, 100 people total, exhausted and still no jury was impaneled because everyone had knowledge of the case. The court ordered the Sheriff to summon 25 more people and not from the bystanders in the room. The next day 10 jurors were eventually found to impanel an "impartial" jury.

The trial of John Cummings commenced and Juan Lopez was the star witness. Detective Insley's confidence was high; he suggested to the defense attorneys to have the defendants confess and throw themselves on the



16507
Caesar Cummings
Murder 1st degree
To be executed Dec. 3/95
Riverside
Case appealed to Supreme Court
Re-sentenced 1-26 executed
Sept 23/96.



16508
John W. Cummings
Murder 1st degree
To be executed Dec 3/95
Riverside
Case appealed to Supreme Court
Re-sentenced 1-26 executed
Sept 23/96

mercy of the court. "Stretching hemp" was the outcome, he suggested.

By day two, Mr. Adair gave a great effort on cross examination of Lopez, but nothing new was elicited. Explaining his original lie, Juan stated he was afraid of the Cummings brothers.

Sheriff Johnson followed Lopez to the witness stand, testifying that Lopez took him back to the ranch to show the Sheriff where gold and currency were buried and clothing was burned.

Over objection, the District Attorney had about an hour of recorded testimony of John Cummings, from the Coroner's inquest, read into the record.

The fifth and last day of trial was September 23. Everyone anticipated John Cummings taking the stand. No such drama was to be had. Adair inquired of several witnesses in an attempt to discredit Juan Lopez, then rested. The afternoon was closing arguments. At 5:00, the jury was given the case. It was two hours later when the jury returned a verdict; "Guilty," murder in the first degree, no mercy. Caesar's trial was to begin the following day.

Caesar's case started with an impossible task of finding a jury; opinions were aplenty of Caesar's guilt following John's conviction. Eventually, the Sheriff rounded up enough people sufficient and testimony was to commence the next morning.

The first witness for the people was John Cummings, just found guilty of the murder. John admitted to the plan to rob

Naramore, corroborating most of Juan Lopez's version, except now including Lopez in the actual crime. John professed he didn't think Naramore was hurt badly. He related how when Juan and Caesar were gone to town, Naramore succumbed to his injuries. Juan wanted to bury Naramore, but John concocted the story they did.

John Cummings testified he expected clemency for testifying. His original story was made up to save the three from being hung.

Caesar eventually testified; they never intended "to hurt the old man." Caesar related how he went to school until he was 12, and then started working at a young age. He never attended Sunday school; and only attended

church a few times. A former neighbor testified the boys' family were nice people.

The case was given to the jury much sooner than in the prior trial; the same verdict resulted.

The following Tuesday, the Court sentenced the Cummings brothers to be hung, sentence to be carried out December 3, 1895.

Epilogue:

The Cummings brothers were delivered to San Quentin for sentencing. A. A. Adair appealed the case which was eventually heard by the State Supreme Court.¹ Adair asserted the error of an improper jury instruction. The Judgment of the trial court was affirmed.

Fortuitously for the Cummings, in 1897 then California Governor James Budd, California's 19th Governor, had an "operation" issue pending at San Quentin. A jutemill was operated at San Quentin utilizing inmate labor. Using the excuse of a clemency request for the Cummings brothers, the Governor and others visited the prison to investigate the jutemill debacle. It must have been a satisfactory dispensation. The Governor eventually did actually converse that day with the death row inmates, the Cummings brothers, and was impressed enough to commute their sentences to life imprisonment. But that's not where the story ends.

Caesar was transferred to the Mendocino State Hospital in 1907 to be returned to San Quentin when "mentally recovered." Caesar never left the hospital, dying November 24, 1942.

On July 15, 1908, Republican Governor James Gillett pardoned John. John died a free man August 31, 1944, and was buried in El Monte, next to his parents and brother, Burr.

Chris Jensen, partner in the law firm of Reynolds, Jensen, Swan & Pershing, is president of the Dispute Resolution Service, Inc. Board of Directors.

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¹ *People v Cummings* (1896) 113 Cal. 88

CIVIL JURY TRIALS – STATE AND FEDERAL – A SUCCINCT COMPARISON

by John M. Porter and Susan Carroll

To the casual observer, jury trials in federal and state courts look about the same. Local residents have been summoned from their homes, schools, and jobs to fulfil their civic duty, which they recognize is important, but which most would prefer to satisfy later. However, trial lawyers need to be well informed about the different aspects of each judicial system, so that they can find the best strategy for the client.

The Right to a Jury in a Civil Case

Federal

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”¹ Twenty dollars in 1789 is equivalent in purchasing power to about \$591.55 in 2020.² The Seventh Amendment right to a civil jury trial is recognized as “inviolable” by the Federal Rules of Civil Procedure.³

Jury trial can be waived by failing to serve and file a demand or if all parties stipulate to waive jury trial.⁴ It is interesting to note that in federal practice if only one party demands a jury trial, that party cannot unilaterally waive a jury trial.

State

The California Constitution similarly provides that trial by jury is an “inviolable” right and “shall be secured to all . . .”⁵ Various rules and procedures set forth the manner of securing the right; trial counsel must carefully comply with all requirements.

The Code of Civil Procedure confirms the right to a jury trial, and sets forth how it can be waived, which include failing to appear at the trial, written or oral consent, and failing to post jury fees.⁶ The court in its discretion may allow a jury trial in the event of a waiver.⁷

Jury Venire

Federal

Potential jurors are residents of the Central District of California, which covers the following counties: Orange,

1 Amendment VII to U.S. Constitution.

2 “Inflation Calculator.” U.S. Official Inflation Data, Alioth Finance, 12 Nov. 2020, <https://www.officialdata.org/>.

3 FRCivP, Rule 38(a).

4 FRCivP, Rule 38(d).

5 California Constitution, Article 1, Section 16.

6 CCP 631(f).

7 CCP 631(g).

Riverside, San Bernardino, Los Angeles, San Luis Obispo, Santa Barbara, and Ventura. Potential jurors are usually summoned to the courthouse nearest their residence.

State

Potential jurors are residents of the county of the court, and like federal jurors, they are often called to serve in the courthouse closest to their residence.

Jury Selection (*Voir Dire*)

Federal

Trial judges often grant counsel a few minutes to personally ask questions of potential jurors.⁸ It is not uncommon for jury selection to take 30-60 minutes. In the Central District, counsel are permitted (if not expected) to submit *voir dire* questions in advance of the trial.⁹

State

The state court practice is similar, but at some point the court must permit counsel to personally question the prospective jurors. Jury selection may take days because counsel shall have reasonable time limits to conduct the examination and “the trial judge shall permit liberal and probing examination . . .”¹⁰

Number of Jurors

Federal

Federal civil jury trials must have at least 6 jurors, but no more than 12 jurors.¹¹ Typically, a trial expected to run a week or two will have 8-10 jurors. (See below for how alternates are handled.)

State

A state civil jury consists of 12 persons, but the parties can agree on a lesser number.¹²

Peremptory Challenges

Federal

Each party is entitled to three peremptory challenges, but several defendants or plaintiffs may be considered as a single party, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.¹³

8 FRCivP Rule 47(a).

9 USDC Central District Appendix A to Local Rules PRETRIAL FORM NO. 1, Paragraph 4.

10 CCP 22.5(b)(1).

11 FRCivP Rule 48(a).

12 CCP 220.

13 28 U.S.C. 1870.

The practice of how challenges are exercised often varies from courtroom to courtroom. A careful review of the judge's written practices will provide guidance.¹⁴

State

Each party is entitled to six peremptory challenges. If there are more than two parties, the court divides the parties into two or more sides, and each side has eight peremptory challenges. Additional peremptory challenges to a side may be granted.¹⁵

Alternate Jurors

Federal

There are no alternate jurors in federal civil trials. Judicial officers usually empanel 8 - 10 jurors, all of whom hear and see the evidence, are instructed, and then deliberate. In the event a juror is excused, the remaining jurors, if there are still 6 left, continue deliberations.

State

The trial court may call alternate jurors, who are present for all of the evidence with the regular 12 jurors, but who do not participate in deliberations. Alternate jurors remain on call. In the event a juror is excused, the alternate and existing jurors are instructed to commence deliberations anew.¹⁶

Number of Jurors Needed for a Verdict

Federal

The verdict must be unanimous, absent a stipulation to the contrary.¹⁷

State

Unless the parties stipulate otherwise, 9 of 12 jurors are required to render a verdict.¹⁸

Civil litigators cannot agree if it is easier to convince 9 out of 12 jurors to prevail in state court or if it is easier to convince all 6, 7, or 8 (or more) jurors to reach a unanimous verdict in federal court.¹⁹

¹⁴ Available on the court's website under the "Judges' Requirements" tab. www.cacd.uscourts.gov/judges-requirements.

¹⁵ CCP 231(c).

¹⁶ CCP 234.

¹⁷ FRCivP Rule 48(b).

¹⁸ California Constitution, Article 1, Section 16.

¹⁹ Professional observation of John M. Porter (1947-).

Opening Statements and Closing Arguments

Although time limitations will likely be shorter in federal court than in state court, the practices are essentially the same.²⁰

Time Allowed for the Trial

Federal

Federal civil jury trials move faster than similar cases in state court. It is not uncommon for a federal judge to allocate 8 to 12 hours (hours – not days) to each side, and often the time is tracked on a chess clock accurate to the minute. Thus many police misconduct cases start on Tuesday, and result in a verdict by Friday.

State

Notwithstanding the additional time often permitted for jury selection in state court, jury trials in state court often proceed at a less hectic pace without the ticking of a chess clock. Jury trials in state court can easily take 10 days.

Conclusion

Although there are significant differences between federal and state jury trials, and some subtle ones as well, it is the intent of this article to guide you in your more in-depth preparation for trial.

John M. Porter is a member of RCBA, and a partner in the San Bernardino office of Lewis Brisbois Bisgaard and Smith.

Susan Carroll, J.D., is a paralegal in the San Bernardino office of Lewis Brisbois Bisgaard and Smith.



²⁰ CCP 607(2).

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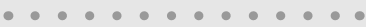


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THE TRIALS AND TRIBULATIONS OF A 2020 LAW SCHOOL GRADUATE

by Ruthie Heavrin

In what seemed like overnight, 2020 law school graduates were thrust into a situation where we were trying to graduate, secure post bar positions in a failing economy, study for the bar, homeschool and feed our children, work on our marriages, and literally stay alive as a deadly virus ravaged our nation, killing friends and family. We were the guinea pigs of all of it.

We adjusted for the last semester of school, but studying for the bar at home for four months is a different animal. Imagine studying for the bar for twice as long, but at the same 12 hours a day rate. I personally studied with a seven- and six-year-old at home: “Negligence is duty, breach of duty – Don’t throw that at your sister!”

Pre-COVID, I had the luxury of libraries and classrooms – things I took for granted. I also had a routine! There was a time and a place for every task. There’s a reason for the maxim, “Don’t sleep and work in the same place.” The classroom is for learning, the bedroom is for sleeping, and the living room is for watching the next season of *The Crown*.

Before law school, I studied eco-criticism – the study of the relationship between characters and their environment. Two philosophers, Yi-fu Tuan and Edward Relph, helped define and describe the difference between ‘place’ and ‘space.’ ‘Place’ is made up of ‘space,’ filling it with meanings and objectives by human experience in a particular space. ‘Places’ literally instruct and concentrate human intentions. Classrooms, neighborhoods, and home offices are examples of ‘place.’ A specific space for a specific purpose.

We had to reorganize our ‘spaces’ and ‘places.’ Dominique Boubion, a fellow 2020 law school grad, said, “It was difficult to get motivated. It’s frustrating to study that hard in the same place you sleep.”

We also had to retrain our brains. Normally, we could write on test sheets and scratch paper. The California Bar exclusively administered the October exam online, minus certain exceptions. No scratch paper of any kind was allowed, except for on the PT. Artificial intelligence tracked our eyes, movement, and noises. If anyone came into the room while we were testing, it was an automatic fail. If we left the view of the camera for any reason, automatic fail. The State Bar created an impossible situation. Study under extreme conditions, in unprecedented times, with overwhelming stress, absent our usual support systems, and do it alone. Alone. Dr. MLK Jr. said, “There is power in unity and there is power in numbers.” We were literally stripped of our power.

Fellow Chapman graduate, Christina Mojica, and Boubion, joined the United for Diploma Privilege Coalition to address our concerns. Mojica and Boubion summarized hundreds of surveys by fellow test takers to present to the State Bar. Mojica couldn’t read them without crying. “People lost family members, jobs, their homes. There was a complete lack of empathy

by the State Bar,” Mojica said. During a public comment session, many State Bar trustees could be seen rolling their eyes, looking at their phones, and even sleeping.

But even worse, Mojica said, was the lack of support from our own. Hurtful comments filled the Chapman Alumni¹ page: “So ridiculous – they can take it from the comfort of their bedroom;” and “They won’t be considered real lawyers – there should be an asterisk by their names.”

This hazing mentality has perpetuated and propped up an archaic system meant to keep out the “other.” In 2013, the University of Massachusetts Law Review released an article tracing the racist origins of the bar exam and addressed the lack of connection between tests and professional performance.² Bar examinations began around 1870, when the American Bar Association (ABA) became concerned over immigrant and mixed-race applicants.³ In 1920, the ABA inadvertently admitted three African Americans who they believed were Caucasian.⁴ The ABA requested their members vote to expel the Black attorneys to “keep[] pure the Anglo-Saxon race” in the legal field.⁵ It has already been shown that COVID has disproportionately impacted minorities and low income households. The connection between diploma privilege, COVID, the State Bar, and the othering of the underprivileged became undeniable.

“We were fighting an organization propping up a racist, gate-keeping system,” Mojica explained. “We couldn’t win.”

Although the Coalition was not successful, Boubion’s and Mojica’s efforts had an impact. COVID exposed the many disparities that were represented on a wide spectrum by the class of 2020. We are a resilient group who are the future of our field. If we learned anything from our experience, it is to lead with empathy, consideration, and kindness: the makings of fantastic lawyers.

Ruthie Heavrin is a 2020 graduate of Chapman University Fowler School of Law. She is volunteering as a post bar clerk at the Riverside Public Defenders Office. Ruthie is a mother of two, a wife, a poet and a Harry Potterhead.



1 Dean Parlow of Chapman University Fowler School of Law supported his students and fought hard to represent our challenges to the State Bar. The views of the Alumni do not represent my experience at Chapman. The professors and administration supported us and diploma privilege.

2 Subotnik, Dan, Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning (2013). 8 U. Mass. L. Rev. 332 (2013), Touro Law Center Legal Studies Research Paper Series No. 14-43, Available at SSRN: <https://ssrn.com/abstract=2436495>.

3 *Id.* at 331.

4 *Id.* at 331.

5 *Id.* at 332.

IN MEMORIAM: ROBERT B. TAYLOR

by Brian C. Unitt

Bob Taylor joined the firm of Holstein, Taylor and Unitt in August 1980, starting as a law clerk, becoming an associate upon passing the California Bar in 1982, and with Bob Holstein's not so subtle insistence, taking on the worker's compensation practice for the firm. So that made him a seasoned veteran when I joined the firm in 1985. He showed me how things worked at the firm, and what was expected of an advocate in a feisty PI and Comp practice. He was also my partner in crime on many a golf course and on the legendary Holstein firm fishing trips, all in the name of drumming up business for the firm. In the later years of those fishing trips, Bob learned to row a drift boat and acquired the nickname "the Admiral" as he led our flotilla down the Klamath River. Well there might have been a few Bud Lites for Bob and a few whiskies for me along the way as well. We became Bob Holstein's partners in the early '90s, and he reluctantly took on the mantle of senior partner after Bob Holstein passed away in 2003.

Bob was born and raised in Riverside, and during his time at Ramona High School and as a student at Riverside Community College, he was an accomplished swimmer and water polo player. He worked as a surveyor in the family business, and as a state lifeguard, before deciding to pursue a career in law. Bob is numbered among the distinguished alumni of Riverside's California Southern Law School receiving his B.S. and J.D. degrees there when it was still known as Citrus Belt Law School. He also taught classes in workers' compensation and paralegal studies at his *alma mater*.

In his career representing injured workers in workers' compensation cases, he established a reputation as one of the preeminent applicants' attorneys, not only in the Inland Empire, but throughout the state of California. He was respected by applicants' and defense lawyers alike. It was not unusual for him to win a hearing against a less experienced lawyer and then say, "Let's go get a cup of coffee and I'll tell you what to do next time." He was not only respected by his fellow practitioners, but also by the worker's compensation judges at the Riverside and San Bernardino Boards who called on him to serve as a judge Pro Tem and an arbitrator on many occasions.

He won significant awards for seriously injured workers despite the harsh impact of the recent revisions in the workers' compensation laws. I often marveled at how every time so-called worker's compensation reform legislation would emerge from Sacramento (mostly intended to make it harder for workers to obtain the benefits of the "compensation bargain"), Bob would quickly ferret out the unintended conse-



Robert B. Taylor
1956-2020

quences of those bills and find some measure of justice for his clients.

Our firm had the privilege of being called labor's lawyers, and Bob was a strong supporter and advocate for organized labor, well known and highly regarded by the Riverside and San Bernardino Building Trades Council and Central Labor Council. Over the years it was not unusual to find him on a picket line, or showing up with pizza for the grocery workers, or cases of water for the nurses, to boost their morale as they advocated for better wages and working conditions.

More than his professional achievements however, Bob valued the time he could spend with his family, his wife, four children, and two grandchildren. He was very present in the community, coaching his children's sports teams, volunteering for Habitat for Humanity, and participating on school boards from grade schools to colleges. He was an avid outdoorsman, fisherman, hiker, and loved to share those activities with his grandchildren, extended family, and friends.

In early 2017, Bob told me he wanted to spend six weeks in the fall walking the five hundred mile pilgrimage across northern Spain known as the *Camino de Santiago*. You may know of it from the movie, *The Way*, starring Martin Sheen. In managing partner mode, I said that sounded like a great experience and a fine thing to do as long as he had his revenue for the year in the bank before he left. With typical brio, he said that would be no problem, and sure enough he did it with time to spare.

The *Camino* was physically challenging, presenting him with rough terrain, unusual forest fires, and even a late season hurricane that touched land's end as he reached his destination. The journey was spiritually rewarding, as well both for the solitude and time to reflect, but also for the people he met along the way. Typical of Bob, at one point he encountered a young man whose boots had worn out and were giving him terrible blisters. Bob gave him his backup pair of boots without a second thought. In 21st century fashion, his family and many friends were able to follow his odyssey through his photos, videos, and notes on WhatsApp. When he made the journey again in 2018, his daughters were able to get time off from work to join him for a few days on the trail. I am certain the opportunity to share a part of the experience of the *Camino* with them meant more to him than any of his professional achievements.

Brian Unitt is a certified specialist in civil appellate law, and the sole remaining shareholder in Holstein, Taylor and Unitt, a Professional Corporation.



JUDICIAL PROFILE: JUDGE EMILY BENJAMINI

by Honorable Kira Klatchko

Judge Emily Benjamini describes herself as an introverted person, yet she seems to be thriving in a very much extroverted environment in Department 2K in Indio, where she hears three different calendars. In her bustling department, where she has sat since her appointment to the bench in 2018, Judge Benjamini hears arraignments, and handles both mental health and drug collaborative court programs.

Although Department 2K has always been busy, Judge Benjamini has handled new challenges since the start of the pandemic. Her arraignment calendars are limited to allow for social distancing and she has made a special point of recording video procedures for self-representing litigants to explain how to comply with the court's safety requirements. She has also taken it upon herself to buy jugs of hand sanitizer. Judge Benjamini said that counsel have described her approach to these extenuating circumstances as motherly, and she works hard to be kind and patient as attorneys and litigants try to make their case through masks from across the room above the general din of a busy calendar department.

If anyone is up to this challenge, it is Judge Benjamini, who spent most of her career as a criminal defense attorney. Initially drawn to law school after learning about First Amendment litigation while in college at the University of Michigan, Judge Benjamini began her career as a civil attorney. After graduating from the University of San Diego School of Law, Judge Benjamini began working at a civil insurance defense firm. She relocated to the Coachella Valley and began working for the firm of Slovak & Barron when her husband (now Judge) Dean Benjamini accepted a job at the Riverside County Public Defenders Office.

Judge Benjamini was actually a year ahead of her husband, who was randomly assigned to be her 1L mentee. They married in law school and have been married almost 30 years. It was her husband, and his affection for criminal law and his colleagues at the PD's office (including now Judges Greg Olson and Susanne Cho), who encouraged Judge Benjamini to make the leap to



Judge Emily Benjamini

criminal law. Judge Benjamini started with the PDs office in 1996, shortly after giving birth to her daughter, who is now also a lawyer. Judge Benjamini enjoyed the fast pace and frenetic energy of criminal law and liked being in court every day. She also enjoyed helping people and felt she had a chance to make a connection and a difference in the lives of her clients.

In 2004, Judge Benjamini, wanting to spend more time with her son (now finishing college) and daughter, entered private practice where she handled criminal

and juvenile matters and came to understand the joy of working for herself and the difficulty of having to be in multiple places at the same time. Those experiences influence how she manages her calendar today, and Judge Benjamini makes it a priority to start on time and grants priority to attorneys who need to appear in multiple departments. A year after she started in private practice, her husband joined her. The Benjamins practiced criminal defense work in partnership together until Dean joined the bench; he sits in a criminal calendar department at the Larson Justice Center and starting in 2021 will be sitting in a criminal trial department down the hall from Emily.

Since joining the bench, Judge Benjamini has come to most enjoy her work with the drug court program. She expresses great pride in the progress made by all of the program participants, particularly its graduates, who spend 18 months trying to move through addiction towards a better path that may involve a new job or reunification with family members. Although drug court graduations are currently being held over Zoom due to the pandemic, that has not stopped Judge Benjamini from trying to make them special for each person, just as it has not stopped her from handling anything else that has come her way.

Honorable Kira Klatchko is a judge with Riverside Superior Court and a past president of the RCBA.



OPPOSING COUNSEL: SCOTT HEIL

by Alexander Harrison

Scott Heil has never been much of a big city guy. He was born in Alabama with a father in the Air Force. Like many children with a parent in the military, he moved many times when he was young. At the age of six his family finally settled in one place, and it was here in Riverside where he truly grew up. He spent a few of his childhood years attending Linfield Christian in Temecula, back when Temecula was much more rural and better known as Rancho California, and Linfield's football team was so small that they only played eight-man tackle. After Linfield Christian, he graduated from John W. North High School in Riverside.

After high school, Scott obtained a degree in finance from the University of Southern California (USC). He spent two years working in the banking industry before deciding to obtain a joint Juris Doctor and Masters of Business Administration (JD/MBA) with a MBA from the Haas School of Business at University of California, Berkeley and a law degree from University of California, Hastings. Even though he was attending classes in San Francisco and Berkeley, Scott preferred to live in the less busy cities of Burlingame and Richmond. When he first started out at Berkeley and Hastings, he did not think he would practice law, but life had his own plans. Scott's first job out of graduate school was as an attorney at the law firm of Redwine & Sherrill in Riverside. He stayed for 21 years. He rose to become a partner with a practice focused on public entity representation and eminent domain, where he represented both public entities and property owners.

Eager to expand his transactional practice further, Scott joined the law firm of Varner & Brandt, where he has now been for over six years. He now does transactional work in a variety of fields including real estate and information technology, and continues his practice of public entity representation and eminent domain.

When you walk into Scott's office, it is clear which alma mater is dearest to his heart, and it is not an institution up north. He has USC all over his office, including a keyboard of cardinal and gold with the symbol of the USC Trojan prominently displayed. At home he has lots of Trojan football memorabilia, including a football signed by the likes of Reggie Bush and Matt Leinert. Scott has season tickets to see the Trojans when they play, although Scott is care-



Scott Heil

ful to point out that he is no bandwagon fan who just likes USC when they win games. In addition to the glory years, he has suffered through the Paul Hackett days (when the team in the late 1990s and 2000 had the inglorious distinction of being the first USC team to have consecutive non-winning seasons in almost 40 years) and the post-Pete Carroll doldrums.

Scott is fortunate to have also gotten to meet some of USC's best-known players. While on vacation in Hawaii, USC was playing the University of Hawaii and Scott and the players happened to stay at the same hotel.

He met Reggie Bush and many others. Scott's key takeaway? Up close, USC football players are big.

Scott lives in Riverside with his beautiful wife, Amy, who is a dentist. Scott met Amy in high school, but unlike traditional high school sweethearts, back then they were only friends. They have a daughter and a son, Rachel and Garrett. Rachel, much to Scott's happiness, is herself attending USC. Garrett will soon graduate from Riverside Polytechnic High School and start the next phase of his life.

When Scott is not spending time with his family or attending a USC football game, he likes to give back to his community. Scott has been a very active member of the Riverside East Rotary Club for over 25 years. He is the current treasurer and has previously served as the president. His favorite activity the club sponsors is the annual car show the first weekend in May. Regularly attended by over 40,000 people, the show often has over 1,000 cars for people to see, with everything from Model As to new Corvettes, and lots of muscle cars from the 1950s and 1960s. And unlike some other shows, the cars drive a route around for everyone to see.

Scott is also a committee member for the Lawyer Referral Service of the Riverside County Bar Association and enjoys helping out high school students with mock trial, sometimes playing the role of a judge, other times as a scorer. He is inspired by seeing kids work hard to develop their public speaking skills and has enjoyed being involved ever since his daughter joined mock trial as a student.

Alexander Harrison is an attorney at Varner & Brandt in its Riverside office and practices civil litigation.



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PRACTICING RESPONSIBLY AND ETHICALLY

by David Cantrell & Brad Zurcher

For savvy attorneys, investigation of the potential biases of prospective jurors now extends beyond the formal voir dire process and into the digital realm of jurors' social media accounts. The importance and increasing ubiquity of online juror research has led some to suggest that it may soon be part and parcel of a trial attorney's standard of care. In a 2012 formal opinion, for example, the New York City Bar noted that the "standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case," including reviewing juror social media accounts.¹ Similarly, the Missouri Supreme Court has held that "a party must use reasonable efforts to examine the litigation history [] of those jurors selected but not empaneled."² An attorney who ignores these avenues of investigation will increasingly do so at his and (more importantly) his client's peril.

But, as with any form of juror investigation, the Rules of Professional Conduct place boundaries on how this may take place. Rule 3.5(d) prohibits a lawyer from "communicat[ing] directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case." In the context of social media accounts, whether a prohibited "communication" takes place is not always clear. For example, may an attorney "friend request" a prospective juror in order to view the juror's account? Or, may an attorney view a juror's account if the social media platform notifies the juror that the attorney has done so?

Neither California courts nor the California State Bar has addressed these questions head-on.³

Courts and commentators across the country, however, are beginning to circle around a consensus on some of these issues when interpreting rules like Rule 3.5(d). For example, while it is now generally agreed that an attorney may review a juror's social media account, the attorney may not request permission from the juror—by "friend request" or otherwise—if required to do so. In a formal opinion by the American Bar Association on the topic entitled "Lawyer Reviewing Jurors' Internet Presence," the Standing Committee on Ethics and Professional

Responsibility likened the request to "driving down the juror's street, stopping the car, getting out, and asking the juror permission to look inside the juror's house because the lawyer cannot see enough when just driving past."⁴ Despite the seemingly de minimus nature of the request, the vast majority of commentators agree: if the information is not available to the general public, an attorney may not gain access to that information through request.⁵

This is perhaps where the bright-line rules end. On the question of whether an attorney may access a potential juror's page if, by doing so, the juror is notified of the attorney's presence, commentators disagree. The New York City Bar, for example, opines that such notification constitutes a prohibited "communication" if the attorney is aware that the notification would be generated.⁶ The ABA disagrees, reasoning that such notification is not a "communication," but is instead the social media platform itself "communicating with the juror based upon a technical feature of" the platform.⁷

Undoubtedly, California will eventually directly address the many issues involved with social media investigation of prospective jurors. And whatever rules are then adopted will almost certainly continue to change as new companies develop new platforms with novel ways of connecting. Given the importance of juror investigation, it is prudent for attorneys to stay abreast with these developments. This likely requires an attorney to (i) refrain from requesting access to a juror's private information if that information is not otherwise available to the general public, and (ii) be aware of the workings of any social media platform upon which juror investigation is being performed, lest the attorney inadvertently initiate a "communication" with a would-be juror.

David Cantrell and Brad Zurcher are members of the firm Lester, Cantrell & Kraus, LLP. Their practice focuses on legal malpractice and professional responsibility. David is certified by the California State Bar's Board of Legal Specialization as a specialist in legal malpractice law.

1 Formal Op. 2012-2.

2 *Johnson v. McCullough* (2010) 306 S.W.3d 551 (Mo. 2010).

3 *But see* <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Ethics-Technology-Resources/Social-Media>, collecting resources discussing ethical implications of social media in litigation.

4 Formal Op. 466 at 4.

5 *See also*, New York City Formal Bar Opinion 2012-2; Oregon State Bar Formal Opinion 2013-189 at 2 n.2; Pennsylvania Formal Bar Opinion 2014-200 at 16.

6 Formal Op. 2012-2.

7 Formal Op. 466 at 5.

JURY TRIALS IN THE SAN BERNARDINO COUNTY COURTS

by Honorable Lynn M. Poncin

Justice Sandra Day O'Connor is quoted as saying, "The courts of this country should not be places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried." And perhaps, given the pandemic and the limited judicial resources, parties should consider alternative dispute resolutions for civil litigants and appropriate dispositions for criminal defendants.

As for civil jury trials, the sad truth is that currently the chance of holding one in the near future is very slim unless the case has preference pursuant to Civil Code of Procedure (CCP) section 36 or facing a five-year deadline (CCP §583.310). And even then, no new trials, either criminal or civil, are currently being held in San Bernardino to limit the number of people entering the courthouse during the surge of COVID-19 cases and lack of capacity in the intensive care units of local hospitals.

So what can civil litigants do to have access to justice? Perhaps now is the time to be creative and to think outside the box if parties do not want to stipulate to having the matter heard by the court rather than a jury. Remote jury trials may be a possibility. And while many civil practitioners want to make a connection with the jury and see them face to face, ask yourself how much of the jurors' faces are you really seeing when one is wearing a mask. Can you really gauge the juror's response to your opening statement, your witnesses' testimony, or your closing argument when all you see is a person's eyes? And remember, not only are the jurors wearing a mask, but they are spread throughout the courtroom to comply with social distancing. However, if the jurors were remote, there would be no need for a mask and you could see their entire face and better gauge any emotional response or reaction to your case.

Since the court has reopened, only two civil trials have commenced. One was a trial nearing the five-year deadline and one was a trial in which preference had been granted, but was vacated and the court found good cause to proceed. The five-year trial was completed and the jurors were able to reach a verdict. The trial that once had preference was suspended during the surge of COVID-19 cases. All other civil cases have been continued into 2021.

The San Bernardino Superior Court is looking at ways to hold civil jury trials remotely because it will be many months before the court resumes normal functioning.

Currently at the San Bernardino Justice Center, due to social distancing, when in-person jury trials resume, the courthouse will only be able to accommodate three to five jury trials at a time. The number of prospective jurors coming to court has decreased and our jury assembly room can only hold a limited number of people. We need empty/open courtrooms to stage multiple groups of prospective jurors and we need empty/open courtrooms to use as jury deliberation rooms. Also, criminal trials will have preference, so that an average run of the mill "automobile versus automobile" civil case is last in line to be heard. And this does not take into consideration the number of unlawful detainer jury trials and bench trials that will take priority and have preference once the moratorium on hearing such cases has been lifted.

Civil practitioners have already had to adapt and change due to the pandemic. Attorneys are working remotely and depositions have been conducted remotely as well. A remote jury trial would not have to mean that everyone appear at the trial remotely, such as the asbestos cases heard in Alameda County this year. Perhaps have a hybrid so that the attorneys, the parties, and the witnesses all appear in court and only the jurors are remote. Or have all the jurors and all the witnesses appear remotely and only have the attorneys and the parties present in the courtroom. Remember, only so many people can be in the courtroom due to social distancing. So if you have a case with multiple attorneys and multiple parties, having jurors appear remotely would allow larger cases to proceed. It should be noted that the San Bernardino Superior Court also has a large temporary courtroom in the Historic Courthouse to allow for larger civil trials to go forward.

As for criminal trials, while only one civil trial has been completed in San Bernardino, the court has proceeded with criminal trials throughout the county. Since we have reopened, 79 criminal trials have been completed countywide. But the number of trials that can be heard in Rancho Cucamonga, Victorville, and Joshua Tree are limited in the same way as the San Bernardino Justice Center. The number of courtrooms that can accommodate trials have been limited and the jury assembly rooms also have limited capacity. Rancho Cucamonga has the capacity to conduct 3-4 trials at a time; Victorville only has capacity to conduct 2 trials at a time, and only 1 trial may proceed in Joshua Tree. In Victorville, the court is using Victor Valley College as an off-site location to house prospective jurors.

Both civil and criminal practitioners face many challenges in trying a case either in-person or remotely. Many issues should be addressed with the trial judge at the pre-trial conference in order to prevent delays and to clarify issues for everyone involved such as jury selection, how to communicate with your client during the trial, sidebar conferences, and the handling of trial exhibits, all of which must be conducted while maintaining proper social distancing protocols. These are just a few of the issues that attorneys should be thinking about heading into trial.

Our normal way of doing business no longer works. We must all work together to create new ways to access justice and provide a way for trials to proceed in these difficult times.

Honorable Lynn M. Poncin is the supervising judge for the Civil Department in the California Superior Court located in San Bernardino County.



MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective January 30, 2021.

Jose Alfaro – Jose Alfaro Law, Riverside

Maryann P. Gallagher – Law Offices of Maryann Gallagher, Los Angeles

Marsha D. Johnson – Inland Counties Legal Services, Riverside

Joanna P. Martinez (A) – Sheasby & Associates, Rancho Cucamonga

Sean C. Oswill – Office of the District Attorney, Murrieta

Lisa Sanchez – Office of the County Counsel, Riverside

Priscilla C. Solario – Law Offices of Priscilla C. Solario, Rancho Cucamonga

Hogan W. Song – Song Family Law APLC, Orange

Laura Soprana-Dec – Office of the County Counsel, Riverside

Marilyn N. Taketa – Law Office of Marilyn Taketa, La Quinta

Heather A. Tomasetti – Office of the County Counsel, Riverside

(A) – Designates Affiliate Member



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Riverside County Superior Court, General Order No.: 2020-74

Nineteenth Implementation of Emergency Relief, Authorized Pursuant to Government Code Section 68115.

On December 17, 2020, upon further request made by the Court on December 16, 2020, Chief Justice Tani G. Cantil-Sakauye issued an additional emergency order authorizing the Court to take certain actions based on the determination that the conditions described in Government Code section 68115(a) continue to exist. This Court hereby finds and orders as follows: In cases in which the original or previously extended statutory deadline otherwise would expire from 1/4/2021 to 2/4/2021, inclusive, any judge of the Court may extend the time period provided in section 1382 of the Penal Code for the holding of a criminal trial by not more than 30 days, (Gov. Code, § 68115(a)(10)).





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