

RIVERSIDE LAWYER

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MAGAZINE

THE JOHN GABBERT GALLERY



HIS HONOR
JOHN G. GABBERT
JUDGE, SUPERIOR COURT
1949 — 1970
JUSTICE, COURT OF APPEAL
1970 — 1974

THE LAW
APPLIED WITH
WISDOM
AND
COMPASSION



Judge Dallas Holmes and
Justice John Gabbert

Judge Victor Miceli and
Justice John Gabbert



Presidents of the RCBA: (back row, left to right) Brian Percy, 2002; Michael Clepper, 1983; Judge Dallas Holmes, 1982; David Moore, 1984; Judge Craig Riemer, 2000; Justice Bart Gaut, 1979; Justice John Gabbert, 1949; Richard Swan, 1977; Art Littleworth, 1971; Terry Bridges, 1987; (front row) David Bristow, current president; Theresa Han Savage, immediate past president; Dan McKinney, 1993; Michelle Ouellette, 2004; Boyd Briskin, 1986; and Irma Asberry, 1997



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RIVERSIDE LAWYER

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MISSION STATEMENT

Established in 1894

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

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

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

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

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

Membership Benefits

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

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

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

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

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

MBNA Platinum Plus MasterCard, and optional insurance programs.

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

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

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

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

CALENDAR

SEPTEMBER

21 Business Law Section

“California’s Statutory Preemption of the Internal Affairs Doctrine”
RCBA Bldg., 3rd Fl. – Noon
Lunch will be provided.
(MCLE)

**CA State Bar Fee Arbitrator
Training for San Gabriel Valley/
Eastern L.A./RCBA/SBCBA**
Mt. San Antonio College, Bldg. 6,
Rm 160 – 6:00 p.m. to 9:00 p.m.
(MCLE – 1 hr. Ethics)

26 Mock Trial Orientation Meeting
RCOE Conference Center – 5:00 p.m. to
7:00 p.m.

27 EPPTL Section
RCBA Bldg., 3rd Fl. – Noon
(MCLE)

**28 RCBA/Barristers Installation of
Officers**
Mission Inn, Music Room – 5:30/6:30
p.m.

**29 Judicial Ethics Course for
Temporary Judges**
RCBA Bldg., 3rd Fl. 9:00 a.m to Noon
(MCLE – 2.75 hrs. Ethics)

OCTOBER

**3 RCBA/SBCBA Environmental &
Land Use Law Section**
RCBA Bldg., 3rd Fl. – Noon
(MCLE)

4 Bar Publications Committee
RCBA – Noon

9 HOLIDAY

10 PSLC Board
RCBA – Noon

11 Mock Trial Steering Committee
RCBA – Noon





by David T. Bristow

When I first became active in the Riverside County Bar Association – as I recall, at the behest of my predecessor and former colleague, John Vineyard – I quickly found that prospective (and some current) members commonly asked the question, “What, exactly, does the RCBA do?,” a question that was often accompanied by the query, “What’s in it for me?” In those darker times, back around the millennium, the Bar board was focused on bolstering membership, which had waned a bit after the Bar suffered through a financial crisis. Thus, the board focused on member benefits – such as insurance discounts and MCLE credit – as well as on adjusting dues rates. Our numbers have improved, whether or not as a result, and the Bar is now on excellent footings, both financially and in terms of our membership.

But that question posed by prospective members – what’s in it for me – has hung around my head ever since, like Coleridge’s albatross, and I found myself bothered by that mindset. Not sure why. I think, perhaps, because I saw the RCBA as the professional guild for lawyers in this county. The function of our institution was to ensure that the practice of law in Riverside County was protected and fostered, and it existed to protect that greater institution, the judicial branch of this state.

As I reflect on it, though, I think the reason I was bothered by the comment was because, at the time, our judicial branch didn’t need much protecting. The County of Riverside was in charge of running the courts, and our supervisors were usually very gracious

in their support. We had Judge Miceli, Justice Ward and Jane Carney bringing us a new court every now and then, and times were good. The RCBA didn’t need to worry about skyrocketing judicial caseloads, or understaffed clerk’s offices, or the cyclical shutdown of the civil courts. Instead, we had the luxury of worrying about our continued relevance to our members, and improved rates on insurance.

Unfortunately, those days are over.

The administration of the courts in the state has, as we know, been taken over by the state. This is not a new development. What is new, however, is that the state has not been quick to respond to the problems confronting the legal system in this county. While our population has exploded, making us one of the fastest-growing areas in the nation, the state has failed to increase our judicial resources accordingly. As a result, our judicial system, particularly the civil branch, has been overwhelmed by the increased caseload. In times past, the county would have increased our resources commensurate with the need, but now, the analysis is done on the state level, and our political stature on a statewide level is not nearly what it should be. Thankfully, the Legislature has approved 50 new judgeships statewide, which will hopefully be part of 150 new positions – but there is no guarantee that Riverside County will receive the apportionment of those judges that it needs. We are at the mercy of Sacramento, or, perhaps more aptly, of Los Angeles and San Francisco, where state political power resides.

So I believe we need to respond as professionals, as the guardians of the Riverside County justice system. For too long, we neglected to step

(continued on next page)

President's Message *(continued from previous page)*

up and assume this role. I believe it is the responsibility of the lawyers of this county to stand up and be heard, to work to return the Riverside County justice system to its former exemplary prominence. The citizens of this county deserve nothing less, and it is up to us – because of our unique position as the legal practitioners who best know and understand the problem. This will require increased political action by our membership, individually and as the RCBA. It will require us to work far more closely with the bench, which is restricted in its ability to advocate for resources. Perhaps most importantly, it will require us to assume a greater role within the community, to remind its members that the judicial branch is theirs, not ours, and that we need to reverse the erosion that is presently occurring.

So that's what in it for us: Working to ensure that our county judicial system is the envy of the state. I think we can all agree that it presently is not, though through no fault of our own. We must adapt to the changes in the judicial system – the shift to centralized state management – to ensure that we continue to have courts that are a pleasure in which to practice. We are not likely to correct the current deficiencies in a year, or even in three. But we must start the process, and it is my pledge to you that the process will start now.

David T. Bristow, President of the Riverside County Bar Association, is a Senior Attorney with Reid & Hellyer in Riverside.



by Mark A. Mellor

Ex parte application required where clerk refuses to set anti-SLAPP motion for hearing within 30 days. The anti-SLAPP statute (Code Civ. Proc., § 425.16) requires that a special motion to strike under the statute must be noticed for hearing within 30 days after service, “unless the docket conditions of the court require a later hearing date.” In *Hoskins v. Hogstad* (2006) 136 Cal.App.4th 1182 [2006 DJDAR 2074] [Third Dist.], the clerk had advised defendants that the first available date for hearing on their anti-SLAPP motion was more than 30 days after filing. The trial court then denied the motion because of failure to comply with the 30-day requirement. The court of appeal affirmed, noting that defendants should have made an ex parte application to the judge for an earlier hearing date.

NOTE: Certification for publication was withdrawn by the Court of Appeal by modification filed March 1, 2006. Although printed in the advance sheets based on the certification for publication on the date the opinion was filed, the opinion is not citable and will not be reported in the bound volume. (See Cal. Rules of Court, rules 976 and 977.)

Monetary damages not required to entitle a party to attorney fees under “private attorney general statute.”

Code of Civil Procedure section 1021.5 provides that attorney fees are recoverable by “a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest” In *Lyons v. Chinese Hospital Ass’n* (2006) 136 Cal.App.4th 1331 [39 Cal.Rptr.3d 550, 2006 DJDAR 2209] [First Dist., Div. Two], plaintiff did not recover damages, but did obtain a stipulated judgment enjoining defendant from committing health and safety violations in connection with asbestos-containing materials in a hospital. The trial court denied plaintiff’s motion for attorney fees. The court of appeal reversed. Relief obtained through a stipulated judgment may qualify a plaintiff as a prevailing party, and the injunction, requiring defendant’s compliance with asbestos laws and regulations, conferred a significant benefit on the general public.

Cause of action for malicious prosecution requires favorable termination of entire underlying suit. In *Crowley v. Katleman* (1994) 8 Cal.4th 666 [34 Cal.Rptr.2d 386, 881 P.2d 1083], our Supreme Court held that, although there was probable cause with respect to some causes of action asserted in the underlying suit, an action for malicious prosecution could nevertheless be maintained based

on other causes of action for which there was no probable cause. However, this analysis does not apply to the other predicate of a cause of action for malicious prosecution; i.e., favorable termination of the underlying suit. Before plaintiffs can state a cause of action for malicious prosecution, they must demonstrate favorable termination of the entire prior action. (*StaffPro, Inc. v. Elite Show Services, Inc.* (2006) 136 Cal.App.4th 1392 [39 Cal.Rptr.3d 682, 2006 DJDAR 2239] [Fourth Dist., Div. One].)

Expert witness testimony will be disregarded if not based on relevant facts. In *Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409 [39 Cal.Rptr.3d 530, 2006 DJDAR 2293] [Second Dist., Div. Six], plaintiff sued a company that had repaired the brake system of a car that collided with his, on the theory that the service had been defective, resulting in a loss of brake fluid. An inspection after the accident and other evidence showed that there had been no loss of brake fluid. In opposition to defendant’s motion for summary judgment, plaintiff offered evidence of an expert witness who opined that there had been a loss of brake fluid because of defendant’s failure to close “bleeder valves.” Summary judgment was granted, and the court of appeal affirmed. The expert witness had failed to address the factual evidence and his declaration should have been disregarded as being speculative.

“Court days” are tacked on at the end of the notice period. California’s summary judgment statute (Code Civ. Proc., § 437c) provides that, when service is made by mail or overnight express, the time for service is extended by five *calendar* or two *court* days, respectively. Similar examples can be found for service under other statutes.

The statute does not specify whether the additional days are to be tacked on at the *beginning* or the *end* of the statutory notice period. *It makes a difference.* For example, for a Code of Civil Procedure section 1005 motion with a hearing date of February 21, 2006, the last service day for overnight express service would have been *January 25* if the two calendar days are tacked on *at the end* of the 16-court-day notice period, but the service date would have been January 24 if the two extra days are tacked on at the beginning.

Paul Marks, one of our readers, called our attention to the fact that *Barefield v. Washington Mutual Bank* (2006) 136 Cal.App.4th 299 [38 Cal.Rptr.3d 858, 2006 DJDAR 1427] [Third Dist.] also held that “mail days” should be tacked on at the end of the statutory notice period (at

least for purposes of the summary judgment statute).

Prescriptive easement arises unless sign posted by owner. Civil Code section 1008 provides that a prescriptive easement does not arise if the owner of the property posts “permission to pass” signs at designated places. (Check the statute for the very specific requirements.) But the signs must be posted by the *owner of the property*. In *Aaron v. Dunham* (2006) 137 Cal.App.4th 1244 [41 Cal.Rptr.3d 32, 2006 DJDAR 3631] [First Dist., Div. One], the signs had been posted by a lessee. This did not prevent a neighbor from obtaining a prescriptive easement across the property.

Batter assumes the risk of being hit by a beanball. Under the doctrine of primary assumption of the risk as applied to a sporting event, *Knight v. Jewett* (1992) 3 Cal.4th 296 [11 Cal.Rptr.2d 2] held that a defendant is not liable for injuries inflicted during a sporting event if the risk of the injury is “inherent in the sport.”

In *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148 [41 Cal.Rptr.3d 299, 131 P.3d 383, 2006 DJDAR 4122], our Supreme Court applied that doctrine when a pitcher allegedly hit the batter intentionally and the batter sued the college district on a number of negligence theories. The court concluded that “being *intentionally* hit is ... an inherent risk of the sport, so accepted by custom that a pitch intentionally thrown at a batter has its own terminology: ‘brushback,’ ‘beanball,’ [and] ‘chin music.’” Justice Kennard disagreed, quoting the official comments to rule 8.02(d) of the Official Rules of Major League Baseball

as authority for the proposition that throwing a beanball “should be – and is – condemned by everybody.”

And in *Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326 [41 Cal.Rptr.3d 411, 2006 DJDAR 4075] [Fourth Dist., Div. Two], where plaintiff suffered a heart attack when his personal trainer was too aggressive in his training, the doctrine of primary assumption of the risk was also applied to shield the trainer from liability.

Attorney lien may be protected even if not expressly covered in retention contract. Even though a retainer agreement provided for an attorney lien only in connection with a specified case, the lawyer was nevertheless entitled to an *equitable* lien on settlement proceeds for work done on an unrelated case. (*County of Los Angeles v. Construction Laborers, etc.* (2006) 137 Cal.App.4th 410 [39 Cal.Rptr.3d 917, 2006 DJDAR 2749] [Second Dist., Div. Eight].)

Summary judgment statute trumps local general order. The San Francisco Superior Court has a standing order expediting summary judgment motions in asbestos injury cases. The order shortens time to 60 days (Code of Civil Procedure section 437c requires 75 days’ notice) and limits the evidence required to support the motion to an attorney declaration. The San Francisco Superior Court can’t do this, according to *Boyle v. CertainTeed Corporation* (2006) 137 Cal.App.4th 645 [40 Cal.Rptr.3d 501, 2006 DJDAR 2971] [First Dist., Div. Four]. Local courts may not adopt rules or standing orders that conflict with statutes or California Rules of Court.

Court reaffirms rule prohibiting splitting a cause of action. When property owner was sued for personal injuries, its insurer initially refused to defend it in the action. Property owner filed a cross-complaint against insurer. Eventually insurer agreed to defend, reimbursed property owner for its costs of defense, and settled the personal injury action. The court then granted the insurer’s motion for summary judgment, and was affirmed on appeal. Property owner had meanwhile sued the insurer for breach of the covenant of good faith and fair dealing based on insurer’s initial refusal to defend. The court of appeal held that the claims in the cross-complaint and in the new action involved the same primary right. Therefore, the doctrine of *res judicata* barred the second action. (*Lincoln Property Company, N.C., Inc. v. Travelers Indemnity Company* (2006) 137 Cal.App.4th 905 [41 Cal.Rptr.3d 39, 2006 DJDAR 3275] [First Dist., Div. Three].)

Privette doctrine extends to independent sub-contractors. Starting with *Privette v. Superior Court* (1993) 5 Cal.4th 689 [21 Cal.Rptr.2d 72, 854 P.2d 721], our Supreme Court has held that, with exceptions, the employee of an independent contractor may not sue the hirer of the contractor. In *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082 [40 Cal.Rptr.3d 777, 2006 DJDAR 3483] [Second Dist., Div. One], the court of appeal applied the same limitation where the injured person was a subcontractor rather than an employee of the independent contractor.

Supreme Court will re-examine auditor’s liability. In *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 [11 Cal.Rptr.2d 51, 834 P.2d 745], our Supreme Court limited the liability of auditors and accountants to third parties. On March 22, 2006, the Supreme Court granted review in *Frame v. PriceWaterhouseCoopers, LLP* (Case No. S139410), which raises similar issues.

by Richard Reed

Vicarious Disqualification

Under the rules of professional conduct, a lawyer cannot represent a client whose interests are adverse to one of the lawyer's former or current clients in a substantially related matter. If the attorney works for a law firm that wishes to take on such a new client, that firm can isolate the infected attorney from the rest of the firm with an ethical wall, so that privileged information about one client cannot be used to benefit the new client who has adverse interests. If the infected attorney is the head of the law firm, the entire firm is forbidden from representing the new client. This is called "vicarious disqualification."

But what if the lawyer with the conflict is the city attorney? His "law firm" is the city's legal department, and he is the head of that department. Should his entire department, then, be disqualified vicariously from representing the city against one of the city attorney's old clients? That was the question in *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839. The answer is "yes," the California Supreme Court ruled on June 5, 2006. As Justice Joyce L. Kennard wrote in the majority opinion: "Public perception that a city attorney and his deputies might be influenced by the city attorney's previous representation of the client, at the expense of the best interests of the city, would insidiously undermine public confidence in the integrity of municipal government and its city attorney's office."

San Francisco's Chief Assistant City Attorney Jesse C. Smith argued that the "people of San Francisco are being doubly harmed in this case, first by being defrauded; and second by having to pay a premium for representation by outside attorneys when there are knowledgeable and experienced career deputies available who are dedicated to serving the public interest and have no confidential information in this case." Unfortunately for attorney Smith's argument, some cities – one in particular comes to mind – routinely outsource litigation. How does that practice defraud the citizens?

The city attorney and staff are all on salary. When the city litigates, it's prepaid. But when a city outsources litigation, the citizens must pay the hourly billing rate of the chosen law firm. On top of that, if the hapless citizen on the other end of the law suit loses, that citizen may have to help pay off the bill that the city has run up. Instead of routinely fobbing off its litigation to private firms, then, a city should outsource only when it has to: when there is a conflict of interest. And, in that case, the city should have to state the conflict for the record. This will save the taxpayers money, reduce the incentive to over-litigate, and keep the city's legal department honest and open about its conflicts of interest.

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



Minute order does not qualify as "notice of entry" so as to trigger time for appeal.

Rule 2(a)(1) of the California Rules of Court requires a notice of appeal to be filed within "60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed."

In *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256 [41 Cal.Rptr.3d 273, 2006 DJDAR 4031] [Second Dist., Div. Five], the clerk had sent plaintiff a 14-page minute order granting defendant's special motion to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16). On page 13 were the words, "notice of entry." This did not trigger plaintiff's time to file the notice of appeal. The rule is interpreted literally, and it requires that the document carry the title, "Notice of Entry."

No notice of potential legal rights after denial of class certification. After the court denied class certification, it approved a letter to be sent to the putative class members advising them they might have valid claims against defendant. The court of appeal reversed, holding that it is not the court's role to order notification of possible legal claims and that such a communication would draw the court's impartiality into question. (*Experian Information Solutions, Inc. v. Superior Court* (2006) 138 Cal.App.4th 122 [41 Cal.Rptr.3d 219, 2006 DJDAR 3824] [Fourth Dist., Div. Three].)

Mark A. Mellor, Esq., is a partner of The Mellor Law Firm specializing in Real Estate and Business Litigation in the Inland Empire.



INTRODUCING THE JOHN GABBERT GALLERY

by Judge Craig G. Riemer

The third floor conference room of the RCBA building has languished for years without a name. At the general membership meeting in July, the RCBA Board dedicated that room to one of our most faithful and longest serving members, retired Justice John Gabbert.

The room is now a permanent reminder of Justice Gabbert's extraordinary record of service to his clients, to our profession, and to the community. As members of an organization and of a profession devoted to the service of others, we can have no finer example.

As the dedication plaque explains:

This room is dedicated to
The Hon. John G. Gabbert

For 40 years, he served this community in private practice and as a Deputy District Attorney, a Police Court Judge, a Judge of the Superior Court, and an Associate Justice of the Court of Appeal.

In addition, he has been president of innumerable community organizations, including the Riverside County Bar Association, and has served on the governing boards of many others, from the school board to the UCR Foundation.

His exemplary record of public service, both on and off the bench, will never be duplicated.

As courthouses symbolize the lawyers and judges who practice within them, so this gallery of courthouses from across Riverside County represents the legal community that he has helped to shape for four generations.

With admiration and affection from his friends in the Riverside County Bar Association.

July 28, 2006

The gallery will be featuring a permanent collection of photographs, paintings, drawings, and other artistic images of courthouses in Riverside County. **If you would like to contribute an image to be displayed, please contact the RCBA office, (951) 682-1015, or go to the bar's website, www.riversidecountybar.com, to download the information flyer.**

Judge Craig G. Riemer, president of the RCBA in 2000, currently sits in the Riverside Superior Court.



Judge Vic Miceli, Retired, and Presiding Justice Manuel Ramirez, Court of Appeal



Justice John Gabbert and David Bristow at the Court House Justices Ceremony



Judge Michele Levine and Irma Asberry



Retired Judge Scott Dales and his wife Dorothy



Justice John Gabbert and Theresa Han Savage



Charlotte Butt (right), Executive Director of the RCBA, is recognized for her 30 years of service to the bar by Theresa Han Savage



Court House Justices Ceremony (immediately following the dedication at the RCBA Building)



Peter Schmerl, Sarah Schmerl, Justice John Gabbert, Katie Gabbert Smith (daughter), Sam Smith (grandson), Scott Gabbert (son)



Justice Gabbert and Judge Craig Riemer at the dedication of the John Gabbert Gallery in the RCBA Building



Judge Vic Miceli, Judge Dallas Holmes, Assistant Presiding Judge Richard Fields (accepting commemorative photo on behalf of the Riverside Superior Court), and Justice John Gabbert



Art Littleworth, Justice John Gabbert, and Bill DeWolfe



Justice Gabbert gives brief remarks at special Court House Justices Ceremony in Historic Courthouse



Judge Dallas Holmes places commemorative picture on display in Courthouse rotunda



Theresa Han Savage, Judge Charlie Field, and Michelle Ouellette



(back row, left to right) Judge Richard Fields, Judge Gary Tranbarger, Judge Michele Levine, Judge Dallas Holmes, Judge Craig Riemer, Retired Judge Scott Dales, Retired Justice John Gabbert, Justice Doug Miller, Justice Bart Gaut, Commissioner Paulette Barkley; (front row, seated) Judge Robert Spitzer, Retired Judge Charles Field, Retired Judge Victor Miceli, Retired Judge Woody Rich, and Judge Jeffrey Prevost

THE LUCKY KID

by Judge Dallas Holmes

Talk about luck! Can you imagine how great it would have been back in the 50s for a high school kid who wanted to be a lawyer to get invited behind the scenes of a lurid murder trial? That's what happened to me, courtesy of the Hon. John G. Gabbert.

This was before officially established legal internships and other formal on-the-job training programs. Instead, it was just an open door to enter, watch, discuss, and learn.

The case was 1958's "trial of the century" around here. Press and radio were in the courthouse every day, and Channel 5's Stan Chambers came out every so often as well. A pretty little girl named Heidi Nicholson was found dead, bloodied and terribly beaten, in a room at the Casa Contenta Motel out by the new University. Her mother, Felicitas E. Nicholson, was charged by District Attorney Bill Mackey with her murder. His chief trial deputy, Roland Wilson, was seeking the death penalty. Public Defender E. Scott Dales and his assistant, John Morgan, were Nicholson's lawyers, with offices right across the street from Department 2, in the old brick Lerner Building.

Poly High was less than a mile away down Magnolia, and it was my senior year, so I had little trouble getting away most afternoons. Department 2 was then the second largest courtroom in the building, and had a nice feature for observers: a built-in bench ran along the inside of the bar, so lawyers awaiting appearances could sit there, hard by the counsel table, ready to jump up and step forward when their cases were called. This is where I sat, through some little swinging gates, close enough to hear whispered conversations or see notes passed by prosecution or defense.

John Gordon Gabbert was the trial judge. Appointed 11 years earlier by



JAN 30 1958 PRESS
MURDER TRIAL CONTINUES—This was the scene in Superior Court yesterday as prospective jurors for the murder trial of Mrs. Felicitas E. Nicholson, 32, (right) were being chosen. After the jury was seated, Judge John G. Gabbert (center, top) directed the trial continued to 9:30 a.m. Monday. Others identified in the photo (left to right), are Deputy District Attorney Roland Wilson, Court Reporter Tom Nolan, D. A. Investigator Don Archer, and

(Photo by Fred Bauman)
Assistant Public Defender John Morgan. The picture was taken by existing light with a 35mm camera, a controversial procedure currently under discussion between members of the State Bar Association and press photographers. The photographers are seeking permission to cover courtroom news with unobtrusive camera equipment. This photo was taken with permission of Judge Gabbert.

Governor Earl Warren (who called him one Saturday morning at the offices of Best, Best & Gabbert to offer him the job), Judge Gabbert ran a general calendar and heard everything the good people of Riverside County brought to him: criminal, civil, divorce, juvenile, mental health, and small claims appeals. His court reporter was Tom Nolan, his secretary next door was Dortha McCarver, and his bailiff was Bob Merrick, who called him "Judgie" in private.

And private was where I got to be ... at almost every recess, the judge would beckon me back (what a thrill!) into the inner sanctum and we would talk about what was going on out front. This is when I first learned two things: how important it was for lawyers to be thoroughly prepared, and what a fine man John Gabbert was.

It is also where I began to get a vague idea of what it meant to be a good judge. Judge Gabbert was unfailingly polite, humble, and polished, on the bench and off. His intelligence, common sense, and in particular his integrity shone like beacons throughout the presentation of what turned out to be some pretty nasty evidence, which as I recall included bloody photographs involving a closet and a curling iron, and stomach-turning testimony from a new pathologist named Rene Modglin about how someone must have jumped with both feet on the little girl's chest to do the damage he found. The courtroom was full every day, and John Gabbert's innate

goodness and respect for every person there was on display and well-appreciated by all.

When I could be there for the lunch break, we would walk together up Main Street – sometimes with Judge Deegan and sometimes with Judge Bucciarelli, but never both. This was a very proud moment for me, and for my dad, who once saw us together out the window of his insurance office. We would meet Randy Walker or Jud Waugh, or both, at the new cafeteria on University or at the drug store. However, even though they served the best hamburgers in town, we never went to the Kiltlifter, a bar and grill down the street. John told me why, when I suggested it: he didn't want any of his jurors seeing him, coming out squinting into the sunlight, and thinking he had drunk his lunch. John was the original source for me of the old saying, "Not only must justice be done, it must be seen to be done."

Well, you say, get to it ... what happened at the murder trial?

Judge Gabbert agreed to let the press take photographs in his courtroom because of the hot interest, a decision generations ahead of its time. Also, as the weeks wore on, to give some competition to the local papers, he allowed a new lawyer in town, Ray Lapica, who was trying to get a competing radio station (KACE) going up against KPRO, to tape and broadcast the trial. These were controversial moves fifty years ago, but the good judge stood his ground in favor of the public's right to know.

After about three times as long as the original time estimate, the jury found Nicholson guilty of murdering her daughter, and, in the second trial required at the time, it gave her the death penalty. Believe it or not, this meant a third trial was required to decide if she was sane at the time of the murder. She certainly wasn't sane in the courtroom, and controversy raged about whether it was just an act, or if she was well and truly crazy. As the third trial progressed, Judge Gabbert could not allow the spectacle to continue; he stopped the proceedings, declared her insane on the spot, and committed her to Patton State Hospital. In theory, she was there awaiting the reconvening of that third trial upon recovery of her faculties ... but that never happened and she died at Patton.

All the lawyers at the counsel table were eventually elevated to the bench. I am sure all of them took to their own courtrooms what they learned that winter from John Gabbert. Like a teacher, a good judge like John touches eternity; he never knows where his influence stops.

Who ever thought I would end up as the judge in that same department 40 years later? I know none of my law partners did. All this time and remodeling later, it is still John's courtroom, and I am lucky to be able sometimes to feel his presence when I try to figure out what justice and the law require.

Judge Dallas Holmes, president of the RCBA in 1982, currently sits in the Riverside Superior Court.



JOHN GABBERT – A TREASURE OF THE RIVERSIDE LEGAL COMMUNITY

by Justice James Ward, Ret.

Those people fortunate enough to attend Justice John Gabbert's 97th birthday celebration, sponsored by the Riverside County Bar Association, learned a great deal about this wonderful man. For those who were not able to be there, I have been asked to tell a little of John's story.

Born in Oxnard on June 20, 1909, John was brought to Riverside in 1912, when his father purchased an interest in and became editor of the *Riverside Enterprise*. John attended school at Magnolia Elementary, Grant, Riverside Polytechnic Boys' High and Riverside Junior College. As a boy, he spent summers in Sequoia National Park, and later he worked there for the Howard Hays Company, giving tours— he has made hundreds of trips to the park. He got his A.B. degree from Occidental College in Los Angeles and his J.D. from Boalt Hall, UC Berkeley in 1934 (among his classmates were Jim Wortz and Mary McFarland Hall, Riverside's first woman lawyer). He took Bernie Witkin's bar review course and passed the bar in 1934. He had been attracted to the law because of his boyhood interest in his father's court battle with the Ku Klux Klan and because of his fondness for debating throughout his school years. In 1938, John married Katherine (Kay) Fuller of Tulare — they had three children: Sarah, Katherine and Scott.

Starting a law practice in the depths of the Depression was not easy. He hung out his shingle in Riverside with a friend, Don Adams, and practiced for a time with George Sarau and John Neblett. As the new attorney in town, he was appointed to act as pro bono counsel for criminal defendants. He handled so many cases that he became the unofficial public defender for the county. In only one case did he receive a fee, and that consisted of a tattooing machine and a moth-

eaten tent. John joined the Riverside County Bar Association immediately on entering practice. There were about 45 lawyers in the county at the time, and he knew them all. Bar lunches were casual affairs on the second floor of a restaurant on Seventh Street. The Ganahls of Corona hosted an annual picnic for the Association at their ranch. John was elected president of the Association, but served only a short time before going on the bench.

For three years, he worked for District Attorney Earl Redwine. One of his fellow deputies was William O. Mackey, who later became D.A. Part of his job was to make the circuit of the eighteen justice courts in the county. All but two of those courts had lay justices of the peace, and practice there was colorful, to say the least. John recalls people riding horseback to court and being armed. In one case, there was a serious fight in a horse corral near the court between the parties to a dispute involving fencing cattle. It was not uncommon for a justice of the peace to hold court in the front room of his house. John participated in the prosecution for murder of the man who was the last person hanged in the State of California. He sat for a time in the part-time position of police judge.

In 1943, John went into the U.S. Army; he served in New Guinea and the Philippines, where he was admitted to the bar and appeared before the Philippine Supreme Court. On his return to practice in Riverside, he hired Dorothea McCarver as a secretary — she worked for him for 28 years, through all his subsequent legal positions. Before and after the war, he practiced with the Best firm, and the firm eventually became known as Best,

Best, Gabbert & Krieger. Their offices were at Eighth and Main streets, across the street from the offices of Tommy Thompson (his firm later became Thompson and Colegate). John tells of Tommy talking so loud on the phone that people wondered why he bothered with the phone, as he could simply shout across the street to John's office.

In 1949, he received a call "out of the blue" from Governor Earl Warren, who asked him to serve on the Riverside Superior Court. He was the eighth judge appointed in the county and his fellow judges were O.K. Morton and Russell Waite. For about two years, Judge Gabbert did not have a courtroom and sat wherever there was space, including Blythe. He was assigned for a time as the judge for Inyo County. John sat on the Superior Court for over 20 years and was revered as a trial judge – attorneys loved to try their cases in front of him. He served pro tem on the Court of Appeal periodically and authored a published opinion he jokingly calls "Gabbert on Buggery."

In 1970, Governor Reagan appointed him to the Court of Appeal, where he served until his retirement in 1974. He served with Justices Kerrigan, Tamura and Kaufman, with Gardner presiding. Justice Gardner's procedure at that time was to take a large percentage of the cases for himself – mostly simple criminal cases – and assign the other cases to the remaining justices based on what he perceived to be their expertise.

John was active in community organizations and served as president of the Present Day Club, the Lions Club and the Citizens University Committee. He served for three years on the Riverside Unified School District Board. His involvement with the University of California, Riverside has been extensive. He was on the founding committee for UCR, served on its Foundation Board and for years taught a pre-law honors seminar. John loves riding motorcycles and has ridden hundreds of thousands of miles in the U.S. and Canada with, among others, his court reporter, Tom Nolan, and Justice Gerald Brown. Always the Renaissance man, John has been a ham radio operator, a beer brewer, a bread maker and

for some years a part-owner of a backpacking supply store. He writes well, and he cannot be surpassed as a speaker.

The recitation of the facts of his career does not tell the most compelling thing about John Gordon Gabbert. I speak of his wonderful human qualities. To learn this, you simply have to know him. John is one of the kindest, warmest and most engaging of human beings. At age 97, he has a sharp intellect and a subtle wit. He is a jewel of our legal community and is truly one of Riverside's treasures.

Justice James Ward retired from the Court of Appeal in October 2005. He was president of the RCBA in 1973.



INTERNATIONAL INTELLECTUAL PROPERTY CONVENTIONS

by Michael H. Trenholm and John W. Holcomb

As the world economy has become increasingly intertwined and interdependent over the past few decades, the international community has adopted various intellectual property law conventions to facilitate IP owners' acquisition of corresponding IP rights in multiple foreign countries. Much recent discussion, especially in the U.S., has focused on the need for, and the desirability of, harmonizing disparate national laws relating to patents, copyrights, and trademarks. If full harmonization of existing national IP laws is the objective, then the current system falls far short.

To provide some background, the term "intellectual property" (or "IP") refers generally to rights granted or acknowledged by a government that provide some sort of limited monopoly power to the holder of those rights. Patents, copyrights, and trademarks are common types of IP. Patents protect new and useful inventions, or improvements to old inventions, such as the better mousetrap. A design patent, or an industrial design, is one particular type of patent that protects the unique ornamental appearance of an object. Trademarks generally protect words, slogans, and logos that designate the origin of a product or service. Copyrights protect artistic or creative expression that is fixed in some medium, such as written manuscripts, artwork, music recordings, and architectural drawings. The international conventions that relate to each of these different types of intellectual property rights are briefly described below.

With respect to patent and trademark rights, most of the world's significant industrialized countries have signed onto the Paris Convention for the Protection of Industrial Property. The Paris Convention originated in the late 1800s, and it has been modified numerous times in the past century. The Paris Convention essentially allows a person who has filed a patent or trademark application in one member country to file a corresponding application in another member country and establish an effective filing date for the corresponding application equivalent to the date of the original application.

IP owners seeking the benefits of the Paris Convention must adhere to certain time deadlines. Specifically, to claim the benefits of the Paris Convention for a utility patent, the IP owner must file its corresponding applica-

tion within one year of the original filing date; for design patents and trademarks, the IP owner must file its corresponding application within six months of the original application.

The benefits conferred by the Paris Convention relate to the substantive national patent or trademark laws of different member countries. For example, many industrialized countries, including Japan and the countries of the European Union, require an IP owner to file its patent application before it publicly discloses its invention anywhere in the world. Without the Paris Convention, patent applicants would have to file all of their patent applications throughout the world before they commercialized their inventions, which, of course, would be cost-prohibitive. The Paris Convention alleviates this problem by allowing IP owners to file their applications in only one convention country, and then complete their filings in other countries up to six months or a year later.

Thus, while the Paris Convention facilitates the filing of patents and trademarks in multiple countries, it is largely a procedural tool because it does not address each member country's substantive laws relating to patents and trademarks. Hence, IP owners must comply with the various formal and substantive legal requirements of each of the countries in which they seek IP protection.

An example of the disparity in substantive patent and trademark law is evidenced by the way different countries determine who among competing applicants is entitled to a particular patent or trademark. In most European countries and in Japan, the first entity to file the patent or trademark application is entitled to the resulting intellectual property right. However, in the United States, the person entitled to a patent or trademark is more often the entity that can establish that it either first invented the subject matter of the patent or first used the trademark in public. Another example of the difference between the substantive laws of different countries relates to the type of subject matter that can be patented. In the United States, one can obtain a patent on a unique method of treating medical patients; however, in many European countries, methods of medical treatment are not patentable.

The discrepancy between the substantive laws of different countries has led to many calls for treaties that would harmonize those laws. Such harmonization has occurred on a regional basis in some places of the world. For example, the European Patent Office will examine pat-

ents that have force and effect throughout the European Union. Similarly, the Patent Cooperation Treaty (or “PCT”) allows for the examination of patent applications before those applications are examined by the national patent offices. However, while the PCT effectively functions as a clearinghouse for international applications, it does not replace existing national patent offices.

International copyright law provides one example of the greater harmonization of substantive IP laws. Copyrights are covered by the Berne Convention. Signatories have agreed that the basic substantive copyright laws set forth in the Berne Convention will be the law in those countries. Accordingly, a person who has obtained a copyright in one Berne Convention country possesses automatic copyright protection in all Berne Convention countries. The Berne Convention eliminates many of the various formal requirements with which IP owners were required to comply in the past; these formal requirements included the mandatory display of copyright notices and the need to file a copyright application before enforceable rights attached to the copyrighted work. Some countries, including the United States, still require IP owners to comply with some of these requirements in order to enjoy protections that are above and beyond the Berne Convention’s basic remedies.

Most commentators believe that, as the world economy becomes increasingly complex, efforts to harmonize

IP laws will increase. Increased harmonization will enhance IP owners’ ability to obtain corresponding rights in foreign countries in an efficient manner. However, sovereign nations do have different national interests, which will continue to be reflected in differences in their substantive intellectual property laws. Accordingly, complete harmonization will require significant negotiations and will likely not occur soon.

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SAFE AND SECURE: HOW THE GOVERNMENT SCREENS VISITING FOREIGN NATIONALS

by Kelly O'Reilly

On New Year's Day, I went to a local movie theater with my family, and, while in line to purchase the obligatory treats, I received a phone call from a client who happened to have the first name of Osama. I answered the phone and greeted him by name and inquired as to how things were in Kuwait. I then realized that I had the attention of the entire theater. With every eye on me and every ear waiting for what Osama might have to say, I prudently excused myself and exited the theater for a little more privacy.

9/11 changed us.

It changed how we feel about airports, traveling and the evening news. It changed the way we look at each other, the way we interact, and the way we feel about people who look or dress differently. For the first time, Americans felt vulnerable and threatened. This fear made us reexamine our immigration policies and the methods used to screen foreign nationals intending to visit or immigrate to our country. It brought immigration to the forefront of our collective consciousness, requiring our leaders to think in terms of national security. Friend or foe, Americans want to know who is coming to the U.S. and why.

Our government appears to share this concern, as evidenced by the introduction of a complex series of security measures intended to identify and remove those individuals who may seek to harm this country. These new immigration procedures, many of which are controversial, were designed to enhance our ability to examine the threat potential of each visitor and to streamline visa processing. In a post-9/11 world, security is everything, and foreign nationals who wish to visit the United States can plan on the following security requirements.

NAME CHECKS

When applying for a visa abroad or for an immigration benefit here in the U.S., applicants must submit to an initial security name check. The applicant's name is submitted by the U.S. Embassy or the Immigration Service, to be matched against similarly spelled names found in a labyrinth of databanks maintained by such agencies as the CIA, FBI, NSA, State Department and Homeland Security Department. These databanks include the FBI's National Crime Information Center, or NCIC, with over eight mil-

lion criminal records; the Consular Lookout and Support System, or CLASS, with more than 18 million names; and TIPOFF, which is a classified database of approximately 120,000 records, including the names of suspected terrorists.

On each application, consular officers and immigration officials check the appropriate databases for a match or a similar name that has been flagged as a possible or proven threat to the U.S. All of this information is constantly updated and available to each and every consular officer abroad and to immigration officials here at home. Congressional reaction to 9/11 mandated this unprecedented level of accessibility and cooperation in the form of the USA Patriot Act, the Border Security Act and the Intelligence Reform Act.

The specific database used depends upon the type of visa. A visitor applying at an embassy or consulate will have his or her name processed through specific databases, depending on the type of application submitted or the purpose of the visit. Clearance through these checks is mandatory before a visa may be issued. There are three main types of checks, known as:

- **CONDOR**

Refers to a check done mostly off the information provided on the application for a visa that focuses on applicants with a potential terrorist connection. This usually means that they are from a Muslim-dominated country. Processing of a visa can be held up by this check by as long as 90 days.

- **MANTIS**

This check is designed to ensure that sensitive technology is not stolen or inappropriately shared with those who would use it to harm the U.S. If the visa applicant might be involved with a "critical-field" technology in the U.S. that could have a dual use, such as a military or national security application, this check will be done to screen out a high-risk applicant. This check may delay the applicant's visa approval by at least 30 days.

- **NCIC**

This name check procedure is done at the embassy or consulate by accessing the NCIC database at the FBI.

This procedure screens visa applicants by name to see if there is a “hit” in the U.S. criminal database. If the search results in a “lookout hit,” the application is subject to a more intensive security screening, usually involving the submission of fingerprints, in-person interrogation without counsel, and even a denial of the visa application.

There are numerous reasons a name check may prompt a “lookout hit,” the more prominent being that the potential visitor has a past criminal record involving firearms, drugs, domestic violence, sexual crimes, or more importantly, the applicant has a known affiliation with a terrorist group. Equipped with this knowledge, the embassy or consular officers can deny the application based upon potential risk to public safety.

Inherent in the use of a name-check database is that, in some cultures, many individuals share the same name or have similar names. (E.g., Patel, Mohammad, Chan, Lee, etc.) This problem has resulted in some “false hits,” where a visa applicant’s name matches a flagged name in the database but is not actually that same person. Recently, this happened to a five-year old girl from Great Britain who shared the name of a famous terrorist and was refused entry even though she obviously posed no threat.

When a name check results in a hit, the consular officer will place an administrative hold on the case in order to further investigate the applicant. This process can add up to six months of delays while further databases are searched and the applicant interviewed.

FBI FINGERPRINT CHECKS (BIOMETRICS)

Section 303 of the Border Security Act mandates the use of biometric identifiers prior to the issuance of a visa. A biometric identifier is an objective measurement of a physical characteristic that may be captured and entered into a database. This identifier can be used to conduct background checks, to confirm the identity of the visa applicant and to ensure that the applicant has not received a visa under a different name or been deported. The most common form of biometrics, required of all visa applicants, is fingerprints.

The FBI fingerprint check provides information relating to criminal background within the U.S. and abroad. Generally, the FBI forwards the response to the embassy or the Immigration Service within 24-48 hours. If there is a record match, the FBI forwards an electronic copy of the criminal history (rap sheet) to the appropriate official. The embassy or immigration officials will review the record and determine what effect, if any, the record will have on eligibility to immigrate to the U.S.

INTERAGENCY BORDER INSPECTION SYSTEM (IBIS) NAME CHECK

This multi-agency central system is used domestically by the Immigration Service and is a prerequisite for any applicant in the U.S. for an immigration benefit. Prior to the final adjudication of an application for immigration benefits, an officer must have an IBIS clearance showing that no derogatory information is available about the applicant from the various intelligence agencies.

USA PATRIOT ACT

Six weeks after the 9/11 attacks, President Bush signed into law the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.” These “tools” include the use of electronic eavesdropping, foreign intelligence gathering and other forms of surveillance on individuals who have applied for or who will apply for visas to enter the U.S.

CONCLUSION

Abuse of the immigration system by the 9/11 attackers has not been lost on those in positions of authority, and as a result foreign nationals who want to visit the U.S. must submit to multiple screening procedures at the appropriate U.S. Embassy or the Immigration Service before permission to enter or to remain is granted. These complicated procedures are inconvenient and often cause lengthy delays, but are necessary for a country still shaken by the mere mention of the name Osama.

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ELECTRONIC DATA DISCOVERY – AN OVERVIEW

by Ed Booth and Michael Caldwell

Here is an interesting bit of not-so-trivial trivia: 60 billion emails are sent every day. 60 billion... every day... the sheer volume is staggering. But for our purposes, this next number is far more significant: 90% of all business communications are sent via email.

Additionally, the vast majority of all business documents – surveys estimate more than 90% since 1999 – are computer-generated: word processing documents, spreadsheets, relational databases, contact databases, electronic presentations, images such as charts and graphs, and more.

Furthermore, there are voicemail and voice over IP, as well as instant text-messaging, blogs and other web-based forms of communication.

And we must consider all the devices on which all this electronically generated data is being created and stored: personal computers, Local Area Networks, offsite web-based servers, smart phones, Blackberries,® Palms,® laptop computers, external hard drives, optical drives, CDs, DVD-ROMs, flash drives, and let's not forget Zip® drives and good old-fashioned floppies (remember those?).

A lot going on here, and it all has the potential for discovery.

Which side of the process you are on will determine how you advise your client on obtaining or providing the required information. Each is different, but both are intimately related. Over the course of the next few articles, we will discuss in depth both sides of the issue, as well as judicial and legislative developments in this relatively new area.

There are those among us who embrace the latest and greatest technologies, using smart phones and PDAs for communications, etc., doing all their research online and using the latest in computer technology to present their cases. And then there are those who still stick to their Daytimers®, use yellow pads for everything and get frustrated with voicemail on their mobile phones. Most of us, however, fall somewhere in between the two extremes.

Those who are on the leading (some say bleeding) edge of technology are already aware of the ramifications of EDD. They are aware of the huge amount of electronic evidence that can be gathered, verified and analyzed. They actively seek electronic evidence, especially in cases regarding fraud, intellectual property theft, family law, spoliation of evidence and breach of contract, among others.

Those who are more reticent about using technology are concerned that the EDD process is too time-consuming,

too complicated, and, probably more to the point, too expensive. The good news for these folks is that it is none of those. In fact, the process of EDD is generally quite a bit less expensive than traditional paper discovery.

Regardless of your level of expertise, there are several steps to take that will make the use of EDD most effective. Recent case law has defined these steps as follows:

1. Send a preservation letter.
2. Appoint a neutral forensic expert.
3. Prepare an order detailing the EDD inspection protocol.
4. Hire a forensic expert to acquire and preserve the computer data for analysis.
5. Examine and analyze the data (in the form of image files) for evidence.
6. Document the findings.

See *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D.Va. 2001); *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639 (S.D.Ind. 2000); *Playboy Enterprises, Inc. v. Welles*, 60 F.Supp.2d 1050 (S.D.Cal. 1999).

Perhaps the most important step, especially for those new to EDD, is to find expert outside consultation (step 4 above). In the past, EDD has been stymied by a lack of universally recognized procedures in acquiring data. Unlike government investigators who can seize computers pursuant to warrant without any advance notification, a civil litigator usually has access only after weeks of discovery motions and related objections.

A good consultant will be able to help avoid these pitfalls. He or she can help prepare discovery requests and develop an effective strategy for acquiring, analyzing and effectively using the data. On the flip side, an experienced EDD consultant will be able to help you on how to advise your client if it is on the receiving end of EDD motions.

In subsequent articles, we will delve into the intricacies of EDD, including the acquisition process, and share tips on how to get just the data you need and how to save money. Stay tuned.

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IN MEMORIAM: JUDGE WILLIAM H. SULLIVAN, RET.

by Sandy Leer and John Gabbert

Fond Remembrances from Two Friends

First from Sandy:

Bill was 78 years old when he died on June 17, 2006. He had been in declining health and was frustrated with losing his ability to drive. He didn't like using a cane, but he certainly needed one for balance. He had to be one of the worst patients in the world when he had to endure hospitalization or stints in the infirmary at Plymouth Towers, where he was living in downtown Riverside. Things were getting harder for Bill, and the road ahead didn't look any easier. For a person as independent as Bill was, it was particularly discouraging, but he continued to struggle to maintain all aspects of his life that were within his reach.

Bill also continued to maintain his friendships and social relationships with those people who had been close to him throughout the years. Vic Miceli, Ginny Hews, John Beal, Mike Bright, and John Gabbert were just a few of the friends he saw routinely and enjoyed. There were many others who were also important to him from long-standing friendships throughout the years, and they know who they are. Friends were important to Bill, and he never forgot that. He was

revered for his caustic and dry sense of humor, and it was always a mark of pride to recount among friends the latest insult by Bill Sullivan. He took as well as gave.

Family was for Bill always first. His wife, Joan, died in 1976, leaving him four daughters to raise. The girls are Stacy, Dana, Anne and Carol. With the help of Isabel, their beloved nanny, Bill saw them through all of the troubles and successes that await all families of four daughters and realized the happiness with his girls that we all hope for. He was the proud grandfather of seven children, including Carol's now seven-week-old son and Anne's now three-week-old daughter. He was pleased that the girls were all well-settled. He was grateful for the role Dana's husband, Steve, played in their lives. Steve was always Bill's go-to guy when something was needed.

Bill Sullivan was a hard worker. He was an undergraduate student at Stanford when he was called up to serve in the Korean War. He came back to Stanford, where he completed his undergraduate work and also Stanford Law School. He drove a school bus to pay

OPPOSING COUNSEL

William H. Sullivan

With the great influx of attorneys moving to Riverside County since the war, a native Riverside lawyer is a rather rare individual. William H. Sullivan was born in Riverside on May 2, 1928. He is a brother of Ray T. Sullivan, Jr., the County Counsel, who is also a native son. Bill attended the local schools and graduated from Poly High School in 1946.

He then enrolled at Stanford, where he obtained his A. B. in 1950. While in College he was a member of the Kappa Alpha fraternity. He also drove a school bus for the Sequoia Union High School District in Redwood City. Upon graduation, Bill joined the National Guard and went over to Korea as a member of California's 40th Division. He spent 10 months in Japan and six months in Korea as a Battalion Operations Sergeant in the infantry. After two years' service, he was discharged.

Bill then returned to Stanford to study law and resume his part-time job as a school bus driver. He obtained his L. L. B. degree in 1955 and was admitted to practice in January, 1956. He returned to Riverside and became a member of the firm of Neblett, Walker & Sullivan, now Walker & Sullivan.

Bill is still a bachelor. He is interested in politics and is secretary of the Riverside County Republican Central Committee. He is also a member of the Board of Deacons of the Calvary Presbyterian Church. A member of the esteemed Present Day Club, he served as president in 1959-60. As a member of the Executive Committee of the Conference of State Bar Delegates, he represents this area.

Outdoors, Bill likes to fish, swim and play handball. Indoors, his hobbies are playing bridge and enjoying classical music.



WILLIAM H. SULLIVAN

expenses while he was in school. Bill was always quick to joke that it had been easier to get into Stanford at the time he was admitted. After completing Stanford Law, he came to practice law in Riverside, where he had grown up. Prior to Bill's appointment to the bench, he practiced in association with several fine lawyers, including the Hon. John (Jake) Hews, who was one of his closest friends. He was president of the Riverside County Bar Association in 1968.

Patience was not among Bill's virtues. He didn't appreciate having his time wasted by verbose or silly arguments from lawyers in the courtroom. He was a man of few words. He loved to have good lawyers in front of him; he enjoyed good presentations of law and fact. He was an old-fashioned judge more prone to issuing his rulings in those terse words, "Granted" or "Denied." The lawyers who practiced in front of him held him in high regard and respect.

Bill loved classical music; he played the organ and the piano. He loved to read. He was complaining recently that he had almost exhausted the library at Plymouth Towers. He didn't have a television. He possessed a keen intellectual curiosity and was among the most cynical of citizens. He believed in good manners and all things traditional.

Bill was attending John and Barbara Beal's 50th anniversary party when he died. He had been chatting with friends and enjoying a martini; he was sharp as a tack. After a while, he had to take a seat, and I offered to bring someone over to the table where he sat to talk with him. I teased him that I would find someone he didn't like to bring over. In his inimitable style, he told me that it wouldn't be hard to find someone in that category. A short time later, we all took our places at the table with him, and within a few minutes, he was stricken and died. There was a physician at our table who attended him, but there was nothing to be done. It was a quiet and speedy death. It was a leaving that took place among friends who cared for him. All of us present were sobered by what had happened, but as we talked about it, we concluded that Bill couldn't have had a better passing.

Let us remember Bill Sullivan with humor, with affection, and with loyalty, as he would have wanted to be remembered.

And now, I yield to the Honorable John Gabbert, Retired, for his thoughts.

Now, from John:

The curtain has fallen on the last act of "Bill" Sullivan's life. Those who knew him cannot help but feel that his time with us ended all too soon. We who were fortunate enough to have known him as a friend knew how lucky we were. One of my last meetings with Bill was when two of us, old friends of his, went to see him when he was in the infirmary at Plymouth Towers recovering from a bad fall. He was his usual blunt, gruff, joking self. He must have been a great Master Sergeant in his Army days!

Bill had a big-hearted spirit. I know scores of helpful acts he extended to needy men, women and children who had no other helping hand offered to them.

Unbeknownst to me, he anonymously funded, in my name, the Justice Fund of the Community Foundation. The income is available for use by the judges of the juvenile court to meet the needs of children for immediate assistance when other funds are not available. The fund is slowly increasing, and today it is several times its original size.

We now say farewell to the last of the three Sullivan brothers, Raymond, Donald and Bill. Each was an important participant in the public legal affairs of the county for more than 50 years. Good-bye, Bill, and God rest the Clan!

Sandy Leer, President of the RCBA in 1991, is a recently retired family law attorney in Riverside.

Justice John Gabbert, Retired, was President of the RCBA in 1949 and is our most senior past president.



IN MEMORIAM: JUDGE WILLIAM H. SULLIVAN, RET.

by Judge Victor Miceli, Ret.

Comments at Funeral Services
for William H. Sullivan
(June 28, 2006)



Judge William H. Sullivan, Ret.

I am honored and privileged to be asked to say a few words about my friend and colleague. A telephone call in the early evening that “Bill is having a problem” – “it looks very serious” – “he’s flat-line” is not a way to end a 40-year friendship. I, and all of us, have been denied the chance for closure. There was no opportunity to prepare for what is inevitable for each of us.

Before I was asked to speak at this occasion, my mind summoned up our past relationship, beginning when his daughter Anne and my son Mickey shared – I don’t want to suggest the same bassinet – but at least the same nursery room in the hospital, and ending with our last luncheon, two or three days before his demise.

The remembrances caused me to endure the range of emotions – sorrow, regret, anger, and joy.

My sorrow is that I will no longer be able to have lunch with my friend and share the banter, dissect the daily events, and grouse about our gripe *du jour*. We had our complaints and grumbles, but courtesy and respect for the sanctity of this holy place precludes me from repeating what Bill would say. Surely, no one here would even think that anything profane came from my lips.

My regret is that Bill’s last few years were impaired by failing health. Although his body may have been infirm, his mind was as clear and as sharp as ever to the very end. Bill could not navigate as easily or as steadily as he may have wished, and this curtailed his activities. Bill’s demise might have been different – he was close to facing murder charges when Steve told him that his car was being taken away and he could no longer drive. He was not, as the kids say, “a happy camper.” Bill described the situation in such terms as to make me blush. But it all worked out. Bill’s many friends and family took him wherever he wanted to go. Some of us, however, had to hear about the perfidy (which he pronounced *per fad e*) of his family. Through all his medical trials and tribulations, Bill retained his sense of humor and rarely complained about his health.

My anger is about the way he was treated in the last days of his judicial career. I do not stand in judgment,

neither supporting, condoning, excusing, nor condemning the circumstances that led to his retirement. But I do bristle at the thought of the viciousness and the mean-spirited attacks upon his character. It was not enough to seek redress or to remedy a situation; his antagonists sought to and did destroy his pride and dignity. My anger is for those who pursued what may be a good cause but were so vindictive and spiteful that their primary motivation was to cause anguish and hurt. They are to be pitied rather than scorned.

My joy is in the memories of the times we spent together. We grew closer and saw each other daily during the time we were on the bench. Rarely did a day go by that we did not have lunch or one of us would not stop by the other’s chambers. Bill had a great love of the law. Although he intentionally gave the impression that he was gruff and would brook no nonsense, Bill was a kind, gentle, and understanding jurist. Attorneys and litigants appeared before him gladly, without hesitation or reservation. I don’t suppose that could be said about me.

Bill was a quiet man, a man of few words. He had a great sense of humor and a biting wit. I tell of the time Bill was called upon to speak at the retirement party for his very close and long-time friend, Don Thomas. Bill came to the podium and said: “My mother told me that if you did not have anything nice to say about a person, don’t say anything.” Bill then turned aside and walked away from the podium.

Bill’s greatest love, greater even than the law, was his family. Bill raised his four daughters without the benefit of his loving companion. He juggled his time so that he was able to practice law, attend all their school functions, and be a caring and loving parent. How he did it and what he did was extraordinary.

I miss him. What I will miss mostly is the telephone ringing and Bernice telling me that Bill wants to know if the little bastard is having lunch with him today. I will be there – and you, Bill Sullivan, will be with me in spirit.

God please bless your soul.

Judge Victor Miceli retired from the Riverside Superior Court in 2001.



JUDICIAL PROFILE: THE HONORABLE MEREDITH A. JURY

by *Cosmos E. Eubany*

Judge Meredith Jury sits on the bench of the United States Bankruptcy Court for the Central District of California. A native of Valparaiso, Judge Jury recalls that although she lived in a small city in Indiana, her city was home to many professionals that worked at the steel mills in Gary, Indiana and the oil refineries in the northwest corner of the state. These professionals, along with the professors lecturing at Valparaiso University, made for an unusually well-educated populace.

Although she loved her city and the small student population at "Valpo," she opted to attend college at the University of Colorado. She confesses that she went to school in Colorado because of a childhood affinity for the mountains. At Colorado, Judge Jury graduated cum laude and Phi Beta Kappa, with a Bachelor of Arts degree in English literature and a double minor in Journalism and History. She spent her junior year of college in the United Kingdom, taking courses toward her degree at the University of East Anglia.

After college, Judge Jury spent time in the nation's capital, working as a computer programmer with the United States Census Bureau while concurrently taking night courses in economics. In 1971, Judge Jury obtained a Master of Arts degree in Economics from the University of Wisconsin-Madison. She then received a master's degree in English and Education, along with her teaching credential, in 1972 from the same institution. After a double dose of disillusionment in the field and poor career prospects, Judge Jury decided to attend law school. She started what would be a successful legal career at the University of Wisconsin Law School and subsequently transferred to the University of California, Los Angeles School of Law.

Judge Jury became interested in litigation after enrolling in a two-year clinical program at UCLA. In her second year of law school, she clerked for Best Best & Krieger, LLP, and later she accepted an associate position in their litigation department. She remained with BB&K for 21 years. During her tenure at BB&K, she served as the managing partner of their Ontario office. She admits that she never liked jury trials and preferred judge trials and appearing in appellate court. She understood that in appellate court, she would have to field difficult questions, and it would ultimately push her to think on a higher level.

In 1978, the bankruptcy code was amended. Judge Jury studied this area of law in an effort to distinguish herself at her law firm. She recalls countless hours of self-study and taking courses on the subject at UCLA. By the time she answered the call to apply for the bankruptcy bench, 20 to 30 percent



Judge Meredith A. Jury

of her practice involved representing creditors in bankruptcy court. After multiple screening processes and ultimate confirmation by the U.S. Court of Appeals for the Ninth Circuit, she obtained the merit-based position and was sworn in on November of 1997.

At the time Judge Jury took the bench, the Central District had the most consumer filings. However, her caseload became limited as the ballooning housing market gave individuals the

option of refinancing their homes and living on the equity instead of filing for bankruptcy. When her case load was heavy, Judge Jury's calendar included approximately 100 cases. However, this number soon decreased to roughly 25 matters.

Because more new bankruptcy laws went into effect on October 17, 2005, I took this opportunity to ask Judge Jury what effect the changes in the law were having in the community. She notes that there was a spike in the number of cases filed in October 2005, as many people moved to file for bankruptcy before the new law took effect. This created a tremendous strain on her staff, as they witnessed a year's worth of cases filed in one month. After the new law went into effect, the filings dropped, as attorneys and pro pers attempted to learn the new law.

The new law has been difficult to learn; however, Judge Jury notes that the bar has stepped up to the challenge. One way in which the bankruptcy community has taken on the challenge is by judges releasing written decisions for publication. Although not binding, the decisions are instructive. Further, the array of well-qualified counsel has helped develop and create an understanding of the new laws.

One problem with the new law, according to Judge Jury, is that there are newly sanctionable activities for lawyers. Under the new law, an attorney may be held responsible if her debtor-client lies to her. This has had the effect of deterring some consumer lawyers from the practice.

A major difference in the new law is that one is less able to rewrite a loan. Under the previous bankruptcy law, a consumer debtor could rewrite his car loan and pay, as a secured loan, the value of the vehicle. Under the new law, if a car is two and a half years old or less, the consumer must pay the contract loan, which can be substantially more than the value of the vehicle. However, the new law does allow the consumer to lower the interest rate on the loan up to a certain point.

When asked about trends she has observed in the field in general, she notes the explosion of special-appearance attorneys, as well as attorneys appearing via court call. She

understands the need for court call, but prefers an attorney to actually appear in front of her.

Most rewarding about her position is the effort to make the right decision, an endeavor she takes very seriously. She normally does not take a matter under submission, but as a rule, if she does take a matter under submission, she will write her opinion and release it for publication.

For an attorney appearing before her, Judge Jury notes that the attorney should be prepared, because she enjoys asking questions from the bench in law and motion hearings.

Judge Jury loves living in Riverside and expresses nostalgia as she recalls the days when the city truly was small. Her

hobbies include playing golf, hiking, and watching women's basketball. In addition, Judge Jury is an avid bicycle rider. She visited New Zealand, Baja California and Canada on bicycle-riding trips, and she once rode from San Diego to Cabo San Lucas by bike. She recalls the ride to Cabo was a two-week trip, supported by vans. She hopes to climb Mount Kilimanjaro in December. We wish her luck on this grand adventure.

Cosmos E. Eubany is an associate at the law firm of Graves & King, LLP, and a member of the Riverside County Bar Association's Publications Committee.



IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

by Mark A. Davis

In criminal courtrooms across California, judges and prosecutors now routinely tell defendants that, as a result of their impending pleas, they *will* be deported, excluded from admission, and denied naturalization, if they are not citizens of the United States. In many instances, they are correct. In many instances, they are not. I am quick to point out and explain when they are incorrect.

Penal Code section 1016.5 mandates that the court tell all defendants that, if they are not citizens of the United States, their plea *may* subject them to deportation, exclusion from admission and denial of naturalization. It may and it may not. This is a correct statement of the law and reality, both thoughtfully considered and carefully drafted by the California Legislature. Indeed, to tell a defendant that he or she *will* be deported, etc. as a result of a plea is often a misstatement of both the law and reality.

The effect of a criminal conviction on a noncitizen defendant will vary, depending on the crime and the defendant's immigration status. It is imperative that criminal defense attorneys discover the precise immigration status of their clients so that they may effectively represent the client's interest in criminal court.

Although criminal practitioners are not required to be immigration experts, they are required to know a fair piece about how a conviction will affect their noncitizen client. (*People v. Soriano* (1987) 194 Cal.App.3d 1470.) Defense attorneys and their clients have a statutory right to investigate and discover how a case or conviction is going to affect the client's immigration status before the plea is entered. (Pen. Code, § 1016.5, subd. (b).) Indeed, that is the responsibility of effective counsel. Defense attorneys should partner with immigration attorneys so that they can competently advise their clients of the specific immigration ramifications of their decision to plead.

Counsel representing noncitizen defendants should be familiar with, and have a fairly sophisticated understanding of, these five immigration terms: aggravated felonies, inadmissibility, deportability, crimes involving moral turpitude, and the petty offense exception.

Aggravated Felonies are, at times, the equivalent of an immigration death sentence. They subject noncitizens (including legal permanent residents, or LPRs) to immediate deportation and sometimes *permanent* banishment from the United States. In many instances, this is a sentence of life without family. The definition includes many serious crimes,

such as murder; rape; sexual abuse of a minor; drug or firearm trafficking; violent crimes, theft crimes or document fraud, where the sentence is one year or more; or fraud crimes, where the loss exceeds \$10,000. You can find the complete list of aggravated felonies at 8 U.S.C. § 1101(a)(43) and section 101(a)(43) of the Immigration and Nationality Act.

Be mindful that aggravated felonies need not be actual felonies. They can also be misdemeanors that fit the criteria set out above. A sentence of 365 days or more on a theft, violent or fraud crime makes it an "aggravated felony," whether a felony or a misdemeanor.

It is also important to note that the definition of "sentence" for immigration purposes includes any imposed and suspended sentence, whether served or not. (8 U.S.C. § 1101(a)(48)(B), § 101(a)(48)(B) of the Immigration and Nationality Act.) Defense attorneys should not necessarily celebrate a one-year suspended sentence, with no time actually served; this may cause the defendant to be deported as an aggravated felon and banished forever from the United States. He or she would have been better served to have pled to 364 actual days on the same offense. The attorney who negotiates a one-year suspended sentence (instead of 364 days suspended, 364 or less actual days) as part of the disposition may well be deemed to have rendered ineffective assistance.

Inadmissibility makes noncitizens ineligible to receive lawful permanent residence, and denies LPRs permission to re-enter the United States if they leave the country. Thus, counsel should be familiar with the list of crimes that cause noncitizen clients to be deemed inadmissible. Included on the list of "inadmissibility" crimes are moral turpitude convictions, prostitution, drug-related activity and *any two* convictions where the aggregate sentence is five years or more. The list of "inadmissibility" crimes can be found at 8 U.S.C. § 1182 and section 212(a) of the Immigration and Nationality Act.

Be aware that drug-related dismissals after successful completion of a rehabilitative program such as Penal Code section 1000 (diversion) or Proposition 36 have no immigration significance. As long as a plea is entered, it will always be a conviction for immigration purposes, and will make noncitizens inadmissible in almost every circumstance.

Deportability is different from inadmissibility because it affects those who have already lawfully immigrated and have their green cards or non-immigrants who entered the country lawfully. Being "deportable" means that the Department of Homeland Security (formerly INS) can initiate proceedings to remove or deport LPRs or other lawfully admitted noncitizens from the country. Hearings are frequently required, and many waivers exist to avert the harsh punishment of depor-

tation. Interestingly, you can be deported only if you have been lawfully admitted. If you have never been admitted to the United States (i.e., if you are illegal), you are simply removed. (The terminology for immigration issues can be more complicated than I am prepared to explain.)

Nonetheless, many crimes that make you deportable can also be found on the inadmissibility list. Oddly, some crimes that make you deportable do not make you inadmissible, and vice versa. This is why it is important to know your client's immigration status. Included on the list of deportability crimes are aggravated felonies, moral turpitude convictions, firearms convictions, domestic violence convictions and drug trafficking convictions. The list of "deportability" crimes can be found at 8 U.S.C. § 1227 and section 237(a) of the Immigration and Nationality Act.

A Crime Involving Moral Turpitude (CIMT) is loosely defined as any crime requiring lewd intent, intent to defraud or steal, or where great bodily injury is caused by an intentional or willful act. There are entire books dedicated to which crimes classify as CIMTs. The fight over what classifies as a CIMT is ongoing. Still, a CIMT is devastating to any noncitizen defendant. For permanent residents, one CIMT within five years of receiving a green card makes him or her deportable. Two CIMTs committed at any time after having received a green card makes a noncitizen deportable.

For noncitizens who are not permanent residents, CIMTs mean almost certain inadmissibility, subject to certain waivers and exceptions.

The Petty Offense Exception is a waiver to a ground of inadmissibility. An offense qualifies under the petty offense exception if (1) it is a misdemeanor, (2) it is the only crime of moral turpitude ever committed, and (3) the sentence is 180 days or less. Thus, it becomes important to avoid irreducible felonies, if at all possible. Today's felony may be tomorrow's petty offense, if the sentence did not exceed six months and it is subsequently reduced to a misdemeanor. This waiver has no effect on grounds of deportability.

Many times, there is nothing that can be done to change the inevitable. However, there are many instances where counsel's

immigration law knowledge can be invaluable in serving a noncitizen client's primary interest of remaining with his or her family in the United States.

If a defendant is not a citizen of the United States, a plea to a crime may get him or her deported, excluded from admission or denied naturalization. Then again, with competent counsel, it may not.

Mark A. Davis is a former Riverside County Deputy District Attorney. He is now a criminal defense attorney who primarily represents noncitizens at trial and in a post-conviction capacity. His office is in Pasadena.



TURNING RIGHT ON THE FOURTH AMENDMENT

by Erwin Chemerinsky

Both conservatives and liberals expect that the new Roberts Court will be significantly more conservative than its predecessor, the Rehnquist Court. Replacing William Rehnquist with John Roberts does not change the ideological balance of the court, but replacing Sandra Day O'Connor with Samuel Alito is likely to change the court's position on many issues. In recent years, Justice O'Connor was in the majority in 5-4 decisions in numerous controversial areas, such as abortion rights, affirmative action, campaign finance reform, the death penalty, federalism, presidential power, and separation of powers. The expectation, with glee from conservatives and with dread from liberals, is that the law in many of these areas is likely to change in the years ahead.

But it was still a surprise when four justices on the court called the exclusionary rule into question in the recent decision of *Hudson v. Michigan*.¹ These justices made clear that they are ready and willing to eliminate the exclusionary rule as a remedy for police violations of the Fourth Amendment. The actual holding of the case was narrower than that. The court ruled that the exclusionary rule does not apply if police violate the requirements for knocking and announcing before entering a dwelling. But the reasoning used by Justice Scalia and clearly endorsed by three other justices would mean the end of the exclusionary rule in Fourth Amendment cases. This may still become the law in the future if a future justice is a fifth vote for that position. At the very least, *Hudson v. Michigan* shows the court is willing to carve exceptions to the exclusionary rule, and it may be the harbinger of many future exceptions that will eat away at the exclusionary rule. It also shows that there is a very conservative bloc of four justices – Roberts, Scalia, Thomas, and Alito – who are willing to dramatically change the law.

The Supreme Court long has held that the exclusionary rule is a crucial remedy for proven police misconduct. In *Weeks v. United States*, in 1914, the Court held that judges were required to exclude any evidence gained by federal authorities as a result of violations of the Fourth Amendment.² In 1961, in *Mapp v. Ohio*, the Court ruled



Erwin Chemerinsky

that the exclusionary rule applied to evidence gained as a result of Fourth Amendment violations by state and local police departments.³ The exclusionary rule is regarded as a key deterrent to police misconduct; officers know that if they violate the Constitution, they will jeopardize criminal prosecutions. Additionally, to echo the words of Justice Cardozo, it is unfair to punish a person because the constable blunders.

Conservatives long have railed against the exclusionary rule, alleging that it unjustifiably allows dangerous criminals to go free. But until *Hudson v. Michigan*, there did not seem to be serious support on the court for reconsidering the exclusionary rule.

Hudson involved the police executing a search warrant in a narcotics case. The Supreme Court has been clear that, except in exigent circumstances, before the police enter a dwelling, they must knock and announce their presence.⁴ But when the police arrived at Hudson's house, they knocked and announced, waited five to ten seconds and then entered. They then found drugs.

There was no dispute among the justices (or the parties) that the police violated the Fourth Amendment in this case. The sole issue was whether the exclusionary rule should be applied. The court, by a 5-4 margin, rejected the application of the exclusionary rule when there is a violation of the knock-and-announce requirement.

Justice Scalia's majority opinion begins by declaring that "[s]uppression of evidence, however, has always been our last resort." This is a remarkable statement, because it ignores the central role of the exclusionary rule in criminal procedure for the last 45 years. It puts the presumption against the application of the exclusionary rule, something new in American criminal procedure.

Justice Scalia then stresses the tremendous costs of the exclusionary rule. The exclusionary rule could easily mean the loss of crucial evidence, vital to a successful prosecution. Dangerous criminals could be set free. In contrast to these costs, the court concluded that the exclusionary rule has little benefit in this area. Justice Scalia wrote: "Viewed from this perspective, deterrence of knock and announce violations is not worth a lot. Violation of the warrant requirement sometimes pro-

¹ 126 S.Ct. 2159 (June 15, 2006).

² 232 U.S. 383 (1914).

³ 367 U.S. 643 (1961).

⁴ See, e.g., *Wilson v. Arkansas*, 514 U.S. 927 (1995).

duces incriminating evidence that could not otherwise be obtained. But ignoring knock and announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life threatening resistance by occupants of the premises – dangers which, if there is even ‘reasonable suspicion’ of their existence, *suspend the knock and announce requirement anyway*. Massive deterrence is hardly required.”

Moreover, the justices suggested that the exclusionary rule is unnecessary to deter police misconduct because civil suits against the police are possible for violations of the Fourth Amendment and because of increased professionalism by police officers.

This argument has no stopping point; if followed, it would call for the total elimination of the exclusionary rule. Justice Kennedy, the fifth vote for the majority’s result, was quite aware of the implications of Justice Scalia’s opinion. Justice Kennedy wrote: “[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today’s decision determines only that in the specific context of the knock and announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.”

Of course, this is correct; the court held only that the exclusionary rule does not apply when there are knock-and-announce violations. But its reasoning would call for the total elimination of the exclusionary rule. Contrary to Justice Scalia’s assertion, there is not any viable alternative to the exclusionary rule as a remedy for Fourth Amendment violations. Civil suits against the police are unlikely to succeed in a case like Hudson’s. Indeed, the effect of eliminating the exclusionary rule for violations of the knock-and-announce requirement is that police now know they can violate the rule with impunity and rarely face any consequences. There is still a right to have the police refrain from entering without knocking and announcing, but the absence of any realistic remedy for violations is sure to make the rule a practical nullity.

For now, it appears that the court will simply cut back on the application of the exclusionary rule in a situation-by-situation manner. They will go as far as Justice Anthony Kennedy wants to go in this direction. And, of course, if President Bush gets to nominate another justice, there is the very real possibility of five votes to eliminate the exclusionary rule in the future.

Erwin Chemerinsky, Alston & Bird Professor of Law and Political Science at Duke University.



VOLUNTEERS NEEDED FOR PUBLIC EDUCATION FORUMS

The Riverside County Superior Court, the Riverside County Law Library, the Riverside County Bar Association, and the local cable public access channel have partnered to provide free bimonthly educational forums on legal topics of interest to the general public. The forums are held six times per year, on the second Tuesday of every odd-numbered month, from 7:00 to 8:30 p.m. at the Riverside County Law Library, 3989 Lemon Street, downtown Riverside. A half-hour question and answer period follows each public forum. Local attorneys who are active in the Riverside County Bar Association are eligible to teach the public education forums.

Law Library staff advertises and promotes the public education forums. On the evening of the forum, the attorney presents the topic and answers audience questions in the half-hour period following the forum. The attorney/presenter may create a PowerPoint presentation for use during the program. (Copies of the PowerPoint program may be handed out later by the court and the Law Library to assist self-represented litigants.) Evaluations, comments, and suggestions for future top-

ics are collected from the audience and forwarded to the court’s Self-Represented Litigants Oversight Committee for review. Judicial members of the Self-Represented Litigants Oversight Committee oversee each public education forum on a volunteer basis. The local cable company may be invited to film a reenactment of the presentation after the forum takes place at the Law Library.

Two very successful, well-attended forums have already taken place. The first forum, presented by attorney Darrell Moore in May 2006, covered tenant-landlord issues and unlawful detainer cases. The second forum, in July 2006, discussed small claims actions and was presented by the court’s small claims advisor, Albert Johnson.

Positive results of these public education forums include: (1) increased Law Library use; (2) increased public awareness of the law; (3) increased self-help center materials; and (4) a positive public image of attorneys.

Please call program coordinator Suzie Slaughter at the Riverside Superior Court at (951) 304-5325 if you are interested in being a presenter.



United States District Court, Central District of California – Educational and Ethical Reminder Re: Ex Parte Communications

In a Discipline Order filed on June 20, 2006, a three-judge panel of the court imposed disciplinary sanctions on a member of the bar. As part of the sanctions, the panel ordered that the Clerk of the Court disseminate to the bar and general public the facts involved and discipline imposed as an educational reminder and a deterrent to ex parte communications in violation of rule 2-100(A) of the California Rules of Professional Conduct.

The findings of fact are as follows: The attorney in question (hereinafter referred to as the Attorney) and an investigator made a visit to a facility to view conditions in dispute; the Attorney insinuated to the owner that the owner's attorney had suggested that someone from the office of the Attorney conduct the inspection; the owner allowed the inspection, and conditions in dispute were discussed by the owner and the Attorney; after the inspection, an associate of the Attorney called the owner's attorney regarding the visit; the owner's attorney conveyed surprise at and disapproval of the ex parte visit; the associate of the Attorney admitted that the attorney for the owner never authorized the Attorney to meet with the owner; and the Attorney acknowledged the improper ex parte communication with the owner.

The three-judge district panel concluded (1) the Attorney violated rule 2-100(A) of the California Rules of Professional Conduct, which provides: "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer," and (2) the Attorney's violation of rule 2-100(A) was serious and willful.

The discipline imposed included suspension from practice in the California Central District Court and all divisions thereof for a period of six months, such term to commence from the date of the order of the district court, and completion of no less than four hours of continuing legal education on legal ethics in an in-person course offered by a provider approved by the California State Bar.

Riverside County Superior Court – Public Notice

Riverside Superior Court is beginning a new service for our customers. If you would like to be notified via

email of press releases, proposed or approved changes in local rules, changes in judicial assignments, changes in calendars, and other information affecting the court and our customers, all you need to do is to sign up. To subscribe to this free service, simply send an email to CourteMailList@riverside.courts.ca.gov and enter "Sign me up" in the subject line. It's that easy!

San Bernardino County Superior Court – Public Notice

Pursuant to California Rules of Court, rule 6.620, the Superior Court of California, County of San Bernardino hereby gives notice that it will cease hearing cases in its Twin Peaks facility effective October 2, 2006.

The matters currently being heard in the Twin Peaks facility will be heard in the San Bernardino (Central) Region. The judicial officer currently hearing cases in Twin Peaks on Monday will hold sessions in Big Bear instead. The San Bernardino clerk's office is open Monday through Friday, 8 a.m. to 4 p.m., except on court holidays.

The decision to cease hearing cases in Twin Peaks was made by Presiding Judge Larry W. Allen.

During the public comment period, the court received over 100 written and email responses. All the responses received by the court objected to the reduction of services provided by the Twin Peaks Court.

The four reasons mentioned most frequently were:

- 1) Having deputies appear in court in San Bernardino would reduce the amount of time they were on patrol, creating a public safety issue;
- 2) Driving to San Bernardino would be a burden on and an expense to mountain residents, particularly during the winter;
- 3) The court provided a sense of identity for the mountain community, which was deserving of a certain level of services from all governmental agencies; and
- 4) Without the convenience of a local court, many legal matters that might otherwise be pursued, such as small claims actions, would go unresolved by the courts.

There are no written factual materials that have been specifically gathered or prepared for review at the time of making the decision to cease operations at the Twin Peaks Courthouse.



CLASSIFIED ADS

Attorney Firm Seeks Associate

1-2 + years of experience wanted for growing Riverside law firm. Req. good writing skills. Will train. Seeking a confident and motivated person. Send resume in confidence to: 6185 Magnolia Ave., Suite 336, Riverside, CA 92506.

PI Firm Seeks Trial Attorney

San Bernardino PI firm seeks Lit/Trial Attorney 10-15 years experience insurance defense, high profile case load 50-70, full staff, computer literate, Spanish a plus. Send resume w/ salary requirement to: Professional Lawyers Group, 1300 N. Mountain View, San Bernardino, CA 92405 or Fax to (909) 885-1651.

Firm Seeks Attorney

Civil Litigation Attorney, Experience preferred. Send resume to: 15992 Summit Crest Drive, Riverside, CA 92506 or e-mail ciny52@aol.com.

Notice to (Bankruptcy) Attorneys – Request for Proposals

The County of Riverside has issued a Request for Proposals (RFP) #TTARC 005 for Outside Legal Counsel. Please respond to this RFP if you are an attorney and are interested in contracting with the County to provide legal representation to the Treasurer-Tax Collector in Federal Bankruptcy cases. The RFP is available at the County's website www.co.riverside.ca.us under bidding opportunities. If you have any questions please contact Monique Gordon at MGordon@co.riverside.ca.us.

If you are interested in bidding on RFP #TTARC 005, please note the following dates: A Non-Mandatory Pre-Bid Meeting will be held on Tuesday, October 3, 2006, at 10:00 a.m. at the Purchasing Department. The Bid Closing Date will be Tuesday, October 24, 2006.

Office Suite for Rent

c.10,000 square feet, executive offices (2) secretarial areas (2) reception area and waiting area, work room and file storage facilities, parking & utilities included. Share kitchen and large conference room with personal injury, workers comp, family law firm. Prefer attorneys in area of real property, bankruptcy, or criminal law. 3 blocks from courthouse. 4001 11th Street, Riverside; Kennedy, Jimenez & Pankratz, contact Mari or Atty. Kennedy (951) 784-8920.

Legal Research

Contract or full time basis. 20 years experience. Call (951) 371-6580 or email EGiddens7@aol.com.

For Sale

Mint Condition Hard Cover Volumes; Pacific Report 2nd 1-120; Cal Reporter Pac 2nd 121-346; Cal Reporter 1-286; Cal Reporter 2nd 1-59; Wonderful addition to office walls. \$750.00. Contact James Ybarrondo, Esq., (951) 925-6666.

Sell Homes

Does Your Client need to Sell their Home? I SELL HOMES. Any condition - Any Area - Any price range. \$1000 Attorney Rebate: Call 1-866-304-8838. ID # 4111. www.inlandempirerealestate.biz

Conference Rooms Available

Conference rooms, small offices and the third floor meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance by contacting Charlotte at the RCBA, (951) 682-1015 or charlotte@riversidecountybar.com.



MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective September 30, 2006.

Charles W. Brower – Kinkle Rodiger & Spriggs, Riverside

Paeter E. Garcia – Best Best & Krieger LLP, Riverside

Stephen P. Greenwood – Sole Practitioner, Murrieta

John R. Hanna – Hanna & Scott, Rancho Cucamonga

Robert P. Karwin – Law Office of Robert P. Karwin, Sun City

Patricia Mireles – Law Offices of Patricia Mireles, Claremont

Paul J. Molinaro – Fransen & Molinaro LLP, Corona

Marjorie Moser – Blumenthal Law Offices, Riverside

Sarah Renee Parry – Sole Practitioner, Riverside

Scott Waddell (A) – Merrill Lynch, Riverside

(A) Designates Affiliate Member

