RIVERSIDE LAWYER

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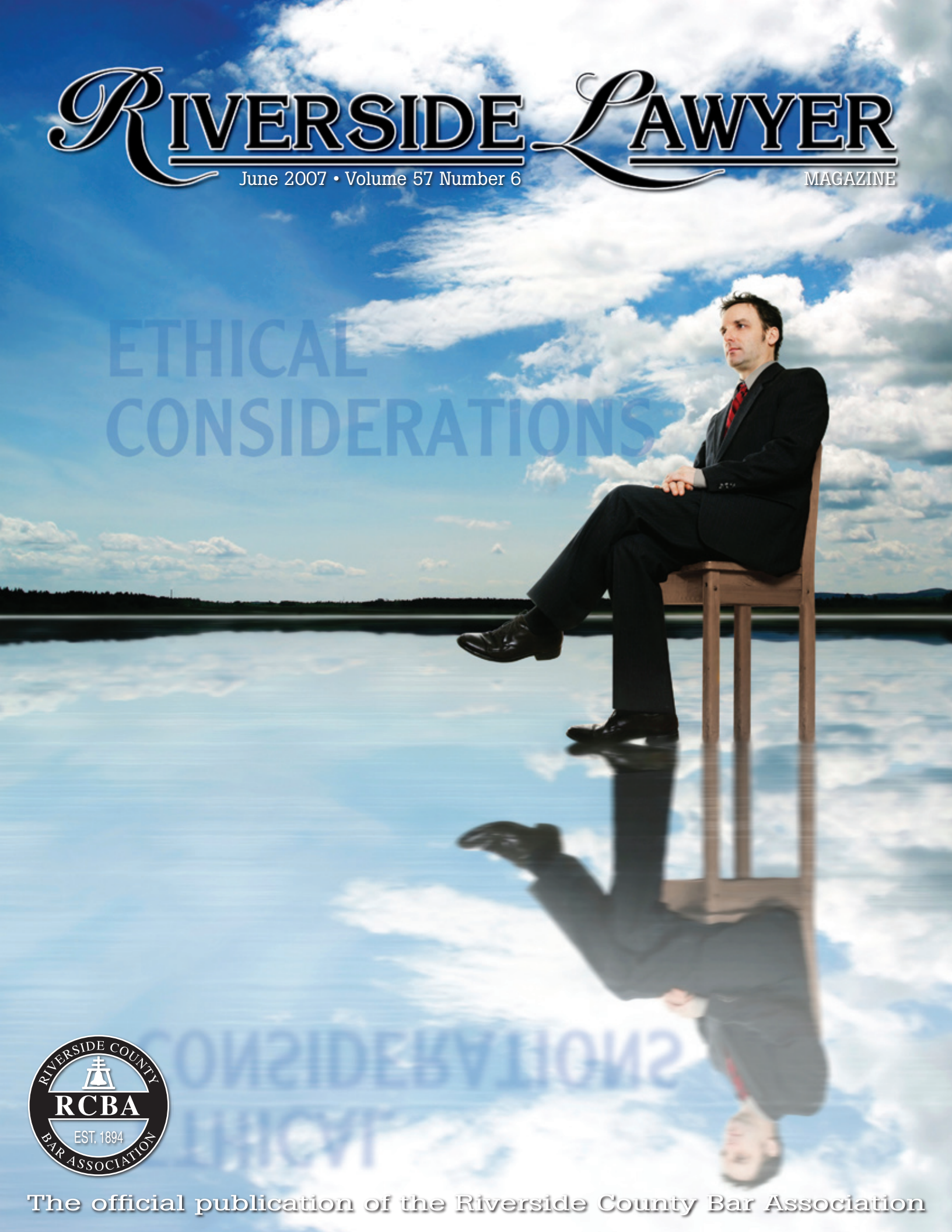
MAGAZINE

ETHICAL CONSIDERATIONS



The official publication of the Riverside County Bar Association

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RIVERSIDE LAWYER
MAGAZINE

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Mission Statement

Established in 1894

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

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve 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

JUNE

19 Family Law Section
"Appellate Savvy"
Speakers: Kira Klatchko, Esq. and Doug Phillips, Esq., Best Best & Krieger's Appellate Group
RCBA Bldg., John Gabbert Gallery
– Noon
MCLE (1 Hr.)

Special General Membership Meeting
"Civil Litigation in Riverside County: Out of County Transfers and Cases Reaching the Five Year Statute"
Speaker, The Honorable Richard Fields
RCBA Bldg., John Gabbert Gallery
– **5:00 p.m. - 6:15 p.m.**
MCLE (1 Hr.)

21 Criminal Law Section
"Defense of Sex Offenses"
Speaker: Paul Grech, Grech & Firetag
RCBA Bldg., John Gabbert Gallery
– Noon
MCLE (1 Hr.)

22 General Membership Meeting
" State of the Appellate Court"
Speaker: Presiding Justice Manuel Ramirez, Court of Appeal, 4th Dist., Div. 2
RCBA Bldg., John Gabbert Gallery
– Noon
MCLE (0.75 Hr.)

Enrobement Ceremony for the Honorable Irma Asberry
Judge, Riverside Superior Court
Historic Courthouse, Dept. 1, Riverside
– 4:00 p.m.

23 Joint SBCBA/RCBA Bridging the Gap
San Bernardino County Government Center, 385 N. Arrowhead Avenue, San Bdno. – 8:30 a.m. - 3:00 p.m.
MCLE (4.25 Hrs., includes 0.75 Ethics)

26 RCBA Board
RCBA – 5:45 p.m.

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President's Message

by David T. Bristow

A courthouse is no different than any other building: brick, mortar, steel. A lawyer is indiscernible from his or her neighbors: flesh and blood, shoes and clothes.

Why, then, are courthouses venerated as temples of justice, and our lawyers regarded (and often vilified) as the arbiters of society? Because it is their function to enforce our laws, weaving the skeins that hold together our free democracy and our capitalistic economy. Our disputes are resolved and our rights enforced in a civilized, methodical fashion, providing all of us with the certainty and security that have allowed our nation to flourish and prosper.

Lawyers are not just an important component of our system of government and our economy, we're critical to their continued success. Our role as the masters of the rules that govern society invests us with enormous power, and with that power comes enormous responsibility. How we conduct ourselves – both in and out of the courthouse – reflects not only on ourselves, but on our clients, our colleagues, our judicial system and our profession.

As we welcome a new class of admittees to the practice of law in Riverside County, it behooves us to consider our ethical obligations as attorneys, and to reaffirm our commitment to civility and professionalism in each of our respective practices. As a practitioner in the Inland Empire, I have reaped the benefits of the professional bedrock that has been laid by so many who have come before me, men and women who set an impeccable standard of professionalism and ethics in their practice, and who required nothing less from their colleagues, lawyers like Terry Bridges, Frank Peasley, and Michael Bell, each of whom took me under their wing at some point in my career and set an example as to how a lawyer should conduct him or herself.

When a new lawyer asks for advice, I hearken back to my training in the San Bernardino County District Attorney's office. During orientation, we were advised by then-Senior Deputy (now Assistant District Attorney) James Hackleman that our reputation as attorneys would be made – or lost – in the first three months of our practice. As he sagely pointed out, one little white lie to a judge, no matter how modest or seemingly inconsequential, would stain a lawyer for the remainder of his or her career. A lawyer's reputation, he said, was our only currency. It is all we have to bargain with. Once we lose it – by lying, by cheating or through shoddy ethical conduct – it can almost never be recovered.

And yet, the temptation to cut an ethical corner is almost always lurking. It can be as innocuous as refusing to grant a continuance to respond to discovery when there is no prejudice to one's client, or telling a judge you were stuck in traffic when you're late to an appearance. In either instance, the conduct falls below the appropriate ethical standard for our profession, and once an attorney begins to slide down the slope, the bottom arrives fairly quickly.

A good place to start for a review (or a refresher) of the code of ethical conduct is with the Riverside County Bar Association's own Guidelines of Professional Courtesy and Civility, drafted by Jim Heiting, which the RCBA adopted in 1997, along with the Riverside Superior Court. The Guidelines are available at the RCBA office or

online at www.riversidecountybar.com (in the Members' Resources section). While not legally binding, the Guidelines flow from the ethical requirements set forth in the California Rules of Court and the Business and Professions Code, and provide an exemplary ethical framework within which to ply our profession.

It is imperative that we in the legal profession never lose sight of the great power that is bestowed upon us, and which we have strived so hard to earn. We must always wield this power carefully and ethically, applying the law to our facts without attempting to gain an advantage through deception, omission or artifice. Only through our own vigilance can we earn the trust of the public we have chosen to serve.

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

Judicial Profile: Hon. Mark A. Mandio

by Donna Johnson Thierbach

As you have figured out by now, I am not a very creative person. Fortunately, I don't have to be, because we have some pretty interesting people in our judiciary!

Judge Mark Mandio was born in Bristol, Pennsylvania. When he was three years old, his family moved to Yardley, Pennsylvania, which is a town just north of Philadelphia. He grew up in Yardley and his parents still live in a nearby town. He is the fourth of five siblings. His father is a lawyer who practices general law and his mother is a homemaker.

I thought for sure that since Judge Mandio's father was a lawyer, Judge Mandio was one of the lucky ones who grew up knowing precisely what he wanted to do. Rather, Judge Mandio said when he graduated from high school, he had no idea what profession he wanted to pursue. The one thing he did know was that he would attend college. He selected Pennsylvania State University, more because he received an application from them than because he had any clear idea of what college he wanted to attend. While in college, he developed an interest in history and majored in Political Science. However, upon graduation, he still was not sure what he wanted to do. He took the LSAT and did well, but at that time he did not think lawyering was something he would like. Instead, he heard someone was looking for a few good men and he joined the Marines.

Judge Mandio was in the Marines for six years and his specialty was tanks. He spent his first year in Quantico, Virginia and Fort Knox, Kentucky. Then he had a choice of Florida, California or Okinawa. He chose California. He said being young and single, he was thinking in California there would be a lot of pretty girls on the beach. He was in Camp Pendleton for two years and in Mt. Fuji, Japan for seven months. He said Japan was probably one of the highlights of his time in the Marines. He said the last three years of his tour were in San Diego, assigned to recruit training, in which he supervised drill instructors. Talking about a small world, Judge Mandio said a Riverside deputy currently assigned to the court was a new recruit while he was there.

I bet you are wondering why Japan was only "one" of the highlights. Well, while in the Marine Corps, he met his wife, and they married during his last year in the Marines. Judge Mandio's wife was from the northwest (not even a California girl from the beach) and was in San Diego working.

Hon. Mark A. Mandio being sworn in by the Hon. Richard Fields

So how do we get from the Marine Corps to the practice of law? Judge Mandio said while he was in the Marine Corps, he was assigned various civil and criminal personnel investigations to determine fault or the truth of any criminal allegations. He found he enjoyed it, so after he finished his tour with the Marines he decided to go to law school.

Judge Mandio said he applied to several law schools, including some back east, but the best school that accepted him was Hastings, so he remained in California.

Judge Mandio said when he entered law school, he thought he would specialize in tax law. However, after his first tax class, he thought better of that. He said he found most of the classes interesting; he did an externship in federal court his last year of school. Once he graduated, his thoughts again turned to returning back east, but the best job offer was from a firm in San Diego, Gray Cary Ware & Freidenrich. He was an associate with that firm from 1992 until 1995 and practiced business law, specializing in debtor/creditor litigation.

Judge Mandio said after graduation from law school, he stayed in touch with a good friend, Michael Rushton. He said they had a lot in common in law school, in that they were both married and had children. He said Mike always knew he wanted to be a district attorney and accepted a position with the Riverside County District Attorney's office. Mike would often tell him how much he loved the job and how interesting it was, so Judge Mandio decided to apply.

Judge Mandio said he was not disappointed. He said his 11 years with the District Attorney's office

were interesting. His assignments included preliminary hearings, misdemeanors, general felonies, special prosecutions (which included insurance fraud), major fraud and elder abuse. Additionally, for one year, he also served as the president of the Riverside County District Attorneys Association.

Judge Mandio was elevated to the bench on November 3, 2006. Initially, he alternated between the Banning and Southwest courts. He did misdemeanor arraignments, small claims, traffic trials and three criminal trials. His current assignment is in Family Law in Hemet.

What about hobbies? Judge Mandio said he took a sailing class in college and loved it. He continues to sail and enjoys sailing to Catalina with his wife and three children. He said none of the children seems particularly interested in law

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Donna Johnson Thierbach was formerly a Deputy Public Defender with Riverside County and is currently the Director of the Adult Division of the Riverside County Probation Department.

Leo A. Deegan Inn of Court

Inn of Court Recognizes Retired Judge Mike Kaiser

At the April 25th meeting of the Leo A. Deegan Inn of Court, current Inn President Paul Grech veered slightly from the regular program agenda to recognize the lifetime achievements of recently retired judge Mike Kaiser.

During his welcoming remarks for the evening's program, Grech called Judge E. Michael Kaiser to the podium, much to the judge's surprise.

"I have given much thought to what I was going to say about Mike," Grech said as he stood next to his mentor. "The first thing that came to mind is that this revered individual is truly a judge's judge and an attorney's attorney."

The judge, who was not only surprised but moved by the acknowledgement, expressed his thanks to the roomful of fellow legal professionals.

Grech presented Judge Kaiser with a plaque from the membership of the Inn. After a lengthy round of applause, Judge Kaiser joined his colleagues and enjoyed the evening's program, which centered around the attorney's role in global warming.

Inn of Court Seeks Members

The Leo A. Deegan Inn of Court, based in Riverside, is currently seeking legal professionals interested in participating in the 2007-08 program year. The Inn of Court, based upon the prestigious British Inns of Court, is taking applications for legal professionals practicing in the greater Riverside area, either in private practice or working for the government. Not all cities or regions have their own Inn of Court, but they are divided geographically.

The goal of the Inn of Court is to provide a forum for lawyers and judges to discuss and debate various situations in which legal ethics impact the outcome of a case. Inn members are encouraged to "stretch the legal muscle" and be creative when developing programs that are educational and informative and when it comes to finding ethical solutions.

Inn membership is by invitation only and all lawyers and judicial officers are encouraged to apply. The current Board of Directors reviews all applications and makes selections based upon referral and what one's legal experience and reputation will bring to the overall program year. All attorney applicants must be current members of the Riverside County Bar Association.

Once selections are made, the Board divides all members into teams of eight; each team is comprised of Associate Members, Barristers, and Judicial Masters, to ensure a balanced blend of legal experience is achieved for team presentations. At the orientation meeting, held in September, teams meet for the first time and begin to plan their strategies for their respective presentations. Teams make an initial selection of months for their presentations and set out to determine topics.

The Inn's program year begins in September and continues through May. Dinner meetings are held from 6 to 8 p.m. once monthly, at a venue to be determined.

There are membership dues and dinner costs associated with membership.

For further information or to obtain an application, please contact the Inn's Executive Director, Sherri Gomez, at (951) 689-1200 or via email at sherri.gomez@gmail.com.

Being an American

by Judge Stephen G. Larson

United States District Judge Stephen G. Larson of Riverside presided at a naturalization ceremony for the Central District of California on March 22, 2007, at the Los Angeles Convention Center, during which over 4,000 emigrants to the United States were naturalized. Judge Larson was joined at the ceremony by Secretary of Homeland Security Michael Chertoff. After he administered the oath of citizenship, Judge Larson made the following remarks to the new American citizens:

Congratulations!

Tradition calls for the presiding judge to say a few words. I will keep my remarks brief, for you are Americans now, and, as President Teddy Roosevelt prophetically stated, we Americans hold in our hands the hopes of the world, and we have much work to do.

I have had the privilege of knowing at least one of you gathered here today just about all my life. Josef Inkrott emigrated to the United States of America from Germany many years ago. He, with his wife Ria, raised a family of four children – two boys and two girls – with whom I went to school. His children are grown now, and he is blessed to have lived to know and love his children's children. I have always admired Mr. Inkrott, and I am so happy that I was able to administer his oath of citizenship this afternoon. He has always been a good father, a hard worker, a loving husband, a faithful minister in his church; an honest, humble man who treats everyone he meets with respect and dignity.

Today Mr. Inkrott's citizenship, like yours, is official and fully documented, but I believe that he has been an American at heart for all of these many years.

I have not had the privilege of knowing each of your life stories as I do Mr. Inkrott's, although I wish I did. I am confident though, that all of you, too, have been Americans at heart for many years.

Being an American is not about having a piece of paper or a certificate; it is not reserved for people born in a certain place, or who look or act a certain way, or who follow a certain religion, or who speak a certain language, or who have a certain kind of job, or who belong to a certain political party. Being an American is about none of those things.

Being an American transcends all cultures, all languages, all religions, all classes, and all parties.

Being an American is about dedicating ourselves – our lives, our fortunes, and our sacred honor – to the self-evident truths that we are all created equal, that we are all endowed by our Creator with certain unalienable rights, among those being life, liberty, and the pursuit of happiness.

Being an American is about being generous, about sharing the burdens of others, in our own country and around the world.

Being an American is about always striving, at times fighting, and sometimes even dying, for the freedoms and liberties that are vested in us all by virtue of our shared humanity. In that regard, I pay special respect to those brave men and women seated in the front row who serve in the American armed services.

Being an American is about active and responsible participation in our government, as voters and as public servants. Such participation requires that you become informed citizens, listening to and reflecting on the news of the day thoughtfully, relying on your life experiences and trusting your common sense to stake out your own opinion, which as an American, you should never fear, and are encouraged, to express freely.

Being an American is about working hard and working innovatively, to better ourselves and to create a better world for everyone around us.

Being an American is about recognizing the value of equality, not an equality of sameness or rigid uniformity, but an equality of opportunity, a sense of equality that recognizes, respects, and rewards both creativity and diversity, our greatest assets.

Like Mr. Inkrott, each of you has your own story, your own talents and gifts, your own contributions to make to this great nation of nations.

My honor this afternoon is to be the first to say to you, our new American citizens, welcome. Welcome to America. Welcome to the shining city on the hill; make it your own. Carve out your own special place, however humble or grand it may be. President John Kennedy once spoke of the torch being passed to a new generation of Americans. You are the newest generation of Americans. Seize that torch, and lead us to a better tomorrow.

Thank you. Thank you for coming to America. Thank you for joining in our wonderful and challenging experiment in participatory democracy. Thank you for joining in our effort to demonstrate to a history yet to be written that once, in our time, there truly was a government of the people, by the people, and for the people. And thank you for joining and committing yourself to a people who pledge their allegiance to one Nation, under God, indivisible, with liberty and justice for all.

Life After *Hanif* and *Nishihama* – What Does the Jury Get to See?

by Edward A. Fernandez

Without question, one of the key pieces of evidence to be presented in a personal injury case is the amount of the plaintiff's medical bills. Traditionally, plaintiffs were able to present all of their medical bills to the jury. Those with higher medical bills typically received greater general damages awards. The onset of managed medical care, however, added confusion to the process. What if the plaintiff's medical provider accepted less than what was billed? Was the plaintiff entitled to recover the amount billed or the amount actually paid?

The case of *Hanif v. Housing Authority* (1988) 200 Cal. App.3d 635 set the stage for determining what jurors would be permitted to consider. In *Hanif*, the plaintiff wanted to offer into evidence the amount paid by Medi-Cal and still wanted to recover the full amount of the billed charges. The trial court awarded the plaintiff the reasonable value of medical services, including the amount written off by the medical provider. The appellate court ruled that the plaintiff was overcompensated and stated that "[a] plaintiff is entitled to recover *up to, and no more than,* the actual amount expended or incurred for past medical services as long as that amount is reasonable." (*Id.* at p. 643.)

After *Hanif*, many plaintiffs successfully argued that its application was limited to cases involving Medi-Cal or Medicare, since in those situations, the plaintiffs had not paid insurance premiums for medical coverage. In 2001, the First District Court of Appeal extended *Hanif's* rule of limiting medical specials to include private health insurance reductions. In *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, the plaintiff sought recovery of medical bills that had been paid for by her employer-obtained medical insurer, Blue Cross. Like many medical insurers, Blue Cross had negotiated with the plaintiff's medical provider for reduced rates. After concluding that the hospital could not assert a lien for more than the amount it contracted with Blue Cross to accept as full payment, the court determined that "[t]here is no reason to assume that the usual rates provided a less accurate indicator of the extent of plaintiff's injuries than did the specially negotiated rates obtained by Blue Cross." (*Id.* at p. 309.)

In *Nishihama*, the appellate court simply modified the judgment to reduce the amount awarded as costs for medical care. This therefore left a void in the practical application of *Nishihama* – should the plaintiff be permitted to introduce the full medical bill or just what was paid by the plaintiff's medical insurer?

In the following years, there seemed to be inconsistency in the application of *Nishihama* by the California trial courts. Some courts permitted the plaintiff to introduce the full medical bill to the jury and then would reduce the judgment postverdict. Other trial courts only allowed the plaintiff to introduce the amount actually paid by plaintiff's medical insurer.

In 2006, the Third District Court of Appeal provided some guidance. In *Greer v. Buzgheia* (2006) 141 Cal. App.4th 1150, the defendant made a motion in limine to limit the evidence of plaintiff's medical bills to the amount that was actually paid. The trial court denied the motion, with the proviso that if the amount of medical expenses awarded exceeded the amount paid, it would entertain a motion for reduction. Unfortunately, the defendant had agreed to a special verdict that lumped medical expenses together with wage loss and other economic damage by listing a single entry for "Past economic loss, including lost earnings/medical expenses." As a result, the trial court was unable to entertain the motion for reduction.

The appellate court reviewed both *Hanif* and *Nishihama* and noted that neither case had held that evidence of the reasonable cost of medical care may not be admitted. The court then determined that evidence of the reasonable cost of medical care "gives the jury a more complete picture of the extent of a plaintiff's injuries." (*Greer v. Buzgheia*, supra, 141 Cal.App.4th at p. 1157.)

From the plaintiff's prospective, it would seem wise to be familiar with *Greer* when gathering the medical bills to present at the time of trial. In addition, the knowledgeable plaintiff should be aware that the defendant will be evaluating the claim with an eye towards offering the plaintiff only those medical specials that were actually paid. From the defendant's prospective, be ready to present the trial court with a special verdict that separates medical expenses from the other items of special damages.

Edward A. Fernandez is a partner with the law firm of Donner Fernandez & Lauby LLP in Riverside.

Breaking Up Is Hard to Do: Ethical Considerations in Attorney Withdrawal

by Kirsten S. Birkedal

Breaking up is never easy to do, even in the case of attorney withdrawal. Attorneys must not only follow the rules regarding withdrawal, but also consider the ethical obligations they have to their clients. An attorney who suddenly ends a relationship with a client without giving proper notice may be held liable for a malpractice claim and/or discipline from the State Bar.

The ground rules for proper attorney withdrawal are straightforward. Under California law, withdrawal while proceedings are pending may be accomplished by the consent of both client and attorney by filing and serving a substitution of attorney form. (Code Civ. Proc., § 284, subd. 1.) Permission from the court is not required. (*Hock v. Superior Court* (1990) 221 Cal.App.3d 670.) However, court permission is required where a minor is substituting in pro per for a guardian ad litem. (*Torres v. Friedman* (1985) 169 Cal.App.3d 880.)

Without the client's consent, the attorney must proceed by noticed motion, providing a declaration stating, in general terms and without compromising the confidentiality of the attorney-client relationship, why the client's consent could not be obtained. (Code Civ. Proc., § 284, subd. 2; Cal. Rules of Court, rule 3.1362.) In addition, the Rules of Professional Conduct, rule 3-700, "Termination of Employment," provides further instruction on attorney withdrawal.

Overall, the most common and preferred method of attorney withdrawal is to file a substitution of attorney form instead of making a motion to withdraw. However, attorney withdrawal by filing a substitution form raises some questions that are not fully addressed by the rules cited above, such as whether an attorney should have a client pre-sign a substitution of attorney form or whether an attorney has an obligation to assist the client in obtaining a continuance for a dispositive motion, to allow additional time for the client to properly defend the case on his or her own or to obtain new counsel. There is also uncertainty regarding the opposing attorney's relationship with a litigant who was once represented by counsel and is suddenly left representing himself, as well as how this change will affect the status of the case.

Additionally, the judges of the Riverside Superior Court do not have the resources to monitor the relationships between attorneys and their clients. On the average, a Riverside trial judge has around 1,300 cases on his or her docket at any one time. In addition, often a trial judge is unaware that a substitution of attorney form has been filed until the next scheduled hearing, which may involve a dispositive motion.

Justice Douglas Miller of the Fourth District Court of Appeal in Riverside has had experience with attorney withdrawal both as a former trial attorney and as a Riverside Superior Court judge. In his practice and on the bench, Justice Miller believes that the withdrawing attorney has an ethical obligation to assist the client in understanding the process and in knowing his or her individual rights and responsibilities upon taking on the case in pro per.

According to Justice Miller, the practice of having clients pre-sign a substitution of attorney form, which authorizes the attorney to withdraw at any time, is unethical. In addition, fee agreement provisions that require the client to pre-sign substitution of attorney forms in pro per, which the attorney retains and files whenever he or she chooses, are also improper.

Justice Miller also advises that an attorney has the responsibility to inform the former client of all dispositive motions on calendar before withdrawing. If there is a dispositive motion set for a hearing date in the near future, Justice Miller advises the attorney to request a continuance from the court so as to give the client some time to find new counsel or to prepare to act in pro per.

However, regardless of the attorney's actions, the trial court will usually grant a continuance of the motion hearing date if a litigant's former attorney has recently withdrawn. In addition, the court will not penalize the litigant with sanctions or a dismissal when the failure to comply with the court's rules occurred because of the actions of his or her former counsel. According to California law, trial courts do not have power to dismiss actions for noncompliance with local fast-track rules when the noncompliance is the responsibility of the counsel and not the litigant. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 475-478.)

Justice Miller suggests that, to avoid the burden of future withdrawal, it is important to analyze a case fully before taking on client representation. For example, before taking a case, an attorney should have a face-to-face meeting with the potential client. At the meeting, it is important to assess the potential client's personality and credibility. In addition, Justice Miller feels that an attorney should never take on a case that he or she does not believe in. Justice Miller also advises an attorney who is interested in a case that is close to the end of the statute of limitations period and who will not have time to complete an initial investigation to file a complaint for the potential client in pro per. This will ensure that the litigant has complied with the statute of limitations and will give the attorney further time to analyze the case in full before taking on the client's representation.

Overall, attorney withdrawal is stressful for everyone involved in the pending litigation, including opposing counsel. For instance, what happens if you are the defense attorney on a case when the plaintiff is suddenly abandoned by his or her attorney and must proceed in pro per? The way a defense attorney approaches the case with the pro per plaintiff can be tricky, especially when you have a pending dispositive motion on calendar. The question of whether you have a duty to make sure that the pro per plaintiff understands the importance of the motion or, if the client is unprepared at the hearing, to ensure that the trial court continues the matter remains a gray area. On one hand, you have the duty to zealously represent your client and no duty to assist the plaintiff in pro per. On the other hand, in the interest of justice, you may feel the ethical obligation to assist the pro per in realizing the importance of the pending motion and hearing as well as to encourage the pro per to find new counsel or to ask for a continuance.

Ending a relationship with someone is never easy to do, especially when it is a former client who hired you to help him or her out during a time of need. However, by following these guidelines you should be able to make the process easier for all of the parties involved.

Kirsten S. Birkedal is an associate with Snyder Walker & Mann LLP, located in Rancho Cucamonga, and practices professional liability defense. Ms. Birkedal can be contacted at kbirkedal@swmdefense.com. *A special thank-you is dedicated to Justice Douglas Miller, who assisted with this article.*

The Ethics of Mediation

by Susan Nauss Exon

When lawyers think about ethics, they probably consider such topics as conflicts of interest, client trust accounts, client confidences and other principles found in the California Rules of Professional Conduct. With the advent of alternative dispute resolution processes, however, ethics assume a broader scope.

Mediation ethics are not just for the mediator. Attorney-advocates who represent clients in mediation should be mindful of mediation ethics as part of their general duty of competence to clients. Awareness of mediation ethics is particularly important here in Riverside County, as more and more civil litigants take advantage of mediation in light of the diminishing availability of civil trials.

So what are mediation ethics? The most common ethical considerations include party self-determination, voluntary process, mediator impartiality, mediator competence, fairness, and mediation confidentiality. Each principle is a discrete topic, yet most principles are intimately intertwined so that compliance with one principle may affect others.

The California Judicial Council adopted Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases (Ethical Rules) effective January 1, 2003[1]. Although the Ethical Rules are aspirational and apply only to court-connected mediation programs for civil cases, most reputable mediators abide by them for any type of mediation.

Party Self-Determination

The ethics of mediation start with the notion that party self-determination is the fundamental aspect of mediation. In other words, clients' voluntary participation is key, as they decide whether and how to resolve a case, rather than abide by a judge or arbitrator's ruling.[2] Often clients simply need to be heard, so mediation is a good forum to allow clients to tell their story from a personal viewpoint. Their account of a conflict may sound very different from the legalistic aspect touted by the professionals. So lawyers, be willing to step aside and let your clients be heard. Save your trial advocacy skills for the courtroom.

Mediator Impartiality

To allow autonomy for the parties, mediators must be impartial[3]. Although the Ethical Rules do not specifically define impartiality, generally, a mediator should serve in an unbiased, evenhanded manner and not provide legal advice. The mediator needs to be impartial in his or her relationship with attorney advocates and parties, in communicating with everyone, and in the process. Specifically, a mediator must keep the parties informed of any potential conflict of interest, such as past and present relationships, personal or professional affiliations or financial matters[4]. Additionally, a mediator must "refrain from coercing any party to make a decision."[5] That means that a mediator may not coerce a party to continue mediating when he or she wishes to terminate the session, provide an opinion or evaluation over a party's objection, or threaten to report a party's conduct to the court.

A mediator's conduct is not deemed coercive if he or she suggests that the parties obtain professional advice. In fact, Rule 3.857(d) allows a mediator to render an opinion or provide information that "he or she is qualified by training or experience to provide." Rule 3.857(d) is vague and ambiguous because it allows a mediator to provide information notwithstanding a prohibition against providing legal advice. The best way to handle these seemingly conflicting provisions is to provide legal information without relating the information to the specific facts of the case being mediated. Another way to maintain mediator impartiality is to provide legal information to all parties in an open session.

Mediator Competence

A mediator must be competent, based on educational and training requirements established by the court, and must truthfully represent his or her abilities to the parties.[6] A good attorney-advocate will inquire about the mediator's background training and experience to determine whether or not the mediator should be capable of mediating a certain type of case.

Fairness

The Ethical Rules recognize that fairness of the process is essential for effective mediations, and specifically require "procedural fairness," defined as a "balanced process" whereby all parties may participate and not be coerced. A mediator, though, is "not obligated to ensure the substantive fairness" of a final agreement.[7]

It is important to recognize the distinction between fairness of process and fairness of result. If the mediator does not believe the parties are agreeing to an equitable result, arguably the mediator need not do anything. Thus, the mediator upholds the principle of party self-determination. Moreover, if the mediator discusses potential con-

sequences with the party on the apparently losing end, the mediator may compromise the requirement of impartiality. On the other hand, if the mediator tries to temper coercive conduct by one party, problems develop as soon as the mediator begins to advocate for, and protect, one party over another. Such conduct undermines the mediator's impartiality and thwarts party self-determination, creating tension among several of California's provisions. Hopefully the mediator has developed acceptable methods to align these seemingly contradictory requirements.

Mediation Confidentiality, Generally

Mediation confidentiality is perhaps the most widely known ethical consideration. It applies in two different contexts: 1) the overall mediation process, and 2) within individual caucus sessions. Regarding the latter, the parties may decide how to handle the confidentiality of communications made in separate caucus sessions, and a mediator should never share the information unless authorized to do so by the party who revealed the information. In either case, the Ethical Rules do not define confidentiality; they simply require a mediator to comply with applicable law.[8]

Mediation confidentiality is codified at Evidence Code section 1119 and applies to evidence, writings, or communications that are "prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation"; they are not admissible or subject to discovery in subsequent noncriminal proceedings in which testimony may be given.

Mediation confidentiality is best explained in *Rojas v. Superior Court* (2004) 33 Cal.4th 407. In *Rojas*, the California Supreme Court emphasized the need for confidentiality in mediations to foster open communications among all parties. The *Rojas* court interpreted the statutory language, "prepared for the purpose of, in the course of, or pursuant to, a mediation," to apply to photographs and witness statements that were prepared for a mediation. One may not seek the protection of mediation confidentiality simply by introducing any evidence at the mediation; the evidence must be prepared specifically for the mediation. The *Rojas* court also distinguished raw evidence (in that case, samplings of mold) from written analyses of the raw evidence. The raw evidence would never be protected, even though the analyses would constitute a writing for purposes of confidentiality protection. As such, the writings were not admissible or discoverable in subsequent civil and administrative matters.

Note that section 1119 specifically exempts criminal matters. Mediation confidentiality, therefore, does not apply to subsequent criminal proceedings.

Confidentiality of a Mediated Settlement Agreement

Mediation ethics, specifically confidentiality, have a far greater impact than one may think. A recent California Supreme Court case, *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, establishes that if parties want to be bound by a mediated settlement terms document, they must use the specific language of Evidence Code section 1123 in the document. *Fair* also illustrates how mediation confidentiality of a settlement terms document may preclude a subsequent attempt to arbitrate.

In *Fair*, at the conclusion of a two-day mediation, the parties entered into a settlement terms document, consisting of nine short paragraphs, which was set up primarily to allow the parties to structure payments for tax purposes. The final paragraph stated: "Any and all disputes subject to JAMS arbitration rules." Attorneys for the parties notified the court that the case had settled and they were preparing formal settlement documents. Three months later, when plaintiff invoked the arbitration provision, defendants disclaimed the settlement. The trial court held that the settlement terms document was confidential, and therefore denied plaintiff's motion to compel arbitration. The court of appeal reversed, holding that the signed settlement terms document met the confidentiality exceptions of Evidence Code section 1123(b) because the arbitration provision was evidence that the parties intended to be bound by the document, "or words to that effect."[9]

The California Supreme Court reversed the court of appeal, upholding the confidentiality of the settlement terms document. The court strictly construed section 1123(b), requiring express statutory language in a mediated settlement terms document in order to bind the parties. The court was not willing to create a judicial exception to the Evidence

Code provisions or otherwise to infer the parties' intent from the reference to arbitration in the settlement terms document. Furthermore, the court was unwilling to examine extrinsic evidence to determine party intent.

Fair v. Bakhtiari provides several important lessons for both mediators and attorney-advocates who want to create mediated agreements that are enforceable. First, the mediator should never end the mediation until some writing is produced and signed by the parties, whether a formal settlement agreement and general release or a settlement term sheet. Second, in light of the strict construction of the confidentiality statutes, attorneys should include in their mediated settlement agreements or term sheets that such agreements are admissible, binding and enforceable against all parties. Attorneys should also consider including in their mediated agreements references to Code of Civil Procedure section 664.6, regarding entry of judgment pursuant to the terms of a stipulated settlement, as well as Civil Code section 1542, regarding the scope of a general release. Such provisions will enable any party to rely on the mediated settlement agreement as an enforceable contract.

Conclusion

Mediation ethics are not just for the mediator. Although the Ethical Rules establish minimum standards of conduct for mediators, they also serve to promote public confidence in the mediation process and to inform and protect those who participate in such an important dispute resolution process.

Susan Nauss Exon is a Professor of Law at the University of La Verne College of Law, where she teaches ADR, Mediation, Negotiation, Civil Procedure, Professional Responsibility and related seminars. She received an LL.M. in Dispute Resolution from Pepperdine School of Law and mediates commercial and business cases.

[1] Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, CAL. RULES OF COURT 3.850 to 3.868 (2007).
[2] *Id.* at Rule 3.853.
[3] *Id.* at Rule 3.855.
[4] *Id.*
[5] *Id.* at Rule 3.853(3). Note that Rule 3.857(b) prohibits coercion generally and Rule 3.853(3) is specific to the parties.
[6] CAL. RULES OF COURT 3.856 (2007).
[7] *Id.* at Rule 3.857(b).
[8] *Id.* at Rule 3.854(a).
[9] Evidence Code section 1123(b) exempts a signed, written settlement agreement if it states that the "agreement provides that it is enforceable or binding or words to that effect."

Is It Malpractice to Be Civil? – An Invitation for Further Discussion

by Terry Bridges

Many years ago, I decided to adhere to the maxim "take the high road" in dealing with opposing counsel. This position was adopted, in part, as a result of working with, appearing before or observing such models of civility as Arthur Littleworth, Enos Reid, Jim Wortz, Leo Deegan and John Gabbert.

As civility standards appeared to me to decline over the years, I modified the maxim to "take the high road – no matter what."

Sadly, over the past decade, I have experienced, as well as spoken with highly seasoned and respected trial lawyers who concur, that there are a growing number of litigators who have adopted a strategy of "savaging the opponent."

This strategy is, in part, reflective of the overall decline in civility in the trial bar, enhanced by the anonymity of a rapidly expanding membership and by a growing trend toward litigating in multiple courts or districts.

The strategy might also be reflective of an expressed expectation on the part of clients that counsel will take a "pit bull" approach to litigation. That, of course, should be a warning sign of inevitable problems to come and should eliminate any possibility of entering into an attorney-client relationship.

Whatever the source or sources of the strategy, it should be of growing concern to the bench and bar.

By way of example, the strategy includes emails consisting of personal attacks and self-serving "confirmation" of mischaracterized conversations. The letters or emails are all but premarked as exhibits for attachment to motions, with the obvious intent of trying to "poison the well" against the opposition. The strategy is implemented in pretrial hearings and, at times, continues at trial, with counsel trying to place opposing counsel in an unfair light with accusations, sometimes in front of the jury, of "hiding the ball," "not complying with statutory obligations," etc.

Assuming, for purposes of this article, that the strategy is indeed a growing problem, the question arises – how do we deal with it?

For those who support the "take the high road – no matter what" approach, it means not responding to "set up" letters that mischaracterize conversations or contain either subtle or express ad hominem arguments. In my practice, I simply inform counsel that I disagree with his or her version of the conversation. Ad hominem attacks are simply disregarded. When the issue arises in trial, I likewise do not engage in "debate," and I attempt to remain focused on the issues.

For counsel who subscribe to the high-road standard, there is an understandable concern that the failure to "descend to the depths" with like-kind responses may create an impression on the part of the trial judge or jury that the opposition's uncivil comments have merit.

If you are appearing before a judge without having established a track record in his or her courtroom, and possibly adding to the mix, in a foreign jurisdiction where you have not established a positive reputation, there is concern that the client may not be properly served by failing to respond to opposing counsel's written and verbal strategic attacks.

In my discussions with judges, several have expressed to me that they "get it" and have an elevated sense of respect for the "civil" lawyer who does not respond in kind. Other judges have stated, in effect, "Maybe I should presume the accuracy of the charges if there is no response." Other judges have suggested that "over time," they have a very clear understanding of who is taking the civil and who is taking the uncivil road, and they adjust accordingly. Finally, some judges advise, in substance, "Don't worry about it, we know who they are."

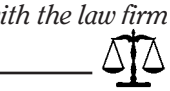
In my posttrial discussions with jurors, it appears that they generally see through such tactics at an early stage and appreciate counsel who takes the high road.

In light of these concerns and reactions, I raise the question of whether "taking the high road – no matter what" might, at least in some cases, fall below the current standards of professional responsibility on the part of litigators and trial lawyers. How tragic it would be if that were the case.

I wish I had the answer. I don't. Instead, it is my hope that these thoughts will generate further comments, discussion and suggestions among the bench, the bar, public and private firms, practice groups, bar associations, etc.

Comments may be directed to me in confidence at terry@rhlaw.com. I will be pleased to provide a subsequent article summarizing the comments, without identifying the commentators.

Terry Bridges, president of the RCBA in 1987, is with the law firm of Reid & Hellyer in Riverside.



The Other Bar

by Greg Dorst

Jim Heiting and I did a presentation at the Leo A. Deegan Inn of Court a couple of months ago with the very able assistance and participation of the Inn. I was asked to recap a bit of our program here.

You have wondered about, and been concerned (at least at a distance) for, opposing counsel. He seems stressed to the breaking point, running behind schedule, asking for additional time to prepare or respond and seemingly unable to catch up with all of his deadlines and responsibilities. He seems bleary-eyed and tired. His clothes are wrinkled, and he has a disheveled look about him. One morning, you attempt to discuss resolution of your shared matter in the courthouse, and you find yourself face to face, eye to eye. You see the purple, broken capillaries in his cheeks and on his nose. You can't help but notice the red, and somewhat swollen, eyes. When he speaks, he tries to turn his head, but the unmistakable odor of alcohol suddenly answers all of the questions you have had about this man's behavior. Or . . . .

The lawyer on the other side is a true adversary. She seems angry about everything. She is often late. She seems fidgety, and when she gives excuses about failure to meet deadlines or commitments, her stories are strange, maybe even bizarre. She keeps odd hours, many times staying in the office late and leaving early, but sometimes, she works all night, even when there is no pressing deadline. She often takes some sort of pills, even right in front of you. You strongly suspect that these pills, or a similar agent, are contributing to this behavior; but she says that they are for her headaches.

Something is definitely wrong.

You have a myriad of emotions. You are angry about how these lawyers have wasted your time, yet empathetic about the personal and professional trap they have created for themselves. You want them to pay for the delays, the obstructions, the lies. You may feel the profession would be better off, as would their clients, if they were no longer lawyers. On a personal, humanistic level, you realize that these people need help; but on a professional level, you recognize that they are, or will be, an embarrassment to the profession and are costing you and your client(s) money.

As you have time to reflect upon what has happened, you have a gnawing feeling that you may have some sort of ethical obligation to report what appears to be an impaired attorney who may be harming clients. The lawyer may be in violation of Rule 3-110 of the Rules of Professional Conduct: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." ("Competence" is defined as applying the diligence, learning, skill, and mental, emotional, and physical ability reasonably necessary to perform the legal service.) But are you required to report the lawyer to the State Bar?

The answer is no. The rules do not impose an ethical obligation to report such conduct. (See Los Angeles County Bar Association Opinion Number 440, which analyzed the issue of a duty to disclose a violation of the Rules of Professional Conduct.)

But now you are faced with an even tougher question. Should you confront this person? Should you mention your concerns? Should you advise them of their obvious "abnormal" behavior and characteristics? In my opinion, the answer is yes.

You may know that addiction is a chronic, progressive and debilitating disease that is treatable, or you may have a vague sense that people who drink too much or take drugs to get a mental or emotional high generally get worse over time, rather than better. Either way, if this lawyer is displaying incompetence or these other characteristics now, in your case, they are most likely displaying them in others, as well as in their personal lives; and they are likely to get worse, over time, rather than better, without some sort of intervention.

Intervention can be a method of bringing a person to recognize their abusive and/or addictive problems, often leading to effective treatment. Sometimes intervention, even if it is as simple as confronting the person with your observations, can lead to the recognition that "the secret is out, I can't hide this anymore," or to similar feelings that can help build a walkway toward recovery. If you fail to say something and allow these actions to go unchecked and to remain "hidden" (at least in the actor's mind), who *will* help this person?

Such a suggested conversation (or confrontation, if you must) carries risks. There is a risk of anger, denial, rejection (and if you don't do it in private, threats of libel and slander, lawsuits and claims). So how do you approach this if you are unwilling to confront the person, but you still want to see them get help?

There are helpful phone numbers you can call that offer counseling and support as to how to approach these issues, and not simply these issues as they apply to oppos-

ing lawyers, but also as they apply to partners, friends, spouses, parents, children, and others for whom you have concern. For example, I am a consultant for The Other Bar, which is, as you know, a group of attorneys and judges in recovery who help others recover from alcoholism and/or drug addiction. I answer the phone 24 hours a day, 7 days a week; we have resources, answers, and approaches that have been developed over many years of addressing just these sorts of problems. Our number, which can be called from anywhere in the state, will be answered, with absolute confidentiality, by me or another consultant local to the call. The number is (800) 222-0767. If you want to see The Other Bar's website, it may be accessed at www.otherbar.org.

You might also call the State Bar's Lawyer Assistance Program, which also promises to receive calls and to speak on a confidential basis, and offers to place a call to the impaired attorney to make evaluation, counseling and treatment available. Their number is (877) 527-4435.

If things have gone too far, Business and Professions Code section 6190 allows the courts to take over. It provides: "The courts of the state shall have the jurisdiction [to assume the lawyer's practice] as provided in this article when an attorney engaged in the practice of law in this state has, for any reason, including but not limited to excessive use of alcohol or drugs, physical or mental illness, or other infirmity or other cause, become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client . . . ."

Hopefully, we will get the call before it is necessary for the court to step in. This ethical, or moral, dilemma can be solved. Knowing how to help is often the key.

Finally, when in doubt about ethical obligations, it is good to know that the State Bar has, since 1983, operated the Ethics Hotline, which can be accessed by dialing (800) 2-ETHICS ((800) 238-4427) during business hours. An experienced research attorney will listen to the issues, research the matter, and get back to you with statutory and case law that bears on the questions presented.

Greg Dorst is a former lawyer who helps lawyers and judges overcome alcohol and/or substance abuse problems. He is a Certified Addiction Specialist and Executive Director of the Cedar House Rehabilitation Center.

Opposing Counsel: Kirsten Birkedal

by Cosmos E. Eubany

Ms. Kirsten Birkedal is a second-year attorney whose thirst for knowledge is surpassed only by her penchant for travel. Her father, an archaeologist and anthropologist, often encouraged her to live her life to the fullest and take advantage of every opportunity. She has followed this motto throughout her life.

Kirsten Birkedal

Ms. Birkedal was born on April 13, 1978 in Santa Fe, New Mexico. She resided there until age 8, when her father was transferred to the park service in Anchorage, Alaska.

She received an excellent education in Alaska, which she attributes to the revenue the state received from the oil trade. At the age of 18, she packed her belongings again, this time to attend college. Ms. Birkedal went to Chatham College for women in Pittsburgh, Pennsylvania. It was a small college, with a student body of about 500. She majored in English literature and became involved in organizations such as Women in Politics.

In 1999, Ms. Birkedal gathered her belongs a third time and boarded an airplane bound for Ankara, Turkey. She lived in Turkey for six months, doing research for her senior thesis. She became interested in Turkey after she and her Albanian roommate took a vacation to the country. In her studies and research, she noticed that Turks were often portrayed in a negative light, and she sought to delve into culture and literature to discover the reason for this. Her research and studies culminated in her thesis, entitled "The Portrayal of Turks in Renaissance Drama."

The political climate in Turkey in 1999 was volatile. There was a Kurdish separatist movement to gain independence and create a Kurdish state in, among other territories, southeastern Turkey. This group, the Kurdistan Workers Party (PKK), headed by Abdullah Öcalan, represented a significant threat to the stability of the country. She recalls the heightened security at the airports and the various checkpoints established by the government.

When she returned from Turkey, she entertained the idea of going to law school. She had always loved pre-law classes, and she received significant encouragement from her mother and a high school teacher. However, she deferred her application to law school in order to take on a position as a legal assistant at the law firm of Cravath, Swaine & Moore, LLP. Once again Ms. Birkedal boarded a plane, this time bound for New York City.

She lived in New York for two years, from 2000 to 2002. On September 11, 2001, she was getting ready for work when the attacks on the World Trade Center occurred. She recalls the chaos that was New York City that fateful morning and recalls the feelings of nostalgia she had for her family. At that point, she realized that life was short and that she wanted to be close to her family and live out her dreams. It was then that she decided to leave New York and apply to law school.

She decided to attend the University of Oregon School of Law because it was close to home. She had a great experience in law school and was involved in the Environmental Law Journal. She developed a passion for torts, a passion she admits was nurtured by her professor, Dom Vetri. She became interested in civil litigation in general and medical malpractice in particular after reading the book "Damages," recommended by her professor.

Ms. Birkedal gained her first experience in the area of civil litigation when she worked for the law offices of Jaqua & Wheatley, in Eugene, Oregon. She took part in an interesting case involving the issue of whether tree roots can constitute a nuisance or a trespass when they cross boundaries and cause damage to neighboring properties. The matter was later argued before the Oregon Court of Appeals, which ruled that tree roots cannot be considered a nuisance and cannot trespass on property.

Upon graduating from law school, she moved to California and settled in the Inland Empire. Her uncle, Les Whitaker, was a former research attorney for Justice Thomas Hollenhorst of the California Court of Appeal in Riverside. Her uncle maintained significant contacts in the area and encouraged her to make the move. She briefly considered returning to Alaska, but the fair weather of Southern California convinced her otherwise.

She lived with her uncle and aunt while she studied and sat for the 2005 California Bar Exam. While awaiting her results, she volunteered for the Riverside Office of the Public Defender. On passing the bar exam, she took on a permanent position at Snyder, Walker & Mann LLP, a firm specializing in medical malpractice.

Snyder, Walker & Mann LLP, based in Rancho Cucamonga, represents mostly physicians and hospitals. She takes great pride in representing professional healthcare providers because of the services they provide to the community. She also loves the experience she has received at the firm. As a young associate, she has had a lot of courtroom experience arguing complex motions, taking numerous depositions, and exercising a level of autonomy with her own cases. She notes that the partners at her firm encourage their associates to plan out and follow a career path and want to see their associates become distinguished trial attorneys.

Ms. Birkedal's most interesting cases focus on issues involving managed care providers. She notes that while the area of medical malpractice is relatively defined, a lacuna is often created when the negligence standard of care ordinarily used for physicians and healthcare providers is supplemented by intentional tort claims of fraud and elder abuse.

Ms. Birkedal enjoys being a part of the Riverside community and would like to help make this county an attractive place for the young. She notes that the county is undergoing a significant revitalization project, and believes this will help encourage young professionals to choose to live here.

For relaxation, Ms. Birkedal enjoys attending events at the Riverside Art Museum, and she is learning to play tennis, among other sports. We take pride in the fact that, after traveling in the United States and abroad, this accomplished young professional has chosen to settle down in our community.

Cosmos E. Eubany is an Associate Attorney with Lewis Brisbois Bisgaard & Smith LLP in Costa Mesa.

26th Annual RCBA Good Citizenship Awards

National Law Day, May 1, is a special day focusing on our heritage of liberty under law, a national day of celebration officially designated by joint resolution of Congress in 1961.

Law Day is an annual opportunity for the Riverside County Bar Association, its members and the Riverside County Superior Court to reach out to the community in an effort to expand awareness of our laws and our justice system, and of their combined impact on our lives. It is more than just a single day to reflect on our legal heritage; it is a means of sharing our daily way of life with the rest of our fellow citizens.

As part of its celebration of Law Day 2007, the RCBA once again sponsored the Good Citizenship Award program for high school students in Riverside County. These awards were given to one student, a junior, from each participating high school. The recipients were chosen by the principals and counselors of their schools based on their exemplary good citizenship. Each student received a monetary award of $100 and a certificate commemorating the day.

On Friday, May 4, 2007, the RCBA and the Riverside County Superior Court recognized the following high school students from around the county for their good citizenship (*student name – high school name*):

Christian Cervantes – Abraham Lincoln
Victor A. Zambrano – Alessandro
Eduardo Ceja – Alvord
Danielle Aarts – Arlington
Deanna Dickinson – Banning
Leandra Frasier – Canyon Springs
Jesse Lee Gomez – Chaparral
Martha Gavilanes – Citrus Hill
Marisa Ramos – Corona
Christopher W. Brown – Eleanor Roosevelt
Alison Roeder – Elsinore High School
Paulina Gonzales – Great Oak
John Torres – Hamilton
Breanna Fleming – Helen Hunt Jackson
Michael G. Hammers – Hemet
Alisha Ansari – John W. North
Austin Brand – Lakeside
Olivia Anderson – La Quinta
Danyelle McNeary & Michelle McNeary – La Sierra
Christy B. Castrence – March Mountain
Efrain Hernandez – Mt. San Jacinto
Alejandro Gongora – Murrieta Valley
Maria Patanwala – Norco
Casey Slocum – Paloma Valley
Daniel J. Atwell – Poly
Sebastian Rivera – San Jacinto
Fairuz G. Dakam – Sherman Indian
Erika Mejares – Vista Murrieta
Rashad Ableson – Woodcrest Christian

Photograph courtesy of Juan Sancedo/The Press Enterprise

RCBA President-Elect Dan Hantman and Presiding Judge Richard Fields each spoke to the assembled high school juniors and their parents, teachers and counselors.

Certificates of recognition were given by the following government officials: U.S. Senator Dianne Feinstein; Representatives Mary Bono and Ken Calvert; California Senators James Battin, Denise Ducheny, Robert Dutton and Dennis Hollingsworth; Assemblymembers John Benoit, Paul Cook, Bill Emmerson, Bonnie Garcia and Kevin Jeffries; and Riverside County Supervisor John Tavaglione.

Congratulations to all the recipients!

VIP Salutes Attorney Mentors at Seventh Annual Awards Luncheon

by Judy Davis

Attorneys, judges, and government officials joined California Department of Corrections and Rehabilitation parolees and friends at the Historic Mission Inn Hotel on April 20, 2007, to celebrate VIP Mentors' Seventh Annual Awards Luncheon. California Court of Appeal Justice Douglas Miller served as the Master of Ceremonies. Larry Grable, representing Governor Arnold Schwarzenegger, Cheryll Bisco, representing Assemblyman John Benoit, Donna Johnston, representing Riverside County Supervisor John Tavaglione, Nancy Hart, Riverside Councilwoman, Merci McGregor and Darlene Elliott representing Riverside Mayor Ronald Loveridge, the Honorable Craig Riemer and the Honorable Jeffrey Prevost, Riverside Superior Court Judges, Sara Danville, Riverside County Assistant District Attorney, Alfred Martinez, Jr., California Department of Corrections and Rehabilitation, Adult Parole Operations Region IV Chief Deputy Regional Administrator, and Guillermina Hall, CRC Prison Warden, were among the honored guests.

The recognition event delivered many memorable moments that garnered sniffles and applause from the audience. The "Outstanding Match" award was presented to attorney James R. Bostwick, Jr. and Richard Valle. James was first introduced to VIP at a state bar convention about seven years ago when he saw a brochure. He thought the concept sounded great, then became involved. James has helped two mentees to discharge parole. Richard was successful after his release from prison because he was proactive about changing his life. He said that his mentor's influence helped him to set and achieve higher educational, employment, and financial goals. James stated that they both benefited from the association. I was there to listen and provide constructive advice, yet the relationship added richness to my life. It gave me a chance to get to know someone I normally wouldn't interact with except in a professional way.

Douglas L. Edgar received the "Outstanding Mentor" award. Since Doug first became involved with VIP in 2002, he's helped three individuals to successfully complete parole, and he is currently working on his fourth match. Mr. Edgar's was also recognized for his assistance with mentor recruitment, help provided at social functions, and clothes he'd donated to a parolee clothes closet.

The "Outstanding Achievement" award went to parolees Lee Vale Butler and Tim Valdez. Lee Vale shared that it's good to have "my thoughts reflect my actions." He also credits his mentor for influencing his decision to go to school. Tim said that he appreciates the people who accept him for who he is today, not for who he was. His mentor, Dave Philips, doesn't judge him. He gives him encouragement and help.

Micheal Salvaggio and Wanda Moore were presented with the "Outstanding Parole Agent" award. "Partners in Success" awards for program support were given to Patricia Garrett and Steve Felix. Four VIP mentees received TOPS (Targeting Obstacles to Personal Success) scholarships to help them continue to make progress in reaching their goals.

Founded by California attorneys in 1972, the VIP program provides mentors to men and women on parole from state prison. We have 14 mentoring programs throughout California. The program began in Riverside County in April 2000. VIP is the only community service program in California that recruits attorneys, and only attorneys, to be guides, advisors, role models, and friends for parolees as they struggle to turn their lives around. Mentors invest about four hours per month developing a friendship with their mentees through mutual activities. VIP volunteers have helped thousands of former offenders begin new lives that are crime-free, self-respecting, and self-supporting.

To become a mentor or learn more about this program, please contact Judy Davis, Program Director, at (951) 782-4479, ext. 242, or at vip-riverside@vipmentors.org. You can also visit our website at www.vipmentors.org.

Outstanding Match Award - attorney James Bostwick, Jr. and parolee Richard Valle

Outstanding Achievement Award - parolee Tim Valdez and attorney David Philips

Judy Davis presents parolee Lee Vale Butler with Outstanding Achievement Award

Outstanding Parole Agent Award recipient Micheal Salvaggio

Outstanding Mentor Award - attorney Doug Edgar

Bar Briefs

Riverside County Law Alliance (RCLA) brought Law Day 2007 to Arlington High School with the help of four wonderful speakers.

Juvenile Court Commissioner Charles Koosed and attorneys Don Inskeep, Ken Kocourek and Donis Borks spoke to students in the AVID Program on May 4 about their lives and careers, what led them to the choices they have made, and the challenges and rewards of a legal profession; they also offered advice on preparing for college.

AVID – Advancement Via Individual Determination – is a program to help students prepare for college. (One student has already been accepted to Yale!)

Law Day (lawday.org) was established in 1958 to honor law and the legal process. This year's theme was "Liberty Under Law: Empowering Youth, Assuring Democracy."

Riverside County Law Alliance (now in its 52nd year) fosters friendship among families of lawyers through its events and programs. Anyone wishing to learn more may call Carolyn Badger at (951) 686-3275.

In Memoriam

Jess A. Barnett
January 1919 – May 2007

Wilford N. Sklar
December 1916 – May 2007

Law Day at the Mall

The Riverside County Bar Association would like to thank the following attorneys who donated their time to help with RCBA's annual "Law Day at the Mall" (Moreno Valley Mall) on Saturday, May 19, 2007: Martha Dahdah, Michael Kellogg, Brian Pearcy, Rosetta Runnels, and John Vineyard.

John Vineyard and Rosetta Runnels

Martha Dahdah and Brian Pearcy

Michael Kellogg

Equalize the Work of the Judges

by the Honorable Elwood M. Rich, Judge of the Superior Court, Retired

Riverside and San Bernardino Superior Courts are constitutionally entitled to an assignment of judges from San Diego and Orange County Superior Courts to "equalize the work of judges."

Witkin California Procedure (4th ed. 1997) at volume 2, page 39, states as follows:

"4. Assignment of Judges by Chief Justice.

"(a) [§14] Constitutional Basis of Power.

"'The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.' (Cal. Const. Art. VI, §6.) [Citations.]

"Thus, consent is required for assignment of a retired judge, or for assignment of an active judge to a court of lower jurisdiction (Cal. Const. Art. VI, §6); but an active judge assigned to a court of 'like or higher jurisdiction' must accept the assignment. (Govt.C. 68548.) And a retired judge who elects senior status [citation] waives the right to refuse an assignment. (Govt.C. 75028.1(d).)"

The procedure for assigning judges to a particular county is for the presiding judge or representative to present to the Administrative Office of the Courts (AOC) a request for the number of assigned judges needed and supporting information. The AOC makes its presentation and recommendation to the Chief Justice, who signs the assignment order if he agrees. In totaling judges for particular counties, the AOC provides numbers of "Judicial Position Equivalents" (JPEs), which count the full-time judges plus temporarily assigned judges

The Judicial Council, through the AOC, annually publishes detailed caseload (case filings) reports for all the courts in California. The most current report available is for fiscal year 2004-05 (www.courtinfo.ca.gov/reference/documents/csr2006.pdf). Prior to 1998, this information was published in pamphlets and distributed to all California judges. I retired from the Riverside Superior Court in 1980 after 28 years on the bench and was a long-time reader of these pamphlets. I remain so today.

Workload Categories

In any superior court, from a significant workload standpoint, there are four categories of cases. The largest workload category by far consists of criminal cases, which produce many felony and misdemeanor jury trials; statewide, these cases produce four times as many jury trials as do civil cases. The second largest workload category consists of civil cases. The third largest workload category consists of family law cases. The fourth largest workload category consists of juvenile delinquency and dependency cases. All of the other types of cases are not individually significant.

The Los Angeles Daily Journal Directory of Attorneys contains a directory of the judges in each of the state's 58 superior courts. This directory indicates the assignment of those judges in terms of matters handled, e.g., criminal, civil, probate, etc. The number of judges assigned to each category indicates its workload significance.

Comments on the Categories

Unlimited civil cases, matters with more than $25,000 in dispute, include personal injury claims, property damage claims, and wrongful death claims. Matters with $25,000 or less in dispute are included under the limited civil category. This category includes a large number of filings that produce a very small percentage of trials. These are mostly short non-jury trials, with less than 0.1% being held as jury trials.

Limited civil includes many cases for small amounts of money. Even though cases such as collection agency matters, attorney represented matters, and most unlawful detainer matters are within the small claims court jurisdictional limits, they are required to be filed in limited civil. Since cases for amounts of money within the jurisdiction of the small claims court are not required to be filed there (it is optional), many business creditors have attorneys file these in limited civil. The trials of many limited civil cases are as short as the trials in small claims court – half an hour or less to up to an hour. The very few jury trials in limited civil are usually the result of insurance companies requesting jury trials in personal injury cases. Many of these involve low-impact motor vehicle collisions.

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Equalize the Work of the Judges *(continued from page 25)*

San Bernardino, Orange, Riverside and San Diego Counties
Comparison of Workloads (Filings) and Judges: 2004-05

Case Type	County/Judges			
	San Bernardino/75	***Orange/143***	***Riverside/69***	***San Diego/154***
Felony	19,422	17,170	17,692	18,563
Misdemeanor	91,241	74,914	61,988	80,192
Delinquency	5,171	5,286	5,879	5,259
Dependency	2,465	1,926	5,678	2,317
Unlimited Civil	7,391	17,852	11,619	15,971
Limited Civil	26,486	34,978	24,232	32,229
Other Civil	3,290	8,420	8,408	8,118
Family Law – Marital	9,107	11,776	8,884	14,061
Family Law – Petition	22,878	17,889	18,392	18,446
Total Filings	**187,451**	**190,211**	**162,772**	**195,156**

Infractions, small claims, small claims appeals, probate, mental health, habeas corpus, criminal and civil appeals do not involve significant workloads and therefore no comparison is made.

Analysis of Orange and San Bernardino Counties, 2004-05

In four of the nine case types, San Bernardino's filings are higher than Orange's, particularly in criminal matters. In the civil filings, Orange's workload is heavier than San Bernardino's. For overall filings, Orange's workload is a little more than San Bernardino's. Accordingly, there is no justification for Orange (143) having 68 more permanent judges than San Bernardino (75). ABSURD! On top of this, Orange had 158.6 JPEs, which means it had 15.6 extra full-time retired judges assigned to it by the Chief Justice (143 + 15.6). In 2004-05, San Bernardino had 86.4 JPEs, an extra 11.4 full-time retired judges (75 + 11.4). 29 of Orange's judicial officers should be assigned to San Bernardino for the reasons described below, until the Legislature gives San Bernardino County the number of judges it needs.

Analysis of Orange and Riverside Counties, 2004-05

In comparison to Riverside, Orange has a workload that is modestly higher. Orange (143) has 74 more permanent judges than Riverside (69). ABSURD!! In addition, Orange had 15.6 extra full-time retired judges, whereas Riverside had 13.2.

Analysis of San Diego

San Bernardino's filings are higher in four of the nine categories than San Diego; San Bernardino is higher in criminal, while San Diego is higher in civil. Overall, San Diego's workload is a little more than San Bernardino's. There is no justification for San Diego (154) having a gigantic 79 more permanent judges than San Bernardino (75). ABSURD!!! Additionally, San Diego had 163.7 JPEs for 2004-05, which means it had 9.7 extra full-time retired judges assigned to it by the Chief Justice. AMAZING!!! In 2004-05, San Bernardino had 86.4 JPEs, an 11.4 extra full-time retired judges.

In comparison to Riverside, San Diego's overall workload is modestly higher. There is no justification for San Diego having 85 more permanent judges than Riverside. ABSURD!!! In 2004-05, Riverside had 82.2 JPEs, 13.2 extra full-time retired judges. 32 of San Diego's judicial officers who live the farthest north in the county should be assigned to Riverside for the reasons described below, until the Legislature gives Riverside County the number of judges it needs.

Trial Production, 2004-05, San Diego, Riverside, San Bernardino and Orange Counties

	Jury Trials				Non-Jury Trials			
Case Type	SD	River	SB	Orange	SD	River	SB	Orange
Felony	229	379	165	**	41	35	50	**
Misdemeanor	264	159	75	**	417	305	355	**
Unlimited	269	111	48	235	218	61*	87	518
Limited	18	6	18	33	3468	6007	3258	7345
Other	87	19	24	96	146	error	69	448
Marital	---	---	---		606	error	1063	8992
Petitions	---	---	---		**	12	**	**

*understated due to error ** COURT failed to report to AOC

Total Number of Judicial Officers in 2004-05

San Diego	Riverside	San Bernardino	Orange
163.7	81.2	86.4	158.6

Civil Trial Litigants Are the Victims

When there is a shortage of judicial officers, what gets neglected? Family law departments and juvenile court are kept adequately staffed because it is necessary. Probate, unlawful detainers, small claims, infractions, mental health, appeals, and habeas corpus individually do not require substantial judicial time, but are kept adequately staffed because it is necessary. Criminal cases, both felony and misdemeanor, make up the largest workload category by far, and they have deadline dates for getting a case to trial or else the case must be dismissed. This gives them priority over the civil cases set in the civil trial departments. The civil cases are the unlimited civil, limited civil, and other civil complaints and petitions. These make up the second largest category of workload, but as a matter of priority for handling in the courts, it is the lowest. Therefore, it is usually the only category that is neglected when there is a shortage of judicial officers.

How did Orange and San Diego Counties become so heavily staffed with judges compared to Riverside? Was it the result of the 1998 consolidation of the five municipal courts in Orange County with the superior court there and the four municipal courts in San Diego County with the superior court there?

Method Used to Determine the Number of Judicial Officers to Assign to Riverside and San Bernardino as Courtrooms Become Available

On February 14, 2007 the AOC, applying its "weighted filings" system, stated that the following courts should have the following number of judicial officers:

Riverside:	133.30	(45.5%)	San Bernardino:	145.25	(47.9%)
San Diego:	159.43	(54.5%)	Orange:	158.47	(52.1%)
Total:	292.73		Total:	303.72	

Applying these percentages of relative need to the existing total of judicial officers results in an equalizing division of the present judicial officers between these courts as follows:

	Judicial Officers	After Applying Percentages of Relative Need to Existing Total		
Riverside:	69	Riverside:	101	(45.5% x 223)
San Diego:	154	San Diego:	122	(54.5% x 223)
Existing Total:	223			
San Bernardino:	75	San Bernardino:	104	(47.9% x 218)
Orange:	143	Orange:	114	(52.1% x 218)
Existing Total:	218			

Therefore, 32 of San Diego's 154 judicial officers should be temporarily assigned to Riverside (including Temecula). Riverside could then transfer a quantity of its present judicial officers in Riverside to the desert. 29 of Orange's judicial officers should be temporarily assigned to the San Bernardino courthouse. San Bernardino could then transfer its judicial officers elsewhere in the county.

Classified Ads

Office Space – Indio

Central Indio, CA. New Class A Office Space. Call Dominick Mancuso at (760) 773-3155 or Email dmancuso@dc.rr.com. Coldwell Banker NRT.

Executive Suites Downtown Riverside

Tower Professional Building has offices available from 200sf to 1500sf. We are located on the corner of Lime and 13th in Downtown Riverside within walking distance to courts. Building has receptionist, conference room, parking, and more. Please call Carole at 951 686-3547 or email to towerpm@sbcglobal.net.

Office for Rent – Full Service

Inns of Court Law Building, 3877 Twelfth Street, Riverside, CA 92501. One block from Court House. Call Vincent Nolan at (951) 788-1747.

Probate/Estate Planning Attorney Position

Heritage Law Offices (fka Law Offices of Herb Chavers) has an opening for an associate attorney position. Practice areas include Estate Planning and administration, including uncontested probate court matters (probate, guardianship, conservatorship, and trust petitions). Experience in estate planning or probate court matters is a plus. Please submit a resume to herb@heritagelawoffices.com.

Fingerprint Consultant

Court qualified expert in the field of the fingerprint science. Also Cal-ID Experience. Contact Granville (Bud) Kelley, email budeffie@yahoo.com, phone (951) 689-2286. Court qualified expert in fingerprint identification and testimony. Superior and Municipal Courts. Resume available upon request.

New Position Approved - BIR

Special Assistant Inspector General, $8,798-$9,515 per month. The California State Office of the Inspector General, Bureau of Independent Review (BIR) is seeking a highly experienced & highly motivated attorney to join the southern regional BIR office in the City of Rancho Cucamonga. Active membership in the State Bar of California is required. For further information, including minimum requirements, salary ranges, duty descriptions, and filing instructions, please visit the website www.oig.ca.gov.

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 June 30, 2007.

Jesus G. Bernal – Office of the Federal Public Defender, Riverside

Rachael L. Cianfrani – Kenyon & Cianfrani, Riverside

Timothy W. Combs – Tran & Combs, Garden Grove

Charles E. Kenyon – Kenyon & Cianfrani, Riverside

Mona M. Nemat – Best Best & Krieger LLP, Riverside

Margaret Shou-Ping Ng – Lobb Cliff & Lester LLP, Riverside

Jean-Simon Serrano – Heiting & Irwin, Riverside

Calendar *(continued from page 2)*

27 EPPTL Section
"MediCal Updates
Speaker: Dennis Sandoval, Esq.
RCBA Bldg., John Gabbert Gallery – Noon
MCLE (1 Hr.)

29 Riverside Superior Court Pro Tem Training
"Judicial Demeanor"
MCLE (3 Hrs Ethics and 0.25 Hr Bias)
To register: Call Sylvia Chernick (760) 863-8127

JULY

4 HOLIDAY

11 Bar Publications Committee
RCBA – Noon

12 Immigration Law Section
"Creating an Effective and Professional Online Presence"
Speaker Andrew Rodgers
RCBA Bldg., John Gabbert Gallery – Noon
MCLE (1 Hr.)