RIVERSIDE LAWYER
September 2007 • Volume 57 Number 8
MAGAZINE

Access to Justice

In This Issue:

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

SEPTEMBER

18 Family Law Section
"Family Law Court Update"
Speaker: Judge Becky Dugan
RCBA 3rd Floor – Noon
(MCLE)

20 Criminal Law Section
"Defending Gang Cases"
Speaker: Jeff Van Wagenen, Esq.
RCBA 3rd Floor – Noon
(MCLE)

Annual Installation Dinner
Mission Inn – 5:30 p.m.

21 Riverside Superior Court
"Judicial Demeanor Course for Temporary Judges"
Speaker: Judge Craig Riemer
RCBA 3rd Floor
1:00 pm – 4:30 pm
(check-in starts 12:00 pm)
(MCLE: 3 hrs Ethics and 0.25 Bias)

26 Estate Planning, Probate & Trust Law Section
RCBA – Noon
(MCLE)

27 State Bar Annual Meeting & Conference of Delegates
(Sept. 27 to Sept. 30)
Anaheim Convention Center

OCTOBER

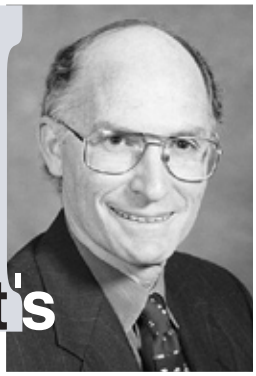
2 Joint RCBA/SBCBA Environmental & Land Use Law Section
"Climate Change – Roundtable Discussion"
At Gresham Savage in San Bernardino – Noon
(MCLE)

10 Barristers
Cask 'n Cleaver, Riverside
6:00 p.m.
(MCLE)

11 Appellate Law Section
"Oral Argument Tips and Tactics"
Speaker: Justice Thomas Hollenhorst
Court of Appeal – Noon
(MCLE)

12 General Membership Meeting
Speaker: John Benoit
RCBA 3rd Floor – Noon
(MCLE)

President's Message



by Daniel Hantman

Access to Justice

The theme of this month's *Riverside Lawyer* is "Access to Justice." You will read articles about several different legal community groups that do a wonderful job of providing legal assistance to our Inland Empire population, as well as about the continuing challenges for our judicial needs.

As some of you may know, in the summer of 1976, I came to Riverside as the Senior Citizen Attorney for Riverside Legal Aid (RLA). This was the predecessor to our Inland Counties Legal Services (ICLS). I was hired by RLA Executive Director, Ronald L. Taylor. When Ron was appointed to be a judge by then-Governor Jerry Brown, Irene Morales became the Executive Director. I worked at ICLS until 1984 and then started my own firm. I did "toaster" law ("whatever popped up") for a few years and then centered my practice around administrative law, mostly dealing with Social Security cases for no- or low-income clients.

While I was at ICLS, the need for legal services far outpaced the resources of the legal community, as it continues to do. When David Bristow began his term as President of the Riverside County Bar Association (RCBA), he enlisted all of our support to face the challenges of our overcrowded courts, our shortage of judicial officers and our overburdened legal providers.

Although we have come part of the way, there is still much more we must all do!!

The Administrative Office of the Courts (AOC) has told us "the lack of an adequate number of judgeships translates into crowded courtrooms, overworked judicial officers and staff, and backlogged cases. Even worse, without additional judges, the courts cannot meet the needs of the citizens or provide them with the access to justice and court services that they are entitled by law to receive."

Retired Judge Elwood (Woody) Rich in his article, "Equalize the Work of the Judges" (Riverside Lawyer, June, 2007), cited statistics showing that, according to a study done by the AOC as of February 2007, Riverside County should have 133.3 judicial officers and San Bernardino County should have 145.25 judicial officers.

The Press-Enterprise reported that the "state Judicial Council's most recent report for fiscal 2005-06 showed Riverside County had the second-highest judge-to-case ratio for large-population counties in the state, with an average of 6,500 filings for each judicial position. San Bernardino County had the highest, an average of 6,704 filings per judicial position. The state average is 4,795 filings per judge."

As of the compilation of this article, Riverside has 76 judicial officers and San Bernardino has 87. Many of us remember the temporary moratorium on most civil case hearings in June 2004 and again from December 12, 2005 through February 3, 2006.

Presiding Judge Richard (Rick) Fields has many times spoken and written about the courts facing one of the most severe case backlogs in California due to our rapid population explosion, our growing number of case filings and our shortage of judicial officers and support staff.

Many of you have heard or read about California Chief Justice Ronald George's announcement that he is sending approximately 12 active and retired judges to assist in attacking our large backlog.

I know each of us will follow the progress of these challenges and I urge all of us to continue working toward solving these challenges.

The RCBA Board of Directors and I would especially like to thank David Bristow for his leadership and many hours of hard work this past year. We also congratulate him and his wife, Kristen, on the birth of their first child, Kathryn.

I close this first monthly article with a quote from Oliver Wendell Holmes, the father of the United States Supreme Court Justice: "I find the great thing in this world is not so much where we stand, as in what direction we are moving . . . we must sail sometimes with the wind and sometimes against it, – but we must sail, and not drift, nor lie at anchor."

Dan Hantman, president of the Riverside County Bar Association, is a sole practitioner in Riverside.

Terry Bridges to be Honored with Krieger Award

by John W. Vineyard

Terry Bridges

Terry Bridges will be honored with the Riverside County Bar Association's James A. Krieger Meritorious Service Award on September 20, 2007. The award, which is the highest honor bestowed by the RCBA, will be presented at a dinner at the Mission Inn. The officers of the RCBA and Barristers will be formally installed at the same dinner.

Terry has long been an active member of the RCBA, serving as President in 1987, and serving as the long-time chair of the Judicial Evaluation Committee. In addition to his many achievements within the association, he was a founding member of the Leo A. Deegan Inn of Court and was instrumental in bringing the Inns of Court Program to Riverside County. Terry has devoted much of his career to fostering professionalism, civility and ethical practice in our profession.

The RCBA established the Meritorious Service Award in 1974 to recognize those lawyers or judges who have, over their lifetimes, accumulated outstanding records of community service. The award, later named for James A Krieger, has since been presented to James Wortz, Eugene Best, Arthur Swarner, Arthur Littleworth, Justice James Ward, Fred Ryneal, John Babbage, Patrick Maloy, Ray Sullivan, Justice John Gabbert, Jane Carney, Judge Victor Miceli, Justice Manuel Ramirez, and Kathleen Gonzales.

The award is not presented every year. Instead, it is given only when the extraordinary accomplishments of a particularly deserving individual come to the attention of the selection committee.

Terry Bridges' service to our community is a source of pride for all RCBA members. Please join us on September 20, 2007 to honor this exemplary colleague.

John W. Vineyard, President of the RCBA in 1999, is the Chair of the Krieger Meritorious Service Award Committee

Congestion in the Court

by the Hon. Richard T. Fields, Presiding Judge of the Riverside Superior Court

The congestion in the Riverside County Superior Court is well known throughout the state. In fact, Chief Justice Ronald George referred to the overburdened courts in Riverside County in his State of the Judiciary speech to the Legislature in February.

Judge Fields addressing the members of the RCBA at a special meeting on court congestion in June.

Several years ago, the California Administrative Office of the Courts, in collaboration with the National Center for State Courts, developed a methodology for determining judicial needs in California.

In 2004, utilizing that methodology, the Administrative Office determined that Riverside County should have 121 judicial officers. At that time, the court had only 69 judicial officers. Thus, we were operating with a shortage of 52 judges. An updated 2007 report indicates that the need for additional judges in Riverside County has increased and that we are now 64 judges short. Even with the additional 7 judges to be appointed this year, we will still face a shortage of 57 judges.

Notwithstanding this extraordinary shortage of judges, we have dramatically increased the number of criminal jury trials that we hear each year. In 2002, we conducted a total of 402 criminal jury trials. In 2005, that number increased to 675 criminal jury trials. In 2006, we conducted approximately 800 criminal jury trials. Court records show that this means that we are completing approximately twice the number of criminal jury trials per judge than the hardworking courts in the surrounding counties. This has been accomplished while we have the lowest number of judges per 100,000 population of the 15 most populous counties in the state. It is important that the citizens of Riverside County know the extraordinary efforts that their courts have made to deal with this criminal case backlog.

Despite these efforts, the backlog has continued to grow. Riverside County officials have provided significant additional resources to the Public Defender and the District Attorney. In fact, the Press-Enterprise reported on December 11, 2006, that from fiscal year 2001 to 2007, the number of deputy district attorneys increased from 144 to 255, a 77% increase. The number of deputy public defenders increased from 94 to 150, a 60% increase. During that same time period, the county's population increased by 26%, and yet the court received only one additional judgeship. By law, new judicial positions must be authorized and funded by the California Legislature. Last year, Senate Bill 56 passed, which will result in our court receiving 7 additional judicial positions sometime this year.

The court has been proactive in attacking the criminal case backlog. The court has taken many steps to maximize efficiency, including the following:

1. Judges who would normally conduct civil jury trials are being assigned criminal jury trials. Therefore, very few civil jury trials have taken place in recent months.

2. Before a judge even finishes a criminal trial, the next trial is sent to the judge and pretrial proceedings are started so that jury selection can start as soon as the first jury starts deliberating. This back-to-back scheduling has greatly increased the rate at which criminal cases are being tried.

3. We are using all our available courts, civil and criminal, on a countywide basis. If the speedy-trial rights of a defendant require that a case be sent out to trial, and there is no available courtroom in the regional courthouse (Indio, Riverside, or Murrieta), then the case will be transferred to whatever region can provide an open courtroom.

4. Although many of our courts have used Fridays to hear motions, sentence defendants, hold felony preliminary hearings, prepare jury instructions, and otherwise do the work necessary to process criminal cases, we have designated some criminal courts to hear criminal trials five days a week. The other matters that would normally be heard in these designated courts have been shifted to other judges.

5. We set up a special area in the Hall of Justice where the deputy district attorneys and criminal defense lawyers can discuss their cases and attempt to resolve them short of trial. Although we had no rooms available for this purpose, we took open space and built out office space for negotiations.

6. With the input of our justice partners, we have worked out some changes to the criminal preliminary hearing calendar that we believe will be helpful in reducing delays. These changes include authorizing overtime for sheriff's deputies to come in earlier so that we can request and receive inmates from the jail earlier in the morning. This permits the judge hearing that calendar to take the bench earlier, because the judge does not have to wait so long for inmates to arrive. This also allows the lawyers to speak with their clients earlier and to begin negotiations earlier. This calendar very often exceeds 200 cases per day. It is hoped that these changes will lead to more resolutions of cases that would otherwise have to be tried.

We appreciate the Chief Justice's action in sending 12 judges to Riverside County for four months to help us reduce the criminal case backlog. Although this will still leave us far short of the number of judges that should be allocated to Riverside County, we earnestly hope that this action will lead to a reduction of the criminal case backlog. Tackling this backlog is critical if we are to meet our number-one goal of providing fair and expeditious access to justice to everyone.

Mental Health Court – Access to Justice

by Maura Rogers, Deputy Public Defender and lead attorney in MHC

Recent statistics indicate that the number of incarcerated mentally ill people has risen to an estimated 25% of the total jail and prison population nationwide. The medical and psychological needs of this population strain an already over-burdened and undermanned criminal justice system. In response, a disparate group of community leaders and concerned professionals, under the leadership of Judge Becky Dugan, established Riverside County's Mental Health Court (MHC) in 2001.

MHC's purpose is to address both the recidivism of mentally ill defendants and public safety concerns by providing a support network within the mental health system, with oversight by the criminal justice system. This is accomplished by the creation of a comprehensive treatment plan for the participant, along with intensive supervision. The treatment plan includes housing, doctors' appointments, medication, counseling, substance abuse treatment, anger management, and most importantly, a case worker. It connects clients to resources within the community with enough structure and supervision to ensure compliance. The caseworkers are an integral part of the treatment plan and provide the essential personal encouragement that can inspire the participant's confidence to succeed.

In addition to inspiration from the caseworker, the participant receives supervision from a probation officer and a judge. The MHC judge's oversight of the participant is an integral part of MHC's success. The participants are particularly motivated to provide positive progress reports to the judge so that their good work is recognized by a judicial officer. Even more motivating at times is a judicial reprimand and the threat of being incarcerated if a participant violates the probation terms.

After two years, MHC statistics revealed that only 11% of those who participated committed new crimes, compared to a 52% recidivism rate for those paroled from prison. Initially, a federal grant provided funding for personnel in the Mental Health Department and Probation Department for MHC. When that funding was terminated after two years, MHC functioned on a limited scale. With recent funds from the Mental Health Services Act (Proposition 63), new positions within the Mental Health Department have rejuvenated the court and expanded it. An MHC in Indio was opened recently under the guidance of Judge Tom Douglass, and an MHC in the Southwest Justice Center is under consideration.

The current MHC follows the same structure as outlined in the original federal grant. Any party can refer an individual who has mental health issues and has a criminal case within the county to MHC. MHC not only includes people who have a diagnosis of a chronic mental illness, but also encompasses persons with developmental disabilities and traumatic brain injuries. The person must be eligible for probation and must plead guilty, either by a negotiated plea or by a direct plea to the court.

The Department of Mental Health has a dedicated clinical therapist and behavioral health specialists for each Mental Health Court. Once a person is referred to the MHC treatment team, the clinical therapist arranges to meet the person, whether in or out of custody. After the assessment, the MHC treatment team meets and discusses the person's assessment. The team may request further information or records about the person or further testing by a psychologist. MHC is able to examine each person referred as an individual and develop treatment plans that meet that person's specific needs.

Unfortunately, not everyone referred is amenable to or suitable for MHC treatment. Some people are rejected due to their criminal background or the nature of their current charges, and others may be rejected due to the lack of appropriate programs. If the team believes that the person is too volatile or does not have a substantive mental health condition, then the person will be rejected. If the person is accepted, then a caseworker is assigned to find a program that meets the needs of the person. One of the most frustrating aspects of MHC is the implementation of the treatment plan, which can sometimes take months due to the lack of resources in the community. Once a program is located and a bed is available, the person pleads guilty and is placed on probation with terms that include the details of the treatment plan. Progress reports are scheduled every two to three months and the Probation Department provides updates to the court.

No probation officer is specifically assigned to MHC, just as during the federal grant. However, the cooperative work of the caseworker and probation officer provides the necessary supervision to ensure compliance. If the MHC participant violates the terms of probation, proba-

tion is notified immediately. The combined oversight of a Mental Health caseworker, probation officer, concerned defense counsel and MHC judge promotes a high success rate. Once the MHC judge observes a prolonged period of good progress reports, which indicates the participant has adjusted in the community with no mental health or criminal offense relapses, then no further hearing is required.

In the midst of a punishment-oriented criminal justice system, a collaborative effort to provide an alternative to that system exists in MHC. This collaborative court brings together formerly conflicted departments and agencies to discuss the individual needs and concerns of the participants, to search the community for appropriate services and to applaud the participants' good progress. The success of MHC is evident not only in its statistics, but more importantly, in the individual lives of the persons affected.

An Overview of Special Education Laws and Regulations as They Relate to Mental Health Services

by Scott M. Runyan

Did you know that special education not only involves teachers, principals and school district officials, but may also involve representatives from county mental health departments? In fact, county mental health departments play an integral role for some children in ensuring that they are provided a free and appropriate public education geared toward meeting their unique needs.

Scott Runyan

As members of the bar, we are exposed to a variety of legal subjects in our everyday practice. While some of the subjects we encounter apply only to distinct segments of society, others are of such importance that we should all have some familiarity with them. One such subject I have encountered and would like to share with you is special education and the provision of mental health services.

Provided below is a brief overview of federal and state special education laws and regulations as they relate to mental health services. This overview should be helpful to you, not only as a legal practitioner, but also as a friend or family member of a child with a disability.

As a matter of background, in *Brown v. Board of Education* (1954) 347 U.S. 483, 493, the United States Supreme Court stated that education is "perhaps the most important function of state and local governments." The Supreme Court further provided that:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (*Ibid.*)

With respect to providing opportunity to children with disabilities, both Congress and the California Legislature have passed laws to ensure that all children with disabilities have available to them a free and appropriate public education "that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." (See the Individuals with Disabilities Education Act, as amended in 2004 by the Individuals with Disabilities Education Improvement Act [hereafter referred to as the "IDEA"], 20 U.S.C. § 1400 et seq.) For a discussion of the evolution of federal law leading to the predecessor of the IDEA, the Education of the Handicapped Act, see *Board of Education v. Rowley* (1982) 458 U.S. 176, 179.) Regulations have been adopted at both the federal and state level to implement the special education laws. The IDEA currently provides special education services to approximately 6.5 million children in the United States.

With respect to mental health services, Government Code section 7576 identifies community mental health service (i.e., a county mental health department) as the responsible agency for providing mental health special education services, if required in the child's individualized education program (otherwise known as an "IEP").

"Mental health services" means mental health assessments and the following services delineated in an IEP: psychotherapy, collateral services, medication monitoring, intensive day treatment, day rehabilitation, and case management. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

At a meeting of the members of the child's IEP team (which generally consists of parent(s), teacher(s), and a representative of the local educational agency), they may determine a need for mental health services in order for the child to benefit from the education offered. The IEP team may make a referral to the county mental health department if all of the following criteria are met: (1) the child has been assessed by school personnel; (2) the school has received written parental consent for the mental health referral and evaluation; (3) the child has emotional or behavioral characteristics that are observed, are significant, impede the child from benefiting from educational services, cannot be described solely as a social maladjustment/temporary adjust-

ment problem and cannot be resolved through short-term counseling; (4) the child's functioning is at a level sufficient to enable the child to benefit from mental health services; and (5) the educational agency has provided appropriate counseling and guidance services, psychological services, parent counseling and training, or social work services to the child or behavioral intervention and the IEP team has determined that the services do not meet the educational needs of the child or documented which services were considered and deemed inadequate or inappropriate. (Gov. Code, § 7576, subd. (b); Cal. Code Regs., tit. 2, § 60040.)

If a referral is made to the county mental health department and it is deemed appropriate and complete, an assessment must be completed and an IEP meeting held within 50 days from receipt of parent's consent. (Cal. Code Regs., tit. 2, § 60045).

If a child is approved for mental health services, the IEP document must include the current levels of social/emotional performance, a description of the types of mental health services to be provided, the initiation, duration and frequency of the services, the goals and objectives of the services, and the parental consent for such services. (Cal. Code Regs., tit. 2, § 60050.)

California law and regulations also authorize county mental health departments to provide out-of-home residential placement services for children who are "seriously emotionally disturbed." (For the definition of "seriously emotionally disturbed," see Cal. Code Regs., tit. 5, § 3030, subd. (i); for the provisions that address residential placement, see Gov. Code, § 7572.5 and Cal. Code Regs., tit. 2, § 60100, et seq.)

In sum, both Congress and the California Legislature have recognized mental health services as a component of special education services and the provision of a free and appropriate public education. As legal practitioners, or as friends and family, we should all be aware of this available and important service provided by county mental health departments.

Scott M. Runyan is a Deputy County Counsel in the San Bernardino County Counsel's Office and is a graduate of the University of California, Riverside, and Loyola Law School, Los Angeles.

A Ruling for Access to Justice

by Jesus Bernal

In a decision hailed by the New York Times as "a ruling for justice," the Fourth Circuit Court of Appeals held this past June that the president cannot unilaterally declare civilians in this country to be "enemy combatants" and on that basis detain them indefinitely in military custody[1]. The 2-1 decision, *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), represents a stinging rebuke to President Bush's assertions that the "war on terror" vests his administration with authority to curtail the due process rights of foreign-born legal residents and that he has the "inherent authority" to do so on his own.

The case arose from a petition for a writ of habeas corpus challenging as unconstitutional the detention in a military prison of Ali Saleh Kahlah al-Marri, a citizen of Qatar who was arrested in December 2001 by the FBI as a material witness in the government's investigation of the September 11, 2001 terrorist attacks. At the time of his arrest, Mr. al-Marri was residing legally in the United States and pursuing a master's degree in computer science at Bradley University in Illinois. After his detention as a material witness, Mr. al-Marri was indicted for federal credit card fraud and lying to federal agents. Shortly before trial on those charges was set to begin – and pursuant to an order by President George W. Bush declaring him an enemy combatant – Mr. al-Marri was transferred to a military prison in South Carolina in June 2003. Since that time, the military has held Mr. al-Marri as an enemy combatant. For the first 16 months of his military confinement, the government held Mr. al-Marri in seclusion. During this time, he was not allowed any communication with the outside world, including his wife, his children, or his attorneys. In a lawsuit filed on his behalf, Mr. al-Marri alleged that he was denied basic necessities, subjected to extreme sensory deprivation, and threatened with violence. 487 F.3d at 165.

Mr. al-Marri filed his habeas petition in July 2004. In August 2006, the district court dismissed Mr. al-Marri's petition, agreeing with the government's contention that he was an enemy combatant. On appeal, however, the Fourth Circuit rejected the government's arguments, including the government's assertion that the recently enacted Military Commissions Act of 2006 ("MCA") divested the court of jurisdiction to hear Mr. al-Marri's claims. The MCA eliminates jurisdiction of habeas petitions by an alien who "has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C.A. § 2241(e). The court determined that his language requires *both* a decision to detain someone as an enemy combatant *and* a determination that such detention is proper. The president's unilateral designation of Mr. al-Marri as an enemy combatant was not a determination that he was properly detained as such. The court thus concluded that the MCA did not divest it of jurisdiction to consider the merits of Mr. al-Marri's claims.

Mr. al-Marri's claims strike at the core of our notions of liberty. The court recognized that Mr. al-Marri "premises his habeas claim on the Fifth Amendment's guarantee that no person living in this country can be deprived of liberty without due process of law." 487 F.3d at 174. "Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects." 487 F.3d at 175, quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Since "[t]he act of depriving a person of the liberty protected by our Constitution is a momentous one," the government is permitted only a limited number of specific exceptions to the general rule that it may not detain a person prior to judgment of guilt in a criminal trial. Id.

One of these limited exceptions, the court acknowledged, is that Congress may constitutionally authorize the president to order military detention, without criminal process, of persons who qualify as enemy combatants. *Id.* Accordingly, whether the government could legally detain Mr. al-Marri turned on whether he met the definition of an "enemy combatant."

In support of its assertion that Mr. al-Marri should be detained as an enemy combatant, the government argued: (1) that the Authorization for Use of Military Force ("AUMF"), Pub.L. No. 107-40, 115 Stat. 224 (2001), vested the president with the authority to detain Mr. al-Marri indefinitely as an enemy combatant on the basis of the proffered evidence; and (2) alternatively, that the president has "inherent constitutional power" to do so. 487 F.3d at 174.

The court held that the determination of whether someone is an enemy combatant "rests on an individual's affiliation during wartime with 'the military arm of the enemy government,'" and rejected the government's assertion that the evidence submitted established that Mr. al-Marri was an enemy combatant. 487 F.3d at 181. The court distinguished *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005),

[1] A Ruling for Justice, Editorial, N.Y. Times, June 12, 2007 at A22.

in which Hamdi and Padilla were held to be enemy combatants. The court stressed that "unlike Hamdi and Padilla, al-Marri was not alleged to have been part of a Taliban unit, not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation, not alleged to have been on the battlefield during the war in Afghanistan, not alleged to have even been in Afghanistan during the armed conflict there, and not alleged to have engaged in combat with United States forces anywhere in the world." 487 F.3d at 183. The evidence submitted by the government, if true, would establish not that Mr. al-Marri engaged in armed hostilities for the opposing side in an international armed conflict, but only that he "Al-Marri engaged in conduct in preparation for acts of international terrorism intended to cause injury or adverse effects on the United States." 487 F.3d at 183. The court added that *Hamdi* and *Padilla* do not support "the view that the AUMF permits indefinite military detention beyond the 'limited category' of people covered by the 'narrow circumstances' of those cases." 487 F.3d at 184.

The court rejected the government's "core assumption" that "persons lawfully within this country, entitled to the protections of our Constitution, lose their civilian status and become 'enemy combatants' if they have allegedly engaged in criminal conduct on behalf of an organization seeking to harm the United States. Of course, a person who commits a crime should be punished, but when a civilian protected by the Due Process Clause commits a crime he is subject to charge, trial, and punishment in a civilian court, *not* to seizure and confinement by military authorities." 487 F.3d at 186.

The court also sharply rejected what it considered the government's most "breathtaking" claim: that the president has inherent constitutional authority to subject civilians to military arrest and detention if he believes that these individuals have engaged in conduct in preparation for acts of international terrorism. The court held that the president "cannot eliminate constitutional protections with the stroke of a pen by proclaiming a civilian, even a criminal civilian, an enemy combatant subject to indefinite military detention. Put simply, the Constitution does not allow

the President to order the military to seize civilians residing within the United States and detain them indefinitely without criminal process, and this is so even if he calls them 'enemy combatants.'" 487 F.3d at 190. According to the court, to sanction such an overreach of presidential authority "would have disastrous consequences for the Constitution – and the country." 487 F.3d at 195. Upholding a claim of such extraordinary presidential power would "effectively undermine all of the freedoms guaranteed by the Constitution." *Id.*

The court thus reversed the lower court's dismissal of Mr. al-Marri's petition and remanded the case with instructions that it issue a writ of habeas corpus directing the Secretary of Defense to release Mr. al-Marri from military custody within a reasonable period of time.

Jesus Bernal is the Directing Attorney of the Office of the Federal Public Defender, Riverside Branch Office, a Director of the Federal Bar Association, Inland Empire Chapter, and a member of the RCBA.

17th Annual Red Mass

by Jacqueline Carey-Wilson

More than 150 members of the legal community and their families gathered at the 17th Annual Red Mass on May 1, 2007. The Red Mass is celebrated to invoke God's blessing and guidance in the administration of justice. The Mass was held at Our Lady of the Rosary Cathedral in San Bernardino. Judges, lawyers, and public officials of several faiths participated. A banner depicting the Holy Spirit, the Scales of Justice, and the Ten Commandments was placed on the altar at the beginning of the Mass to symbolize the impartiality of justice and how all must work toward the fair and equal administration of the law, without corruption, avarice, prejudice, or favor. The Mass was dedicated to those who serve us in the Armed Services, especially in Iraq, Afghanistan, and other places where they are in harm's way.

The principal celebrant of the Mass was the Most Reverend Gerald Barnes, the Bishop of the Diocese of San Bernardino. Reverend Michael Sweeny, O.P., President of the Dominican School of Philosophy and Theology in Berkeley, gave the homily. Rabbi Hillel Cohn, Rabbi Emeritus of Congregation Emanu El in San Bernardino, read a passage from the Old Testament. Also participating in the service were the Honorable Stephen Larson, United States District Judge, the Honorable John Pacheco, Judge of the San Bernardino Superior Court, and Deacon Scott Hunsicker. Prayers of the faithful included remembrances of the members of the Inland Empire legal community who passed away during the last year.

Father Sweeny's homily called us to expand our understanding of "prayer," asking us not to think of prayer as an exceptional activity, divorced from all the other activities of life, but more as an engagement in a personal conversation with God. According to Father Sweeny, "prayer is an embodiment of the total engagement of our whole person in a relationship with God that is essentially public. Prayer does not consist merely in words, but also actions, such as fasting and almsgiving. We are at work in the world and our common work consists in vindicating our common hope in and through our everyday encounter with the world . . . . Hence prayer is the expressed hope for vindication of our own rights and the rights of all humanity." Father Sweeny ended the homily with the request that we pray constantly, because "our prayer is our work" and our prayer is embodied in our thoughts and our actions.

At the reception immediately following the Mass, Brian Unitt presented attorney George S. Theios with the 2007 Saint Thomas More Award. The Saint Thomas More Award is given to an attorney or a judge whose conduct in his or her profession is an extension of his or her faith, who has filled the lives of the faithful with hope by being a legal advocate for those in need, who has shown kindness and generosity of spirit and who is overall an exemplary human being.

In October 2000, Pope John Paul II proclaimed Saint Thomas More to be the patron of statesmen and politicians. In his proclamation, the Pope stated that Saint Thomas More's "life teaches us that government is above all an exercise of virtue. Unwavering in this rigorous moral stance, this English statesman placed his own public activity at the service of the person, especially if that person was weak or poor; he dealt with social controversies with a superb sense of fairness; he was vigorously committed to favoring and defending the family; he supported the all-round education of the young." Without question, George's activities over the years mirror those attributes of Saint Thomas More highlighted by Pope John Paul II.

George is deeply committed to ensuring that individuals have access to justice. He puts this commitment into practice by serving as Vice-President of the Board of Directors of the Inland Counties Legal Services and President of the Board of Directors of the Legal Aid Society of San Bernardino. In addition, George regularly provides pro bono services. In one of his most noteworthy cases, George and his colleague, Brian Unitt, filed a habeas corpus petition for a woman who was wrongly convicted of a crime and held at the Immigration and Naturalization facility at Terminal Island, awaiting deportation. As a result of George and Brian's advocacy, all charges were dismissed and the woman was released after spending 23 months in detention. George is also very active at his parish, Our Lady of the Rosary Cathedral, and for the past four years, has participated in the parish's program to feed those in need and collect toys for the children at Christmas. George is a faith-filled person whose life resonates with the virtues of generosity and compassion.

The Red Mass Steering Committee was pleased to recognize his extraordinary service and devotion to church, community and justice.

The Red Mass Committee is accepting nominations for the 2008 Saint Thomas More Award. The award will be given at the reception following next year's Red Mass, which will be held on Tuesday, May 6, 2008. If you have any questions or would like to be involved in the planning of next year's Red Mass, please call Jacqueline Carey-Wilson at (909) 387-4334 or Mitchell Norton at (909) 387-5444.

Jacqueline Carey-Wilson is Deputy County Counsel for San Bernardino County, Director-at-Large for the RCBA, Editor of the Riverside Lawyer, and Co-Chair of the Red Mass Steering Committee.

Photographs by Jacqueline Carey-Wilson

Debbi Sparkman and George Theios with the Saint Thomas More Award.

Patricia Cisneros and Mark Strain

Brian Unitt presenting the Saint Thomas More award to George Theios.

Judge Stephen Larson and Loretta Holstein

Mitchell Norton with the Red Mass banner.

(L-R) Alice Cisneros, Grace Wilson, Nancy Smoke, and Julia Wilson

Matthew Marnell, Khoa D. Le, George Theios, Brian Unitt, David Werner, Father Michael Sweeny

Inland Counties Legal Services: Free Civil Legal Assistance for Low-Income and Elderly

by Irene Morales

"Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status."

– Lewis Powell, Jr., U.S. Supreme Court Justice (ret.) (during his tenure as President of the American Bar Association).

Maria's husband had been physically abusive toward her. One night, after the separation, he showed up at her home and tried to force himself on her. She resisted and he began hitting her on the head. Maria's mother called the police and he was arrested. Maria obtained a restraining order prior to seeking ICLS assistance for dissolution of marriage. Our advocate prepared Maria's dissolution documents along with a hearing request so that Maria could get child custody, visitation, and support orders. When Maria met with the advocate to sign her documents, Maria expressed her gratitude for having somewhere to turn to during this time of stress when she had no idea what to do. When Maria went to court, she obtained sole legal and physical custody of the child along with a child support order of $556 per month.

Without free legal assistance, Maria may have stayed with the abuser in economic servitude. Without the efforts of countless equal justice advocates since civil legal aid for the poor began in New York in 1876, vulnerable people in circumstances like Maria's would undoubtedly be living a much lesser quality of life.

Federal government assistance for civil legal services began in 1965 through the Office of Economic Opportunity (OEO). In 1974, Congress passed the Legal Services Corporation (LSC) Act and in 1975, LSC took over the OEO legal services programs. In 1976, Community Legal Services of Riverside County began receiving federal assistance. In 1977, with the formation of Inland Counties Legal Services, Inc. (ICLS), federal funding was awarded to include San Bernardino County. A 24-member Board of Directors was established, including seven attorney members each from the Riverside County Bar Association and the San Bernardino County Bar Association, and eight client-eligible board seats, four per county. Later, a board seat was created for the Inland Empire Latino Lawyers Association as well as the African-American Attorneys of the Inland Empire.

In 1980, the political climate resulted in a 25% slash in LSC funding, the prohibition of federally funded legal assistance to the undocumented and a requirement for programs to develop a Private Attorney Involvement (PAI) Plan to devote an amount equal to 12.5% of the federal LSC grant to promote private attorney involvement in pro bono legal services. ICLS's PAI Plan set out a framework of having bar associations sponsor volunteer attorney programs. In 1982, the ICLS Board of Directors' decision to award LSC funds to the Public Service Law Corporation (PSLC) of the Riverside County Bar Association, the Inland Empire Latino Lawyers Association (IELLA), and the Legal Aid Society of San Bernardino (LASSB) was approved by LSC. A fourth program was also approved and operated in San Bernardino County for more than ten years. In the early 1980's, California enacted the IOLTA statute to require that the interest on attorney-client trust accounts on small amounts of money or money held for a short period of time in lawyers' trust accounts be remitted to the State Bar of California Legal Services Trust Fund Program for distribution to legal aid offices throughout California. The IOLTA statute was unsuccessfully challenged, and in 1985, the funds became available. Today, there are 100 nonprofit IOLTA-funded programs in California, including ICLS, PSLC, LASSB and IELLA.

In 1996, after 16 years of a bipartisan struggle to keep the Legal Services Corporation funded, a political compromise was reached to preserve federal civil legal services for the poor. Congress implemented major structural reforms, including prohibiting class actions and attorneys' fees, instituting a competitive bid process, and adopting timekeeping and other administrative reporting measures. In the following years, LSC reduced the total number of federally funded programs from about 230 to the current 138 programs. In California, 11 out of 22 LSC-funded programs survived mergers and consolidations. In 1999, the California state legislature created the Equal Access Fund and made an important contribution toward achieving equal justice in California, helping the most vulnerable poor people, including domestic violence victims, the disabled, the elderly, the medically uninsured and those facing abrupt displacement from their homes.

Without access to free legal assistance and to the courts and adjudicatory agencies, justice is an unfulfilled promise. Keeping the promise of justice is important to preserve our way of life and to maintain the rule of law in our society. ICLS has established a legal delivery system with the goal of having various pathways for potential clients to access free legal assistance. As a private nonprofit corporation, with a mission of pursuing justice and equality for low-income people through advocacy and community education, treating all with dignity and respect, ICLS provides free legal assistance throughout Riverside and San Bernardino Counties and struggles to serve a low-income client-eligible population that has significantly increased since 2000, when the census count was 317,377 indigent persons. Today, ICLS's total annual budget is $5.92 million. LSC funding provides 70% and State Bar funding (IOLTA and Equal Access) makes up 20% of the program's total funding. Other revenue sources include Older Americans Act Title III-B funds awarded by the Riverside County Office on Aging and the San Bernardino County Department of Aging and Adult Services. ICLS is also a recipient of HUD funding for advocacy for the homeless in San Bernardino County.

ICLS's major challenges are the geographically large service area and a significant poverty population. The service area encompasses 27,266 square miles – 7,214 in Riverside County and 20,052 in San Bernardino County. San Bernardino County is geographically the largest county in the country and Riverside County is second. The total service area is roughly the size of Connecticut. The poverty population at this point may exceed one half million. ICLS strives to meet these challenges by maintaining branch offices strategically located in the bicounty service area, as well as conducting client intake throughout the service area at community outreach centers, senior citizen, homeless and women's shelters and other places where vulnerable populations such as the deaf and hearing impaired or victims of domestic violence are provided supportive social services

What types of cases does ICLS handle? ICLS case priorities are housing, family law, public benefits, consumer and elder law. Clients are provided counsel and advice, document preparation, or extended services, consisting of negotiating settlements with or without litigation as well as direct representation in court or at administrative hearings. ICLS has experienced paralegals who represent clients before administrative law judges in SSI, welfare, food stamp, Medi-Cal, education, health, unemployment, and DMV cases. In 2006, ICLS closed 516 administrative law cases, with legal assistance provided in 88 cases that resulted in administrative agency decisions.

Who is eligible for free legal assistance? Anyone has the right to apply and be considered for free legal assistance. To qualify, persons must be low-income according to federal or state criteria; have limited assets; be disabled; be age 60 or older and in great social or economic need; or be

applying for benefits from a governmental program for the poor. For example, a household of two persons (both under age 60), married or unmarried, working full-time and earning minimum wage of $7.75 per hour would not qualify for legal assistance. To qualify, they would need to have three dependent persons with no income as part of the household. ICLS management has discretion to qualify individuals for legal assistance when the case facts are compelling and the action is meritorious if other factors are present, such as ongoing medical expenses, child care, transportation or other expenses necessary for employment (e.g., uniforms or tools), or when there are household expenses associated with the age or infirmity of one of the household residents. ICLS does not handle criminal or fee-generating cases, and limits assistance to advice in bankruptcy or conservatorship cases.

How many cases does ICLS handle? In 2006, ICLS closed 12,450 cases, including 7,875 cases handled directly by the program and 4,575 closed by PAI volunteer attorneys. Of the ICLS cases, 12% were handled beyond the advice and pro se level. In cases accepted for full representation, almost two-thirds were housing (64%); followed by family (17%), administrative (9%), consumer (5%) and health (3%). An additional 4,575 LSC-funded client cases were closed at PSLC, LASSB and IELLA legal aid clinics. Almost all (97.3%) PAI cases are limited to counsel and advice and/or document preparation. In 2006, the total value of pro bono donated hours as determined by audit was $1,706,755, most of it donated attorney time.

Toll-Free Telephone Access: ICLS provides a toll-free line, a seniors' line (real person) and a TTY line at its five branch offices:

	Toll-Free	Seniors	TTY
Riverside	(888) 245-4257	(951) 320-7500	(951) 684-1901
Indio	(800) 226-4257	(760) 347-5303	(760) 775-3114
San Bernardino	(800) 677-4257	(909) 888-3889	(909) 381-0274
Rancho Cucamonga	(800) 977-4257	(909) 476-9252	(909) 476-7875
Victorville	(888) 805-6455	(760) 241-7072	(760) 843-9814

Housing Hotline: ICLS operates this hotline Monday through Friday 9:00 a.m. to 4:00 p.m., except on Thursday mornings. Callers are screened for financial, citizenship or legal residency eligibility. The toll free number is (888) 455-4257. A second number is (951) 368-2570.

The Housing Hotline was established to address the housing legal needs created by a tight housing market and a high eviction rate in the inland counties, where about one-third of all occupied housing units, or 361,756, are "renter-occupied." According to a 2005 State Bar report, more than 30,000 unlawful detainer lawsuits are filed annually in the inland counties area, with a ratio of 8.33 per 100 occupied rental units, giving the Inland Empire the distinction of having the highest rate of evictions in the state, as compared with second-place Los Angeles County, with a 5.01 ratio, and third-place San Joaquin Valley, with a 4.58 ratio.

In 2006, the Housing Hotline closed 1,699 cases – 9 out of every 10 callers received legal advice and about 10% had an ICLS attorney represent them in court. Legal issues include proper notice, habitability, repair and deduct, tender of rent, waiver, discrimination, nuisance, and retaliation, as well as mobile-home-park-specific questions. Tenants who need help with answering an unlawful detainer complaint are referred to an ICLS branch office pro se clinic, to the bar association PAI programs, or to website sources, including the local court websites, which use the EZ legal service, as well as to the statewide web resources of www.lawhelpcalifornia.org and www.courtinfo.ca.gov.

Tenant and Landlord Assistance Project (TLAP)

Our client, a 25-year-old working single mother with a three- year- old child in day care, was a recipient of housing benefits from the local Housing Authority. The benefits consisted of reduced rent in the "project." Without any prior notice, the state closed the day care facility. Our client had no family in the area with whom she could leave her child and it took her over two weeks to find suitable day care. Unfortunately, her employer was not sympathetic and fired her for absences. She was unable to pay the rent and the Housing Authority filed an unlawful detainer action to evict her.

The Housing Authority has very strict rules regarding evictions. Once a tenant is evicted, the Housing Authority strips the tenant of housing assistance benefits, a situation that can easily lead to homelessness. When a person on this type of housing assistance suffers a change in economic circumstances, the person has the ability, pursuant to the applicable Federal regulations, to have the amount of assistance he or receives adjusted. Our client told us she had made several attempts to contact her case worker to request an adjustment in the amount of rent she owed due to her loss of employment. The Housing Authority claimed not to have a record of our client's efforts to telephone her case worker and adamantly pointed out that any such efforts were inadequate under the regulations, which require an in-person appearance with a completed written application requesting the rent adjustment. It was undisputed that our client did not complete the request in writing.

By the time our client approached the TLAP desk at the Moreno Valley Courthouse, her landlord had taken a default against her. She was within days of being without a place to live and having all housing assistance taken away from her. Our client was directed by the court's staff to the TLAP desk. The

trained paralegal explained three specific points: first, the negative consequences of having a default entered, second, the need for the preparation and filing of a motion to set aside the default, and third, the need for the client to reverse the Housing Authority's decision to terminate the housing benefit. The paralegal prepared two documents: a motion to set aside the default and an answer to the unlawful detainer lawsuit. After review by an attorney, the motion was filed and a hearing date set.

The motion to set aside the default was granted by the court and the matter was set for trial. At the time of the trial, the ICLS attorney appeared on behalf of the client in court and was able to negotiate with the Housing Authority. At the time of trial, and in lieu of trial, the parties reached an agreement whereby the client would be allowed to be reevaluated and the amount of rent she was to pay adjusted retroactively to the day she lost her job.

The client went through the reevaluation process and had her rent lowered. She avoided the eviction and maintained her housing benefits!

Without free legal assistance, this young mother and her child would likely be homeless. And the cycle of poverty remains unbroken for the child.

TLAP offers attorney representation to any pro se litigant who qualifies for services, tenant or landlord, first-come, first-served, Monday through Friday, in the hallway outside the Moreno Valley Courtroom, starting at 12:45 p.m., just before the unlawful detainer calendar is called at 1:30 p.m. An ICLS paralegal screens client eligibility on the spot, calling the office for a conflicts check. Pro se UD litigants are also screened on Tuesdays and Fridays from 1:30 p.m. to 3:30 p.m. in Room 211 at the court. Started in 2005 in collaboration with the Riverside Superior Court, TLAP is highly successful: in the one-year period ending June 30, 2007, 281 out of 404 court cases, or 70%, settled in the hallway by stipulated judgment. Without TLAP, most of the 404 cases would have been tried, consuming court as well as the time of all the parties and their counsel. Many settlements have resulted in complete dismissals when the tenant has complied with the terms, which may include vacating the premises by the agreed-upon date. With a dismissal, the tenant avoids an adverse credit history and has better rental housing options. More than 95% of all tenants comply with the settlement.

Family Justice Center Advocacy Project: An ICLS attorney provides free legal assistance to victims of domestic violence or sexual assault at the safe "one-stop" Family Justice Centers in Riverside and Murrieta. This is a collaborative endeavor with the District Attorney's Victim Witness Office, Alternatives to Domestic Violence as well as social service providers. ADV prepares the restraining orders and ICLS represents DV victims in family law court.

Riverside Family Law Access Project: An ICLS attorney, assisted by a Spanish-speaking paralegal, provides general family law information to pro se litigants at the Family Law Court on Mondays and Tuesdays from 9:00 a.m. to 4:00 p.m. on a first-come, first-served basis. ICLS prepares documents for indigent persons and refers non-indigent persons to the Lawyer Referral Service, Family Law Facilitator or a self-help website.

Indio Court Access Project: An ICLS attorney provides similar family law assistance to pro se litigants at the Indio Larson Justice Center on Mondays. On Tuesdays, an ICLS attorney provides general information only to pro se court consumers in civil cases. Both projects operate from 9:00 a.m. to 4:00 p.m., first-come, first-served. Pro se litigants start lining up at 7:30 a.m.

Banning Court Access Project: An ICLS attorney provides general legal information to court consumers and prepares court documents for indigent persons on Thursdays from 9:00 a.m. to 4:00 p.m. in the court's lower level. Services are first-come, first-served.

Elder Law Advocacy and Outreach: Elder law advocacy is a significant part of the legal work done by ICLS. ICLS handles elder abuse cases and selected real property fraud cases as well. In Riverside County, client outreach is regularly done at senior centers in Corona, Lake Elsinore, Moreno Valley, Perris, Temecula, Banning, Beaumont, San Jacinto, Hemet, Desert Hot Springs and Blythe. In San Bernardino County, senior outreach is done in Redlands, Yucaipa, Twentynine Palms, Joshua Tree, Yucca Valley, Montclair, Ontario, Rialto, Fontana, Upland, Needles, Big River, Trona, Baker, Lucerne Valley and Big Bear Lake.

2007 Major Impact Cases: In 2006, two years of litigation between the City of Colton Redevelopment Agency and Colton Non-Profit Senior Housing, Inc. ended in a settlement of $1.4 million in relocation benefits for 55 senior tenants. The seniors were residents in a large apartment complex that had been the subject of a defective construction lawsuit brought by the City RDA and the Non-Profit board, which had settled for over $5.5 million in damages. After that lawsuit was settled, the city attempted to make the seniors move out without payment of relocation expenses. In 2004, when the City RDA sought an order enjoining the tenant board from renting out vacant units, ICLS substituted in to represent the low-income seniors, filing a cross-complaint for declaratory relief to determine the parties' contractual rights. ICLS's representation, and its ability to procure the pro bono co-counsel services of the international law firm of Mayer, Brown, Rowe & Maw, not only resulted in a monetary relocation award to the Colton Palms senior citizen residents, but also gave the seniors, many of them frail with serious health problems, time to find suitable housing.

(continued on page 28)

Eight Weeks in the Box, Part I

by Donn Dimichele

(Part one of a four-part series)

In the spring of 2005, I served on a jury in a personal injury case in San Bernardino County Superior Court. The plaintiff, a man in his thirties, was paralyzed when the car he was riding in rolled over, causing his head to hit the roof and injuring his spinal cord. The principal issues were whether the car manufacturer could, and should, have designed the roof so that it would have prevented the injury.

The trial lasted about eight weeks and featured testimony from biomechanical engineers, physicists, accident reconstructionists, physicians, and other experts, often for several days at a time. We also viewed a "Day in the Life" video of the plaintiff and numerous videos of rollover tests on cars with different roof designs. After deliberating for a week, the jury found for the manufacturer, though it found for the plaintiff against the codefendant, his sister, who had been driving the car. I did not join in the verdict, not because I necessarily disagreed with it, but because I thought it had been reached without enough consideration of the evidence, particularly some of the research papers relied upon by the experts.

Eventually, I was asked to write about my experience for this publication and began to think about what I should cover. Since articles by lawyers who have served as jurors have become fairly common[1], I decided not to give a blow-by-blow account of my experience. As I thought about what I might say instead, it occurred to me that even though I had been a litigation attorney for more than 25 years, had tried a couple of jury cases, and had read several hundred jury trial transcripts as an appellate attorney, I had more or less accepted trial procedures as given without thinking much about them. I began to wonder whether things were done in certain ways because experience had shown those to be the best ways, or just because they had always been done those ways and this seemed to work reasonably well.

My jury service gave me a chance to look at the system from a different perspective. Based on my experience, and on research studies I was able to find on some of the points I was concerned with, I came up with the following suggestions for making the trial process more understandable and responsive to prospective and serving jurors. I offer these in the hope they may be of interest to lawyers or judges.

1. *Get it in Writing, Part 1* – Jury Questionnaires

Since our case had a long time estimate, we had an unusually large pool of prospective jurors. As a result, using a juror questionnaire was almost a necessity. Though the questionnaire was long and took a while to fill out, it saved court time and made voir dire smoother and more focused. Because of the amount of information already provided in the questionnaire responses, the court did not have to ask the usual background questions and the lawyers could focus their questioning on specific areas of concern that were raised in the questionnaire responses.

In contrast, earlier this year I reported for jury service on a criminal case in which no questionnaire was used. The voir dire took one full court day, most of which consisted of the 30 or 40 panelists who were called to the box in the course of the day answering the same background questions – employment, family, jury experience, and so on – and follow-up questions that also tended to be mostly the same from panelist to panelist. This was for a trial that was only expected to last three days. Thus, the voir dire for the criminal case consumed one-third as much time as the trial itself. In contrast, the one-week voir dire in the civil case on which I served took only about one-eighth as long as the trial. Although other factors may have contributed to the disparity, I attribute it largely to the use of the questionnaire in the civil case.

Using a questionnaire also reduces the chances of juror boredom. The authors of a 1995 study of jury selection in New York state courts noted: "The jurors do not understand why they must sit, often for days and occasionally for weeks, while groups of six are asked the same boring questions over and over."[2] In addition, questionnaires reduce the chances of embarrassing jurors, because questions that might make jurors uncomfortable if asked in open court can be asked confidentially in a questionnaire.

The American Bar Association Principles for Juries & Jury Trials (ABA Principles) now recommend the use of questionnaires in all cases.[3] In California, Judicial Council form questionnaires already exist for civil and criminal cases.[4] Thus, in many cases, little or no additional effort, beyond printing up the questions and distributing copies, would be needed to employ questionnaires. I urge the bench and bar to consider expanding their use of this tool.

2. *Unpicking the Jury* – Explaining the Panel Composition Process[5]

Trial practice pundit Irving Younger used to point out that lawyers don't "pick" a jury, since they can't call to the box the panelists they would most like to have try the case. Instead, the most they can hope to do is "unpick" the jury, by excusing the panelists they would least like to have. Judging from prospective jurors' statements during breaks in the voir dire in our case, many of them did not understand this fact, or the other mechanics of the selection process.

In fact, because questionnaires were used, some prospective jurors thought the attorneys had used the questionnaires to pre-select the panelists they wanted the clerk to call to the box, and to predetermine the order in which the panelists would be called. One prospective juror drew the same conclusion from the fact that when counsel for the plaintiff questioned the first 12 panelists called to the box, he already knew their background information. The prospective juror assumed counsel knew beforehand who the first 12 would be. (Actually, counsel simply memorized the questionnaires of the first 12 over the lunch break, after their names had been called but before they were questioned by counsel.)

Though perhaps it isn't vital to the process that prospective jurors be told how panelists are selected to be called to the box, knowing that random selection is required by law likely would promote jurors' confidence in the impartiality of the legal system. Therefore, I suggest that at the beginning of voir dire the court briefly inform the prospective jurors that California law requires random selection in all phases of the process.[6]

3. *Inquiring Minds Want to Know, Part 1* – Number of Peremptories Per Side

I don't think this suggestion should be controversial, but it would certainly promote prospective jurors' understanding of the voir dire process. During voir dire in the case on which I served, many prospective jurors were asking one another how many peremptory challenges the parties had left. Presumably, they wanted to estimate how likely they were to be called, or how long the process would last.

I'm not aware of any reason why the court should not inform the prospective jurors, before the parties start to exercise their peremptory challenges, how many challenges each party has. The last time I reported for jury duty, I asked for the information and the court readily gave it to us. However, in my experience most judges don't by themselves think to provide the information. I suggest they should.

Part II will be published in the October issue of Riverside Lawyer magazine.

Donn Dimichele is a Deputy City Attorney for the City of San Bernardino.

[1] See, e.g., Delson, *A Jury with My Peers* (April 2006) California Lawyer 76; Nielson, *Insights of an Attorney Serving on a Criminal Jury Trial* (June 20, 2005) Broward County, Florida, Bar Association Barrister, available at http://www.browardbar.org/articles/152.htm; see also Genn, *Lawyers can gain unique perspective by serving jury duty* (November 4, 2005) Long Island Business News, available at http://www.findarticles.com/p/articles/mi_qn4189/is_20051104/ai_n15804330.

[2] McMahon, Kornblau, *Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York* (1995) 10 St. John's J. Legal Comment. 263, 269.

[3] American Bar Association Principles for Juries & Jury Trials (2005), Principle 11.A.

[4] See California Standards of Judicial Administration (2007) Standards 3.25(a)(1), 4.30(b).

[5] A jury "panel" is defined by statute to mean "a group of prospective jurors assigned to a courtroom for the purpose of voir dire." (Code Civ. Proc., § 194, subd. (q).) However, according to the California Supreme Court, "panel" apparently has been understood by California courts to mean "the subset of the members of the whole venire who are called to fill the jury box during voir dire." (*People v. Avila* (2006) 38 Cal.4th 491, 537.) Therefore, I will use "venire" or "prospective jurors" to mean all of the prospective jurors assigned to the courtroom, and "panel" to mean only those called to the box for voir dire.
See Code Civ. Proc., §§ 191, 197, subd. (a), 198, subd. (a).

Current Affairs

by Richard Brent Reed

Horseplay in Middle School = Felony Sexual Harassment

Felony butt-slapping – it's no joke, not in McMinnville, Oregon. Two 13-year-old boys were charged in February with "sexual contact by touching a sexual or intimate part" of the body of several teenage girls "by means of forcible compulsion." In short, they were slapping each other's butts – *but* none of the girls were charged. Even though the felony was reduced to misdemeanor sexual battery, the two boys could face years in juvenile detention (one year per count) if convicted, since they have been charged with five counts of sexual abuse and five counts of sexual harassment.

Shortly after the playground horseplay at Patton Middle School, a teacher's aide sent the boys to the vice-principal, who called in the campus cop. The investigating officer Mirandized the boys, slapped the cuffs on them, and hauled them off to spend the next five days in juvie (the juvenile detention center). Even though all but one of the girls later recanted their stories, the prosecutor seems determined to see the end of butt-slapping in his state. If butts are to be included in the growing roster of off-limits zones, along with ear lobes, neck napes, unwimpled brows, and the infamous well-turned ankle, poets will be left with nothing to write about and contact sports may become a thing of the past. And if butt-slapping is criminalized in Oregon, can California be far behind?

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

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, 2007.

Stephanie Clemens – Sole Practitioner, Rancho Cucamonga

Daniel Detienne – Office of the District Attorney, Riverside

Christopher S. Hammatt – Law Office of C. S. Hammatt, Temecula

Margaret "Peggy" Hosking – Best Best & Krieger LLP, Riverside

Joseph A. Katz – Sole Practitioner, Murrieta

Sanjit Kaur – Best Best & Krieger LLP, Riverside

Sheldon Lee – Wallin & Klarich, Riverside

Karen E. Lockhart – Karen E. Lockhart APLC, Murrieta

Jeffrey L. McFadden – Jeffrey L. McFadden PC, Rancho Mirage

Flint W. Murfitt – Murfitt Law Offices, Palm Springs

Andrew Tsu – SE Corporation, Corona

Christopher P. Walker – Law Office of Christopher P. Walker, Anaheim Hills

Diane Walker (S) – Law Student, Murrieta

Arnold H. Wuhrman – Serenity Legal & Loan Services, Murrieta

Rebecca Tenwick's All-Mobile Bail Bonds

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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.

Inland Counties Legal Services *(continued from page 23)*

On July 26, 2007, the Western Center on Law and Poverty won a major case against the Fontana Redevelopment Agency when the Fourth District Court of Appeal issued an opinion that greatly benefits low-income people in need of affordable housing throughout California. The appeals courts unconditionally agreed with ICLS's client, Jeanette Torres, and the nonprofit organization Libreria del Pueblo, who argued that the Fontana Redevelopment Agency misappropriated at least $53 million in affordable housing funds over the past 20 years by illegally diverting the money to a private developer. This decision serves to hold redevelopment agencies in California accountable for affordable housing and debt limitation requirements under state redevelopment law. ICLS managing attorneys Robert S. Roddick and Cass Watters were members of the legal team, which also included the California Affordable Housing Law Project of the Public Interest Law Project, Briggs Law Corporation and Kirkland & Ellis.

Irene Morales is the Executive Director of the ICLS and has been with the agency since 1976. Ms. Morales serves as Co-Chair of the Project Directors Association, which is funded by the California Legal Services Corporation, and is a member of the National Legal Aid and Defender Association (NLADA) Civil Policy Group