RIVERSIDE LAWYER

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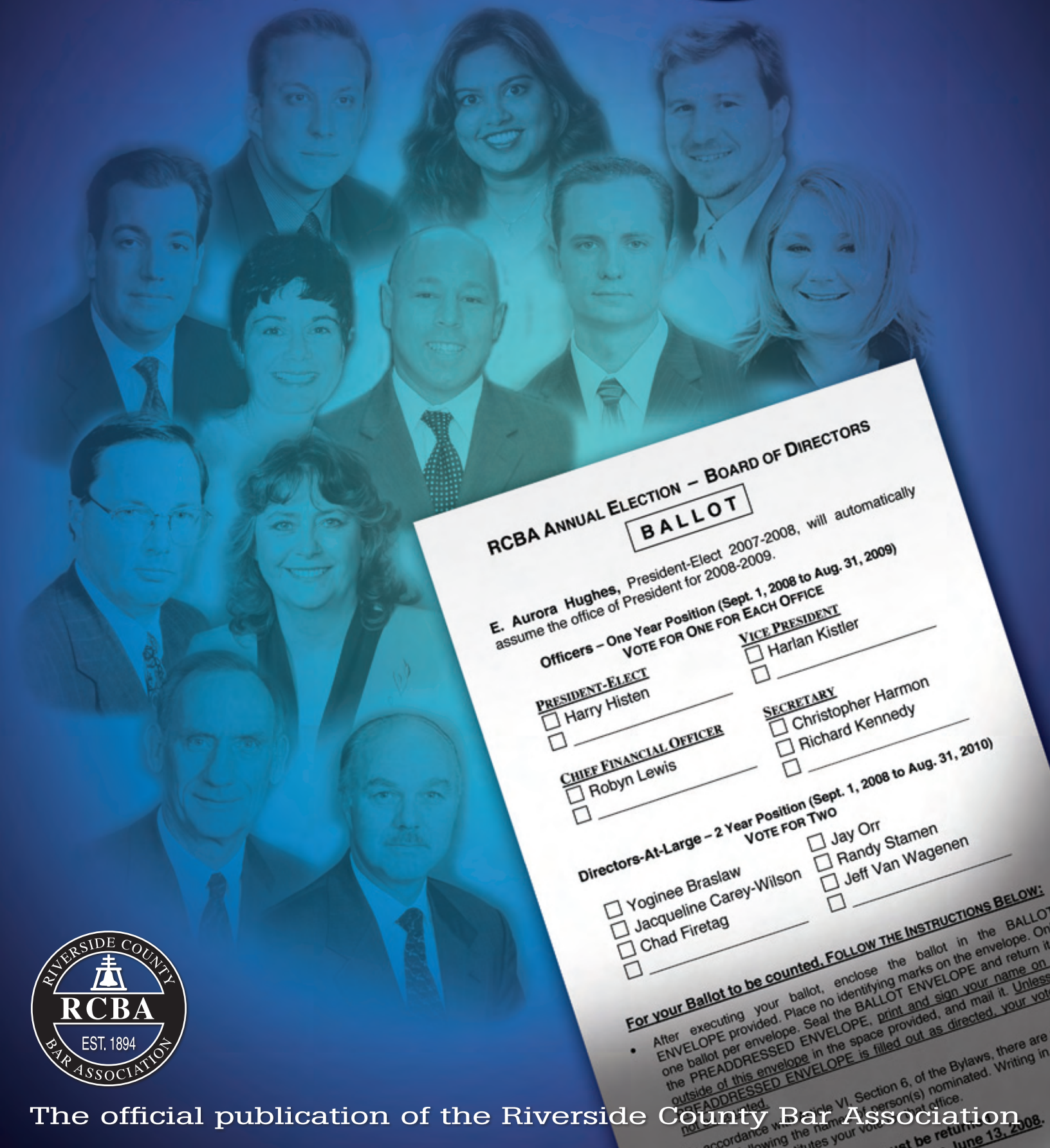
MAGAZINE



RCBA ANNUAL ELECTION – BOARD OF DIRECTORS

BALLOT

E. Aurora Hughes, President-Elect 2007-2008, will automatically assume the office of President for 2008-2009.

Officers – One Year Position (Sept. 1, 2008 to Aug. 31, 2009)
VOTE FOR ONE FOR EACH OFFICE

PRESIDENT-ELECT
☐ Harry Histen
☐ _____

VICE PRESIDENT
☐ Harlan Kistler
☐ _____

CHIEF FINANCIAL OFFICER
☐ Robyn Lewis
☐ _____

SECRETARY
☐ Christopher Harmon
☐ Richard Kennedy
☐ _____

Directors-At-Large – 2 Year Position (Sept. 1, 2008 to Aug. 31, 2010)
VOTE FOR TWO

☐ Yoginee Braslaw
☐ Jacqueline Carey-Wilson
☐ Chad Firetag
☐ _____

☐ Jay Orr
☐ Randy Stamen
☐ Jeff Van Wagenen
☐ _____

For your Ballot to be counted, FOLLOW THE INSTRUCTIONS BELOW:

- After executing your ballot, enclose the ballot in the BALLOT ENVELOPE provided. Place no identifying marks on the envelope. One ballot per envelope. Seal the BALLOT ENVELOPE and return it in the PREADDRESSED ENVELOPE, print and sign your name on the outside of this envelope in the space provided, and mail it. Unless the PREADDRESSED ENVELOPE is filled out as directed, your vote

not be counted.

In accordance with Article VI, Section 6, of the Bylaws, there are only ___ person(s) nominated. Writing in the name(s) of additional person(s) following the name(s) printed on this ballot constitutes your vote for that office.

Ballots must be returned by June 13, 2008.

RIVERSIDE COUNTY RCBA EST. 1894 BAR ASSOCIATION

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

MAY

16 **General Membership Meeting**
"Private Investigation: Services, Costs and Ethical Considerations"
Speaker: Mr. Lance Bauer
RCBA Bldg., 3rd Floor – Noon
(MCLE)

20 **Family Law Section**
"Pension and Retirement Division, Part 2"
Speaker: Rick Muir, Esq.
RCBA Bldg., 3rd Floor – Noon
(MCLE)

RCBA Board
RCBA – 5 p.m.

26 **Holiday – Memorial Day**
RCBA Offices Closed

28 **Estate Planning, Probate & Trust Law Section**
RCBA Bldg., 3rd Floor – Noon
(MCLE)

Leo A. Deegan Inn of Court
Victoria Club – 5:30 pm

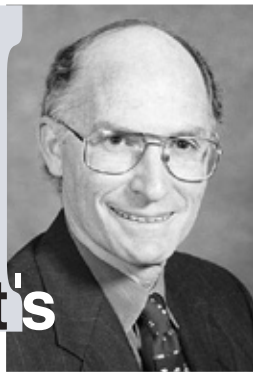
31 **Law Alliance Annual Gala**
Ciao Bella Ristorante – 6 p.m.
Info: Liz Cunnison (951) 684-5934

JUNE

4 **Bar Publications Committee**
RCBA – Noon

11 **Barristers**
Cask 'n Cleaver – 6 p.m.
(MCLE)

20 **General Membership Meeting**
RCBA Bldg., 3rd Floor – Noon
(MCLE)



President's Message

by Daniel Hantman

In last month's *Riverside Lawyer*, I mentioned that on the June 3, 2008, California statewide ballot, we would be voting for 18 Riverside County judgeship positions. Three candidates are running for Office No. 18. They are Anne M. Knighten, a judicial staff attorney for the Riverside County Superior Court, John D. Molly, a Riverside County deputy district attorney, and John W. Vineyard, a private-practice attorney.

Many of you may have received, throughout the years, a questionnaire from the Commission on Judicial Nominees Evaluation (JNE Commission) of the State Bar of California. Within that questionnaire, one is requested to evaluate a candidate, giving an opinion of the candidate's professional ability, professional experience, judicial temperament, professional reputation, work ethic and bias. "Professional reputation" includes "honesty, integrity and community respect." "Bias" includes "commitment to equal access to justice; does nominee exhibit, or to your knowledge has nominee exhibited, any bias which may be perceived as based on race, sex, sexual orientation, religion, political affiliation, etc."

We, the Riverside County Bar Association (RCBA), have continued our long-standing tradition of providing the public with an evaluation of judicial candidates. You received, and, hopefully, returned, the RCBA Judicial Candidates Survey packet that we mailed to you. The results of those surveys will be provided to the news media. In the past, our own local press and the legal community's *Los Angeles Daily Journal* have published these results.

I hope all of you read Terry Bridges' March 2008 *Riverside Lawyer* article, "State Bar Guidelines of Civility and Professionalism." Terry has spoken at our monthly luncheons, at section and committee meetings, and at our March 18 board meeting. At the latter meeting, the board passed a resolution to approve and adopt the *California Attorney Guidelines of Civility and Professionalism*. The guidelines are available for download (or printing) on RCBA's website: www.riversidecountybar.com. One of the recitals in the resolution is:

> "As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution."

Terry was president of the RCBA in 1987, and I hope all of you have seen, or will see, his shining example of "civility and professionalism" in court and in his many other legal and community activities.

Our community is blessed with people who contribute so much. In last few months we have experienced the loss of two individuals who have contributed both to the community and to our RCBA. On February 19, Peggy Fouke Wortz passed away at the age of 89. She was born in Michigan at the home of her grandfather, R.E. Olds, who started the Oldsmobile company. She married Riverside attorney James Wortz in 1975, and the two of them made a tremendous impression through the years on this community. (Jim, a past president of the RCBA, died in 2005.) The Community Foundation's Spring 2008 Community Quarterly wrote, "Peggy was a dedicated and generous philanthropist, a woman of incredible commitment and desire to serve the public good and a lady of great spirit and strength."

Also, on March 20, Emily Catherine Neblett passed away at the age of 94. She was born in Kentucky. The memorial service at the Calvary Presbyterian Church was a lovely tribute to all that she and her husband, Judge John Neblett, had contributed to the community. The written program related that she attended a dance at Duke University and met our future judge when he was a law student there. They were married in 1939 and settled in his Riverside home. They were both very involved in the legal community, Calvary Presbyterian Church and many other groups in Riverside. Judge Neblett died in 1997. Emily Neblett continued to contribute her time, passion and understanding to others until her death.

I hope that all of us will continue to follow these wonderful examples of helping others through our legal expertise and our social contributions.

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

Brain Science and the Law

by Ken Grimes and Paul J. Zak

In a suburban apartment in Riverside County, a would-be career criminal ponders committing his first crime.

Scattered before him are numerous printouts: stats for local police clearing rates of his chosen crime; average sentencing for first-time offenders; profiles of the local prosecutors and judges. Our antihero has, naturally, cased the proposed crime scene for weeks, and produced a complex, minimum-risk contingency plan, based partly on frequent consultation with his complete DVD collection of *CSI*. Other considerations are: estimated profit from the crime, including the thrill of the act itself, the afterglow of triumph, and bragging rights among other criminals and women who would be impressed by his daring. And, of course, he's also taken the trouble to imaginatively "project" himself through his potential jail sentence, in order to give proper weighting to this worst-case scenario.

Meanwhile, in Sacramento, California legislators are meeting to set new sentences for this very crime. They, too, are crunching numbers and making imaginative projections. Their aim: to second-guess the mind of our would-be criminal; to calculate the precise increase in jail sentence that will tip the balance of *his* calculations, and deter his plunge into crime. They keep one fearful eye, always, on electorate reactions to the consequent increased enforcement costs.

The above dual scenario is, of course, a caricature. Nevertheless, this is essentially the process through which laws are designed: a conscious, rational calculation of potential benefits and costs to would-be lawbreakers, resulting in a "made-to-measure" deterrent.

Both critics and supporters of this rational-design approach, though, have long puzzled over the well-documented gap between the predicted and the actual effectiveness of designed deterrence. Why, we keep asking, won't criminals behave as they "should"? As discussed in the new book *Moral Markets*, radical findings from breakthrough research in neuroscience are beginning to offer answers.

The "rationalist" school of thought, parodied above, has been dominant in American jurisprudence since Oliver Wendell Holmes (1841-1935), and has recently absorbed the compatible "law and economics" analysis of crime. The targets of persuasion for this contemporary fusion are brain regions associated with high-level cognitive reasoning, especially the prefrontal cortex. These evolutionarily recent brain areas not only handle cost-benefit-type calculations, but also allow us to infer, or "model," the cognitive states of other people, including their desires and fears. Among other noted thinkers, René Descartes and Immanuel Kant championed these cognitive mechanisms as the basis for social morality, and therefore law, in humans.

So where does all this high-powered thinking go wrong? There seem to be two separate problems. First, the common-sense rational notion that "harsher penalties must bring lower crime rates" fails to account for the apparent irrational optimism of the criminal mindset. Most would-be murderers, for instance, do not lose their nerve at the point where life imprisonment could become capital punishment, for the simple reason that their brains consistently suggest that they will *get away with their crime*.

Obviously, this "Plan A is to not get caught; there's no Plan B"-type thinking offers little opportunity for deterrent intervention by the state. The only obvious policy emergent from this analysis would be the blanket broadcasting of CSI episodes, with the hope of instilling in potential criminals what we might term "fear of forensics."

Second, several recent laboratory studies show that overt monitoring and punishment of violations of social conventions not only is ineffectual, but can actually *increase* the number of violations. This counterintuitive relationship was partly explained as long ago as the 18th century, by the political writer Edmund Burke: "People crushed by laws have no hope but to evade power. If the laws are their enemies, they will be enemies to the law; and those who have most to hope and nothing to lose will always be dangerous." The current studies suggest that relentless coercive legal monitoring can transform citizens' sense of law-breaking from one of shameful moral violation to one of "catch me if you can" in-your-face defiance.

But what's the alternative, we might ask? Most Americans hold this truth to be self-evident: that the relationship between law-makers and law-breakers simply *must* be coercive. This follows a common, if unconscious, view of the social order in general, and the legal system in particular, as artificial constructs designed to contrast and control our "true" selfish and lawless human nature.

From this viewpoint, it is clear that the alternative to coercion – say, an appeal to a would-be criminal's sense of social justice or civic responsibility – would be doomed to fail. But would it?

Contemporary research programs, as pioneered by the Center for Neuroeconomics Studies (CNS) here in California, suggest otherwise. It is becoming clear that the cognitive calculating process described above is, in fact, one of *two* brain mechanisms that support cooperative or virtuous behaviors in humans. The conscious and recently evolved decision-making mechanism, which we might term the "High Road," is complemented by an evolutionarily older mechanism, or "Low Road."

In contrast to the High Road, which calculates costs and benefits, the Low Road is instinctive. Under its influence, we experience a gut sense of the emotional state of others, and a rapid reaction to that state. A facial expression signaling distress, for example, will normally stimulate a feeling of distress in the viewer and an instinctive desire to help the other person.

The Low Road emotional identification with another person is the basis for empathy. Strongly associated with empathy, the projection of the self into another's skull and skin, is the instinctive recognition of the other's equal right to autonomy and fair play, a capacity that could be called conscience.

The Low Road, whose neural machinery resides in more primitive brain regions, is an evolutionarily ancient mechanism. The system dates back to our primate ancestors, where it developed to allow profitable cooperative activities typical of social, group-living species. Such behaviors include group foraging and hunting, negotiation and maintenance of the social hierarchy, rearing of young, and coordinated defense actions against predators or invading primate troops.

Primates today do, in fact, demonstrate a sense of fair play. In a recent laboratory study, when two monkeys cooperate for a food reward by both pulling a heavy bar, if the rewards offered are unequal, the hungry monkey given less will reject the unfair offer. Oh, and this is accompanied by violently tossing the food out of the cage and concomitant screaming about the unfairness of it all. Fairness has deep evolutionary roots and is the basis for a host of cooperative behaviors. Fairness is enshrined in the directive we are all taught: the Golden Rule.

In contrast to the coercive model of law-making, this new research suggests that prosocial cooperative behaviors, and the brain mechanisms that support them, are actually a part of our evolved nature. We have, as it were, a sense of "natural law" wired into our brains. For instance, contemporary brain-imaging studies of humans show that the same brain regions associated with physical disgust are also stimulated when people contemplate committing moral violations. This internal moral compass helps to keep most of us on the straight and narrow.

In studies where people make decisions over moral dilemmas, there is evidence for

activity in both the "calculating" High Road and the "empathic" Low Road. Crucially, the Low Road seems capable of moving people to virtuous behavior even when the parallel High Road calculation would suggest that they choose a low-risk, self-serving option – this moral compass is more fully engaged when the dilemma has a "direct involvement" component to it, rather than happening at a distance.

The brain pathways activated in the Low Road are characterized by a signaling chemical called oxytocin. Oxytocin is present in all primates, and indeed in all our mammal relatives, and motivates care for offspring by parents. In the five percent of mammals that are monogamous, oxytocin also sustains bonds with our mates. Research at CNS has shown that besides facilitating ties with family members and fiancés, oxytocin also promotes cooperative bonding to complete strangers. In a series of monetary exchange games, for example, a moderate dose of oxytocin infused into human brains increased people's generosity with money to strangers by a dramatic 80 percent. Think of oxytocin is a physiological signature for empathy – it causes us to care about other people.

In an earlier, groundbreaking series of experiments, people reliably trusted strangers with their money, even though a parallel High Road calculation suggested that this was a sucker move. More to the legal point, 98 percent of participants who had been trusted with another's money consistently rewarded that trust by repaying some money to the donor. This was true even though there was no obligation, other than conscience, to do so. Oxytocin makes fair play feel good by stimulating reward pathways in the brain. These are the same brain regions that motivate us to eat and reproduce, and that are hijacked by many drugs of abuse. This is powerful stuff!

This principle of "trust someone and they'll prove trustworthy" can be seen in action along rural roads on any summer day. When people set up unmanned roadside stalls inviting people to leave money for, say, avocados, they do so because they know that most people will pay for what they take. What the sellers are doing here, albeit instinctively, is stimulating our oxytocin levels: engaging our ancient empathy-driven sense of fair play. Under this influence, the vast majority of people obey the law against theft, even in the absence of potential retribution. Having said that, the money-boxes are inevitably affixed to the fruit stand, reducing the temptation to steal.

The implication for the legal system in general is dramatic: the law needs to clearly set the boundaries for what is, and is not, acceptable, and then allow for reciprocal trust in most citizens in most circumstances. This optimally draws on both High Road and Low Road brain mechanisms to circumscribe appropriate behaviors. It also recognizes human freedom and dignity. Some enforcement is, of course, necessary, but such a system will ensure that most people, most of the time, are law-abiding.

Unfortunately, recent studies of psychopaths, violent criminals, and drug users have found that a substantial portion have a damaged High Road system. These findings in the new science of what we might term "neurocriminology" suggest that the ability to make a

cost-benefit calculation is impaired, diminishing the coercive ability of law. At the same time, the modulation of empathy is reduced and a violent fearlessness dominates in the Low Road – a neurologic double-whammy.

These individuals may actually experience the law as a *threat*. Our normal biological response to a perceived threat includes the charging up of our testosterone-driven "fight or flight" response system. To the extent that the public response to the perceived legal threat is "flight," the result is civil obedience, albeit based on fear of retribution. When the response is "fight," the results are widespread crime and the growth of glamorized "alternative" social identities, including membership in street gangs, survivalist organizations and terrorist networks. Instead of targeting citizens' testosterone-driven, calculating, competitive response system through fear, policy-makers should also consider how to target our oxytocin-driven, empathic, cooperative response system through conscience.

The Low Road is engaged by the social. Indeed, the way we punish the worst of the worst who misbehave – prisoners – is to put them in isolation. For nearly all of us, separation from other humans is psychologically and physiologically stressful.

One element of our evolved predilection for cooperation is the instinct to punish those who violate social rules. Monkeys, for example, will invest considerable time and energy in pursuing and haranguing food-sharing cheats. Our own experiments show that humans willingly punish rule-breakers even at a cost to themselves. This response is particularly true of men, who produce a telltale testosterone surge, in addition to subjective feelings of anger, as they target offenders. Clearly, if unfairness provokes a natural desire to punish, then it invites a role for legal institutions to do so, and with instinctive public support. This is natural and useful, but must be modulated in light of the adverse effects that may occur from legal penalties that are perceived as a threat.

Law-makers, therefore, should create legislation that targets *both* of our natural responses to law: our fear *and* our empathy. Since the latter, Low Road, motivation has until now been largely neglected, we make the following modest suggestions to promote its inclusion:

1. Increased public involvement in law-making processes would underline the idea of the legal system as a collaborative venture, in which citizens – even former criminals – are participants.

2. The law should be promoted to citizens in the way most likely to encourage voluntary compliance. This means shifting from a "coercion through calculation" image, targeting High Road selfishness, towards a "cooperation through conscience" image, targeting Low Road empathy. At a physiological level, when citizens contemplate the law, we want to stimulate their oxytocin, not their testosterone.

3. Part of the "image makeover" for the law would involve revising the idea that our legal system enshrines a moral system, with the novel insight that this moral system is an evolved characteristic of our species: we have, as it were, a sense of "natural law" within us. Laws and penalties for violations should be viewed as moral standards and deserved punishments, to maximize their impact on behavior.

4. One implication of reemphasizing the contribution of morality and conscience to law would be a stronger role for societal leverage in deterring crime. Part of our evolved nature as social primates is a strong sense of our own and others' reputation within the group. When laws seem fair, most of us care enough about what others think to respect them. The naming and shaming of clients caught using prostitutes is one successful example of such moral leverage.

Our "neurolaw"-inspired new legal world, then, would stand on two basic principles: that law-making and law-keeping should engage our empathy-and-oxytocin trust system; and that law-breaking and law-enforcing should engage our judgment-and-testosterone punishment system. Both are surely necessary, and should be applied in varying proportions for different crimes.

These principles derive from modern studies in brain science and neuroeconomics. In 1897, Oliver Wendell Holmes made the following prediction: "For the rational study of the law the blackletter man [i.e., the mechanical interpreter of written law] may be the man of the present, but the man of the future is the man of statistics and the master of economics." Had Holmes been even more prescient, his list might have included "master of neuroeconomics."

Ken Grimes is a London-based freelance science writer currently captivated by the ground-breaking work being done at the Center for Neuroeconomics Studies, in California.

Paul J. Zak is the Director of the Center for Neuroeconomics Studies at Claremont Graduate University in Claremont, California and Professor of Economics and Neurology. His lab discovered the role of oxytocin in facilitating trust between strangers. His new book "Moral Markets: The Critical Role of Values in the Economy" is available from Princeton University Press.

Expert Witnesses: Can the Science Be Trusted?

by Kelly Henry

At one time in our recent history, so-called experts believed that the last image a murder victim had seen was imprinted on the retina of the victim's eye. This particular anecdote in the annals of junk science was proven to be just that, junk. In addition, our modern sensibilities, modern logic and modern understanding of science inform us that such a hypothesis is utterly ridiculous. However, those "eye image" experts were believed by the educated and uneducated alike at the time. The frightening aspect of this piece of forensic history is that very few questioned the baseless assertions by the so-called "eyeball" experts. Surprisingly, this phenomenon still exists today. Experts in a courtroom have a mystic quality that lends itself to believability. Intelligent and logical people will defer to the expert on issues of which people have very little understanding. After all, that is what experts are for. However, what happens if you have an expert whose primary purpose is to "get results" and not to get to the truth? What happens if the organizing principle of the attorney who hires that expert is just to win? What is damaged? The integrity of the judicial system is damaged. When the integrity of the judicial system is damaged, so are those who are subject to it and those who serve it.

The news today is filled with scandals involving expert witnesses. Take, for example, the case of forensic expert Fred Zain, who provided expert analysis for the states of West Virginia and Texas. Zain testified in dozens of rape and murder trials regarding testing he never performed. This went on for ten years, until Zain was appointed as the head of serology at the Bexar County Medical Examiner's Office in Texas. At that time, an independent forensic specialist was tasked with reviewing Zain's work and found systemic fraud and falsification of evidence perpetrated by Zain. As a result, at least five murder and rape convictions for which Zain had provided expert testimony have been overturned. Despite questions regarding Zain's ethics, attorneys continued to put him on the stand because he could win a case for them.

Michael West is an infamous and disgraced forensic odontologist from Mississippi. Mr. West was continually hired by attorneys because of his ability to "get results." What made Mr. West infamous was his use of long-wave ultraviolet light and yellow-lensed goggles for the purpose of studying bite marks and other wound patterns on a body. The problem with Mr. West's method was that his results and conclusions, to which he testified in many courts of law, could not be verified by any other forensic expert. Even after Mr. West's method was thoroughly debunked, attorneys continued to hire him based on his knack for "getting results."

In a recent civil case, an attorney for a self-proclaimed psychic was able to find an expert to testify that the client lost her psychic powers after undergoing a medical scan. The jury gave the psychic a verdict in the amount of $1 million. What is next? Should there be a disclaimer issued by doctors, radiologists, etc., for the purpose of warning patients that, if they possess psychic powers, a medical scan may permanently deprive them of their "soothsaying" abilities?

Recently, noted forensic psychologist Dr. Park Dietz testified for the prosecution in the murder trial of Andrea Yates. Dr. Dietz, who had been a consultant for the crime drama "Law & Order," testified that Mrs. Yates had killed her five children in the same fashion as in the plot of an episode of "Law & Order," a show, testimony revealed, that Mrs. Yates liked to watch.

Dr. Dietz later realized that there had never been an episode of "Law & Order" that mirrored the circumstances of the Yates crime. Dr. Dietz promptly notified the court and the prosecution of his mistake. Despite having knowledge of this mistake, the prosecution reminded the jury, in their closing statement, that Andrea Yates regularly watched "Law & Order" and committed the crime in the same fashion as set out in an episode of that show. A Texas court of appeals reversed the conviction and granted Yates a new trial based on the fact that the jury may have been influenced by Dr. Dietz's testimony.

In all the preceding examples, the expert misconduct and mistake were overlooked, if not suborned, by the attorney who hired the expert. The attorney is the individual who can bring reasonableness and candor to the issue of expert witness testimony. Experts are not bound by promulgated rules of ethics, attorneys are. Specifically, in California, attorneys are bound by rule 5-200 of the Rules of Professional Conduct, which is often referred to as the rule related to an attorney's duty of candor. Subdivision (B) of rule 5-200 sets forth that an attorney " [s]hall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law . . . ."

Attorneys know that experts carry a great deal of weight in the courtroom, because their primary objective is to educate the jury on issues of which the average juror

has little or no understanding. If an expert testifies to bad science that results in the conviction of an innocent person or a judgment against a defendant in an unmeritorious case, what evolves is a distrust for the judiciary among those who depend on the judicial system to serve justice in their community. It also breeds fear of a judicial system for those caught up in what can be perceived as a rigged game. When the sole orientation of officers of the court is to get results via their experts, the truth is often the first casualty.

Attorneys should verify their expert's credentials and fully understand their expert's conclusions. Attorneys need to do what they do best and ask questions.

On one occasion, not too long ago, an expert asked me what I wanted out of his investigation. I responded that I wanted the truth. Our job as attorneys, first and foremost, is to serve justice, which means serving the truth.

Kelly Henry, a member of the Bar Publications Committee, is with the law firm of Thompson & Colegate in Riverside.

Geographic Information Systems in Environmental Litigation

by Tina J. Brister

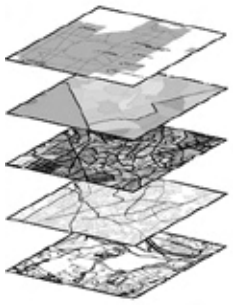
For years, a geographic information system ("GIS") has been a popular tool in many industries. Its appeal is now being recognized in the world of litigation. This article will describe what GIS technology is, how it applies to litigation, and what you need to develop a GIS project for your case. If your environmental case is complicated and saturated with data, GIS can help you manage and present the details of your case in a manner that can be easily understood by the judge and the jury, making you the envy of your opposing counsel.

What Is GIS?

A geographic information system ("GIS") is a mapping technology that connects and displays spatial and tabular data. Spatial data consists of geographic information – for instance, where the incident in the case occurred. Tabular data consists of spreadsheets or databases containing details about different aspects of your case. GIS allows many different kinds of data to be overlaid and displayed together for a comprehensive analysis and characterization of all the data in a case. It allows a person to visualize relationships, patterns, and trends among the data.

Most of us, without even knowing it, have already encountered GIS through the use of popular internet tools such as MapQuest or Google Earth. Additionally, most government websites use GIS to provide the public with data such as assessor parcel maps, zoning designations, watershed boundaries, etc. GIS has also been used in conjunction with global positioning systems (GPS) to locate and manage endangered species for compliance with the Endangered Species Act. GIS is used by environmental experts in analyzing contamination at a site and in allocating the clean-up costs among the responsible parties in connection with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund).

A typical GIS project includes a base map, often an aerial photo or a topographic map. Layers of information are then overlaid onto the base map. These layers could be street data, rivers and lakes, zoning designations, census data, municipality water distribution systems, etc. There is no limit to how many layers of data can be combined. In addition, layers can be created to show specifics of a study area, such as building locations, property lines, etc.



Unlike paper maps, GIS projects are dynamic and can be queried to analyze large amounts of data. For instance, you could query the GIS to:

- Display all the well locations with a perchlorate concentration greater than the Environmental Protection Agency's standards for clean-up;
- Display the property owner for each parcel on a year-by-year basis; or
- Display all groundwater basins, along with the amount of water each person is pumping out of each basin.

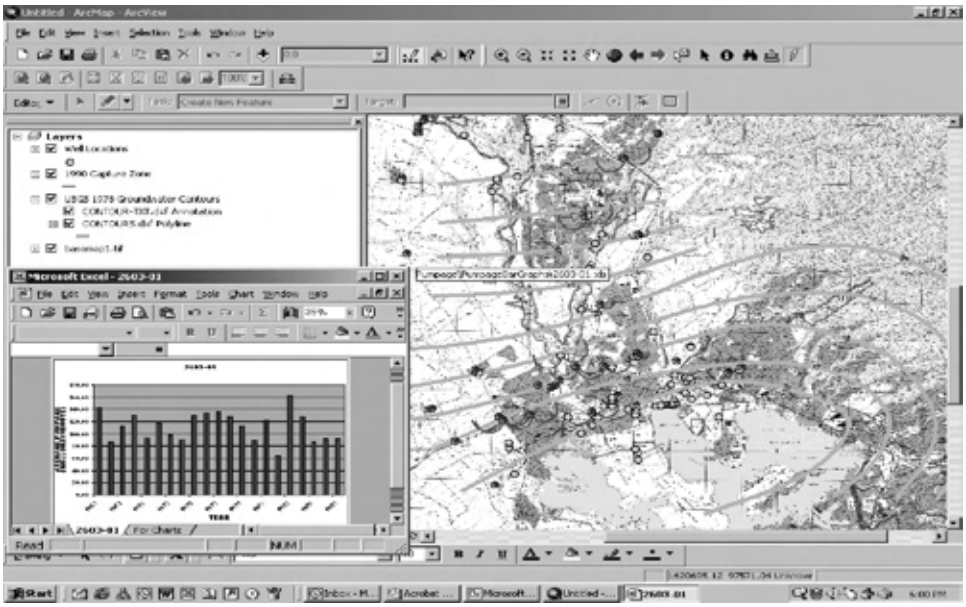
A GIS is capable of displaying any combination of data. It can reveal exposure patterns, evaluate potential point sources and responsible parties, and allow for assessment of damages.

GIS as a Tool for Environmental Litigation

GIS projects have the ability to provide a visual explanation of what is going on in a case. As the common saying goes, a picture is worth a thousand words. GIS has been embraced by environmental litigators as an efficient way of managing very complicated, data-intensive environmental cases. It has been used in many CERCLA cases to help determine cost allocation for the clean-up of contaminated sites with many potentially responsible parties. It is able to show contamination plumes, groundwater gradients, and proximity of various parties to the contamination plumes. In particular, GIS was used in recent litigation involving a fuel farm and many big oil companies to assess clean-up costs for one of the largest MTBE spills in Southern California history.

Additionally, GIS has often been used in toxic tort lawsuits. In a recent case, GIS was used to demonstrate the scientific and logical weaknesses in the plaintiffs' claims of injuries from contaminated drinking water. The GIS project was able to display, collectively and separately, 60 years of groundwater data, the water distribution system

pipelines serving the plaintiffs, the different locations of where the plaintiffs lived over their lifetime, and the alleged contamination sources. By having all of the data in one location, and being able to query any combination of that data, the relationship between the plaintiffs' claimed injuries and the possible exposure to contaminated drinking water could be readily analyzed. It showed causation flaws in the plaintiffs' case, demonstrated other parties who might be responsible, and at trial, presented the information visually in a way that was easy for the jury to understand.



GIS displaying military bases, groundwater flow lines, well locations, and pumping data for a selected well

GIS has more recently been used in water rights cases to analyze groundwater basin boundaries in relation to property locations and the depletion of water resources. While predominantly used in environmental litigation, GIS is also starting to be used as a tool in other areas of litigation, including cases involving class actions, census data and district funding, and war crimes.

Developing a GIS Project for Use with Your Case

The first step is determining whether a GIS project should be developed for the case. Often that depends on what kind of data you will need for your case and the amount of data to be collected. If you determine that a GIS project is warranted, then you should meet

with a GIS professional who is familiar with providing litigation support. There are companies that specialize in GIS, and most environmental consulting and engineering firms also have GIS professionals on staff. Next you will need to assess what data must be included to meet the needs of the case. Often, this is influenced by what claims and defenses are being made. The GIS professional will gather the requested data, incorporate any data produced during discovery, and create a GIS project tailored to your case. Once completed, electronic images and hard copy maps can be produced to display the data and create trial exhibits.

For those who would like to utilize the concept of GIS for small projects, Google Earth now offers the ability to compile and display spatial data. It allows people without GIS expertise to overlay various layers of information (i.e., aerial photographs, topographic maps, road data, hydrologic data, business locations, etc.), but it does not have the querying capability of a typical GIS project.

Conclusion

GIS is a valuable tool in environmental litigation support. It allows attorneys to understand complicated and voluminous data – for example, to evaluate claims of damages, costs their client may pay for environmental clean-up, and available water resources in water adjudications. The visual images generated from a GIS further provide an excellent resource for explaining the data and your case to a judge and jury. As more litigators become aware of the benefits of GIS, the courtroom is likely to see more of this technology.

Tina J. Brister is an associate in Gresham Savage Nolan & Tilden's Riverside office, specializing in environmental law and litigation.

Reform of the Patent System

by Michael H. Trenholm

The past year has seen significant efforts to reform how patents are granted and enforced. These efforts have included not only judicial reform, but also proposed regulatory and legislative reform. The perception that patents have become too easy to obtain and enforce is one motivation for these efforts. The argument is that, rather than fostering innovation, patents that are too easy to enforce impede businesses' development of new products.

The emergence of entities disparagingly known as "patent trolls" is bolstering the perception that there is something wrong with the system. A patent is, in one sense, a legal right to sue someone else for infringement. Unlike some other legal rights, patents have the attributes of personal property and can be freely transferred and assigned. Assigning your right to sue another is generally disfavored in our legal system, and doing so was historically viewed as constituting the tort of champerty.

With patents, though, assignment of the patent from one to another can also assign the right to sue for past infringement. Thus, patent trolls have developed business models where they acquire patents from others for the sole purpose of enforcing the patents to make money. The patent trolls are not making products or developing technology; they are only in the business of suing on the patents they acquire. The extent to which patent trolls have hampered innovation is unknown; however, the rise of entities that exist simply to sue others for patent infringement has made some question the current patent system.

Last year the U.S. Supreme Court attempted some judicial reform in *KSR Intern. Co. v. Teleflex Inc.* (2007) ___ U.S. ___ [127 S.Ct. 1727, 167 L.Ed.2d 705]. In *KSR*, the patent at issue involved the positioning of an electronic sensor on an accelerator pedal assembly of a vehicle. The invention in question was an arguably new combination of known elements, in that the pedal configuration was known, the type of sensor was known, and positioning sensors at a particular location on a structure similar to the pedal was also known. What was arguably not known was combining all of these elements together in the manner that the patent applicant did.

For the past 25 years, the legal standard governing whether such combinations of known elements were patentable was referred to the teaching, suggestion or motivation test. A person challenging a patent on a combination of known elements would have to show that a person of ordinary skill in the art would have been motivated by some explicit teaching or suggestion in the prior art to combine the known elements in the manner claimed in the patent. In KSR, the Supreme Court concluded that the lack of such an explicit teaching, suggestion or motivation did not necessarily mean a combination of known elements was patentable. The Supreme Court made it clear that, absent some exceptional circumstances, a combination of known elements is probably not patentable.

A further effort at reform came from the U.S. Patent and Trademark Office (USPTO) itself. Under the current rules, an applicant can file an unlimited number of requests for continued examination (RCEs) or continuation applications. In other words, once a patent application has been examined and presumably rejected by the patent examiner, the applicant can file an RCE and seek additional examination of the same application. Generally, in an RCE application, the applicant will present additional arguments or seek a different scope of protection. Similarly, once an initial application has been filed, the applicant can file additional continuation applications that seek a different scope of protection than the initial application.

The USPTO's view is that the unlimited number of continuation and RCE applications creates a substantial backlog of applications awaiting examination in the USPTO. This backlog delays the issuance of new patents and results in less thorough examination of new applications. To address these issues, the USPTO promulgated rules last year that would limit the number of RCE and continuation applications an applicant can file. The proposed rules would also effectively limit the number of claims that could be filed in an application.

The USPTO's effort at regulatory reform was quickly challenged, and last month the U.S. District Court for the Eastern Division of Virginia, in *Tafas v. Dudas* (2008) ___ F.Supp.2d ___ [2008 WL 859467], concluded that the USPTO did not have the authority to enact these rules, as the rules represented a substantive change in the legislative scheme governing the issuance of patents. In short, the patent laws passed by the Congress allowed for unlimited claims, unlimited continuations and unlimited RCEs. Absent statutory authorization, the court held that the USPTO, as an administrative agency, does not have the

authority to limit these statutorily granted rights. The USPTO is, of course, likely to appeal the district court's ruling but, at the moment, the old rules continue to be in place.

There is also patent reform legislation that has passed the U.S. House of Representatives. This Patent Reform Act represents potentially the most significant legislative reform of the patent laws since 1955. The most significant changes being sought in this legislation include switching to a "first to file" system and changing the manner in which damages are calculated in patent infringement lawsuits.

The first-to-file system deals with the circumstance in which two or more inventors have independently developed the same invention at roughly the same time. In that circumstance, the question is, who is entitled to patent the invention? Most patent systems elsewhere in the world deal with this circumstance by giving the patent to the person who files the application first, i.e., the person who wins the race to the patent office door. In the U.S., however, an inventor who can establish that he or she conceived of the invention first and diligently reduced the invention to practice can patent the invention even if someone else was the first to file a patent application.

Under current U.S. law, the USPTO determines who is entitled to the patent through an administrative process known as an interference proceeding, which is typically very costly and time-consuming. To avoid this, the Patent Reform Act would amend the patent laws to give priority to the first application that has been filed.

The other major legislative reform relates to how damages are calculated in patent infringement cases. Damage calculations in patent cases are highly complex, involving consideration of a number of different factors. However, under current U.S. law, simplified for clarity, the owner of a patent on a component that is used in a larger system can seek to calculate damages based on the sale of the larger system. For example, the inventor of a widget that is used in an automobile can seek to have the damages for patent infringement assessed using the value of the entire automobile, rather than the value of the widget alone. In some circumstances, this can result in significant damage awards in cases involving relatively small components of overall systems.

The proposed legislation seeks to tie the damage calculations in these cases more closely to the value of the component (or widget) rather than the overall system. The view of some is that such a change in the patent laws will reduce the number of large patent damage awards, thereby discouraging the activities of patent trolls.

The legislation is currently pending before the U.S. Senate, and it is not clear at this writing whether it will be passed. Pharmaceutical companies and, most recently, labor unions have been lobbying against the legislative reform. The labor unions are taking the view that weakening the damage provisions will make it easier for foreign manufacturers to make cheaper products that infringe U.S. patents.

Given the complexities of the U.S. patent system, the overall effect of these reform efforts will not be seen for some time. It is hoped that the proposed reforms will result in fewer unmeritorious patents being issued and a decrease in frivolous patent litigation. It may be that additional reform efforts will be seen over the next few years, as the problems with the patent system come before the public eye.

Michael H. Trenholm is the managing partner in the Riverside office of Knobbe Martens Olson & Bear, LLP. He specializes in representing companies with their patent, copyright and trademark matters, including patent and trademark procurement and related licensing issues.

Nominees for RCBA Board of Directors 2008–2009

The RCBA Nominating Committee has nominated the following members to run for the RCBA offices indicated, for a term beginning September 1, 2008. (See below for their biographies.) Watch your mail for ballots. Election results will be announced at the RCBA General Membership meeting in June.

E. Aurora Hughes, *President-Elect 2007-2008,* will automatically assume the office of President for September 1, 2008, to August 31, 2009.

Harry J. Histen, III
President-Elect

I am a sole practitioner and make my office in Riverside, California, and have done so since June of 1977. I have a fairly broad, general practice, with an emphasis on wills and trusts and general business law. I also do probate and conservatorship matters, family law matters, general civil litigation and real estate matters.

I was born in 1942 and am a "second career" lawyer and a graduate of Western State University Night Law School in Fullerton, California. Prior to becoming a lawyer, I majored in mathematics and worked as a Computer Programmer/Systems Analyst for Rockwell International on the Apollo and Space Shuttle programs.

I was very active in bar activities as a younger lawyer; I belonged to several panels and served on the Lawyer Referral Service Committee. I have served on the California State Bar Resolutions Committee. I have trained as a mediator, both by experience and by taking mediation courses at the University of California at Riverside. I mediate privately and through the RCBA Dispute Resolution Service, as well as on a voluntary basis through the probate departments and family law bimonthly voluntary settlement conferences.

I believe that what I can offer the bar is my experience, and in particular, the diversity of my legal experience. I am currently the Vice President on the RCBA Board.

Harlan B. Kistler
Vice President

Harlan B. Kistler is a native Riversider who attended Notre Dame High School. He was a student athlete in college, attending UCLA, ASU and the University of Iowa. He obtained his law degree from the University of Iowa College of Law.

He spent seven years as an associate attorney with Reid & Hellyer, practicing business litigation and personal injury. In 1996, he established his own law practice, and he has since focused primarily on the practice of personal injury law.

Throughout the years, he has been involved in Barristers and the Leo A. Deegan Inn of Court, and he has assisted the Mock Trial program as a scoring attorney. He has contributed his time preparing family law documents for clients of the Public Service Law Corporation. Presently, Mr. Kistler is assisting the Riverside Superior Court as a mediator through the RCBA Dispute Resolution Service. He has served many years as an arbitrator for attorney-client fee disputes, lectured on "Marketing Your Law Practice" at Barristers, published articles in the Riverside Lawyer and participated in the Civil Litigation Section.

Mr. Kistler is actively involved in the community as a volunteer head wrestling coach at Martin Luther King High School. He founded the Orangecrest Crushers, which is a youth wrestling program in Riverside. Similarly, he has partnered with Singh Chevrolet to continue the Perfect Attendance Program for schools in Riverside. Mr. Kistler has also been involved in many community fundraisers and is a former Kiwanis member. Mr. Kistler has been married 15 years to Lori and has two sons, Harlan II and Nolan.

Mr. Kistler is currently on the RCBA Board as Chief Financial Officer.

Robyn A. Lewis
Chief Financial Officer

Robyn A. Lewis is an associate attorney with the Law Offices of Harlan B. Kistler, which is located in Riverside. Since her admission to the bar in 1998, Ms. Lewis' practice has focused primarily on personal injury and

elder law. She has been an active member of the RCBA since joining her firm in 1999.

Ms. Lewis has served as Secretary of the Riverside County Bar Association for the last year. Prior to that term, she was a Director-at-Large. She is a former President of Barristers, having served her term for that organization during 2005-2006.

In addition to her involvement with the RCBA Board of Directors, Ms. Lewis is a contributing member of the Publications Committee and the Continuing Legal Education Committee of the RCBA, as well as a member of the RCBA Golf Tournament Committee. She is a board member of the Leo A. Deegan Inn of Court and previously coached the mock trial team of Santiago High School in Corona.

A graduate of Seton Hall University School of Law, Ms. Lewis is originally from the state of New Jersey. She is married to Jonathan Lewis, of J. Lewis and Associates, who has a civil litigation practice in Riverside.

Christopher B. Harmon
Secretary

Chris Harmon is a partner in the Riverside firm of Harmon & Harmon, where he practices exclusively in the area of criminal trial defense, representing both private and indigent clients. He received his undergraduate degree from USC and his J.D. from the University of San Diego School of Law.

Since his admission to the bar, Chris has practiced exclusively in Riverside, and has always been an active member of the Riverside County Bar Association. As a leader in the RCBA, he has been active in many bar activities and programs. He currently serves as a Director-at-Large on the RCBA Board, as the Co-Chairman of the bar association's Criminal Law Section, and on several other bar committees. He is a current member and past Board Member of the Leo A. Deegan Inn of Court. He has coached and assisted various Riverside schools in the mock trial program, and is a past executive committee member of the Riverside chapter of Volunteers in Parole. He has been a frequent volunteer as a judge pro tem and has written articles for the Riverside Lawyer magazine.

Chris and his wife Kim have two young daughters.

Richard A. Kennedy
Secretary

I am currently ending my two-year term as a Director-at-Large, and it has been a distinct privilege and honor to be of service to the RCBA.

I have previously served on the boards of Inland Counties Legal Services and the Public Service Law Corporation. I also have volunteered as an attorney-client fee arbitrator for the RCBA and as a judge pro tem here in our county. I am currently a member of the Governing Committee for the Lawyer Referral Service of the RCBA. Since I arrived in Riverside in 1990, my involvement in our legal community through the RCBA has been continuous and ongoing.

I would welcome the opportunity and consider it a privilege to continue to serve the Riverside County Bar Association as your Secretary. My professional involvement in and experiences with the various entities and boards I have served warrant your considered attention and support.

Yoginee Patel Braslaw
Director-at-Large

Yoginee Patel Braslaw is a Senior Research Attorney for the Court of Appeal, Fourth Appellate District, Division Two, in Riverside. She has been working in that capacity since January 1999. Prior to that, she worked as a law clerk for Haight, Brown & Bonesteel, LLP, from 1994 to 1998, in various departments, including products liability, malpractice defense, and appellate, at its former Santa Monica office. She was also an extern for the Honorable Consuelo B. Marshall of the United States District Court for the Central District of California. She also briefly worked as an immigration attorney for a law office in the downtown Los Angeles area.

Since moving to Riverside in 1999, Ms. Braslaw has been an active member of the RCBA as well as the local community. In 1999, she joined the Publications Committee of the RCBA as a writer and photographer for the Riverside Lawyer, and she is still a contributing member. She is also a current member of the Leo A. Deegan Inn of Court, as well as a board member and mentor for VIP Mentors. Throughout the years, she has participated in the mock trial program as a scoring attorney. She was also a member of this year's and last year's RCBA Golf Tournament Committee.

In addition, Ms. Braslaw is an active member of the Junior League of Riverside, where she serves as a committee member for the Ball Committee and the Preschool Enrichment Program. She is also active in assisting her husband Steve in fulfilling his dream of becoming a restaurateur. They own a Subway franchise in San Bernardino, along with the Pizza Kiln in Moreno Valley and Pizza Time in Riverside. These businesses have kept them active in the community; they have sponsored several events at Martin Luther King High School, the Riverside Children's Theatre, and various elementary schools and sporting events in the Orangecrest area. Ms. Braslaw is also involved in activities relating to her two children, Deven (6) and Maya (4). She has volunteered at JFK Elementary School and Temple Beth El Child Development Center, and as an AYSO assistant coach and soccer mom.

Ms. Braslaw grew up in Chatsworth, California, and is a graduate of the University of California, Los Angeles, and Whittier Law School.

Ms. Braslaw is running for the Director-at-Large position because she likes working for the RCBA and enjoys the camaraderie that comes along with the position. She finds the Riverside legal community to be unique and extraordinary in building lasting professional relationships as well as friendships.

Jacqueline Carey-Wilson
Director-at-Large

I have practiced both criminal and civil law, and now specialize in appellate work. I was previously a research attorney at the Court of Appeal and am currently employed as a Deputy County Counsel in San Bernardino. After graduating from California State University, Fullerton with a Political Science degree, I was a field representative for Congressman George Brown in Colton. I then attended Southwestern University School of Law and was admitted to the bar in 1995.

I have been an active member of the Riverside County Bar Association since 1996. In 1997, I joined the Publications Committee of the RCBA as a writer and photographer for the Riverside Lawyer, and I am now the editor. As editor, I coordinate each month's publication, recruit writers, and review the content of the magazine. In addition, I served on the RCBA Board as a Director-at-Large in 2007.

In March 2001, I became a Director of the Volunteer Center of Riverside County, and I served as President of the Board of Directors from September 2004 through September 2006. The Volunteer Center is a nonprofit agency that provides services to seniors, youth, people in crisis, court-referred clients, and welfare-to-work clients.

In October 2005, I was appointed to the State Bar's Public Law Section Executive Committee. As a member of the Executive Committee, I assist the Public Law Section in educating attorneys who represent cities, counties, school boards, and special districts.

Since November 2005, I have been a Director of the Inland Empire Chapter of the Federal Bar Association, and I now serve as President-Elect. I assist in coordinating events for the FBA and have written for the Federal Lawyer.

For the last three years, I have served as a member of the Advisory Board of VIP Mentors. VIP Mentors recruits attorneys to serve as mentors for men and women on parole to assist with their transition back into the community.

I reside in the City of Riverside with my husband, Douglas Wilson, and our three daughters, Katie (15), Julia (11), and Grace (7). I would be honored to serve the Riverside legal community as a Director-at-Large of the RCBA.

Chad W. Firetag
Director-at-Large

Mr. Firetag is a partner in the law firm of Grech & Firetag. During his time with the office, he has represented numerous clients in high-profile cases involving drugs, white collar crime and murder.

Mr. Firetag graduated Phi Beta Kappa from the University of California at Riverside with a B.A. in Political Science and a minor in History. He received his law degree from the University of California at Davis.

Mr. Firetag has been an active member of the Riverside County Bar Association and the Leo A. Deegan Inn of Court. He currently serves as the Co-Chairman of the bar's Criminal Law Section. He is also active in the Riverside County Mock Trial Competition, having served on the Steering Committee and volunteered as a coach.

Mr. Firetag lives in Riverside with his wife, Victoria, and their son, William (2).

Jay E. Orr
Director-at-Large

In September 2006, the Riverside County Board of Supervisors began the restructuring of county code enforcement. They wanted to create a new "division" with more independence in its ability to operate an

efficient organization, while at the same time creating a stronger and more noticeable presence in the unincorporated communities that it serves within the county. The Board of Supervisors thus created a new county department, Code Enforcement. This department falls under the umbrella of the Transportation & Land Management Agency (TLMA). The board selected attorney Jay E. Orr as the Director of the new department.

Jay attended the United States Naval Academy from 1974-1976. In 1978, Jay received his Bachelor of Arts degree in Political Science from the University of California, Santa Barbara, and in 1985, he graduated with a law degree from the Ventura College of Law.

Jay began his legal career with the Ventura County District Attorney's office in 1985. He became a member of the Riverside County Public Defender's office in 1987. Jay transferred to the Riverside County District Attorney's office in December of 1988.

During his tenure with the D.A., Jay worked in Economic Crimes and Major Fraud, and was the Supervisor of the Special Prosecution Unit. He progressed through the ranks and became an assistant district attorney in 1999. As assistant district attorney, Jay was in charge of the Administrative Division. He oversaw a budget of over $60 million, as well as the Writs and Appeals unit, the Information Technology unit, Human Resources, and staff training.

Jay has previously served on the RCBA Board of Directors from 2002-2004 and the Dispute Resolution Service Board of Directors from 2005-2007. He is currently an arbitrator in the RCBA Attorney Fee Arbitration Program.

Randall S. Stamen
Director-at-Large

Randy was raised in Riverside. He received his B.A. from U.C. Irvine and his J.D. from the University of San Diego. Randy served as an extern at the Court of Appeal in San Diego at the conclusion of law school.

Randy returned to Riverside to practice law in 1992. He was initially an associate for Donald Powell and Michael Kerbs at Reid & Hellyer. Randy was later associated with the Law Offices of Thomas L. Miller.

Randy has been a sole practitioner in Riverside for the past 12 years. The bulk of his practice concerns landscape-related litigation and risk management, in addition to general civil litigation.

Randy is the author of California Arboriculture Law, a book for contractors, government officials, and lay people. It analyzes tree-related litigation and statutes. Randy lectures throughout the United States on these topics.

Randy is fanatical about working out at the gym and is involved in martial arts. He lives in Riverside in a small orange grove with his wife, Teri, and their two young children. Randy is involved in a number of sports with his children, in addition to the Leo A. Deegan Inn of Court and Boy Scouts. In the past, Randy served on the Board of Directors of the local chapter of the Juvenile Diabetes Foundation and on the Governing Committee of the Lawyer Referral Service of the RCBA.

Jeffrey A. Van Wagenen, Jr.
Director-at-Large

Jeff Van Wagenen, a specialist in criminal law, certified by the Board of Legal Specialization of the State Bar of California, is a former deputy district attorney for the County of Riverside, and is currently dedicated to the representation of those accused of crimes, both state and federal, at all stages of the proceedings. With offices in the Riverside County Bar Association Building and Murrieta, his practice is dedicated primarily to the courts of western Riverside County.

Mr. Van Wagenen, a graduate of the University of Southern California and Hastings College of the Law, has been actively involved in the legal community of Riverside since 1996. In addition to being a past Chair of the RCBA Criminal Law Section and a past member of the Advisory Committee of VIP Mentors, he currently serves on the board of the Leo A. Deegan Inn of Court.

Mr. Van Wagenen lives in Riverside with his wife Dawn, who has previously served on the board of the Junior League of Riverside and is currently the President-Elect for the Riverside County Law Alliance, and their two children.

Mr. Van Wagenen looks forward to the opportunity to serve the membership of the Riverside County Bar Association as a member of the Board of Directors for 2008-2009.

ATTENTION RCBA MEMBERS

If you are not getting email updates/notices from the RCBA and would like to be on our mailing list, visit our website at www.riversidecountybar.com (click on > For our Members, >Resources) to submit your email address.

Judicial Profile: Commissioner Lawrence P. Best

by Donna Thierbach

With each interview, it becomes clear that Riverside County has a pretty good track record of managing to snag (and keep) some of the "best" lawyers from other areas. Commissioner Best's family moved to La Habra from Salt Lake City when he was seven years old. His father was an accountant for International Harvester, and his mother was a homemaker and substitute teacher. He had two older brothers, but one, tragically, died in a car accident. The other currently works for Beckman Instruments.

Commissioner Lawrence P. Best

So with no lawyers in the family, how did Commissioner Best become interested in law? When he entered California State University, Fullerton (CSUF), he was a communications major. However, after he took an elective criminal justice class, he knew he wanted to practice law, so he switched his major in his sophomore year. He graduated from CSUF in 1979 and then attended UCLA Law School. At that time, he thought he would practice either environmental or criminal law. On a side note, he did not just find his love of the law at CSUF, but he also met his wife, Robin. They married after his first year of law school, and they survived the law school experience intact!

When Commissioner Best graduated from law school, he knew he wanted to be a prosecutor. However, in 1983, only two counties were hiring, Kern and Riverside, and the opening in Riverside was in Indio! He accepted the position with Riverside County, because at least he and his wife would still be in Southern California. Thus, when they first moved to Indio, they planned to stay only a few years. However, he loved his job and his wife loved the area, so they stayed and have no plans to leave. Commissioner Best said the only downside to the desert is there are no major sports.

You've guessed it, Commissioner Best loves sports. He watches most UCLA teams and the Angels. He also enjoys movies, especially comedies, but no law-related shows for him. I also thought he probably loved the desert because of the golf, but he is not a golfer. He also confessed that he is not much of a swimmer. He and his wife have three children, all of whom swam and played water polo in high school. He said they must have received their swimming abilities from his wife. Two of their children are now in college, and their youngest is in high school. His wife is a teacher at the College of Desert and a lease specialist. Are there any future lawyers in the family? Not yet; the oldest aspires to be a first-grade teacher, and the second oldest has her eye on a career in athletic training.

So what has been Commissioner Best's career path? He began as a prosecutor in Indio in 1983. In 1997, he left the District Attorney's office to be a commissioner. However, he missed the law-office atmosphere, so he returned to the District Attorney's office a year later in 1998. During his tenure at the District Attorney's office, he served assignments in the juvenile, homicide, domestic violence and child abuse units. Ironically, as a commissioner, he is currently assigned to Drug Court, which is one of the few assignments he did not have while with the District Attorney's office. So how does he like being a commissioner the second time around? He said this time, he was ready for the move. He is learning a lot and enjoys his assignment. He said it is very satisfying to see people succeed in Drug Court, and he enjoys the hustle and bustle of a big calendar.

Donna Thierbach, a member of the Bar Publications Committee, is Chief Deputy of the Riverside County Probation Department.

Opposing Counsel: John Holcomb

by Jacqueline Carey-Wilson

John Holcomb was born and raised in northwestern Pennsylvania in the small town of Smethport. His father, Boyd Holcomb, was a bricklayer and mason by trade and built the family home shortly before John was born. His mother, Dolores (Brooder) Holcomb, worked as a secretary and bookkeeper while she kept a firm hand on John, his two older brothers, Gary and Jeffrey, and his younger sister, Annie (Holcomb) De La Haza.

John entered the Massachusetts Institute of Technology in Cambridge, Massachusetts in 1980 and graduated four years later with a Bachelor of Science degree in Civil Engineering. John attended MIT on a Navy ROTC scholarship, and in his senior year he was appointed Commanding Officer of the MIT NROTC Battalion, with responsibility for 150 student midshipmen. In this capacity, John was awarded the American Legion Medal for General Military Excellence, the American Medal for General Scholastic Excellence, and the Boston Counsel of the Navy League Award for Sustained Academic Excellence. During his college years, John also found time to start at defensive end for the MIT football team and to serve as treasurer of his fraternity, Delta Upsilon.

John graduated from MIT in 1984 and entered the U.S. Navy Surface Warfare Officer School in Coronado, California. John graduated with distinction and began a three-year tour aboard the battleship U.S.S. New Jersey. During that sea tour, John traveled to destinations throughout the Pacific. On one of his last stops in Hong Kong in 1986, John purchased diamonds and designed an engagement ring at the jewelry store at the famous China Fleet Club. Unable to wait several months until his return to the United States, John proposed to his then-girlfriend, Monica Sypien, over the phone, and then shipped the engagement ring to her, half a world away, in Boston.

John and Monica were married in 1987 and settled in Washington, D.C. At that time, John served as a naval analyst for the Joint Chiefs of Staff at the Pentagon. John engaged in strategic plans and analyses of U.S., allied, and Soviet bloc military and naval forces. In addition, he developed, maintained, and operated computer models to support the Joint Chiefs' conventional and strategic force analyses. John was awarded the Joint Service Commendation Medal for his service with the Joint Chiefs of Staff.

John entered Harvard Business School in 1989. After a few months, John thought he needed to make life a little more challenging, so he also entered Harvard Law School. In June 1993, John earned his Juris Doctor *cum laude*, as well as a Master's in Business Administration. During his time at Harvard, John was an editor of the *Harvard Journal of Law and Technology*, Volume 5, president of the HLS Veterans' Association, and managing director of the JD/MBA Society. John also served as a research assistant to then-visiting Professor Elizabeth Warren. It was Professor Warren who recommended John to the Honorable Ronald Barliant. As a result, from 1993 to 1994 John clerked for Judge Barliant at the United States Bankruptcy Court for the Northern District of Illinois.

Holcomb Family: Steven, Matthew, Michael, Katie, John and Monica

John is admitted to practice law in Pennsylvania, Illinois, and California. In 1994, John accepted a position as an associate with Irell & Manella, LLP, working in both its Los Angeles and Newport Beach offices. John had previously worked at the firm while he was in law school. John was a member of the Litigation and Insolvency Work Groups and coauthored *Recent Developments in Jurisdiction, Venue, Abstention, Remand, Removal, Withdrawal of the Reference and Jury Trials*, published in the 18th Annual Current Developments in Bankruptcy and Reorganization (1996).

John was hired by Knobbe Martens Olson & Bear LLP in 1997 and is now a partner with the firm. John counsels clients in cases involving patents, trademarks, trade secrets, and copyright. He is also involved in every aspect of litigation and has represented clients all over the country. John has had many successes in the courtroom. In a recent case, John obtained a $2.7 million judgment for a client in a copyright infringement and trade secret mis-

appropriation action. John also obtained the dismissal of trade dress infringement claims relating to the shape of the vintage 1960's Cobra automobile. Last year, John persuaded Judge Virginia Phillips to change one of her tentative opinions after oral argument, which is not an easy task in any courtroom.

In addition to his full-time job, John has been very active with the Inland Empire Chapter of the Federal Bar Association. John has been a member of the chapter since 2002 and is currently the President. John is instrumental in organizing chapter events and fostering a positive relationship with the judges of the United States District Court for the Central District of California. According to Judge Stephen Larson, "In a relatively short period of time, John has established himself as a real cornerstone of the federal bar. His commitment to his practice, his community and his family is exemplary. We are extraordinarily fortunate to have a man of his character and vision in Riverside." In addition, John's firm has generously donated administrative support to the chapter. This support has enabled the chapter to focus on educating the legal community on various issues and topics of interest to federal court practitioners.

John and Monica reside in Coto de Caza with their four children, Michael (16), Steven (14), Katie (11), and Matthew (8).

Jacqueline Carey-Wilson is a Deputy County Counsel for San Bernardino County, editor of the Riverside Lawyer, and President-Elect of the Federal Bar Association.

Justice on Tour

by Richard Brent Reed

On March 27, 2008, Presiding Justice Manuel Ramirez and Associate Justices Thomas Hollenhorst, Bart Gaut, Jeff King, Art McKinster, and Douglas Miller took to the stage, when Division Two of the Fourth District Court of Appeal sat at Arlington High School in Riverside for a special setting of oral argument. The set of this "special setting" was an austerely draped dais facing the house, flanked by counsel tables on the apron: appellant, stage right; respondent, stage left. The court clerk was stationed upstage right, just below the justices. The show consisted of two one-act hearings: *People v. Wooten*, heard by Justices Ramirez, Gaut and King, and *People v. Mayns*, heard by Justices Hollenhorst, McKinster, and Miller. A backdrop displayed the headline:

Serving For Justice
Yesterday, Today, and Tomorrow
Centennial Celebration

Several hundred high school students filled Arlington's auditorium to be enthralled by the performances of both justices and attorneys. I was in that audience, because attorney Kira Klatchko had sent out the call for appellate lawyers to help with the classroom visitations afterward. Every year, the court of appeal goes on tour somewhere in the Inland Empire to educate the next generation about the judicial process, and this year, Arlington High School was the lucky venue. The California Highway Patrol security officer commanded all to rise, the justices filed in, and the first hearing began.

The Case of the Excluded Tape

People v. Wooten: A boy of 17 was the victim of a drive-by shooting when he was put in the hospital by one of four black youths in a car, who was subsequently taken into custody. The People suggested that the shooting may have had a gang motivation. The shooter was convicted of attempted murder and sentenced to 25 years to life in prison. He was 15 years old.

While recuperating in the hospital, the shooting victim made a recording that seemed to cast doubt on his ability to identify his assailant. Even so, he fingered him at trial, in open court. In order to impeach the victim's testimony, defense counsel, at the last minute, attempted to introduce the redacted audiotape. Since the prosecution had not had an opportunity to review the 28 pages of redacted audiotape transcript, counsel's motion was denied as untimely under Evidence Code section 352. In their tentative opinion, the three justices proposed to find that, even if the tape should have been admitted, the error was harmless.

The take-home lesson for attorneys came from Justice Ramirez's exchange with the People's counsel (respondent) regarding the People's briefing of the hearsay issue: "Counsel, are you saying, with a straight face, that the tape-recorded conversation was hearsay? The hearsay objection was not raised at trial, and yet your brief is full of hearsay objections." Attorney Cavalier protested that she had not written the brief. That excuse did not register with the justice. In the end, all that she could do was to apologize sheepishly for the brief. I felt bad for her. She had probably been handed the brief and told to argue it. Now, she had to take the flak for a mistake that wasn't even hers. Moral: if someone else writes your brief, make sure that they stay on point.

The Right to Self-Misrepresentation

After a brief intermission, the second panel sat to consider the case of *People v. Mayns*, in which George Mayns, the defendant/appellant, had been convicted of the second-degree murder of his mother's boyfriend. It seems that Mayns killed his mom's significant other 15 years ago. Seven years later, the body – or what was left of it – was discovered. In 1998, a state computer got a hit in its dental records database, identifying the deceased. Subsequently, the medical examiner reexamined the remains and determined the cause of death to be blunt force trauma. Mayns was arrested.

Mayns decided to represent himself. He prepared his case in custody while awaiting trial. For security reasons, the sheriff confiscated Mayns' trial preparation materials. Mayns protested and got the judge to order the sheriff to return the materials.

By August 8, 2007, the materials had not yet been returned. Mayns did not raise the issue at an August 22 hearing. At the preliminary hearing on September 12, however, Mayns sought to have the sheriff held in contempt.

The preliminary hearing proceeded, over Mayns' protestations. As an accommodation, Mayns was assigned standby counsel and told that he could recall witnesses later. This, according to Mayns' appellate attorney, was a "false accommodation." Mayns told the court he was

withdrawing his pro per status because he was being forced to defend without his materials.

Needless to say, Mayns lost and appealed on the issue that his Sixth Amendment right to self-representation had been denied him. The People contended that Mayns failed to perfect his rights under the court's order to return the materials; since a pro per is held to the same standard as an attorney, he must live with his oversight. The panel appeared to agree: even though the sheriff's inaction was contemptible, Mayns had been dilatory in asserting his legal remedies to obtain his work product.

The court was well-received by the audience. The event was a thrill, even for an appellate attorney. Unfortunately, the court's leading lady, Justice Richli, was unable to appear, due to an illness in her family. After the justices took turns responding to questions, the students went back to class. Then the justices, the various counsel, and a few of us volunteers were farmed out to various classes that had not been in attendance. The reception there was, generally, polite, but the students were not as engaged as one might have hoped. This is hardly mystifying, since civics, as a subject, is no longer taught in public schools. Hopefully, the court succeeded in exposing the attending teens to the judicial process: an aspect of our culture that cannot be downloaded into an iPod.

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

State Mock Trial Competition 2008

by Hon. Joe Hernandez

The California State Mock Trial Competition was held in Riverside on March 28-30, 2008. 34 teams from around the state were here representing their counties. Volunteer judges and scoring attorneys, from around the state, were also here. In total, over 1,000 people were in Riverside because of the Mock Trial program.

The competition among the teams was spirited, as usual. The champion was La Reina High School of Ventura County. Their attorney coach was Matt Hardy, a Riverside Deputy Public Defender assigned to Riverside Juvenile Court. In second place was Piedmont High School of Alameda County. Riverside's champion, Temecula Valley High School, coached by Deputy District Attorney John Davis, finished seventh. Redlands East Valley High School, from San Bernardino County, finished sixth. The other members of the top eight were:

Third: Tamalpais High School (Marin County)

Fourth: Gabrielino High School (Los Angeles County)

Fifth: Stockdale High School (Kern County)

Eighth: Buchanan High School (Fresno County)

The state finals have four rounds, two on Friday and two on Saturday, plus a championship round on Sunday. The presider at the championship round was Justice Laurie Zelon, of the Second District Court of Appeal. At the awards ceremony on Sunday afternoon, there were still over 500 Mock Trial participants present.

The sponsor of the State Mock Trial Competition is the Constitutional Rights Foundation. The Foundation presented a Hospitality Award to Riverside County. Accepting on behalf of Riverside County were Bar President Dan Hantman and Judge Joe Hernandez. Other people presenting awards included local attorneys Virginia Blumenthal and Linda Dunn.

The trial attorneys and witnesses are students. The scorers are real attorneys. The presider is a judge, or in some cases a very experienced attorney and Mock Trial volunteer. For example, both Virginia Blumenthal and Linda Dunn presided over some of the rounds. The competition is at a very high level, and anyone who wins a "best" award has really accomplished something.

Individual "best" award winners from Temecula Valley were Chris Araujo, for the role of Alex Palmer, the defendant, and Megan Insua, for the role of Adrian Chase, "caterer to the stars."

It was another successful year for both the county and the state Mock Trial competitions. In Riverside, the sponsors are the Riverside County Bar Association, the Riverside County Department of Education, and the Riverside Superior Court. The many Riverside judges, scoring attorneys and others who volunteered can be very proud of themselves for helping out the community and our youth.

Hon. Joe Hernandez, a member of the RCBA Mock Trial Steering Committee, is a judge of the Riverside Superior Court.

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Patent Agent
Registered to practice before the USPTO. Patent drafting and prosecution experience in a variety of technological areas. Contact Colin Rasmussen at 909-653-6607; ascus@sbcglobal.net.

Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective May 30, 2008.

James E. Curtis, III – James Curtis & Associates, Riverside

Kathryn DiCarlo – Cummings McClorey Davis & Acho, Riverside

Ann A. Gottesman – Sole Practitioner, Riverside

Michael A. Turek – Haslam & Perri LLP, Ontario

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