RIVERSIDE LAWYER

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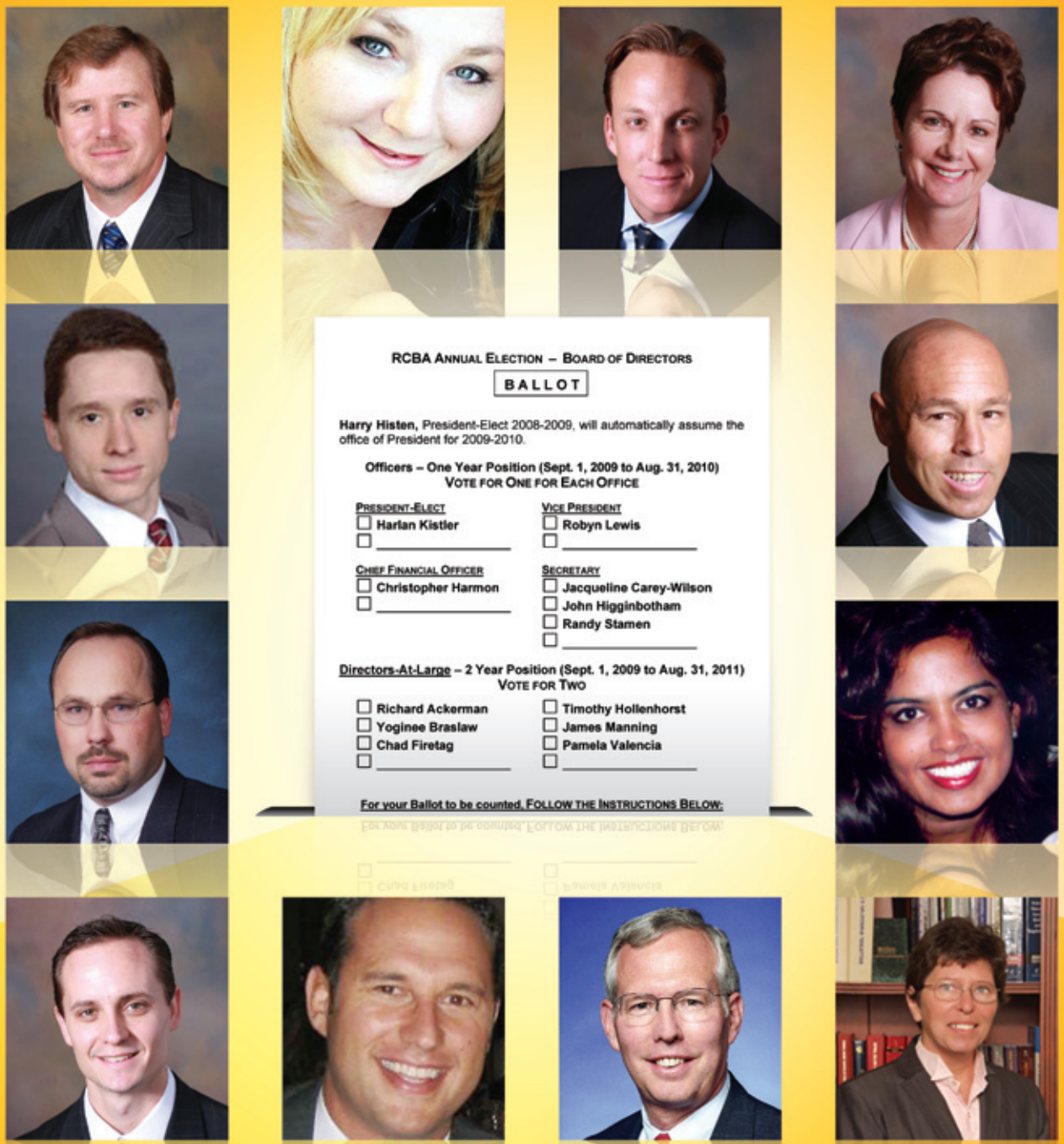
MAGAZINE



RCBA Annual Election – Board of Directors

BALLOT

Harry Histen, President-Elect 2008-2009, will automatically assume the office of President for 2009-2010.

Officers – One Year Position (Sept. 1, 2009 to Aug. 31, 2010)
VOTE FOR ONE FOR EACH OFFICE

President-Elect
- ☐ Harlan Kistler
- ☐ _____

Vice President
- ☐ Robyn Lewis
- ☐ _____

Chief Financial Officer
- ☐ Christopher Harmon
- ☐ _____

Secretary
- ☐ Jacqueline Carey-Wilson
- ☐ John Higginbotham
- ☐ Randy Stamen
- ☐ _____

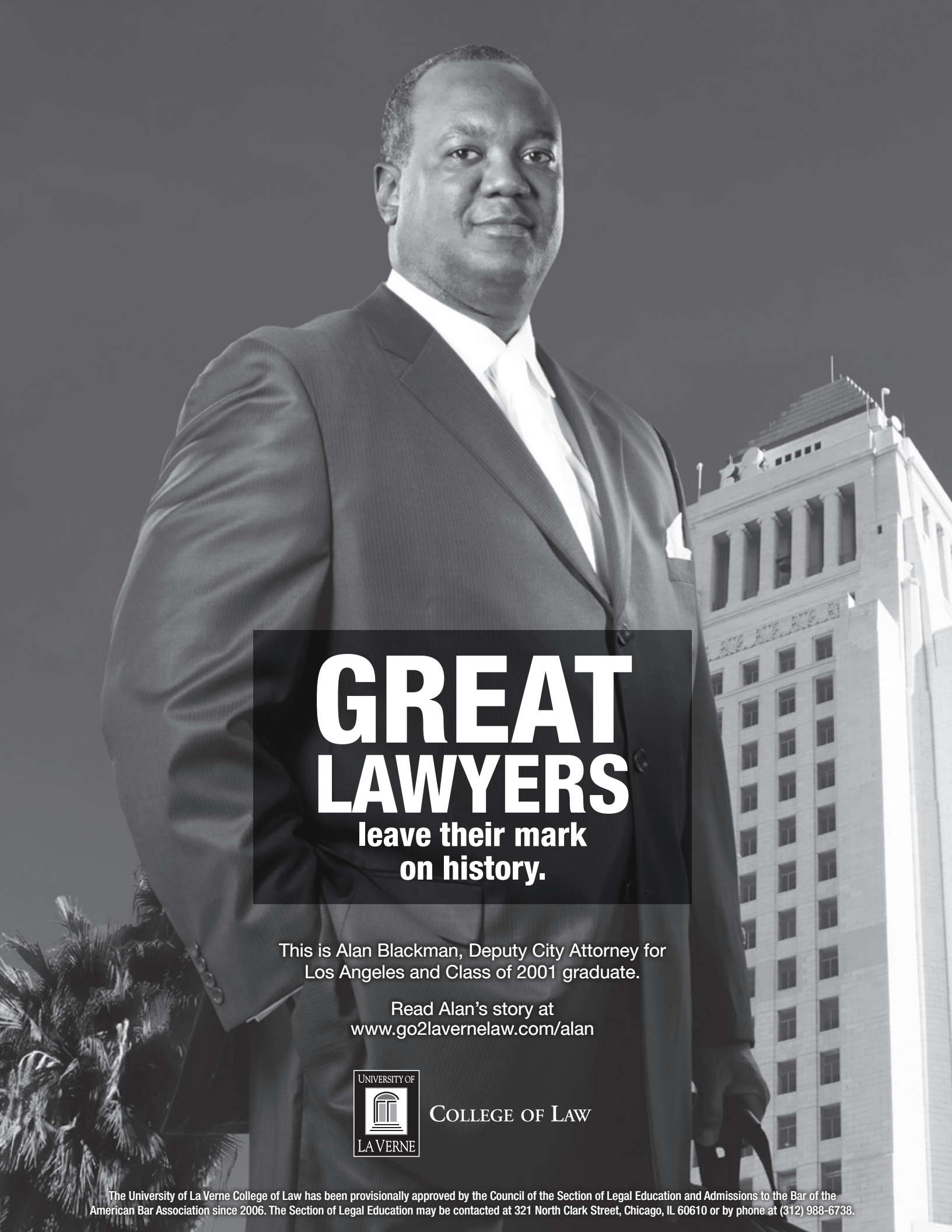
Directors-At-Large – 2 Year Position (Sept. 1, 2009 to Aug. 31, 2011)
VOTE FOR TWO

- ☐ Richard Ackerman
- ☐ Yoginee Braslaw
- ☐ Chad Firetag
- ☐ _____
- ☐ Timothy Hollenhorst
- ☐ James Manning
- ☐ Pamela Valencia
- ☐ _____

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

RIVERSIDE COUNTY BAR ASSOCIATION — RCBA — EST. 1894

The official publication of the Riverside County Bar Association


GREAT
LAWYERS
leave their mark
on history.
This is Alan Blackman, Deputy City Attorney for
Los Angeles and Class of 2001 graduate.
Read Alan's story at
www.go2lavernelaw.com/alan
UNIVERSITY OF
LA VERNE
COLLEGE OF LAW
The University of La Verne College of Law has been provisionally approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association since 2006. The Section of Legal Education may be contacted at 321 North Clark Street, Chicago, IL 60610 or by phone at (312) 988-6738.

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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

20 **Immigration Law Section**
RCBA 3rd Floor – 12 p.m. to 1:15 p.m.
"What You Should Know When Representing a Client Before the San Bernardino District Office"
Speaker: Irene Martin, Field Office Director
(MCLE)

Enrobement Ceremony
Judge Kelly Hansen
Historic Courthouse, Dept 1 – 4:00 p.m.

25 **Holiday – Memorial Day**
RCBA offices closed

27 **Estate Planning, Probate & Trust Law Section**
RCBA 3rd Floor – 12 p.m. to 1:15 p.m.
"Mysteries of Probate: The Probate Examiner Reveals How to Achieve RFA"
(MCLE)

28 **Small & Solo Firm Section**
RCBA 3rd Floor – 12 p.m. to 1:15 p.m.
"Nuts & Bolts of Small Law Firm Office Management"
(MCLE)

30 **Joint RCBA/IEBF Seminar**
RCBA 3rd Floor – 9:30 a.m. to 12 p.m.
"Bankruptcy for Non-Bankruptcy Practitioners"
(MCLE: 2 hrs)

JUNE

3 **James Wortz Distinguished Speakers Series Dinner**
Mission Inn, Music Room
Social 5:30 p.m. – Dinner 6:00 p.m.

4 **Swearing In Ceremony**
Historic Courthouse – 10:00 a.m.

President's Message

by E. Aurora Hughes

It seems that time has gone by so fast when I realize that three-quarters of my term is almost over. We celebrated the accomplishments of Poly High in the Mock Trial county competition and their eighth-place finish in the state competition in February and March. Over the years, I have enjoyed watching many young men and women participants giving it all they have. I have seen them celebrate victory and observed graciousness in defeat. I have felt their determination and their disappointment. I have seen their attorney coaches deal with victory and defeat, setting an example for those in their charge. Most coaches set a fine example, while some, very few, get so caught up in the competition, they forget themselves, and in turn forget that their actions and words affect those under their tutelage. We should remember that what we say and how we conduct ourselves is observed and many times adopted by those who look to us for guidance. I hope each attorney coach thinks about what they said about other teams and remembers that those in their charge may adopt this behavior.

In March, the Board renewed the spa fundraising discounts for our members. This discount is very good and the spa treatments are reported to be great.

We have made some progress towards having an open forum to discuss the duties and limitations imposed upon our judges and the ethical duties of lawyers. While we do not yet have a forum for these discussions, we are hopeful that we can have at least one presentation through the law libraries program, which is funded by the RCBA. I want to take this opportunity to thank Justice Douglas Miller for volunteering his time for this program. I also would like to thank Yoginee Braslaw and Jacqueline Carey-Wilson for their efforts in trying to obtain a forum for these discussions.

We are working to get caught up on our fee arbitrations. Charlotte will be able to put more time into setting up our fee arbitrations after she has completed the training of our new executive director.

The Red Mass was held on April 28, 2009. It is such a moving experience. It covers more than the Catholic mass, and I urge you all to attend when it is scheduled next year.

May is our busy month, with Law Day activities and the good citizenship awards. We are also having the Wortz Distinguished Speaker Series program on June 3, 2009. The nationally known Laurie Levenson will be our distinguished speaker. I encourage all of you to attend.

Finally, on a personal note, I and some of my family attended the Walk to Defeat ALS held in Loma Linda, California in April. This walk is one of the means that the ALS Association utilizes to raise money for the services, research, and other assistance it provides to patients with ALS and to their family members. They have this walk each year, and I urge each of you take the time to join a team and raise funds to help cure this most dreaded disease.

Nominees for RCBA Board of Directors, 2009–2010

The RCBA Nominating Committee has nominated the following members to run for the RCBA offices indicated, for a term beginning September 1, 2009. (See below for their biographies.) Watch your mail for ballots. Election results will be announced at the RCBA General Membership meeting in June.

Harry J. Histen, III, President-Elect 2008-2009, will automatically assume the office of President.

Harlan B. Kistler

President-Elect

Harlan B. Kistler is a native Riverside 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 18 years to Lori and has two sons, Harlan II and Nolan.

Mr. Kistler is currently on the RCBA Board as Vice President.

Robyn A. Lewis

Vice President

Robyn A. Lewis is the managing attorney with the Law Offices of Harlan B. Kistler, which is located in Riverside. Since Ms. Lewis' admission to the bar in 1998, her 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 is currently the Chief Financial Officer of the Riverside County Bar Association, having previously served as its Secretary and as a Director-at-Large. She is a past President of Barristers, serving her term for that organization during 2005-2006. In that capacity, she has also served as a member of the RCBA Board. Ms. Lewis has chaired many Barristers and RCBA social events, such as the BMW Oldtimer's Event and the Holiday Socials, which have served to raise donations for the RCBA Elves program.

In addition to her involvement with Barristers, Ms. Lewis is a contributing member of the Publications Committee and the Continuing Legal Education Committee of the RCBA. She has previously served as a member of the RCBA Golf Tournament Committee and is on the Board of Directors for the Lawyer Referral Service. She also serves as Chair of the Liaison Committee for the Attorney Volunteer Program with the Office of the Public Defender.

Ms. Lewis is on the Executive Board of the Leo A. Deegan Inn of Court. She was the first recipient of the Louise Biddle Award in 2006, which is given to an Inn of Court member for his or her professionalism and dedication to the legal community. Ms. Lewis is a former Mock Trial coach for Santiago High School.

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

Christopher B. Harmon

Chief Financial Officer

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 Secretary 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.

Jacqueline Carey-Wilson

Secretary

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 was elected to serve a two-year term on the RCBA Board as a Director-at-Large in 2008.

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. I assist in coordinating events for the FBA and have written for the Federal Lawyer.

I reside in the City of Riverside with my husband, Douglas Wilson, and our three daughters, Katie (16), Julia (12), and Grace (8). I would be honored to continue to serve the Riverside legal community as secretary for the RCBA.

John D. Higginbotham

Secretary

John Higginbotham is a partner in the Riverside office of Best Best & Krieger LLP. He practices exclusively in the area of litigation, with an emphasis on business, employment, and construction litigation.

John joined BB&K in 1999 as an associate. He graduated cum laude from Brigham Young University's J. Reuben Clark Law School in 1999, and concurrently earned a Master's of Business Administration from BYU's Marriott School of Management. John also received his undergraduate degree from BYU, with a major in Economics.

John lives in Riverside with his wife and two children. He has been an active participant in the Riverside County Bar Association for the past ten years. He currently serves on the Board as a Director-at-Large, and previously served as Treasurer, Vice President and President of Barristers.

Throughout his service to the RCBA, John has been a strong advocate for fiscal discipline and focus on the core missions of the association. John would welcome the opportunity to continue those efforts as Secretary.

Randall S. Stamen

Secretary

Randy Stamen was raised in Riverside. He received his B.A. from UC 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 with 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 and Boy Scouts with his children. He is a Director-at-Large of the RCBA and is a member of the Leo A. Deegan Inn of Court. 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.

Richard D. Ackerman

Director-at-Large

Rich Ackerman grew up in Santa Ana, graduated from Western State University School of Law in 1994, and has been practicing for the last 14 1/2 years. He has spent most of his legal career in Riverside County. He is the managing partner of Ackerman, Cowles & Associates, a firm emphasizing practice in the areas of family law, civil litigation, and bankruptcy. He is married to Stefanie and has four children.

Rich's law practice involves public interest litigation, constitutional challenges, and complex civil litigation. He regularly serves as a judge pro tem for the civil, juvenile, and traffic courts. He started his career by completing volunteer internships with the ACLU and Orange County District Attorney's Office. He served as a full-time law clerk for the Cifarelli Law Firm LLP (Santa Ana) for three years as well.

For the last several years, he has been an active member of the RCBA CLE Committee, served as a scoring attorney for the RCOE Mock Trial Program, and regularly volunteered his time at the Public Service Law Corporation. He also serves as the President/CEO of the Mt. San Jacinto College Foundation, and previously served as the Vice-Chairman of the Murrieta Valley USD Measure K Bond Oversight Committee.

He is seeking a Board position because he wants to further the RCBA's interest in addressing the legal needs of the indigent, maintaining the quality and variety of MCLE programs, increasing public awareness of the need for judicial infrastructure and personnel, and increasing the diversity of the bar as to minorities and the marketplace of ideas. More on Rich can be found at: http://www.inlandvalleyattorneys.com/attorneyprofiles.html.

Yoginee P. Braslaw

Director-at-Large

Greetings! My name is Yoginee Patel Braslaw, and I am a Senior Research Attorney for the Court of Appeal here in Riverside. I cannot believe I have been working in that capacity since January 1999. I love every moment of it. Since coming to Riverside almost ten and a half years ago, I have been an active member of the RCBA as well as the local community. I have been a member of the Publications Committee of the Riverside Lawyer since 1999, and am still currently a contributing member. I am also a current board member of the RCBA as a Director-at-Large, as well as a member of the Leo A. Deegan Inn of Court. I am also a board member of the Junior League of Riverside.

I enjoy being part of the RCBA as well as the local community. Since coming to Riverside, I have seen this city grow to the

forefront in environmental issues as well as community service. I believe I would make a valuable member of the RCBA Board, and would appreciate your vote. Thank you for your time.

Chad W. Firetag

Director-at-Large

Chad Firetag is a partner in the law firm of Grech & Firetag. During his time with the office, he has represented numerous clients involving a wide range of criminal matters.

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 RCBA's Criminal Law Section. He is also active in the Riverside County Mock Trial Competition, having previously served on the Steering Committee and volunteered as a coach.

Mr. Firetag lives in Riverside with his wife, Victoria, and their son, William (3).

Timothy J. Hollenhorst

Director-at-Large

Timothy J. Hollenhorst is a Deputy District Attorney with the Riverside County District Attorney's Office. He currently works in the Sexual Assault Child Abuse (SACA) unit, dedicated to protecting the children of our community. He has been with the office for five years, working in various units, including grand theft auto, identity theft and general felony prosecutions.

Mr. Hollenhorst graduated from the University of California at Santa Barbara with a B.A. in political science. He received his law degree from the University of Kansas.

A lifelong resident of Riverside, Mr. Hollenhorst has been active in both the legal community and his hometown. He has been a member of the Riverside County Bar Association for four years and is a member of the Leo A. Deegan Inn of Court. Mr. Hollenhorst is a member of the Board of Directors of the Riverside Police Department's Youth Court. He currently serves as a mentor to students at the University of California at Riverside who are working towards a career in the law. Mr. Hollenhorst is a past coach for the La Sierra High School Mock Trial team and has also volunteered his time as a scoring attorney during competition. He has participated in Career Days at Rubidoux and Poly High Schools as well as Mock Trial at Magnolia Elementary School. He is the manager of the District Attorney's office softball team.

Mr. Hollenhorst lives in Riverside with his wife, Noreen, a local kindergarten teacher. They are expecting their first child this spring.

James J. Manning, Jr.

Director-at-Large

Jim Manning is a Senior Partner in the Riverside office of Reid & Hellyer, one of the Inland Empire's oldest law firms. His general civil practice has emphasized real estate, property tax, title insurance, media law, warranty and construction litigation throughout Southern California

since 1977. He has also handled certain transactional work in those practice areas.

Mr. Manning is rated "AV" by the Martindale-Hubbell Law Directory, the highest rating given by the most prestigious attorney rating directory in the United States. Additionally, he has served in numerous matters as a private mediator or arbitrator, both in his areas of emphasis and otherwise. He has been a First Amendment panelist for the University of California Extension and is an active member of the Law and Media Committee of the Riverside Bar Association. References are available on request.

Mr. Manning is or was a member of the California First Amendment Coalition, the California Newspaper Publishers Association, the Associated General Contractors of California, the California Land Title Association, the Superior Court Arbitration Panel, the Riverside County Bar Association Dispute Resolution Service, the State Bar of California and the American Bar Association. He has been actively involved in numerous civic and community groups his entire life, having served on the boards of several, including the San Bernardino County Bar Association.

Mr. Manning attended Marquette University and the University of California at Riverside, where he received his B.A. degree in 1971. While serving as a Deputy County Assessor for Riverside County, he entered law school and earned his J.D. degree in 1976 from La Verne College (now the University of La Verne). While at La Verne, Mr. Manning was a member of the Board of Editors for the La Verne College Law Review. He was admitted to practice in California in 1976 and has practiced with the one firm his entire career.

Pamela Y. Valencia

Director-at-Large

Pamela Valencia is an associate of Dennis M. Sandoval, APLC. She received her J.D. from the University of New Mexico and her Master of Tax Law from New York University. Her Bachelor of Arts degree is from the University of California, San Diego. She has passed the exam to be a Certified Estate Planning, Trust and Probate Law Specialist and is going through the administrative process to obtain certification. Pamela has taught Wills and Trusts at California Southern Law School, and plans to take on some of the teaching for consumers and continuing education that the law firm offers.

Pamela is serving as the 2008-2009 Co-Chairperson of the Estate Planning Section of the Riverside County Bar Association. She is also a member of the National Association of Elder Law Attorneys, the National Association of Life Care Planning Law Firms, and the Academy of Special Needs Planners.

Pamela very much enjoys the intimacy and collegial nature of her Estate Planning Section, but has committed herself as Co-Chair to substantially increasing the outreach of the section to the bar in general. She believes that our representation of clients and personal satisfaction in the practice of law is immensely enhanced by networks of personal and practice-related organizations. The RCBA is the single most important network available to us, and she would commit herself to contributing to the professional, social and educational activities of the bar.

Concentrate on Your Style First and Your Questions Second

by David Cannon, Ph.D.

Don't let the title mislead you. It's very important to ask the right questions during voir dire, but the right questions will be far less revealing if the way you ask the questions is wrong. Following are some pointers that will help you get more out of voir dire and the entire jury selection process.

Point 1: You are making a lasting impression.

First impressions are extremely important. Like it or not, people make assumptions about your character, personality, and motives after speaking with you for only a few moments. First impressions form a starting point from which your future behaviors are judged.

We rely on first impressions because they simplify our thought process. There is so much happening in our environments that we rarely have more than a few moments to think about each person we meet throughout the day. Instead, we often have to rely on snap judgments that are based on stereotypes and/or past events in our lives.

First impressions are especially important in the courtroom. Entering a courtroom is a mundane task for most attorneys, but most people who are summoned for jury duty are entering into an unfamiliar setting. Many are first-time jurors whose only courtroom exposure has been through a television show or movie. It is important to remember that the venire, while representing a diverse group of people with unique perspectives and backgrounds, still arrives with common stereotypes of attorneys and the legal system.

The only time an attorney may interact directly with jurors is during voir dire. While attorneys are often busily using this time to identify the most undesirable jurors, individuals in the venire are evaluating the attorneys and attempting to gain insight into each attorney and his or her case.

Attorneys sometimes fail to take advantage of this opportunity to build rapport and trust with the jurors. They forget that jurors are forming lasting impressions. But this doesn't stop jurors from observing the attorney. Just how organized is this attorney? Does he remember my name or my previous responses? Why is he asking me the same question I just answered? Is he really listening to me? Is he kind? Is she genuine? Does she act like a salesperson? Are her questions knowledgeable, sensitive, and appropriate?

Point 2: Keep it conversational.

"Open up" the venire by getting the venire to talk, disclose, and share. There are a couple of different ways to think about this concept. You could think of voir dire as a talk show where you are the facilitator. Or view it as if you are entering a party with a roomful of strangers you would like to get to know. How would you get people to talk to you under these circumstances? Well, tell them a little about yourself first, and then start with easy questions that get people talking. Cast the net widely by asking general questions before you move to specific questions or more sensitive topics. When someone responds, reinforce that response, even if it's not what you wanted to hear. This will set up momentum and get more people talking. If jurors are talking, they are making progress toward sharing valuable information.

Avoid close-ended questions and negative or non-reinforcing tones. Those will quickly close off the jurors, along with any information they were going to share.

Point 3: Don't lose them.

Consider an attorney who reads a list of questions in a stilted manner, as if he is not familiar with his questions and needs to read them verbatim. The questions may contain unfamiliar jargon. They may be closed-ended, eliciting only a simple "yes" or "no" and little else. The questions may be long and difficult to follow. These discourage dialogue and frustrate jurors. The jurors react by tuning out the attorney; they are not listening or paying attention. Attorneys who do this may appear uninspired and boring, as if they are just going through the motions.

Point 4: Be genuine.

Some attorneys are all too aware of the importance of impressions during voir dire. These attorneys sometimes try too hard to build rapport, so they come across as artificial. For example, the attorney may compliment the venire in an attempt to build rapport. That same attorney may use self-deprecation or humor. However, when

this tactic is used in excess, it usually fails. When an attorney appears to be "trying too hard" to establish rapport, it only increases a juror's skepticism of the attorney. Jurors may ask, "What does he want from me? Oh, he is trying to influence me and my decision." Remember that many jurors use stereotypes to help form first impressions. Attorneys are sometimes thought of as opportunists, and tactics such as humor, compliments, and self-deprecation may build upon that stereotype, making a juror question the attorney's motives.

Point 5: Be aware.

Jurors are watching. They are evaluating your body language, vocabulary, and appearance, just as people do in any social environment. They are evaluating your motives and deciding whether or not they like and trust you. Keep in mind that your credibility may be as important to your case as the credibility of your witnesses. Use a rapport-building tactic that is appropriate and comfortable for you. Do not force it or try too hard; jurors will feel that it is not natural.

Look organized, attentive, and familiar with your voir dire questions and with questionnaire responses, if applicable. Let someone else take notes during voir dire so you can focus on the people before you.

Point 6: Draw upon personal experiences.

Can you remember any times in your life when someone asked you a question, but the way they went about it was all wrong? Perhaps your response would have been different had the question been asked in a different way. How do you think the question could have been asked more effectively? Keep that experience close to heart before your next jury selection.

Point 7: Practice!

Practice your voir dire questions in front of family, friends or colleagues before going into the courtroom.

David Cannon, Ph.D., is a trial consultant in the greater Los Angeles area. Please feel free to contact him with any questions at DCannon@JRI-INC.com or at (310) 927-5879.

Intellectual Property Trials: Hire a Teacher as Your Next Technical Expert Witness

by John W. Holcomb

Trials in intellectual property cases, and particularly in patent cases, are challenging for many reasons. One of the primary challenges arises from the vastly different nature of the two audiences who ultimately render the decision in the case: the judge and the jury. The judge, of course, possesses great expertise in the law in general, and probably has at least some experience with patent cases. Accordingly, counsel's trial presentation must be detailed and comprehensive from a procedural and technical legal perspective. On the other hand, to win over the jury, counsel must present a compelling story about real people and the understandable problems that they face. The dilemma for the patent litigator is how to present a case that engages and persuades both the judge and the jury. Choosing the right expert witness who can teach both audiences is the key to bridging that gap.

Satisfying the Judge. Even when a patent case is tried to a jury, the judge plays a very important role by making critical rulings before, during, and after the trial. Before the jury ever hears opening statements, the judge must decide how the claims of the patent in suit are to be construed. That is, pursuant to U.S. Supreme Court precedent, the judge must rewrite and explain, in layman's terms, the technical terms in the claims of the patent so that the jury can understand them and attempt to read them, on the product accused of infringing the patent in suit, or on the prior art, or both. Also, at some point before or during the trial, the judge must choose what instructions to issue to the jury after the close of evidence. These jury instructions usually include several special instructions drafted by counsel that address unique aspects of patent law. Finally, during and after trial, the judge must issue rulings on the parties' inevitable motions for judgment as a matter of law.

Each of these three activities – claim construction, jury instructions, and JMOL motions – requires meticulous preparation and close attention to the technical details. Counsel's failure to achieve a mastery of both the law and the technology at issue will almost certainly result in adverse rulings by the judge. In most cases, counsel will retain one or more technical expert witnesses, both to teach counsel the relevant technology and to provide declarations, opinions, and live testimony in the case. Accordingly, it is critical to retain experts who are technically competent and well-respected in their field. Ideally, the judge will be impressed with the expert's credentials and confident that the expert is providing a credible and accurate opinion.

Engaging the Jury. In order to maximize the probability of obtaining a favorable verdict from the jury at trial, counsel must tell a compelling story. As every trial lawyer knows, jurors are easily bored, so the best trial presentations are interesting and short. Counsel needs to prepare witnesses so that their testimony communicates a story that the jury will believe and that will cause the jury to empathize with the client. In patent cases, counsel must avoid tedious forays into scientific details that the jury almost certainly will not understand or, worse, that will intimidate the jury and potentially sway it against the client.

Despite the danger of alienating the jury, the task of presenting arcane scientific evidence in patent cases must be accomplished. Indeed, failing to get into evidence the technical details of the case that are favorable to your client will almost certainly result in dire consequences, typically through the judge's adverse ruling on the opponent's JMOL motion. Usually, the best way to obtain the admission of that scientific evidence is through expert witness testimony. Counsel's objective, then, is to retain an expert witness who not only possesses the right technical credentials, but also makes a good witness.

Choosing the Technical Expert. Did you ever have a teacher you loved? Did that teacher make you enjoy a subject that you had never enjoyed (and perhaps had even disliked) before? Did that subject involve math or science? Most people have had that experience sometime in their academic lives. The qualities that made your favorite math or science teacher successful are the same qualities that you should seek in your technical expert witness in a patent case.

It should then come as no surprise that gifted professors often make wonderful technical experts. Accordingly, a good place to start when searching for a technical expert is a local college or university. In fact, many professors supplement their income by offering their services as a technical expert witness. If you identify a potential candidate who has stellar technical credentials and expertise through this route, consider asking a friend who is not a lawyer and who is not versed in the relevant technology (and who is therefore most like the jurors who will decide your case) to attend one of the professor's lectures. If your friend finds the professor interesting and engaging and not deathly boring, then you may have found your technical expert.

Of course, there are many ways to search for technical experts, and not every successful expert witness is also a

professor. However, the qualities that make someone a gifted lecturer – the abilities to present complicated ideas in interesting ways, to capture and maintain the rapt attention of the listener, and, ultimately, to get the point across – will also likely make him or her an effective expert witness. After all, the technical expert's ultimate goal is to teach the judge and the jury that the expert's client has the winning case.

Counsel must win the case before both the judge and the jury. That task is particularly difficult in patent cases, where some of the most critical evidence is technical and scientific in nature. The best way to reach and engage both of those audiences is through an expert witness who is a gifted teacher. Therefore, consider looking first to academia when you are retaining your next technical expert witness.

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Statements of Decision and Appellate Review

by Kira L. Klatchko

Often viewed as an opportunity to secure an already-won victory, statements of decision are frequently drafted as lopsided documents not reflective of what happened at trial or what the trial court ultimately had to say about it. That's a shame, and often a problem on appeal, because a statement of decision is often the only way to connect law, evidence, and verdict, and reversible error often lurks where those things cannot be reconciled.

Bridging the gap between the trial and appellate court, particularly where the facts are at issue, a statement provides a window into the decision-making process that would otherwise be obscured by the doctrine of implied findings. In the absence of a statement of decision, an appellate court will automatically infer the trial court made all necessary factual findings to support its judgment. Its review, always refracted through the prism of the standard of review, will be for substantial evidence in support of implied findings favoring the judgment. (*In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 1159.)

When a court implies findings, the outcome on appeal almost always favors the prevailing party below. The statement of decision removes the highly deferential shelter the doctrine of implied findings provides for trial courts and allows for deeper review on appeal. For that reason, the statement of decision has been labeled the appellate court's "touchstone" for determining whether a decision is supported by the facts and law. (*In re Marriage of Sellers* (2003) 110 Cal.App.4th 1007, 1010; *Slavin v. Bornstein* (1994) 25 Cal.App.4th 713, 718.)

A party is not entitled to a statement of decision in every situation. Under Code of Civil Procedure section 632, a party may request a statement of decision only "upon the trial of a question of fact" – that is, either a non-jury trial or a "special proceeding" that shares many of the characteristics of a trial. When the right to a statement is questionable, courts consider a number of factors, including the importance of the issues at stake, the type and significance of rights involved, and whether appellate review can be effectively accomplished in the absence of a statement of decision. (*In re Marriage of Sellers, supra,* 110 Cal.App.4th at p. 1040; *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660.) A motion is not a "trial," and statements of decision are rarely, if ever, appropriate following a motion, even one that involves an evidentiary hearing. (*Lien v. Lucky United Prop. Invest., Inc.* (2008) 163 Cal.App.4th 620, 624; *In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040.)

Assuming a statement of decision is appropriate, a party must still make a timely request specifying the controverted issues the statement should address. (Code Civ. Proc., §§ 632, 634.) In a short-cause matter lasting one calendar day, or fewer than eight hours over multiple days, a party must request a statement before the matter is submitted for decision. (Code Civ. Proc., § 632.) If the trial lasts longer, a party has 10 days after the court announces its tentative decision to make a request. (*Ibid.*) In either case, a request cannot be merely for a statement of decision; it must be for a statement as to particular controverted issues. (*Ibid.*)

If a statement is not timely requested or if the request does not specify controverted issues, the request may be deemed waived. (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140.) Because the statement may be critical to determining issues on appeal, failure to render a statement of decision after a timely and appropriate request is usually considered to be reversible error per se. (*Espinoza v. Calva* (2009) 169 Cal.App.4th 1393, 1397-98; *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1127.)

Once a proper request is made, it usually falls to the prevailing party to draft a statement that explains the court's decision. The statement should adequately explain the factual and legal basis for the court's decision as to each of the principal controverted issues by stating ultimate factual and legal conclusions, as opposed to evidentiary facts. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590; *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.) A statement need not contain an exhaustive recitation of facts or answer every question posed by a party; it should address core facts. (*Central Valley General Hosp. v. Smith* (2008) 162 Cal. App.4th 501, 513.) Failure to address an issue in a statement rarely constitutes reversible error, but in some cases, where a court fails to state an ultimate finding "on a material issue which would fairly disclose the trial court's determination," the error may be prejudicial if findings on the omitted issue would controvert or destroy other findings. (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.) Reviewing courts examine the appellate record for substantial evidence to support the ultimate factual findings contained in the statement, so a prevailing party that is overly zealous in drafting a statement of decision may create problems by adding conclusions to the statement that cannot be supported by the record.

Under Code of Civil Procedure section 634 (section 634), in order to argue on appeal that the trial court failed to make a particular finding, a losing party must first raise the

issue in the trial court by objecting to the statement of decision. Failure to object to an "omission or ambiguity" in a statement may constitute waiver of the issue on appeal (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132), the idea being that the trial court should have an opportunity to correct any error before entering judgment (see *Phillips v. Phillips* (1953) 41 Cal.2d 869, 873). Though section 634 addresses objections to "omissions or ambiguities," as a practical matter it is often wise to construe the phrase broadly to include "misstatements," lest you risk exposing yourself to a waiver argument on appeal. Broadly speaking, if a problem with a proposed statement is not addressed by timely objection in the trial court, the reviewing court will imply findings just as it would if there had been no statement of decision with respect to the matter at issue. (*In re Marriage of Arceneaux, supra,* 51 Cal.3d at pp. 1133-1134.) On the other hand, if a party properly objects to a problem with a proposed statement, the reviewing court will not presume the correctness of the judgment as to the facts and issues embraced in that problem. (Code Civ. Proc., § 634; see *Agri-Systems, Inc. v. Foster Poultry Farms* (2008) 168 Cal. App.4th 1128, 1135.) Section 634 does not address alternative proposed statements, so assume filing an alternative statement is not equivalent to filing an objection.

Overall, the statement of decision poses numerous complex issues for trial and appellate practitioners. The key take-away here is that each part of the statement of decision process, from request to issuance, deserves careful consideration because each part narrows the issues on appeal and impacts the level of deference accorded the trial court's judgment.

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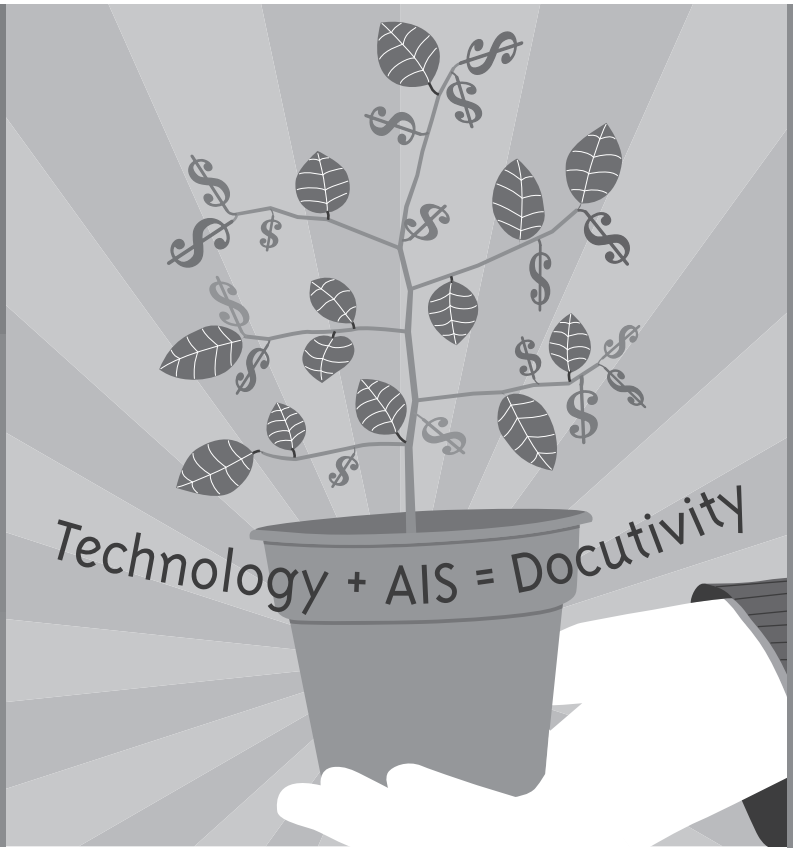

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Making the Record You Need for a Winning Appeal

by Brian C. Unitt

Every trial lawyer who handles civil cases is eventually confronted with a trial court ruling or misconduct of opposing counsel that jeopardizes a favorable verdict. It may be a defense lawyer who insists on attributing fault to a party that was dismissed after winning its motion for summary judgment, despite an in limine ruling precluding such evidence or argument. (See Code Civ. Proc., § 437c, subd. (m).) It may be a plaintiff's lawyer who makes a "Golden Rule" argument (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 182, fn. 11), or a defense attorney who argues the poverty of the defendant and the consequent "devastating" impact of a verdict for plaintiff (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552-553). It may be a trial judge excluding all reference to roadway design standards not used by the defendant city engineering department, or refusing to allow a witness to be examined on a subject matter ruled irrelevant.

In each of these situations, and hundreds of others, the trial lawyer is confronted with a conflict between the tactics of getting the case to the jury and the strategic considerations of preserving the issues for appeal. There is the legitimate concern that the jury may be distracted or annoyed by prolonged wrangling at the sidebar, or that jurors may speculate as to what is being "hidden" from them. These are not trivial concerns, so there is a strong temptation to make a perfunctory objection and move on, or to accept the judge's offer to give a cautionary instruction that will "clear everything up." Unfortunately, if the poison has its effect and the verdict goes against you, this expedient may not be enough to preserve the issue for appellate review.

According to the California Supreme Court, the correct legal terminology for loss of the right to challenge a ruling on appeal is "forfeiture," the failure to preserve a claim by objection or other conduct, as distinguished from "waiver," the intentional relinquishment or abandonment of a known right. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293.) It is not enough to show an erroneous ruling; the California constitution permits reversal of a judgment only if, after an examination of the entire cause, including the evidence, it appears that the asserted instructional, evidentiary, pleading or procedural error resulted in a miscarriage of justice. (See Cal. Const., art. VI, § 13; see also Code Civ. Proc., § 475, Evid. Code, §§ 353, 354.) A miscarriage of justice is found if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) The appellate court reviews the entire record and makes an independent determination as to whether any error was prejudicial. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) It is crucial that the record is sufficient to reveal the error and counsel's diligence in attempting to head it off.

Misconduct by opposing counsel, such as the examples mentioned at the beginning of this article, is not assertable on appeal unless the record shows that the appellant made a timely and proper objection and requested that the jury be admonished, unless the misconduct was so prejudicial that it could not have been cured by a cautionary instruction to the jury. (See, e.g., *Cassim v. Allstate Ins. Co., supra*, 33 Cal.4th at pp. 794-795; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1163; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 129-130; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860.) However, the failure to request an admonition does not forfeit the misconduct issue if the trial judge immediately overruled the objection, thereby depriving the objecting party of the opportunity to request the admonition. (*Cassim v. Allstate Ins. Co., supra*, 33 Cal.4th at 795.) In other words, the failure to continue to object and request an admonition may be excused, where the misconduct is serious and repeated, and objections have been overruled. (See *Love v. Wolf* (1964) 226 Cal.App.2d 378, 392.)

It is improper for counsel to mention or to bring before the jury matters the court has previously ruled inadmissible. (See *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118, 123 [opening statement, voir dire].) However, failing to object each time excluded matter is referred to jeopardizes a finding of misconduct by the appellate court. Also keep in mind that if the issue is failure to admonish witnesses as to the scope of an in limine order or exclusionary ruling, it is necessary to make a record that counsel actually failed to admonish the witness.

Unsuccessful appellants are often admonished by the courts of appeal that a party may not make the tactical decision to remain silent, see how the case comes out, and claim misconduct if the verdict goes against it. In the absence of a timely objection, the error is forfeited, unless it is so aggravated that it could not have been cured by admonition. (E.g., *Menasco v. Snyder* (1984) 157 Cal. App.3d 729, 733.) In this regard, the risk is that failure to object will be found by the appellate court to have deprived the trial judge of an opportunity to cure the misconduct by a timely admonition, as well as of the opportunity to establish a boundary between permissible and impermissible inquiry into a particular subject. For instance, in *Neumann*

v. Bishop (1976) 59 Cal.App.3d 451, the defendant argued on appeal that there was a "deliberate course of action to distort the case before the jury . . ., and that any objections and admonitions would have been ineffective to curb the prejudice resulting from this torrent of misconduct." (*Id*. at p. 488.) After reviewing the record, the court said: "[W]ith but few exceptions, the errors could have been checked when they first appeared by proper objection." (*Ibid.*) The *Neumann* court then quoted *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, as follows: "'Defendant urges us to ignore the rules of procedure relating to the "magic words" of proper objection and admonition. But the procedure outlined above is not a meaningless ritual; it has been designed through judicial experience to prevent by timely words of caution the very problem with which we are here concerned.'" (*Neumann v. Bishop, supra,* (1976) 59 Cal.App.3d at pp. 488-489, quoting *Sabella v. Southern Pac. Co., supra,* 70 Cal.2d at p. 320.)

The *Sabella* court defined the appellate decision process this way: "Each case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances." (*Sabella v. Southern Pac. Co., supr*a, 70 Cal.2d at pp. 320-321, fn. omitted.)

The process is illustrated in *Cote v. Rogers* (1962) 201 Cal.App.2d 138, in which a widow sued for the wrongful death of her husband, who had been killed in a truck accident. The defendant argued that decedent caused the accident by improperly stowing a flashlight in his truck so that it rolled on the floor and lodged under the brake pedal. Defense counsel sought to introduce an article from a Highway Patrol publication expressing this conclusion, but it was excluded as hearsay. Counsel then provided the article to the local newspaper, which published its substance, along with a list of the names of the jurors, during the trial. The content of the article was then reported on the radio. On appeal, defense counsel argued that claimed misconduct must be called to the attention of the court at the earliest possible time, or any objection thereto is forfeited, and the record showed neither timely objection nor motion for mistrial. (*Id*. at pp. 143-144.) It was undisputed that throughout the entire time defendants' counsel was attempting to have the magazine article received in evidence, he was holding in his hand and gesturing with what purported to be the particular issue of the magazine containing the article relative to the accident. The court noted that "defense counsel knew that the article, as such, was not admissible in evidence and that his continuing reference to it, while holding a copy of the magazine in his hand, was calculated solely to impress the jury that here was a statement by a highly respected law enforcement agency of the State of California whose province it was to investigate the very question in issue, but because of some obscure, highly technical rule of evidence unknown to it, the jury was being precluded from the benefit of expert information which would have decided the very point in issue before it." (*Id*. at p. 144.)

The court concluded that "where the actions of defendants' counsel were '. . . of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, the absence of such assignment and request will not preclude the defendant from raising the point on appeal [citing cases]; . . . such cases furnish ground for reversal; and where it fairly appears, as here, all of the evidence considered, that the irregularities complained of in all probability largely influenced the jury in arriving at their verdict . . . such result is a miscarriage of justice.'" (*Cote v. Rogers, supra*, 201 Cal.App.2d at p. 144.)

As with misconduct of counsel, challenges on appeal to the erroneous admission of evidence must be supported by a showing of a timely and proper objection or motion to exclude or strike the evidence, clarifying the specific ground for the objection or motion. (See Evid. Code, § 353, subd. (a); *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1226-1227, fn. 13.) The reasons for this rule are the same as those governing misconduct of counsel. There is an exception to this rule, however. Issues are preserved for appellate review despite the failure to interpose a required objection at trial where it would have been "fruitless or an idle act" to object. (See *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.) The failure to obtain a trial court ruling on evidentiary objections does not forfeit the right to appellate review if counsel made a diligent effort to secure a ruling from the trial court, to no avail. (*Id*. at pp. 784-785 [where trial court failed to rule after two requests, requiring a third request would have been fruitless].)

Likewise, failure to make an adequate offer of proof at the trial court level ordinarily precludes consideration on appeal of an allegedly erroneous exclusion of evidence. (See Evid. Code, § 354; *Heiner v. Kmart Corp*. (2000) 84 Cal.App.4th 335, 344; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1433.) However, "[w]here an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal, and an offer, if made, may be broad and general." (*Beneficial etc. Ins. Co. v. Kurt Hitke & Co.* (1956) 46 Cal.2d 517, 522 [refusal to allow extrinsic evidence as to the meaning of an insurance policy]; *Lawless v. Calaway* (1944) 24 Cal.2d 81, 90-92 [applying this rule where the trial court refused to allow the plaintiff to examine the defendant physician as an expert witness under a former version of Evid. Code, § 776].)

There is a reward for the trial lawyer who carefully preserves the record for the types of error discussed in this article. In an appeal based solely on the asserted absence of substantial evidence to support the verdict or judgment,

the evidence must be considered in the light most favorable to the prevailing party (*Chodos v. Insurance Co. of North America* (1981) 126 Cal.App.3d 86, 97), and the appellate court may not weigh conflicts and disputes in the evidence. (See, e.g., *Estate of Teel* (1944) 25 Cal.2d 520, 526-527.) On the other hand, where the appellate court is required to decide whether the erroneous exclusion of evidence or the failure to curb misconduct was prejudicial and resulted in a miscarriage of justice, it must weigh the evidence. (See, e.g., *Estate of Arbulich* (1953) 41 Cal.2d 86, 93-94.) This requirement significantly aids an appellant where the evidence was conflicting, but when fairly considered, should have preponderated in his or her favor. The chance to erode the presumption in favor of the judgment, and thus in favor of the respondent, will amply justify the efforts taken during trial to make a solid record.

Brian C. Unitt specializes in appellate law and is a partner with Holstein Taylor & Unitt.

Judicial Profile: Hon. Michael J. Rushton

by Evelyn Cordner

First impressions can be wrong. I think it was the haircut that threw me. Turns out Judge Michael Rushton, one of Riverside County's newest judges, is not at all what I expected.

While waiting in the back of his dependency courtroom to interview him over the lunch hour, I was able to observe one of Riverside County's newest superior court judges at work. He had two boys before him: The younger one was going home and the older one was not. The younger one could hardly contain his happiness as he sat next to his mother, but the older boy, wearing the identifying yellow t-shirt of a current resident of Juvenile Hall, sat somber-eyed at the counsel table. The judge spent time talking to the boys and their mother, demonstrating his genuine concern. The older boy was messing up and the judge talked to him about it, really talked to him.

Michael J. Rushton and family

When court adjourned for the lunch hour, we met in his chambers. I was surprised to learn he is only 43 years old (he seems so much older). He has been married 20 years, and he and his wife, Kimberly, an ESL (English as a Second Language) teacher, are the parents of four children ranging in age from 10 to 19.

He grew up in Orange County, graduated from Tustin High School, attended one year at Saddleback Community College, left for a two-year mission assignment (he is Mormon) in Buenos Aires, where he learned his fluent Spanish. He loved his time in Argentina, the lively people and the food. He found his experiences with a different culture illuminating. Returning to the USA, he enrolled at Brigham Young University, where he met his wife-to-be. Once he graduated, he went directly into law school at Hastings in San Francisco. Unlike most of his fellow law students, he was married and was already a parent. He believes being a father and husband helped him focus during law school. He was ambitious and felt a strong responsibility to his family to succeed. After law school, it was straight to the Riverside County DA's office. He knew he wanted to practice law as a prosecutor. What was valued in the family of his youth, and subsequently embraced by him, was not how much money he could make, but what contributions to his community he could make. Law was interesting to him. "I thought I would be good at it."

When asked what values he developed as a prosecutor, he replied, "First, to do justice. Second, to exercise prosecutorial discretion," and he added a third, "community safety." He was not afraid to dismiss for lack of evidence or in the interests of justice, both as a trial attorney and as a supervisor. He will hold prosecutors and defense attorneys in his courtroom to the highest professional and ethical standards. As for his expectations of the attorneys in his courtroom, "I expect them to do the right thing . . . the better they do their jobs, in terms of the law, the facts and the arguments, the better I can do my job.

When asked how he was going to sever his advocacy as a past prosecutor from his new role as a judge, he replied with honesty, "I never had to be neutral. It will be a challenge for me." Addressing this issue, he added that after leaving the DA's office, he took two months off. He said this helped with the transition. The current assignment at juvenile court hearing dependency matters under Welfare and Institutions Code section 300, he feels is also giving him the needed transition time from criminal cases.

Off the bench, Judge Rushton's greatest enjoyment is his kids. "Our number one priority is their happiness and success." He and his wife value education and set the bar high for their four children. "My wife and I have no desire to push any one of them towards a certain career path. They will find their own way." They all seem pointed in the right direction. The oldest, Michael, age 19, is on his two-year mission in Poland and will be entering BYU upon his return. Spencer, at 17, is a good student and a high school athlete. Both boys are gifted musicians, and all four children were introduced to the piano at an early age. Later, the boys asked for guitars; Judge Rushton says, "I said okay, as long as they promised not to join a rock and roll band!" (They later broke their promises.) 12-year-old Sara is a straight A student, plays club soccer and has exceptional study skills. The youngest is 10-year-old Annie, "a great conservationist who wants to know the nuts and bolts about everything." He admits the two of them are reality show junkies . . . especially when it comes to American Idol. He also enjoys boating and golf.

Ending the interview, I found myself, a retired public defender, warming up to this ex-DA, now judge. If he can truly find his way into the neutral waters he must navigate as an impartial jurist and stay that course, he has a lot of potential. Best wishes, Judge Rushton.

Evelyn Cordner previously worked at the office of the Public Defender and is now self-employed, working with the Conflict Defense Panel.

Ten Ways to Make a Grown Judge Weep,
or How Not to Prepare for and Conduct a Trial in the U.S. District Court

by Virginia A. Phillips, United States District Judge

1. **Do not take your "trial date" seriously.** About a month or so beforehand – and well after the discovery cut-off date – propound your first written discovery or set your first deposition or two. Then, no earlier than a week before the Pretrial Conference date, submit a stipulation, or better still, an ex parte application, to continue the trial date and all other case management deadlines, explaining that you need more time to do discovery and to comply with the court's requirement to participate in a settlement conference or mediation. Explain to the court that you are a busy lawyer with other cases to handle, opposing counsel has not been cooperative, and you have a "prepaid vacation" starting the first week of trial.[1]

2. **Do not be overly concerned with the requirements for the Pretrial Conference.** Never, ever read Federal Rule of Civil Procedure 16, Local Rule 16, or the Standing Order of the judge to whom your case is assigned. Treat the deadlines for meeting with your opposing counsel and for filing your memoranda of contentions of fact and law, proposed voir dire questions, joint exhibit and witness lists, jury instructions, proposed Pretrial Conference Order, and motions in limine as suggestions or ideals, rather than "requirements." For example, if the Pretrial Conference is scheduled for a Monday afternoon, file the pretrial documents on Monday morning, which ought to give the other side enough time to respond, and the judge plenty of time to read everything before the conference.[2]

3. **Do not waste your time crafting a proposed Pretrial Conference Order.** True, Rule 16 and the case law state that the PTCO supersedes the pleadings and controls the proceedings. And yes, "technically," each side is required to set out all the evidence it intends to introduce to prove each claim or defense on which it has the burden at trial. To do this requires careful thought and analysis as to which claims and affirmative defenses remain viable after the conclusion of discovery and which should be abandoned. Ouch! Thank heavens for word processing programs – now all you have to do is cut and paste everything from the complaint or answer right smack into the proposed PTCO and bingo! You're done. When briefing the legal issues, if you find that your earlier work relies on California precedent on procedural and evidentiary issues, resist the temptation to refresh your memory about that case from your first-year civil procedure class (Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). When it comes to exhibits, use the same boilerplate list of objections to each and every one of your opponent's proposed exhibits; do not examine each one to determine if you have a good-faith basis to object to its admission. In other words, never take advantage of the opportunity the PTCO presents to highlight the strengths of your case.

4. **File as many motions in limine as possible, except on issues that need briefing.** Do not check to see if the assigned judge limits these (see Rule 2, above: never read the Standing Order). Assume your opposing counsel is an unprincipled and unlettered rogue, and the court, no matter how experienced, is unaware of such arcane principles as the impropriety of referring to insurance coverage in front of the jury. If the case does present novel evidentiary issues, however, do not reveal them in pretrial motions or research them ahead of trial. Everyone loves a surprise.

5. **Do not take the Pretrial Conference seriously. (See Rule 1, above.)** If you believe you will not be going to trial on (or very close to) the date set, it follows you will not be prepared to discuss with the court the following matters at the Pretrial Conference:

   - The expected testimony of each witness on your witness list, why that testimony is neither cumulative nor duplicative, and the expected length of time needed for the witness;
   - The total length of time needed to present your case, and time limits for opening statements and closing arguments;
   - Any anticipated problems with scheduling of witnesses;
   - Any expected evidentiary issues that may arise during trial;

1 Do not bother to explain why you did not bring this to the court's attention when the trial date was selected at the Scheduling Conference nine months ago. Most judges sign anything that passes in front of them and won't remember or notice that you are trying to change a trial date you agreed to earlier.

2 The Local Rules require that blue-backed, exhibit-tabbed copies of all documents filed or lodged with the court be delivered to the judge's chambers. If you fail to comply with this requirement and a member of the court's staff calls to remind you to deliver your chambers copy, take advantage of the golden opportunity to express your indignation and dissatisfaction with the court's rules.

- Any deviations from the standard order of proof that either party suggests might be helpful or necessary during the trial (e.g., consecutive presentation of expert testimony);
- Needed preliminary instructions for the jury, including instructions on the elements of each claim and affirmative defense;
- The court's practices regarding jury selection and attorney voir dire; and
- Requests or motions to bifurcate or sever issues for trial.

In short, feel free to miss the opportunity to impress your adversary with what promises to be a polished and persuasive presentation at trial.

6. **When in doubt, make ad hominem attacks, blame others, and ignore unfavorable rulings.** Rather than responding to the merits of an argument, just get personal. "Plaintiff's counsel must be suffering from amnesia – I just told her yesterday that I'd get her those documents . . . ." And don't limit this tactic to your opposing counsel. Rather than attempting to persuade the court by citing case law and applying it to the facts of your case, begin your arguments over rulings in the following fashion: "The court got it wrong here, right from the beginning . . . ." Once trial begins, ignore unfavorable rulings on motions in limine and other pretrial matters, and when called to explain, simply state you disagreed with the ruling and therefore were not bound by it. The opportunity to blame others is not reserved for trial, of course; use it early and often, as in "I told my associate /paralegal/secretary to file that proof of service/research that issue/call that witness." Ignore common courtesies and courtroom demeanor; e.g., remain seated when addressing the court and when the jury enters and leaves the courtroom, don't seek leave to approach the witness, and pound on the counsel table rather than examining from the lectern.

7. **Use voir dire to argue your case, curry favor with the members of the jury panel, repeat information the judge has already imparted, and ask jurors to repeat answers you didn't listen to when first given.** This will increase the chances that the lawyers in the next case tried in front of the judge won't get the opportunity to conduct voir dire.

8. **Ignore the time limits placed on opening statements and closing arguments, and the distinctions between them.** If you assume the judge has probably forgotten the time limits set for opening statements at the Pretrial Conference, then you can avoid the tiresome work of preparing a thematic, organized and succinct statement of the facts you intend to present to the jury during the next few days or weeks. Instead, you can ramble, rant and rave at the jury in a disorganized fashion, but one which, you hope, reminds them of their favorite character in some television show about lawyers. During your closing argument, don't synthesize the evidence actually presented during the trial and link it to the law — for example, using the jury instructions as a guide to assist the jury. Instead, save preparation time and simply argue to the jurors what you wanted to present to them. When in doubt, engage in ad hominem attacks on opposing counsel and blame others for the shortcomings in your performance or presentation of your case. (See Rule 6, above.)

9. **Pay scant attention to the Federal Rules of Evidence.** Do not spend time before trial analyzing whether or not a particular witness can testify to certain facts, e.g., whether he or she has the personal knowledge or other necessary foundation, or whether a document is admissible. And don't limit yourself to the bases for objection set out in the Federal Rules. Be creative: for example, object, "Unfair and prejudicial and biased," without confining yourself to Rule 403, which requires that relevant evidence may be excluded only if its probative value is substantially outweighed by its unduly prejudicial nature; or object, "The document speaks for itself," which is useful if the document is otherwise admissible but awfully damaging to your side.

10. **Above all, do not respect the time and sacrifice of the members of the public who are called to serve as jurors.** In other words, do not prepare your case. Examine witnesses without a single question prepared ahead of time. Seek sidebar conferences with the judge to deal with evidentiary issues you failed to anticipate and research before trial began. Raise issues with the court at the last minute, such as the need for hearings to determine the competency of a witness or the foundation for an expert witness's testimony, to increase the chances that the jurors will spend time during the trial day cooling their heels in the jury room rather than hearing testimony. Do not become familiar with the evidence display equipment in the courtroom before trial begins, so that when you attempt to use it the first time, with the jury in the box, you fumble for several minutes and keep everyone waiting. Arrive late in the morning and return late after lunch. This will increase everyone's sense of anticipation for your presence in the courtroom.

Finally, settle your case on the morning of trial, with jurors waiting outside the courtroom who have rearranged their personal and professional schedules in order to serve as jurors on your case. By wasting their time and good will, you will damage their perception of the legal system and lawyers, and perhaps decrease the chances they will appear the next time they are summoned. You may also have made it more difficult for another case to begin trial that day or week. And congratulations, you may have earned an award of sanctions in the form of an order compelling you to pay the costs of assembling the jury panel.

In Memoriam: Paul E. Fick

by Sara L. Danville

On January 3, 2009, our community lost more than a lawyer, we lost a true visionary. That visionary was Paul Fick.

Paul and his wife, Carol, moved to Riverside from Pennsylvania in 1990. He graduated from Southwestern University School of Law, after completing his course work in just two years. On December 17, 1990, he became a Riverside County deputy district attorney. During his 16 1/2 years in our office, Paul had two areas of expertise. He tried statutory rape cases early in his career. However, it was the expertise that he developed in worker's compensation fraud prosecutions that led to his statewide notoriety. He created unique ways of investigating these crimes, which are now models for other prosecuting agencies. Paul handled one of the largest worker's compensation fraud cases ever prosecuted in Riverside County, People v. Mobray, which resulted in multiyear prison sentences and a $5.4 million restitution order for the three defendants.

Paul E. Fick

While I worked with Paul and admired his abilities as an attorney, it is how Paul spent the rest of his time that has created such a void in this town.

Paul loved the arts and he loved his community. He dreamed of "Riverside: City of Arts and Culture" many years before he helped make it a reality. He not only talked the talk, but he walked the walk. He was Board President and an actor with the Riverside Community Players. He was on the board of the Riverside Philharmonic, the Riverside Art Museum and the Riverside Arts Council. He was involved with the Dickens Festival and the Riverside Ballet. In 1997, Paul co-founded the Riverside Public Library Foundation and served as its president. He also held board positions with Riverside Downtown Partnership and the March Field Museum Foundation. He was a president of the Greater Riverside Chambers of Commerce. In 2002, he was very instrumental in raising funds for the library by campaigning for Measure C. In 2003, Paul ran for a seat on the Riverside City Council and was narrowly defeated in a runoff.

Paul was also a member of the Kiwanis Club. For years, he had a vision of the Kiwanis Grove Arbor walk. It would feature walkways, benches, and a walking map of tree information. This year, Kiwanis Club President Nancy Melendez is making Paul's dream a reality. On Saturday, April 4, 2009, phase I of the Kiwanis Grove began with a tree planted in Paul's name. The grove can be found at the Riverside Corona Resource Conservation District at 4500 Glenwood Drive in Riverside, which is across the street from Evergreen Cemetery where Paul was laid to rest on January 9, 2009.

The most important person in Paul's life was his wife, Carol. She loves the arts and her community just as much as Paul did. Carol is a vocal instructor and she, too, served on the board of the Riverside Community Players. In December 2007, Paul gave his wife a unique gift for their 25th wedding anniversary: He threw a surprise party for her at the Coffee Depot. Paul told Carol that she needed to perform for an arts fundraiser. Of course, Carol eagerly obliged. I was there to see the joy on her face when the lights came on and she was surrounded by their daughters, who live out of state, and several friends. During the course of the evening, Paul gave Carol a wooden music stand and a trip to Europe as anniversary gifts. The gift that brought tears to Carol's eyes was an endowment called the Carol Fick Fund for the Arts, set up through the Community Foundation. Instead of bringing anniversary gifts to the party, Paul requested that we donate to the fund, if we were so inclined. It was a night I will always remember. I was honored to be a guest.

On May 18, 2007, Paul retired as a deputy district attorney to start the career of his dreams. On June 1, 2007, he became the first Director of Development for the Riverside Art Museum. Later that year, he had to give up that position to fight a year-long battle with cancer. Throughout that time, he maintained his incredible sense of humor and his zest for life. He traveled to Europe and attended a concert at the Riverside Philharmonic. Unfortunately, the cancer took his life on January 3, 2009. Paul did more for the City of Riverside in the 18 plus years that he lived here than most people do in a lifetime. This community was lucky to have him. I know I am a better person because he was my friend. I think of him often as I look at the art on the walls of my home and my office.

Sara L. Danville is an Assistant District Attorney for Riverside County.

Opposing Counsel: Maura R. Rogers

by Donna Thierbach

I still remember meeting Maura Rogers when I started with the Public Defender's office. We were both assigned to misdemeanors, and I admired her caring demeanor and her ability to get along with everyone, even those sometime difficult district attorneys!

She was born in New Orleans and moved to Charlotte, North Carolina, at age 10, where she remained until college. Maura's father was a minister and her mother a librarian. Her father was very influential in developing her sensitivity to human rights issues, which were something they talked about frequently. He and her mother would also take Maura and her younger sister to soup kitchens and homeless shelters to serve meals and help out. Although there were no other lawyers in her family, she knew by high school she wanted to be, not just a lawyer, but a public defender. Her sister also seemed to have developed the desire to help others, as she is now a pediatrician in Virginia. Her parents? Both retired, and her father is busy building their own home in the mountains of Tennessee.

Maura went to college at Wake Forest University in Winston-Salem, North Carolina, and she graduated with a bachelor's degree in history. After graduation, she took a year off and in worked in Washington, D.C. with the Bread for World Institute, an organization focused on world hunger education. Then she attended law school at the University of Richmond, Virginia for two years. So how did she end up in California? She met her former husband in Washington D.C. When he was accepted at Claremont Graduate School, they spent their honeymoon driving a U-haul across the country to California. Once in

Maura R. Rogers

California, she interned with the ACLU and attended Loyola Law School as a visiting student. She returned to the University of Richmond for graduation.

When Maura graduated from law school, most Southern California public defenders' offices had a hiring freeze, but as luck would have it, Riverside was hiring. She was hired in 1996 and has remained loyal to the office. She has served assignments in misdemeanors, preliminary hearings, juvenile, and the violation of probation calendar. Since 2001, she has been in her current assignment, Mental Health Court, which is an alternative sentencing court for persons with mental illnesses.

Despite her busy public defender schedule, Maura has still made time to be involved in the Inn of Court for the past two years. As a member of the Riverside County Bar Association, she has written an article for the Riverside Lawyer about Mental Health Court. She especially enjoys these associations, because they provide her with an opportunity to get to know judges and attorneys from other disciplines of law. If that is not enough, she is also a member of the University of Riverside Human Research Review Committee, which reviews research protocols that involve human subjects.

So what does Maura do with all her free time? Her hobbies include everything her eight-year-old son enjoys, such as Little League, football and riding bikes. She loves hanging out with close friends, traveling and baking. She also plays the piano and cello.

Now after interviewing her, I can certainly understand the basis of her compassion and the reason for her choice of vocations.

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

Classified Ads

Office Space – Riverside
Office space available in the Tower Professional Building located on the corner of 13th and Lime Street in downtown Riverside. We are within walking distance to all courts. All day parking is available. Building has receptionist. Please call Rochelle @ 951 686-3547 or email towerpm@sbcglobal.net. Residential services available also.

Professional Office Space
2305 Chicago Avenue, Suite B, Riverside. Includes 2 executive offices, 1 large conference room, large bullpen area to accommodate 4 to 5 workstations, filing or storage room and/or secretarial workspace. Please call Debbi to schedule an appointment at (951) 240-6283.

For Sale
Free standing professional office bldg. Located near downtown. Contact Jeff (714) 612-0944. United Real Estate Group.

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Office spaces and executive style suites available in the Cooley Ranch area of Colton. 100 sf. to 2,174 sf. Centrally located among Riverside, San Bernardino and Rancho Cucamonga courts. Rates as low as $270.00 per month. Class A management. Please call Ray at (909) 824-5700.

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CPA with 30 plus years experience available to advise and testify on: Real Estate and Partnership Taxation and Accounting issues; Real Estate Syndication and Management issues; and Real Estate Finance matters. Please call or email for C.V., 310-476-5987, Jeff.FrombergCPA@gmail.com

Court Appearance Attorney/ Contract Attorney
Experienced litigation/probate attorney available for contract work (depositions, trial preparation, pleadings etc.) Also available for in person court appearances in Riverside County (Indio) and San Bernardino County (Redlands) or other court-call appearances at other locations. Call Flint Murfitt (909) 557-4447 or (760) 320-6008.

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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.

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, 2009.

Derek K. Early – Fernandez & Lauby LLP, Riverside

Klayton Khishaveh – Khishaveh & Associates, Tustin

Jeremy S. Roach – Tous Gonzales & Dorman, Corona

Nathan L. Rosenberg – Barrister & Barrister, La Quinta

Mark S. Sandberg – Elliott & Elliott, San Jose

Patrice A. Thompson – Miller & Thompson LLP, Irvine

Bench to Bar

Superior Court of California, County of Riverside — Temecula Court Calendar Changes

- Effective Monday, May 4, 2009, the Temecula court calendar will be structured as follows:
- Limited General Civil, Law and Motion and Civil Applications and Order for Appearance and Examination will be scheduled every Thursday at 10:00 a.m. in Department T1.
- Unlawful Detainer Court Trials, Motions and Unlawful Detainer Applications and Order for Appearance and Examination will be scheduled on Tuesdays and Thursdays at 1:30 p.m. in Department T1.
- Small Claims Trials, Motions and Small Claims Applications and Order for Appearance and Examination will be scheduled on Mondays, Wednesdays and Fridays at 1:30 p.m. in Department T1.
- Ex-Parte matters for Civil and Unlawful Detainer cases will be heard Monday through Friday at 1:30 p.m. If the Ex-Parte is received prior to 12:00 noon the matter will be set the following day at 1:30 p.m. If received after 12:00 noon the matter will be set the second day out in the appropriate department at 1:30 p.m. Pursuant to California Rules of Court, Rule 3.1204, an ex parte application must be accompanied by a declaration regarding notice.
- Civil special settings will be scheduled by the court on Tuesdays at 10:00 a.m. in Department T1.
- Traffic Arraignments have been expanded to five days a week, Monday through Friday at 7:30 a.m. in Department T1.
- Traffic Court Trials have been expanded and will now be heard on Mondays, Wednesdays and Fridays at 10:00 a.m. in Department T1.

Riverside County LAWYER

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