# RIVERSIDE LAWYER

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## In This Issue:



The official publication of the Riverside County Bar Association


# GREAT LAWYERS

**make the most of their opportunities.**

This is Soheila Azizi, Principal of Soheila Azizi & Associates and Class of 1993 graduate.

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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

## OCTOBER

**11** **Columbus Day Holiday**
(RCBA Offices Closed)

**12** **PSLC Board**
RCBA Boardroom - Noon

**12** **Joint RCBA/SBCBA Landlord-Tenant Law Section**
Nena's Restaurant, San Bdno – 6 p.m.
(MCLE)

**13** **Mock Trial Steering Committee**
RCBA Boardroom - Noon

**15** **Joint RCBA/PSLC General Membership Meeting**
Speaker: Judge David Bristow
RCBA, John Gabbert Gallery – Noon
(MCLE)

**19** **RCBA Board of Directors**
RCBA Boardroom – 5:00 p.m.

**20** **Estate Planning, Probate & Elder Law Section**
RCBA, John Gabbert Gallery - Noon
Speaker: Michael Hagedorm
"Funding Buy Sell Agreements: Ensuring Expectation of Performance Meets Reality of Performance"
(MCLE)

**21** **Immigration Law Section**
RCBA, John Gabbert Gallery – Noon
(MCLE)

**27** **Environmental Law Section**
RCBA, John Gabbert Gallery – Noon
(MCLE)

**28** **Solo & Small Firm Section**
RCBA, John Gabbert Gallery - Noon
Speaker: Steven Geeting
"Testimonies from Trenches, IV"
(MCLE)

## NOVEMBER

**5** **Ask the Judges Anything**
RCBA, John Gabbert Gallery – Noon
(MCLE)

**9** **Joint RCBA/SBCBA Landlord-Tenant Law Section**
Cask 'n Cleaver, Riverside – 6 p.m.
(MCLE)

**11** **Veterans Day Holiday**
(RCBA Offices Closed)

**12** **CLE Brown Bag Series**
RCBA, John Gabbert Gallery – Noon
Speaker: Dr. Jeremy Hunter
"Working Harder and Accomplishing Less: How to Get Off the Stress Treadmill – Part II"
(MCLE)

**12** **Mock Trial Steering Committee**
RCBA Boardroom - Noon

# President's Message

*by Harlan Kistler*

It is truly an honor to serve as this year's president of the Riverside County Bar Association. The RCBA Board of Directors and I would like to thank Harry Histen for his leadership and many hours of hard work this past year. I look forward to meeting many of you at the general membership meeting on Friday, October 15, with speaker Judge David Bristow.

Committee and section enrollment forms are being mailed out to RCBA members. I would encourage everyone to participate in at least one of these organizations. Not only are these worthwhile organizations, but the networking opportunities are invaluable, especially during these troubling economic times. There is no better way to get connected to other attorneys experiencing the same law practice management issues that most everyone is currently experiencing and to share ideas, resources, adjust previous business models and discuss a host of other issues relative to the ongoing business and operation of a law firm. You are not alone in this economic crisis.

The theme of this month's *Riverside Lawyer* is "Privacy and the Law," a topic that is important, considering that the internet and social networks may allow privileged information about a transaction or pending litigation to be leaked by the parties. Here is just one example: During the deposition of an injured client, the witness testifies about her alleged physical injuries, including her limitations and restrictions relative to her everyday life activities. However, opposing counsel requests a break during the deposition and informs plaintiff's counsel that the alleged restriction concerning her inability to dance at the prom is not justified, since there is YouTube footage of the teenage plaintiff on the dance floor during the prom.

With advancements in computer technology, there is a risk that clients will leak information about their pending litigation or transactions through the internet via social networking sites such as Facebook, MySpace and others. This should be cause for alarm for all attorneys, as your client's private information, including incriminating pictures, ongoing communications about a pending matter, marriage status, and communications with friends may appear on these internet sites.

Whether an attorney may access private information of a witness or represented person in a pending matter via their social networking site is certainly an issue or point of controversy. Proponents for allowing attorney access to information posted on social networks reason that since the information is placed on the internet, which is readily accessible to millions of people, it should be "fair game" for an attorney to access the information, as well. Opponents reason that the information has been categorized as private by the user and as such is not open to public viewing.

Attorneys should be aware of this potential leak of client information and advise their clients on these issues to avoid having the clients make social media postings that could adversely impact their case. It would be a good practice to learn how your clients use the internet and caution them against posting any communication about a pending case.

I hope to see many of you at the RCBA meetings, not only for the benefit of MCLE credit, but also to lend support to each other during these tough economic times. I encourage everyone to send me their ideas and opinions on how to improve the many services that the RCBA provides its members. You can do so by emailing me at harlan@harlankistlerlaw.com.

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*Harlan B. Kistler, president of the Riverside County Bar Association, is a personal injury attorney with the Law Offices of Harlan B. Kistler in Riverside.*

# Is Your Copy Machine Spying on You? A Reminder to Update Your Document Recovery Plan

*by Ben A. Eilenberg*

A police department, a health insurance provider, and a construction company all just discovered the identity of the informants leaking their confidential information: Their copy machines.

In a recent exposé, CBS News purchased four random used copiers from a dealer in New Jersey. Their question was, what documents could be recovered from the copiers? As it turns out, there were a lot.

Nearly every digital copier built since 2002 has an internal hard drive. The hard drive keeps a copy of every document copied, scanned, faxed or printed by the copier. These hundreds of thousands of documents remain in the machine unless the hard drive is wiped or replaced.

In less than a day, CBS was able to access the hard drives and recover hundreds of thousands of documents. Among them were reports from the Sex Crimes Unit of the Buffalo, New York police, medical records from Alliance Health Care, and payroll records from a New York construction company.

Unfortunately, the hard drives are necessary for digital copiers to function. However, a number of solutions have started to spread through the business and legal community. There are services available that will regularly wipe and replace copier hard drives. At least one major copier manufacturer has published a downloadable patch that encrypts the hard drive on its copy machines.

This raises two major concerns for lawyers, and their clients, everywhere. First, your clients should immediately institute safeguards on their copiers to prevent confidential information from leaking when they replace their copier. Second, this highlights the necessity for law firms and their clients to review their document retention and destruction policies to incorporate new technology.

Document retention policies are necessary for two reasons. The first is simply to know what information is being created, and destroyed, on a daily basis. This includes paper documents, computer files, emails, voicemails, metadata, and other information. One of the sources of that information is also your digital copier. In order to prevent liability for information escaping, it is important to determine what information is generated.

The second reason is to prevent liability in a lawsuit against your clients for accidentally destroying information. In both federal and state courts, the definition of a discoverable "document" has grown to include computer files, emails, voicemails, and metadata, as well as many other forms of data. If the key piece of data has been destroyed, your clients face significant sanctions, unless it was destroyed in compliance with a reasonable document policy. (In one extreme case, the sanctions were over $1,000,000.)

Because of the fast-changing nature of technology, document retention policies now need to be updated to include many of your electronic devices, including:

- Email servers
- Desktop computers
- Laptops
- Smart phones
- iPads
- Flash drives
- And now, copy machines

Every one of these devices may hold documents your clients need to keep track of. And as CBS recently proved, those documents can wind up in unexpected and embarrassing places, unless you plan ahead.

*Ben A. Eilenberg is an associate at Gresham Savage Nolan & Tilden, APC. Mr. Eilenberg assists clients with all aspects of corporate, intellectual property, property, banking and environmental litigation.*

# Smart Use of Smartphones

*by Christopher J. Buechler*

First it let you make phone calls from your car. Then it let you make calls from your pocket. Then, it let you take pictures, send messages and access internet sites over a slow cellular connection. Now, the cellular phone has evolved into a "smartphone", which can send text messages or email, take pictures, browse the internet over a cellular or wireless internet connection, run a vast array of personal or business applications, and yes, even make phone calls. With its wireless internet capabilities, growing computing and storage capacities, and steadily decreasing price tag, any type of legal practitioner would do well to buy one to have an office-on-the-go. But, as with any electronic device, information sent and received tends to linger even after the "delete" button is pressed, and now that we have devices potentially carrying as much information as a laptop that are as easy to lose or damage as a cellular phone, we should examine the privacy implications of smartphone use in attorney practice.

Any discussion of privacy in attorney communications begins with Cal. Bus. & Prof. Code §6068(e) and the corresponding California Rules of Professional Conduct 3-100(A), which imparts upon an attorney the duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The attorney wants to avoid "gross carelessness and negligence." Jackson v. State Bar (1979) 23 Cal. 3d 509. The problem, then, is applying that standard to this emerging technology. Better guidance comes from the ABA's Model Rule 1.6, Comment 17, which admonishes attorneys to take reasonable security precautions to prevent communications from coming into the hands of unintended recipients. Because a smartphone is an amalgamation of a laptop and cellular phone, attorneys can use relevant aspects of their current Information Security Policy to cover smartphone use and data transmission. Here are some, but by no means all, issues that such a policy should address:

1. Does this communication belong on the phone in the first place? Just because we can transmit emails and texts to clients and counsel from our phone, does not mean that we should. Limiting the scope of data transmitted limits your liability.

2. Who will have access to the information being transmitted? Are emails, text messages, voice mails or internet transmissions only accessible to the attorney, client and other privileged parties, or are there other parties with access that could compromise privilege?

3. Where is the information being transmitted? If you have an "elevator rule" regarding cellular phone use (i.e. the only acceptable communications are ones that could be made on a crowded elevator), be sure it extends to the other forms of smartphone communication – emails, text messages and internet transmissions.

4. What happens in case the phone is lost or damaged? Smartphones can now be equipped with remote access features to let you track where your phone was lost, enable password protection, and even wipe any information from a lost phone. At a minimum, phones should have password protection equipped at all times. As for recovering lost data, smartphones are now utilizing cloud computing capabilities where the phone downloads and uploads information either from an internet server or an office computer. Cloud computing has its own privacy implications, so be sure the backup data site is protected, too.

5. Some clients may require a level of security beyond "reasonable". Any client-tailored Information Security Policy – smartphone or otherwise – should be reflected in the representation agreement. Comment 17 addresses this case, and the converse where a client may agree to a lower standard. But since California has not adopted the ABA rule, I would advise against this latter scenario.

6. And finally, with all high-tech gadgets, evolution happens rapidly so standards of "reasonable" protection of smartphone data could change quickly. Be sure that you review your Information Security Policy frequently to reflect your smartphone's increased functionality and available security measures. Comment 17 also lists factors to consider such as the sensitivity of the information and the extent to which it is already protected by law.

Besides practitioners, clients may also need advice about their own privacy issues transmitting data on their smartphones. A good place for them to start would be the article, "Text Messages: Digital Lipstick on the Collar" (New York Times, December 8, 2009), discussing how such transmissions are discovered and ultimately introduced as evidence at trial.

*Christopher J. Buechler, a member of the Bar Publications Committee, is a Legal Support Assistant for Riverside County Department of Child Support Services.*

# Tips to Improve Your Privacy on Facebook

*by Jean-Simon Serrano*

When it comes to privacy, Facebook is a potential nightmare. Dangers posed by Facebook range from identity theft to the possibility that prospective employers, coworkers, and clients will see and learn things from your personal life that are best left private.

A few years ago, I struggled with whether or not I should get an account. I wanted to know what everyone was talking about, but I didn't want coworkers, prospective clients, and potential employers to be able to look me up and see personal photos or learn private information.

Ultimately, I set up an account that identified me only by name and provided no photos or other information. Sure, I was able to reconnect with old friends and family, but I was missing out on the full experience. Fortunately, Facebook has made many changes in recent years, to the point where I believe it is possible to maintain a Facebook page with some personal information and with photos of vacations and family events that I wouldn't necessarily want to share with the world.

## What Should I Avoid?

There are a few things you should steer clear of when using Facebook. First, Facebook provides you with places to input sensitive information, such as birthdate, address, telephone number, etc. There is very little reason to add this information, and it could potentially be abused. The only benefits to adding this information are that it may differentiate you from the other 10,000 "John Smiths" and your friends will be notified when your birthday is approaching. There's little to no harm in just leaving much of that personal information blank. If you have a common name and are worried that people will not be able to find you, you could provide one or two extra pieces of information, such as the state you live in or perhaps one of the schools you have attended.

If someone is requesting to add you to their friends list and you don't recognize them, don't add them! Over the past year, it has been increasingly common to get friend requests from people who are only trying to add you so they can look at your personal information (the information I warned against providing above). No good can come from adding these people to your friends list. Don't do it.

## With So Many Privacy Concerns, Why Get an Account at All?

Despite the various privacy issues posed by having a Facebook account, there are a lot of good reasons to have one. Keeping in touch with friends and family is made much easier by means of Facebook – especially if your friends and family live far away. I regularly keep in touch with family members in Europe. We are able to inform each other of major happenings in our lives, as well as instantly share photos with each other. Gone are the old days of mass-emailing your vacation photos to all of your friends and family. Getting the photos your colleague took with his own digital camera from that event you attended last month is much less painful. This is because Facebook allows users to post all of their photos to online photo albums, for others to see at their leisure.

Reconnecting with old friends and acquaintances is also greatly facilitated by Facebook. You'd be surprised by the people who have accounts. Once you start making connections with old friends, you'll start to see that they have kept in touch with people you had forgotten about. Getting back in touch with that forgotten friend is as simple as a few clicks of the mouse.

## Is There Any Way to Protect My Privacy?

Yes – for the most part. Facebook is aware that many of its members are concerned with their privacy and has recently added many privacy options and controls. If you have a Facebook account or are planning to get one, the first thing you are going to want to do is to familiarize yourself with these settings and understand what information you are sharing with the public. My suggestion would be to share nothing with the general public other than, perhaps, the fact that you have an account. This will allow old friends to find you by name; however, they will receive no information about you other than the existence of your account and will have to request your permission to see any other parts of your page. For most of your other settings, such as "status updates," "photos," "posts" and "bio" information, I would recommend nothing more than sharing this with your "friends" – that is, those people whom you have confirmed you know and have added to your "friends" list. Other options include "everyone" (which is obviously a bad choice if you value your privacy) and "friends of friends." You may be tempted to share all of your information with "friends of friends." I would caution against this, as you may not want to share family vacation photos, personal musings, etc. with everyone your "friends" have seen fit to add to their own friends list.

## Can I Control What Information I Share Within My Friends List?

Absolutely. Not only is this possible, but as more and more people get Facebook accounts, to protect your privacy, you will probably want to manage what information you are sharing among your friends. For example, you may want

to share photos of your newly purchased house with your closest friends and family, but not with clients and coworkers. Your status update about the great party you went to on Thursday night may not impress Grandma and your boss when they read it on Friday morning. All of these settings can be controlled within the privacy settings and through liberal use of the Facebook "lists" features.

## What Are Lists, and How Do I Create Them?

Lists are essentially subsets within your "friends" list. Within the 200-plus friends on your friends list, you can create "lists" for those who are "family," "coworkers," "full access," "limited access," or potentially any other type of classification you wish to make. I hesitate to provide step-by-step instructions on how to create lists, because (a) Facebook seems to change the procedure for many of its privacy settings on an almost monthly basis, and (b) it wouldn't make for particularly interesting reading. This information can be found online. Creating lists will take some time, but the payoff is that you will be able to use your Facebook profile without fear of sharing too much with some friends and too little with others.

After you have created your lists, you can place each of your friends into one or more of them. When the lists have been populated by your newly categorized friends, you need to decide what lists see what types of information. Maybe you want to allow only your closest friends (e.g., "full access") to see your status updates. Maybe you want only your closest friends and family to see status updates. Maybe you wish to share status updates with everyone. Perhaps you have added some clients or coworkers to your friends list because you felt compelled to do so – put them in your "limited access" list, and allow them to see very little of your profile.

The same thing can be done with all of your photo albums. Each album has its own permissions settings, allowing you to custom-tailor who sees each and every photo album you have posted. For example: Photos of your new home are set to be seen only by closest friends and family; photos of your newborn child are set to be seen only by friends, family and coworkers. The possibilities are endless, and you have complete control.

Ultimately, it is possible to have a Facebook account *and* maintain your privacy, but it will not come without a little bit of effort. Avoid placing too much sensitive information on your page to keep the potential for identity theft to a minimum. Take the time to create lists similar to what I have suggested above. Pay attention to the privacy settings for each of your photo albums so you know whom you are sharing them with. With a little bit of effort, you can confidently post pictures, update your status, and post links to online articles without fear of involuntarily compromising your privacy.

*Jean-Simon Serrano, president of Barristers, is an associate attorney with the law firm of Heiting and Irwin. He is also a member of the Bar Publications Committee.*

# Barristers President's Message

*by Jean-Simon Serrano*

The year kicked off nicely with our first meeting, held at Mexicali Bar & Grill. Jim Manning of Reid & Hellyer, who is also a Director-at-Large of the Riverside County Bar Association, was our first speaker of the year, giving a speech on anti-SLAPP motions. Attendance was quite good, with a little over 20 young attorneys present.

Last month, I mentioned that the Barristers are exploring ways in which we can give back to the community. One of the ways in which we are attempting to do this is through the Associated Students of the University of California, Riverside (ASUCR) Legal Clinic. This clinic is comprised of a panel of volunteer attorneys who provide free legal services to registered undergraduate students at UC Riverside. I am proud to say that, at present, all of the attorneys on this panel are Riverside County Barristers members.

While this clinic does not provide legal representation, it does provide self-help services, advice, and a forum for students to have legal questions answered. The Barristers presently on the panel comprise a good cross-section of the legal community, including attorneys with specialties in real estate, personal injury, criminal matters, bankruptcy, family law, and administrative law. If anyone is interested in becoming a panel attorney for the ASUCR Legal Clinic, I would encourage them to visit the clinic's website at www.asucr.ucr.edu/legalclinic. The clinic has the potential to be an invaluable tool for the students of UCR, and I am proud that my members have taken the initiative to get involved and donate their time to this program.

The legal clinic is just one way in which our members are actively giving back to the community this year. It is my hope that this is merely a first step and that the Barristers will come to be known for their service to the community.

Last, the Barristers' bylaws provide that law students may attend meetings and become members. I have contacted my alma mater, the University of La Verne, College of Law, to encourage attendance and membership by the law students. Attendance at our meetings is not only educational for the students, but also a great opportunity to meet attorneys who already practice in the community and to get a head start on networking. Students of all local law schools are welcome to attend.

As always, the Barristers welcome new members. Encourage your young associates to join!

Please feel free to contact me at jserrano@heitingandirwin.com should you or your young associates have any questions.

*Jean-Simon Serrano, president of Barristers, is an associate attorney with the law firm of Heiting and Irwin. He is also a member of the Bar Publications Committee.*

# The Unintended Effects of the HIPAA Medical Privacy Rule on Your Clients' Estate Plan

*by Craig M. Marshall*

## Introduction

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is implemented in part by regulations collectively called the "Privacy Rule." (45 C.F.R. Part 160 and part 164, Subparts A and E.) Many people first learn of the Privacy Rule when they receive a "Notice of Privacy Practices" during a visit to a health care provider, such as a primary care physician or a dentist. The notice is designed to inform individuals about: (i) their rights regarding their health information, (ii) how their health information may be used and disclosed by the health care provider, and (iii) the obligations of the health care provider with respect to that information. Unfortunately, the notice does not identify the unintended effects of the Privacy Rule on common provisions that have traditionally been included in estate planning documents.

This article provides a brief summary of the Privacy Rule and discusses certain estate planning implications associated with it. A significant concern is the impact of the Privacy Rule on incapacity planning and situations that may arise in which the release of medical information is crucial to the operation of an estate plan. The article looks at the use of a separate authorization document and the addition of language to existing estate planning documents to address certain effects of the Privacy Rule.

## HIPAA and CMIA

The Privacy Rule generally prohibits the use and disclosure of "protected health care information" by individuals and entities identified as "covered entities," unless these entities obtain prior written authorization from the patient. Failure to comply with the Privacy Rule can result in significant fines and criminal penalties.

"Covered entities" include health plans and health care providers (e.g., doctors, nurses, emergency medical technicians, and hospitals). (45 C.F.R. § 164.501.) Subject to exceptions, the term "protected health information" refers to information collected from an individual that: (i) relates to the past, present, or future physical or mental health or condition of the individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (ii) identifies the individual or can be used to identify the individual. (*Ibid.*)

The Privacy Rule is a matter of federal law. The principal California statute that governs the confidentiality of medical information is the Confidentiality of Medical Information Act ("CMIA") (Civ. Code, § 56 et seq.). When specific provisions of the CMIA are more stringent than the Privacy Rule, they will continue to have full force and effect. When provisions of the CMIA are less stringent than, or contrary to, the Privacy Rule, they will be superseded by the Privacy Rule.

## Estate Planning Implications

The restrictions imposed by the Privacy Rule (not to mention the California CMIA) may substantially interfere with certain provisions in your clients' estate planning documents. It is common practice for trusts and other estate planning documents, such as "springing" durable powers of attorney for health care or financial management, to provide mechanisms for the transfer of authority from an individual to a successor trustee or agent upon the individual's incapacity, as certified by a licensed physician. However, the Privacy Rule and the CMIA limit what medical information a physician may disclose to someone other than the patient. As a result, obtaining the required certification by a physician may be difficult or impossible for the successor trustee or agent named in the estate planning documents. The fiduciary may be forced to go to court to obtain the necessary information, which defeats a primary goal of the estate plan.

One alternative that may allow a successor trustee or agent to access an individual's medical information upon the individual's incapacity is to have the individual execute a HIPAA/CMIA authorization that complies with federal and state law. The HIPAA/CMIA authorization is a useful document, in that it authorizes a health care provider to release information to specified classes of persons, such as trustees of a trust, agents under a durable power of attorney for health care, or agents under a power of attorney for financial management.

## Valid HIPAA/CMIA Authorization Form

Health care providers are generally permitted to release protected health care information as provided in a valid authorization executed by a patient. A patient may limit the amount of information that may be disclosed pursuant to a valid authorization, and it is recommended that an authorization be limited to the purpose of determining

capacity under a trust, durable power of attorney for health care or financial management. The requirements for a valid authorization under the Privacy Rule (specifically, 45 C.F.R. § 164.508(c)) are as follows:

1. An authorization must be written in plain language.
2. An authorization must contain a description of the information to be used or disclosed, which identifies the information in a specific and meaningful fashion.
3. An authorization must contain the name or other specific identification of the person(s) or class of persons authorized to make the requested use or disclosure.
4. An authorization must contain the name or other specific identification of the person(s) or class of persons to whom the requested use or disclosure may be made.
5. An authorization must contain a description of the purpose(s) of the requested use or disclosure.
6. An authorization must contain an expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure.
7. An authorization must contain the signature of the individual to whom the information pertains and the date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.
8. An authorization must contain statements adequate to place the individual on notice of all of the following: (i) that the individual has the right to revoke the authorization; (ii) that treatment, payment, enrollment or eligibility for benefits will not be conditioned on whether the individual signs the authorization; and (iii) the potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer protected by the Privacy Rule.
9. The Privacy Rule generally prohibits compound authorizations, so an authorization should not be combined with any other document.

The CMIA also has the following two additional requirements for authorizations (Civ. Code, § 56.11):

1. The authorization must be either handwritten or in at least 14-point type.
2. The authorization must contain a statement informing the person signing the authorization that he or she has the right to receive a copy of the authorization.

## Additional Advance Planning

Once a successor trustee or agent is appointed, a similar problem may arise if the successor trustee or agent becomes incapacitated. Thus, additional language can be added to certain estate planning documents to require successor trustees and agents to execute authorizations with regard to their protected health information. An example of a provision to consider for a trust or a durable power of attorney for health care or financial management is as follows:

> "Immediately upon appointment, a *successor trustee/alternate agent* shall be obligated to execute an authorization valid under the Standards for Privacy of Individually Identifiable Health Care Information (45 C.F.R. Parts 160 and 164) under the Health Insurance Portability and Accountability Act of 1996 ('HIPAA') and the California Confidentiality of Medical Information Act ('CMIA') for the purpose of providing said *successor trustee's/alternate agent's* health care providers with the authorization necessary to allow each of them to disclose protected health information about said *successor trustee/alternate agent* to another *successor trustee/alternate agent* designated in this instrument."

## Conclusion

The purpose of the Privacy Rule and the CMIA is to assure that health information is properly protected while allowing the flow of health information needed to provide high-quality care. While this purpose is significant, the rules have inadvertently affected many estate plans. Your clients would be well served by having their estate plans reviewed and updated in light of the unintended effects of the Privacy Rule.

*Please see profile of Craig Marshall on page 24.*

# Can You Keep a Secret?

*by Richard Brent Reed*

The answer is "yes," if you're the government. So saith the Ninth Circuit Court of Appeals in *Mohamed v. Jeppesen Dataplan, Inc.* (9th Cir. 2010) ___ F.3d ___ [2010 WL 348991]. There's not much to tell, really. It seems that half-a-dozen desperados were taken into custody by the Central Intelligence Agency, on various occasions, and, under the CIA's extraordinary rendition program, dispersed to sundry jurisdictions where justice is a bit rougher than Western sensibilities prefer. Sovereign immunity[1] protects the U.S. government from liability arising out of any indelicate treatment that the detainees might have endured, so these chaps decided to sue the company that made the navigation equipment that was installed in the aircraft that got them to where they didn't want to go. What could be more logical?

## The Players

Plaintiff Binyam Mohamed, a young Ethiopian, was arrested in Pakistan on immigration charges and deported to Morocco, where he was locked up for 18 months and, as Mohamed puts it, "cut with a scalpel." Eventually, he was whisked away by the CIA to a "dark prison" in Afghanistan for four months of loud noise, little light, and a low-calorie diet. He then spent five years at Gitmo.[2] There, at his trial, the evidence suggested that, in 2001, prior to September 11, Mohamed had made his way to the al-Farouq camp[3] in Afghanistan for a 40-day course in how to handle explosives, shoot light weapons, falsify documents, and program cell phones. Mohamed claims that he was on his way to Chechnya to fight Russians.

Iraqi plaintiff Bisher al-Rawi, accused of sheltering and funding al-Qaida terrorists, was arrested in Gambia and taken to that same "dark prison" in Afghanistan, where he was, according to him, beaten and subjected to noise. Eventually, he was transferred to Guantanamo.

Plaintiff Farag Ahmad Bashmilah, a Yemeni, was arrested in Jordan. It is uncertain what the Jordanians charged him with, but they handed him over to the CIA. Guess where the CIA took him: to a "'black site' prison,"[4] possibly the noisy motel in Afghanistan. Soon, he found himself back in Yemen, where he was convicted of some "trivial crime," sentenced to time served, and set free.

## Happy Hour at the Totten Bar

The American Civil Liberties Union, in its complaint, alleged that Jeppesen, by providing the flight plans for the rendition flights, enabled "the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities" and that Jeppesen had actual or constructive knowledge that these clients were to be subjected to "forced disappearance, detention, and torture." According to the ACLU, since the treatment was both "torture" and a tort,[5] the CIA must open up its classified rendition files. The government intervened, asserting the state secret privilege, whereupon the district court dismissed the entire action.

On appeal, the Ninth Circuit upheld the lower court dismissal under the *Totten*[6] bar, which requires dismissal of cases where the subject matter is a state secret.

1 The government cannot be sued without its consent.

2 Guantanamo Bay Prison in Cuba.

3 An al-Qaida terrorist training facility.

4 This is how he described it, even though they left the light on for him – all day and all night. See the "dark prison" in the other, strikingly similar stories.

5 Under the Alien Tort Statute. (28 U.S.C. § 1350.)

6 In *Totten v. United States* (1876) 92 U.S. 105 [23 L.Ed. 605], the estate of a Civil War secret agent sued the government for the deceased spy's back pay. Unfortunately, the spy contract was not subject to discovery, since it was a secret agreement.

This was a happy hour, indeed, for the government.

## The Reynolds Rap

In its decision, the Ninth Circuit also relied on the *Reynolds*[7] case, in which the families of civilian observers killed in the crash of a B-29 Superfortress bomber in Waycross, Georgia on October 6, 1948, tried to sue the government for engine failure. The plaintiffs in *Reynolds* moved, under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force's accident report. The government moved to quash the motion, claiming that these matters were secret. The district judge granted the plaintiffs' motion, holding that good cause for production had been shown. Shortly thereafter, the Secretary of the Air Force asserted a "Claim of Privilege," whereupon the district court revisited its decision, but still ordered the government to pony up the classified files.

Ultimately, the *Reynolds* case was reviewed by the Supreme Court. The justices recognized that "circumstances indicating a reasonable possibility that military secrets were involved" and that "there was certainly a sufficient showing of privilege to cut off further demand for the documents." The *Reynolds* court found that the electronic equipment aboard the surveillance aircraft was of a sufficiently sensitive nature that its secrecy should be protected and that there was nothing to suggest that the electronic equipment "had any causal connection with the accident." In other words, due to its sovereign immunity, the government does not have to consent to discovery in a civil suit.

## The Franklin Doctrine

Ever since the Civil War, the courts have been reluctant to become a cat's paw for foreign agents or to be used as a judicial crowbar to pry open secret government files. In some cases, a judge may be entrusted with the responsibility of poring over classified documents and redacting sensitive information. But such scrutiny, however strict, is risky when dealing with state secrets and classified information that could give aid to the enemy and endanger Americans serving abroad.

Can you keep a secret? When you're dealing with such sensitive information, you can keep a secret if you can keep the secret out of the courtroom and out of the newspapers. Or, as Benjamin Franklin so aptly put it, three may keep a secret, if two of them are dead.

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7 *United States v. Reynolds* (1953) 345 U.S. 1 [73 S.Ct. 528, 97 L.Ed. 727].

# Redaction Requirements in Riverside (State and Federal)

*by Jeffrey A. Boyd*

Court filings often contain critical personal information about the participants in a lawsuit (and innocent third parties caught in the crossfire of litigation). In a country of open government and sunshine laws, there has to be a balance between the transparency of government and an individual's right to privacy. What makes it more difficult is that the actions required of an attorney are different at the federal and state level.

Sensitive information is already out there. In 2008, a privacy rights activist from Virginia posted the Social Security numbers of Riverside's Mayor Ron Loveridge, then-Riverside City Councilman Frank Schiavone, and other public officials, pulled from records in the Riverside County Superior Court database.[1] Six months earlier, allegations were made that over 1,000 Social Security numbers belonging to California Highway Patrol officers were found in the Riverside County Superior Court database.[2] With identify theft and fraud growing as more information becomes accessible online, the courts responded by placing the burden on attorneys and parties to redact certain information when filing documents with the court. The type of information that needs to be redacted is different at the federal and state level.

## Federal Requirements

Recently, attorneys who filed documents in federal court through the CM/ECF computer system had to click a new box indicating, "I understand that, if I file, I must comply with the redaction rules. I have read this notice." The redaction rules are rule 5.2 of the Federal Rules of Civil Procedure and rule 49.1 of the Federal Rules of Criminal Procedure. They require the redaction of all Social Security or taxpayer identification numbers, dates of birth, names of minor children, and financial account numbers. In criminal cases, the attorney is required to redact home address information, as well. These requirements apply to all documents filed with the court, including attachments.

There are exemptions from these requirements in instances where the financial account number identifies property in a forfeiture proceeding, the document is a record of an administrative, agency, or state court proceeding, and the document is a record of a court or tribunal and was not subject to a redaction requirement when originally filed.

While the federal rules have a person's privacy interests at heart, they can be a bit misleading in their effectiveness at protecting privacy. For example, a filing may include only the last four digits of a Social Security or tax identification number. There are two problems with this. First, oftentimes a financial institution will use the last four digits of a Social Security number as a method of identifying the caller. Second, a simple search through a public records database on Westlaw or LexisNexis allows even the casual researcher to discover an individual's Social Security number – except with the last four digits redacted. Putting these two together, an individual now has a name and Social Security number – enough information to set up a credit account over the phone.

It is unclear what penalties, if any, attorneys face for violating this rule. In an unpublished opinion, the Tenth Circuit held that Rule 5.2 did not provide a private right of action.[3] The court also dismissed a state privacy tort cause of action on the grounds that information such as birthdays, marriages, and addresses is not "intimate or private information" on the order of sexual or personal health matters.[4]

## California Requirements

California's requirements for redaction of private or sensitive information are found in California Rule of Court, rule 1.20(b), which requires parties or their attorneys to redact Social Security numbers and financial account numbers.[5] The rule specifically states that the responsibility for excluding or redacting information resides solely with the parties or their attorneys. The

1 "Riverside County Superior Court's Web site stirs privacy activists' ire,", Press-Enterprise, May 13, 2008, available at http://www.pe.com/localnews/rivcounty/stories/PE_News_Local_D_access14.3f0006d.html.

2 *Id.*

3 *Good v. Khosrowshahi* (10th Cir. 2008) US.App. LEXIS 22199.

4 *Id.*

5 But again, if a number must be used, only the last four digits may be used (which presents the same problem as with the federal rule).

court clerk will not review each filing for compliance with the redaction requirement.

Attorneys routinely ask a deponent for his or her Social Security number on the record in a deposition. It is this author's practice to ask the attorney to keep this off the record, so as to limit access to as few people as possible. Additionally, it assists that attorney if the deposition page is ever attached to a motion or other pleading.

Both the federal and state rules allow for filing of a reference list which uses identifiers that match up the appropriate identifier with the public document.[6] The reference list is kept confidential.

One problem is that these laws are not retroactive. There is no clawing back of records filed prior to the law.[7] So while the problems faced by the CHP officers and other Riverside officials above might not be remedied, the courts are at least taking steps moving forward to protect some private information of litigants. And the one upside I have seen so far to the court's new paywall for accessing documents and conducting searches is that it makes it that much more difficult for someone with ill intent to access personal information about a litigant.

Remember, if you are in superior court, think about any Social Security numbers and financial account numbers in your motion before you file. In federal court, think about the same, plus the names of minor children and dates of birth.

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6 Fed.R.Civ.P. 5.2(g) and Cal. Rules of Court, rule 1.20(b)(4).

7 Rule 5.2 of the Federal rules of Civil Procedure was added on December 1, 2007. California Rules of Court, rule 1.20 went into effect on January 1, 2008.

# What Government Records Can You Obtain?

*by Jacqueline Carey-Wilson*

Records held by government agencies are, for the most part, public records and are subject to disclosure and review. As will be discussed below, certain public records are confidential and can be disclosed only under specified exceptions or in the interest of justice.

The California constitution provides that "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).) These records can be obtained through the California Public Records Act (CPRA). (Gov. Code, § 6250 et seq.) In enacting the CPRA, the legislature declared "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250.) All state and local agencies are covered under the CPRA, except for the judicial branch and the legislature, which are exempt. (Gov. Code, § 6252, subds. (a), (f).)

A public record includes "any writing containing information relating to the conduct of the people's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252, subd. (e).) Any person may make an oral or written request to inspect or obtain a copy of identifiable public records. (Gov. Code, § 6253.)

If the request is vague, the government agency must assist the person to identify records and information that are responsive to the request or to the purpose of the request, describe the information technology and physical location in which the records exist, and provide suggestions for overcoming any practical basis for denying access to the records or information sought. (Gov. Code, § 6253.1.) The public agency has met its obligation to assist if:

(1) It is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the person making the request;

(2) It makes the records available;

(3) It determines that an exemption applies; or

(4) It makes available an index of its records. (Gov. Code, § 6253.1, subds. (b), (d).)

Beginning with the date the request is made or received, an agency has ten calendar days to determine whether there are identifiable or disclosable public records. (Gov. Code, § 6253, subd. (c).) The agency must give an estimated time and date when the records may be available. (*Ibid.*) In unusual circumstances, the time limit to respond may be extended by 14 days. (*Ibid.*) "Unusual circumstances" include: (1) the need to search for records in field or separate offices; (2) the need to search for and examine voluminous amount of records; (3) the need to consult with another agency with a substantial interest in the records; and (4) the need to compile data or create a computer program to extract the data. (*Ibid.*)

The government agency does not have to produce copies of the records until the person requesting them pays the direct costs of copying them. (Gov. Code, § 6253, subd. (b).) If the agency does not comply with the CPRA request, "[a]ny person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter." (Gov. Code, § 6258.) If the person instituting the proceeding prevails, he or she may be awarded costs and reasonable attorney fees. (*Ibid.*)

As previously stated above, a public agency may withhold a record that is exempt from public disclosure. Information that is confidential or privileged under other laws is exempt. (Gov. Code, § 6242, subd. (k).) Confidential information includes most records kept by public social services. Welfare and Institutions Code section 10850, subdivision (a) provides that "[a]ll applications and records concerning any individual made or kept by any public officer or agency in connection with the administration of any provision of this code relating to any form of public social services for which grants-in-aid are received by this state from the United States government shall be confidential, and shall not be open to examination for any purpose not directly connected with the administration of that program, or any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such program." Records kept by county agencies that protect children, the elderly, and dependent adults are protected by this code section. Any person who knowingly and intentionally releases con-

fidential public social services information is guilty of a misdemeanor. (Welf. & Inst. Code, § 10850, subd. (b).)

Elder abuse reports held by a county are also confidential and may be disclosed only under limited circumstances. (Welf. & Inst. Code, § 15633.) Information relevant to an incident of elder or dependent adult abuse may be given to an investigator from an adult protective services agency, law enforcement, the probate court, the office of the district attorney, the office of the public guardian, counsel representing an adult protective services agency, or an investigator of the Department of Consumer Affairs. (Welf. & Inst. Code, § 15633.5, subd. (b).)

Records and investigations regarding an incident of elder abuse may be sought by parties in civil and criminal cases who have some connection to the elder and/or the case. The information may be provided to parties falling into one of the exceptions provided by Government Code section 15633.5. Parties who do not fall into one of the exceptions will often file a motion to compel the agency to provide the confidential information. At the hearing on the motion to compel, the court will usually review the confidential records in chambers, as provided in Evidence Code section 915. Release of this information will turn on whether "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (Evid. Code, § 1040.)

A county's child protective records are also statutorily confidential and may be disclosed only under very limited circumstances. (Welf. & Inst. Code, § 827.) "Included within the sphere of confidentiality are agency records relating to juvenile contacts as well as police reports. Even if juvenile court proceedings are not instituted and the matter is handled informally the juvenile's records relating to the incident remain confidential." (*Lorenza P. v. Superior Court* (1988) 197 Cal.App.3d 607, 610; see Cal. Rules of Court, rule 5.552, subd. (a).)[1]

Juvenile records are under the exclusive jurisdiction of the juvenile court. (Welf. & Inst. Code, § 827, subd. (a)(3).) Parties wanting access to this information are required to file and/or serve the following: *Request for Disclosure of Juvenile Case File* (JV-570); *Notice of Request for Disclosure of Juvenile Case File* (JV-571); a blank copy of *Objection to Release of Juvenile Case File* (JV-572); *Proof of Service – Request for Disclosure* (JV-569); *Order on Request for Disclosure of Juvenile Case File* (JV-573); and *Order After Judicial Review* (JV-574). (Rule 5.552.) These forms are available in the forms section of the California courts website: http://www.courtinfo.ca.gov.

The juvenile court must review the petition, and if good cause is not shown, the court can summarily deny release of the records. (Rule 5.552(e)(1).) If the petition shows good cause, the court may set a hearing on the release of the records. (Rule 5.552(e)(2).) "In determining whether to authorize inspection or release of juvenile case files . . . , the court must balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public." (Rule 5.552(e)(4).) In order to release the records, "the court must find that the need for discovery outweighs the policy consideration favoring confidentiality of juvenile case files." (Rule 5.552(e)(5).) The court may permit disclosure of the records "only if the petitioner shows by a preponderance of the evidence that the records requested are necessary and have substantial relevance to the legitimate need of the petitioner." (Rule 5.552(e)(6).)

Obtaining government records can be difficult and costly, but may prove to be invaluable as you prepare your case for litigation.

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1 All rule references are to the California Rules of Court unless otherwise noted.

# w.p.m.

*by Richard Brent Reed*

"300 w.p.m." That's what the ad said. Winston Underwood had graduated at the top of his class at 240, and here was a job with the courts that could be his if he could get his speed up over 300. 300 words per minute was ungodly – unheard-of – but Judge Molino was a motor-mouthed jurist with the delivery of a howitzer. He had gone through six court reporters in five months. No one could keep up with him.

Winston had a more immediate problem: He had three days to prepare, but his machine was in the shop and wouldn't be ready for another week. Winston had to find another machine. Before Monday. Fat chance of that. Then, the fat chance appeared right next to the ad: Another item advertising an estate sale, featuring a steno machine. Tucking Friday's newspaper under his arm, Winston grabbed his jacket and went machine shopping.

Across town, the estate sale was just wrapping up. The pewter, the china, and the Hummel figurines had all been picked over, but no one had claimed the steno machine. It was a brand that Winston had never heard of: "Sarnograph."

"Was he a stenographer?," asked Winston.

"The deceased?," responded the estate agent, "Yes, Mr. Blake was a court reporter. Are you interested in the machine?"

"The steno machine, yes."

"It's in excellent condition. Mr. Blake didn't own it very long."

"How did he die?"

"In the courtroom. Dropped dead over his machine. Right in the courtroom. Exhaustion."

"Charming. How much?"

"Fifty."

"I'll take it."

"Mr. Blake's cipher book goes with it."

"Why would I want that?" inquired Winston.

"You'll be wanting it," assured the estate agent, handing Winston a small, black journal labeled, "Key."

With that, President Grant bought Winston the time he needed to get up to speed.

At home, Winston immediately set up his new Sarnograph. The tape was still in it from its last use. Winston turned on his CD player and sat down to take dictation. The action was awkward, at first. Ultra-sensitive. It required a light touch. Once he got used to the machine, however, Winston zipped through the recorded drills: 220; 250; 270 words per minute. Two-voice; three-voice; even four-voice dictation. It was uncanny: 280 seemed effortless. Winston overtook 300 and left it in the dust. He was ready. Winston pulled the tape to check his accuracy. But Winston didn't even recognize the first line: The cipher – just two strokes – were unfamiliar to him. It must have been the last thing that Mr. Blake had written, in some keying known only to him. And yet, those two steno symbols matched none of the key strokes in the cipher book. Whatever the meaning of that line was, Blake had taken it with him to the grave. Or, perhaps, someone else had written it in their own cipher. Perhaps it was someone's cryptic little joke.

The rest of the tape was nearly flawless: 98 percent accuracy. Winston reflected on the thousands of relentless hours he had put in on his own machine just to get up to 180. For three years, he had been a slave to his stenograph, a prisoner of incessant practice. Now, he had broken through 300 words per minute. Now, Winston was ready.

Monday morning found Winston, wearing his lucky tie, standing before Monica, Judge Molino's clerk.

"Set up in here," the clerk instructed, pointing to the adjoining courtroom, "His Honor will be with you in a moment. Be ready."

Winston quickly got the Sarnograph ready and seated himself in front of it, posture perfect, fingers resting lightly on the keys. In came Judge Molino, chattering at a mile a minute. Winston's fingers began to move instantly. It was as though his hands were voice-activated.

His Honor palavered away about the disposition of the cases that he had reviewed the night before. The judge raced through case after case, dictum after dictum, accelerating as he went. Fifteen minutes and twenty decisions later, he stopped.

"All right," Judge Molino grinned, "Read it back."

Winston fumbled his way to the beginning of the tape and repeated the judge's dictation back to him, word for word.

"Good. Have the minute orders ready in half an hour."

"Your Honor?," whimpered Winston.

"Just give them to my clerk when you're finished. Use the word processor over there."

Judge Molino directed Winston's attention to the computer and printer at the clerk's desk and left the courtroom. Over the next half hour, about two dozen hopeful attorneys and litigants found their seats in the courtroom. At eight o'clock, the judge took his place on the bench just as the printer spat out the last minute order. The clerk, who had preceded the judge, placed the copy in front of his Honor. Forty-five minutes later, the judge had run through the law-and-motion calendar like a dose

of salts: Every case had been disposed of. Purged and contented, Judge Molino went back into his chambers.

"Fill out an application," the clerk ordered Winston, handing him a form, "You're hired."

Working for Judge Molino was not easy. The hours were grueling. Winston often had to stay up past midnight, preparing dicta, minute orders, evidentiary rulings, opening arguments, closing arguments, reprimands to unprepared attorneys, and sanctions on slow-talking litigants.

The real test came one afternoon when Winston recorded his first trial. Winston sat at his machine. Promptly at 1:30, the judge took the bench; plaintiff's counsel started his opening remarks. Winston began stroking his machine. A feeling of disorientation swept over Winston, so he closed his eyes. When he opened his eyes again, the courtroom was empty. The clerk popped her head in:

"Have that transcript ready in the morning" commanded the clerk, "Good night, Winston."

The clerk's head disappeared. Winston glanced up at the clock. It was five o'clock. Winston looked down at the Sarnograph: It had disgorged yards of testimony, all neatly accordioned for review and transcription. How could he not remember doing all of that work? Winston looked down at the fettuccine disgorged by his machine. He couldn't read it. The entire transcription was in a cipher completely foreign to Winston. He packed up his machine and left for the day.

At home, Winston continued to stare at the gibberish of key strokes that his Sarnograph had produced. It was like trying to read hieroglyphics. Then, on a hunch, Winston reached for the Rosetta Stone that the late Mr. Blake had left him. The symbols on the ribbon matched those in the Key. The Key was so logically laid out that deciphering the ribbon became possible, then easy, then obvious. What had promised to be an all-night labor was accomplished with ease: In just under an hour, the transcript was finished.

The second day of trial went the same as the first: The clerk took her seat, the judge took the bench, the witness took the oath, and Winston took a nap. Three and a half hours later – only a second to Winston – the judge was asking for the transcript and retiring to chambers. The ribbon bin was, once again, full of testimony. Once again, the Sarnograph had done all of the work for him. This time, Winston had brought the Key with him. At 6:15, he finished transcribing and went home.

The next day's law-and-motion calendar was finished in record time – even by Judge Molino's stopwatch. Then, instead of waiting to begin after lunch, Molino called in the attorneys waiting outside the courtroom in the hallway and told them to be ready to resume the trial in five minutes. There were to be no delays, no long-winded orations, no hemming and hawing. Hemming would punished by sanctions and hawing would land you in jail. Have each witness in the pipeline – one in the barrel and one in the chamber – and ready to take the stand. Tell him to hit his mark, listen for his cue, and come in with his lines. Long-winded evidence would be excluded. And each counsel had three minutes to close.

Winston sat at his post, fingers poised. The gavel came down. Winston closed his eyes. When he reopened his eyes, he heard the judge say: "Counsel, call your first witness." The Sarnograph was as still as a virgin on her first date, awaiting Winston's stroke. Winston's fingers sprang into action and, by the time the oath had been administered, they had caught up, but just barely. The attorney put his questions with the succinctness of a telegram and the responses were just as terse. Gradually, the questions became longer, the answers grew more complex. The speed of examination increased exponentially with each witness. Then, the first objection hit at about Mach 3:

Plaintiff: "Objection, Your Honor. The evidence lacks foundation, violates best evidence, and is, furthermore, incompetent, immaterial, and inadmissible under the Fourth Amendment."

Defense: "Your Honor, if it please the court, under the doctrine of res ipsa loquitur and rebuttable presumptions, the evidence goes to the mens rea and the gravamen of the case . . ."

Judge: "Objection noted. I'll take your argument under submission. Move on, counsel."

Forty-five minutes and three witnesses later, counsel had moved onto a property title issue:

Counsel: "Is it true that Dr. Hu cosigned the second deed of trust?"

Witness: "No, Hu's on the first. Mr. Watt signed on the second."

Judge: "What's the man's name on the first?"

Witness: "No, Watt's on the second."

Judge: "Who's on the second?"

Witness: "Hu's on the first."

Counsel: "What's the name on the third mortgage?"

Witness: "Watt's on the second."

Counsel: "Who's on the third?"

Witness: "Hu's on the first."

Counsel: "So the name on the third trust deed was . . . ."

Witness: "Ware."

Counsel: "On the third."

Witness: "Ware."

Counsel: "The third trust deed. What was his name?"

Witness: "Watt's the guy's name on the second."

Counsel: "That's what I'm asking you.

Witness: "That's what I'm telling you."

Counsel: "You're telling me what?"

Witness: "No, I'm telling you Ware."

Counsel: "Where what?"

Witness: "The man's name on the third."

Counsel: "Who's on the third?"

Witness: "No, Hu is on the first. Ware's on the third."

Counsel: "So, Ware is the man's name."

Witness: "At the bottom."

Counsel: "At the bottom of the third?"

Witness: "That's Ware."

Counsel: "That's what?"

Witness: "No, Watt's on the second."

Counsel: "Who's on the second?"

Witness: "Watt's on the second. Hu is on the first."

Counsel: "Are you following this, Your Honor?"

Judge: "It's very simple, Counsellor: Hu is on the first, Watt's on the second, and Ware's the name on the third."

Witness: "At the bottom, Your Honor."

Counsel: "What's at the bottom?"

Witness: "Ware."

Counsel: "At the bottom. What's at the bottom."

Witness: "Ware."

Counsel: "At the bottom."

Witness: "That's right."

Counsel: "That's what?"

Witness: "That's Ware."

Counsel: "That's what I'm asking you."

Witness: "That's what I'm telling you."

Counsel: "You're telling me what?"

Witness: "No, I'm telling you Ware."

Winston's heart and hands raced to keep up with the ever-accelerating interchange as he desperately attempted to differentiate parties from pronouns. Suddenly, Winston's fingers stiffened. The judge turned to Winston.

Judge: "Are you getting this?"

Winston's fingers froze. So did his heart. He slumped over his machine, dead. Judge Molino declared a ten-minute recess so that the medical team could remove Winston's body from the courtroom while another court reporter was brought in. Before retiring to chambers, Judge Molino turned to his clerk.

"Looks like I'll be probating this one, too," mused the judge. "Better run another ad for court reporter next week. And be sure that the estate sale ad runs right next to it."

The judge's clerk then tore the day's transcript ribbon out of the Sarnograph so that it could be decoded and typed up. As the bailiff shut the courtroom door against the last litigant to leave, imperceptibly, the Sarnograph typed out two key strokes – this time in Blake's cipher--then fell silent.

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At Winston's estate sale, the Sarnograph sat in the corner among the deceased's practice guides, theory books, and dictionaries, displaying those two cryptic symbols on the stub of paper left sticking up out of the machine, the rest having been harvested by the court. Had anyone cared to check Blake's book, they could have translated those last two strokes on the steno tape to read: "I'm free," written by the departing Blake in his own cipher. Blake had found his replacement. And, now, Winston must find his.

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# News from the Law Library

*by Sarah Eggleston, Law Library Director*

## This is NOT Your Grandfather's Law Library

Believe it or not, that is something I want to shout from the rooftops quite often. Many library users come in and assume that we are little old ladies wearing cardigans and comfortable shoes and telling people to be quiet. Well, gone are the days of dusty books and lagging technology. Times have changed, and so have we. We've still got the books, but we've expanded into wireless technology, online database access, and CDs. Our job is to make access to information as effective and efficient as possible. And oh, what fun we are having!

I've just finished my first year here at the Riverside County Law Library. It's been a whirlwind year. As an East Coast transplant who lives in Huntington Beach, I always thought of Riverside County as a last outpost before the desolate desert. I quickly discovered I was wrong. Don't mistake me, I can do without Riverside's oppressive summer heat, Furlough Fridays, the mini-cyclone winds of the desert pass, or unbearable traffic on the 91, but it's the people that changed my mind. Every day, I meet energetic intelligent people who are handling complex issues and finding creative solutions. What could be better?

As Director of the Law Library, I'm constantly trying to develop programs and to collect materials that will be useful and relevant to practicing attorneys. (Actually, with Judge Rich frequenting the library as much as he does, I'm also trying to keep up with arbitrators and those who give impossible legal research questions!) Remember, the library receives a majority of its funding through a portion of the local superior court filing fees. We receive our money from people involved in litigation, so our services and our collection support those in court (or simply trying to stay out of court). As a result, the library has a variety of materials – everything from subject-oriented practice guides to MCLE CDs to free MCLE participatory-credit workshops – all aimed at helping attorneys.

Collecting subject-oriented practice guides has always been a specialty of ours. I've made it a priority. Practice guides are invaluable. Whether you browse them electronically or in print, they help attorneys figure out the nuts and bolts of a topic and fill in any analytical gaps. Understanding this, the library collects a little bit of everything, from bankruptcy to appellate practice to defending DUIs. Where most law offices might have one or two practice guides on a topic, the library will often have three or four. For example, a family law attorney might have one title: *Practice Under the California Family Code*. Our library has that title, along with others, including *Family Law Financial Discovery, Child Custody Litigation and Practice*, and *California Domestic Partnerships*.

Making the leap from audiocassettes to CDs is another way the library is upgrading. To help manage the costs of keeping up with MCLE credits, we've purchased over 50 new MCLE CDs that attorneys can check out from the library for free. Time is valuable, so these CDs allow an attorney to earn self-study credit at work, at home, or while sitting in traffic. We have collections in both Riverside and Indio, so there are plenty of choices for your listening pleasure. New titles include *Effective Jury Voir Dire: Picking the Right Jury, Mastering the Art of Employment Investigations*, and *Here Comes the Judge: ADR for Real Estate Disputes*.

Practice guides and MCLE CDs aside, what I am most proud of as the library director are the relevant and practical free MCLE programs and workshops held at the library. In May, Eric Garner, the managing partner of Best Best & Krieger, gave our 2010 Distinguished Speaker lecture on the current environmental and legal issues facing California's water supply. On October 4, we had "The Other Bar" and the publisher CEB come to give free workshops that offered three hours of participatory legal ethics credits. On October 26, Terry Bridges, senior attorney with Reid & Hellyer, is offering the "Ten Worst Mistakes I Ever Made Before and During Trial." Ending the year on November 4 will be Carolina Rose, conducting a lunchtime workshop on the ethical use of California legislative history.

The Law Library still has dark wood, leather chairs, and core resources, but no longer is it just a place of quiet. It is a place of professional information. If we don't have it, we know where to find it. Stop by in Riverside or at the Larson Justice Center in Indio, or check out our website – http://www.lawlibrary.co.riverside.ca.us.

# Opposing Counsel: Craig M. Marshall

*by L. Alexandra Fong*

## The Problem Solver

Craig Marshall was born in San Diego, California, while his father, Jack Marshall, was stationed at Coronado Island serving as a line officer in the United States Navy. Craig's family lived in Brooklyn, New York as well as several Orange County communities before moving to Riverside when Craig was approximately five years old. Craig's father, Jack, worked in Riverside during the day but attended law school at night commuting to Pepperdine University's Orange County campus before beginning his legal career at Thompson & Colegate. While Craig was growing up in Riverside, his neighbors were Robert J. Hanna, an attorney who works for Best Best & Krieger (BB&K) in its San Diego office, Greg Hardke, an attorney who works for BB&K in its Irvine office, and Pat Benter, director of recruiting and professional development for BB&K in its Riverside office.

*Craig Marshall and family*

Craig attended the University of California at Riverside (UCR), where he was captain of the school's basketball team. He was an Academic All-American and he still holds the school record for most three point baskets made in a game. At UCR, he met his future wife, Blossom, who was a member of the UCR swim team. Love bloomed soon thereafter and he matriculated with a bachelor's degree in Political Science and Administrative Studies in 1995.

Except for a brief stop in Malibu where Craig received his Master of Business Administration in 1998 and Juris Doctor from Pepperdine University in 1999, he has remained in Riverside. While in law school he clerked with BB&K and, after passing the California bar exam, accepted an offer to work with the firm. He became a partner with BB&K in 2008 and his 5th floor office (which is filled with family pictures) has a clear view of the recently renovated Fox Theatre.

Rather than following in the footsteps of his father, a litigator, Craig decided to focus on transactional law: business planning, estate planning, corporate, and health care.

As part of his business planning and estate planning practice, Craig handles business succession planning for closely-held businesses, including the preparation of buy/sell agreements, family limited partnership agreements, operating agreements, and partnership agreements. He advises high net worth clients in estate tax planning and prepares estate planning documents, including, Trusts, Wills, Advance Health Care Directives, Uniform Statutory Form Powers of Attorney for Financial Matters, Health Insurance Portability and Accountability Act (HIPAA) and/or Confidentiality of Medical Information Act (CMIA) Authorization Forms and related documents.

As part of his general corporate counsel practice, Craig advises on issues of entity formation, governance and compliance, including the drafting of shareholder agreements. He also provides advice on issues of daily company operations, including the drafting, negotiation, analysis and review of domestic and international commercial contracts and agreements, commercial leases, consulting and employment agreements. He drafts and negotiates stock and asset purchase agreements, including ancillary documents such as leases, employment, non-competition, security and pledge agreements.

As part of his health care practice, Craig advises hospitals, hospital districts, independent physician associations, medical groups and other providers on federal and state restrictions on patient referrals under applicable IRS, anti-kickback and anti-referral statutes. He also provides advice on issues of patient privacy under HIPAA and CMIA. Further, he drafts various types of physician and provider agreements.

As part of his overall practice, Craig likes to help clients plan ahead for potential problems or issues which may occur in their businesses or personal lives. He creates business plans and agreements for owners of privately owned businesses. The agreements have built-in contingencies for all types of issues or events that may arise in the future, such as the death or incapacity of a co-owner, divorce, employment termination, voluntary transfer such as a sale to a third party (depending on type of business entity, this could be a sale of stock (corporation), membership interest (LLC) or partnership interest (partnership)), an involuntary transfer (such as bankruptcy, the filing of a judgment against a shareholder/member/partner, or any other legal proceedings having the effect of transferring or assigning a shareholder's/member's/partner's interest for the benefit of a creditor). Additionally, the agreements can set forth mandatory buy-outs on certain triggering events or an option to purchase, as well as, the price, how the purchase price gets paid (cash or a promissory note) and other terms.

An interesting matter he has dealt with involves negotiations with the surviving spouse of a co-owner of a business to

purchase that portion of the business owned by the decedent. After forming their business, the owners put an agreement together that did not clearly articulate how the surviving owner would purchase the deceased owners stock at death. The original business agreement was not drafted by BB&K.

Craig is involved in many community activities. He is a Board Member of the Inland Empire Economic Partnership (IEEP), a group of public and private leaders trying to create economic development within the community. He believes the IEEP is an important organization for our area given these difficult economic times. Additional information about IEEP may be obtained from its website at: http://www.ieep.com/.

Craig is also a Board member of the Riverside Medical Clinic Foundation (RMCF), whose mission is dedicated to improving health in the community through education at the individual, professional and community level. RMCF is a non-profit organization that funds a regular schedule of health education activities and lectures. Additional information about RMCF may be obtained from its website at: http://rivfound.org/.

Craig recently joined the Riverside Community Health Foundation (RCHF) Board of Directors, whose mission is to spread health awareness within the community. RCHF provides the underserved with access to medical, dental, and vision care. Additional information about RCHF may be obtained from its website at: http://rchf.org/. A past event for RCHF was its annual "Under the Sea" gala celebration on September 25, 2010. Funds raised at the "Under the Sea" gala celebration were used to assist Inland Agency and RCHF's Teen Health Services. Inland Agency, which opened "The Pink Ribbon Place" in 2009, provides free breast cancer screening to low-income women along with support services to breast cancer patients, survivors and their families. RCHF's Teen Health Services provides over 6,000 teens with health information needed to make healthy decisions and increase their ability to make responsible choices.

In the past, Craig has also served on the YMCA Board. He is a currently a member of the Leo A. Deegan Inn of Court, Riverside Estate Planning Council, and UCR Planned Giving Advisory Board, and he has graduated from the Leadership Riverside program.

In his free time, when he is not involved in these community activities, Craig enjoys spending time with Blossom and their children, John (9) and Carly (7). He is assistant coach for their soccer, baseball, and basketball teams. He also enjoys playing golf (with a 10-12 handicap), X-Box games with John and Wii games with Carly. He hopes to travel more with his family and enjoyed their recent trip to Carlsbad.

*L. Alexandra Fong, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside.*

# Rule of Court 7.955: Mandatory Requirements to Obtain a "Reasonable Attorney's Fee" in a Minor's Compromise Case

*by Judge Elwood Rich, Retired*

## "The court must use a reasonable fee standard." All local rules (percentage fees) voided by Judicial Council

First and foremost, the attorney's right to receive an award of a "reasonable attorney's fee" is contingent upon that attorney achieving a settlement of the case or a judgment after trial. Consistently over time, 98% of all persons – minors and adults – receiving personal injuries settle their cases. The rest of the cases result in trial, defaults, defendants not served, dismissals, etc. Obviously it is not often that the attorney doesn't ultimately get paid for services rendered.

Rule 7.955 became effective January 1, 2010. Section (a) provides that "the court must use a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money. . . to be paid for the benefit of a minor . . . ."

This carries out Probate Code section 3601, subdivision (a), which states: "The court . . . shall make a further order authorizing and directing that reasonable expenses . . . and attorney's fees, as the court shall approve and allow therein, shall be paid from the money . . . to be paid . . . for the benefit of the minor . . . ."

It is ironic, but the more attorney's fees the attorney requests and receives by court award, the less money the attorney's client, the minor, ultimately receives.

Subdivision (c) of the rule states:

"A petition requesting court approval and allowance of an attorney's fee under (a) must include a declaration from the attorney that addresses the factors listed in (b) that are applicable to the matter before the court."

Thus, the attorney MUST file a declaration that ADDRESSES the factors listed in (b) that are APPLICABLE to the case.

Factor 8, the "time and labor required," must be addressed in every case. It is by far the most dominant factor in the court's determination of a reasonable attorney's fee. Some cases require little time and some a great amount, and there are all sorts of time amounts between the two extremes.

Many cases are settled without any complaint being filed or depositions taken. Paralegals may be very active in the handling of these cases. In a case that is settled without a complaint being filed, often an attorney's paralegal has done all the work.

The attorneys and their paralegals need to keep accurate time and activity records on their handling of the case, the same as attorneys and their paralegals have to do in business litigation.

Factor 4, "the amount involved and the results obtained," also must be addressed in every case. Most minor's cases are the result of being passengers in motor vehicle collisions. There are rarely slip- or trip-and-fall minor plaintiffs. Maybe they were all admonished by their parents to "pick up your feet and watch where you walk." They are occasionally dog bite victims or injured pedestrians.

Almost all motor vehicle collisions are the result of a right-of-way violation of some type or are rear-end collisions. Liability is infrequently disputed. The dispute is over damages.

Income loss is rarely an issue, because minors generally aren't employed. In general, there isn't much dispute about the necessity and reasonableness of the medical and hospital charges. The real dispute is over general damages – the quantity and duration of the pain and suffering sustained by the minor and its highly uncertain estimated jury value. Although general damages are difficult to evaluate, nonetheless 98% of these cases settle.

Rule 7.955 is all about a reasonable attorney's fee.

In *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, the California Supreme Court superbly explains the proper procedure for a trial court to use to ascertain "reasonable attorney's fees," as follows:

"[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is *fundamental* to a determination of an appropriate attorneys" fee award.' [Citation.] The reasonable hourly rate is that prevailing in the community for similar work. [Citations.] The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for

the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary. [Citation.]" (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at p. 1095, italics added.)

There are 58 counties in the state, and 23 of these county superior courts have adopted local rules in minor's compromise cases that typically provide that the attorney be awarded 25% of the settlement amount as fees.

These local rules have existed for over 50 years. They resulted in attorneys being awarded 25% of the settlement as fees, regardless of how little work the attorney did. Some of these settlements have been for hundreds of thousands of dollars. The awarding of these excessive attorney's fees for five decades or more has collectively cheated minors out of untold millions of dollars.

Subdivision (d) of Rule 7.955 is preemptive: "The Judicial Council has preempted all local rules relating to the determination of reasonable attorney's fees to be awarded from the proceeds of a compromise, settlement, or judgment under Probate Code sections 3600-3601. No trial court, or any division or branch of a trial court, may enact or enforce any local rule concerning this field, except a rule pertaining to the assignment or scheduling of a hearing on a petition or application for court approval or allowance of attorney's fees under sections 3600-3601. All local rules concerning this field are null and void unless otherwise permitted by a statute or a rule in the California Rules of Court."

As a reminder: Family Code section 6602 states, "A contract for attorney's fees for services in litigation, made by or on behalf of a minor, is void . . . ."

An attorney can contract with the parents to represent the minor and can state in the contract that if the attorney achieves a settlement or a judgment after trial, the court will determine and award the attorney a reasonable attorney's fee. The insurance carrier's check for the amount of the settlement or judgment is deposited in the attorney's trust account, from which court-approved expenses and approved attorney's fees are paid.

*Judge Elwood (Woody) Rich retired from the Riverside County Superior Court in 1980.*

# 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 at 951-686-3547 or email towerpm@sbcglobal.net. Residential services available also.

**Office Space – Downtown Riverside**
1 block from the court complex. Full service office space available. Inns of Court Law Building. Contact Vincent P. Nolan (951) 788-1747 or Maggie Wilkerson (951) 206-0292.

**Office Space – RCBA Building**
4129 Main Street, Riverside. Next to Family Law Court, across the street from Hall of Justice and Historic Courthouse. Office suites available. Contact Sue Burns at the RCBA, (951) 682-1015.

**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 Charlene or Lisa at the RCBA office, (951) 682-1015 or rcba@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 October 30, 2010.

**Michael C. P. Clark** – Le Clark & Ho LLP, Riverside

**Tara Michelle Durbin** – Law Offices of Jeremy K. Hanson, Riverside

**Rahman Gerren** – Office of the City Attorney, Riverside

**Donie Ho** – Le Clark & Ho LLP, Riverside

**Au Lang Le** – Le Clark & Ho LLP, Riverside

**Charles B. Parselle** – Inland Valleys Justice Center, Ontario

**Marcella L. Perkins** (A) – Michael V. Hesse APC, Riverside

**Delores Munoz Reed** (A) – D. Munoz Bail Bonds, Riverside

**Seth Weinstein** – Law Student, Baton Rouge, LA

(A) — Designates Affiliate Members

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