

RIVERSIDE LAWYER

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MAGAZINE

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The Banks v. The Servicemember

**Servicemembers Civil Relief Act
as Applied to Child Support**

Obtaining Citizenship Through Military Service

**The Air and Marine Operations Center at
March Air Reserve Base Protects the Nation
Day and Night**

Opposing Counsel: Herbert H. Williams, III

**Missing in Action: A Veterans' Court for
Riverside County**

The Trial of Mary Surratt



The official publication of the Riverside County Bar Association

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RIVERSIDE LAWYER

MAGAZINE

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MISSION STATEMENT

Established in 1894

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

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve its members, and indirectly their clients, by implementing programs that will enhance the professional capabilities and satisfaction of each of its members.

Serve its community by implementing programs that will provide opportunities for its members to contribute their unique talents to enhance the quality of life in the community.

Serve the legal system by implementing programs that will improve access to legal services and the judicial system, and will promote the fair and efficient administration of justice.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are \$25.00 and single copies are \$3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in Riverside Lawyer.

The material printed in Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

CALENDAR

OCTOBER

- 4 Civil Litigation Section**
“How to Win Your Case right Away (or how to Avoid Losing Right Away): Pre-Trial Remedies, including TROs, Preliminary Injunctions, Writs of Attachment, and Writs of Possession”
MCLE
- 5 Bar Publications Committee Meeting**
RCBA Boardroom – Noon
- 10 Columbus Day Holiday**
RCBA Offices Closed
- 11 PSLC Board Meeting**
RCBA Boardroom – Noon
Red Mass
Our Lady of the Rosary Cathedral - 6:00 p.m.
2525 N. Arrowhead Avenue, San Bernardino 92405
- 12 CLE Brown Bag**
RCBA John Gabbert Gallery - Noon
“Government Claims”
Speaker: Arthur Cunningham
MCLE
- 14 General Membership Meeting**
Joint with Public Service Law Corporation
RCBA John Gabbert Gallery – Noon – MCLE
“Riverside Superior Court: Where Do We Go From Here?”
Speakers: Presiding Judge Sherrill Ellsworth
Sherri Carter, Court Executive Officer
Barrie Roberts, ADR Director
- 18 Family Law Section Meeting**
RCBA Gabbert Gallery - Noon
RCBA Board Meeting
RCBA Boardroom – 5:00 p.m.
- 19 Estate Planning, Probate & Elder Law Section Meeting**
RCBA Gabbert Gallery – Noon
“The Latest from Departments 8 & 11”
Speakers: Judge Cahraman, Commissioner Burgess and Court Staff
MCLE
CLE Committee Meeting
RCBA Boardroom
- 21-22 Dispute Resolution Service**
Two-Day Advanced Mediation Training Seminar
RCBA John Gabbert Gallery – 8:30 a.m. – 5:00 p.m.
DRS Panel Members – Free, Non-members - \$300
(Please see page 27 for details)
- 25 CLE Brown Bag**
RCBA John Gabbert Gallery - Noon
“Obtaining Your Default Judgment in Family Law Court”
Speakers: Riverside Superior Court Bench Officers and Staff
MCLE
- 26 CLE Brown Bag Sponsored by the Business Law Section**
RCBA John Gabbert Gallery - Noon
“Documents Retention Policies in an Ever Changing World of E-Discovery”
Speaker: Ben Eilenberg, associate at Gresham, Savage, Nolan & Tilden

NOVEMBER

- 2 Bar Publication Committee Meeting**
RCBA Boardroom – Noon
- 4 Appeals (CIVIL): Winning Strategies from Start to Finish**
Presented by Pincus Professional Education
Mission Inn – 9:00 a.m. – 5:15 p.m.
For information - please go to pincusproed.com
- 10 Child Rights & Advocacy**
Presented in cooperation with the RCBA's Human Rights Section
Speaker: DW Duke, Esq.
9:00 – 11:00 a.m.
Institute for Children's Aid
41745 Rider Way, Temecula
Information & RSVP: Pat @ 951-695-3336



President's Message

by Robyn A. Lewis

On September 21, 2011, the RCBA Annual Installation Dinner was held at the Mission Inn. I want first to take this opportunity to thank everyone who joined us at that dinner. Most particularly, I would like to thank Justice Thomas Hollenhorst for participating as the judicial officer who swore me in as President. I must also thank federal Magistrate Judge David Bristow for acting as the master of ceremonies for the evening. Both of these men have served as a source of inspiration and support for me, and I was so honored that they agreed to participate in such a special night.

I also wanted to thank Jim Heiting again for his touching tribute to the late Aurora Hughes, past president of the RCBA, and the namesake and first recipient of the E. Aurora Hughes Memorial Award for Meritorious Service to the RCBA and to the legal community at large.

In my first month as President, I have spent a lot of time thinking about the unique legal community that we have here in Riverside. It is one of the reasons why it is such a privilege for me to practice in this county and why it is a particular honor for me to serve as president of its bar association. I was reminded of that sense of community at the installation dinner, which is always a time for attorneys and bench officers to come together and celebrate the RCBA and our legal community. But what can we do to make that community better and stronger?

The first thing is to recognize that the history and tradition of our community should be honored. We should know those who came before us as practitioners and as bench officers. Those persons have given us the gift of the community that we have today. From the RCBA to Barristers to the Leo A. Deegan Inn of Court, for example, the organizations that have been

founded and nurtured by our predecessors have been a precious inheritance for all of us.

I recently had a conversation with a younger attorney who seemed to question the importance of tradition and the relevance of fostering relationships with older generations of attorneys. I thought about this for quite some time and wondered if his points were valid. Shouldn't we focus on what is current and happening now? Today, everything is about what is cool or sexy, right? Is it possible that I am just using tradition or community as a way to avoid the reality that I am just getting older and that there is a new generation of attorneys, who are doing things their way?

The answer is simply, "No." Perhaps Albert Einstein said it best: "Bear in mind that the wonderful things you have seen in your schools are the work of many generations . . . All this is put into your hands as your inheritance in order that you may receive it, honor it, add to it, and one day faithfully hand it to your children."

Without understanding those who have come before us, we lose a part of our collective soul. We lose what is so special about being an attorney in Riverside. Understanding the history of our legal community is what makes us a family. It is our duty to learn from the past, to add and improve what we can to the best of our ability, and to pass along what we have learned to the newer generations of attorneys and judges that come after us.

The second way to strengthen our legal community is to become an active participant in the RCBA. While we have well over a thousand members, we are not a thousand members strong. The more attorneys who participate, the stronger our organization will become.

There are so many ways to get involved. By now, you have each received a flyer with information on how to join a RCBA section or committee. Whether your practice focuses on family law or elder law or general civil litigation or criminal law, the sections are a great way for you to meet other attorneys in your area of practice. Attending other sections' meetings is a way for you to network and develop relationships with other attorneys who are referral sources. The MCLE topics offered by these sections are designed to aid in your specific area of practice, which will add to your base of knowledge. And best of all, this is free to you with your membership. I would encourage you to take advantage of all of these resources.

(continued on next page)

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And when I ask for active participation, I am not only asking for the participation of our attorney members, but our judicial members as well. Statewide budget cuts and an overwhelmed court system have caused our judicial officers to have an ever-increasing case load. To ask for even more of their time may seem to some to be a difficult request. However, our judicial officers are invaluable members of our legal community, and it is important for them to join us at bar events and functions. We need their participation and involvement to thrive as a united legal community.

The final thing that we can do to make our legal community even stronger is to give back to the community at large. Being a lawyer is not just about doing a job or conducting a business, but rather is about being a member of a noble profession. While the general public reputation of attorneys might be somewhat tarnished, we should all make it our goal to give back to the greater community at large. The RCBA offers programs such as Mock Trial and the Elves Program to do just that. But there are so many different ways that you can use your skills and knowledge to strengthen our community.

In this issue of *Riverside Lawyer*, the articles focus on the military and on our veterans. So many members of our armed forces are coming back from overseas with a variety of legal issues, and volunteer opportunities are available for attorneys to offer their assistance. For example, the Veterans Consortium pro bono program allows attorneys to offer their time and services to veterans who are in need of representation before the Court of Appeals for Veteran Claims. Most of these cases involve VA disability or death benefits. Interested attorneys are given basic training and asked for a commitment of approximately 50 hours. To date, almost 1,300 attorneys have accepted approximately 3,000 cases under the program. If you are interested in learning more about how you can volunteer your time for this program, please visit the web site for the National Veterans Legal Services Program at nvlsp.org.

Robyn Lewis, president of the Riverside County Bar Association, is with the firm of J. Lewis & Associates.





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Thank you for continuing to support the RCBA and its giving-back programs.



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UPCOMING CHAPMAN DIALOGUES



Catharine A. MacKinnon

Adrien K. Wing, Bessie Dutton Murray Professor, University of Iowa College of Law, and Bette and Wylie Aitken Distinguished Visiting Professor of Law, Chapman University School of Law, will present **After the Last Judgment: The Future of Middle East Constitutionalism**.
Thursday, October 27, 2011, 11:30 a.m.

Catharine A. MacKinnon, Elizabeth A. Long Professor of Law, University of Michigan Law School, will present **Trafficking, Prostitution, and Inequality**.
Tuesday, November 29, 2011, 11:30 a.m.

Walter E. Dellinger, III, the Douglas B. Maggs Professor Emeritus of Law at Duke University School of Law, will present **Lincoln, King and Mendez: The Quest for American Equality**.
Friday, December 2, 2011, 11:30 a.m.



Walter E. Dellinger, III

John Eastman, Henry Salvatori Professor of Law and Community Service, Chapman University School of Law, and **Larry Rosenthal**, Professor of Law, Chapman University School of Law, will present **United States Supreme Court Update**.
Thursday, February 23, 2012, 11:30 a.m.

Peter H. Schuck, Simeon E. Baldwin Professor Emeritus of Law and Professor (Adjunct) of Law, Yale Law School, will present **Immigration Policy: Myths and Realities**.
Thursday, March 15, 2012, 11:30 a.m.

Members of the legal community are invited to attend the Chapman Dialogues. Space is limited and advance reservations are required. Please contact bbabcock@chapman.edu for additional information.



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BARRISTERS PRESIDENT'S MESSAGE

by Scott H. Talkov



Honoring Our Veterans: Army Ranger & Barrister Curtis Wright

The Barristers could not have organized such a well-attended panel in August if it were not for the dedication of U.S. Army veteran and Barrister Curtis Wright. The panel addressed whether cities can prohibit medical marijuana dispensaries through zoning, with more than 100 people in attendance as the sun set over Tio's Tacos in downtown Riverside.

While Riverside City Attorney Greg Priamos was unable to speak due to pending litigation involving another panelist, his office insisted that he was confident that the city's attorneys at Best Best & Krieger could intelligently advocate the position that municipalities may prohibit dispensaries entirely. The city's confidence was not shaken when I informed the deputy city attorney in charge of these issues that the firm would be represented by Barrister Curtis Wright, who had passed the California Bar Exam just one year earlier after graduating magna cum laude from the University of La Verne College of Law.

Indeed, the city's trust was well placed. At the meeting, Curtis walked the audience through Proposition 215 (the Compassionate Use Act of 1996) and its implementation through Senate Bill 420. Although Curtis was joined by perhaps the Inland Empire's most passionate legal advocate for medical marijuana dispensaries – Lawrence Bynum, an RCBA member who has practiced law in Riverside for 16 years – there was no disagreement about Curtis' understanding of the law. Even with Stephen A. McEwen, a partner at Burke, Williams & Sorensen, and marijuana activist Lanny Swerdlow on the panel, the only disagreement between the panelists was their interpretation of unsettled areas of the law that are currently on appeal.

It was likely Curtis' military training, and the discipline and poise that come with rising to the rank of captain, that prepared him for the ambush that he faced by medical marijuana advocates at the event. After all, Curtis regularly faced enemy fire while leading an infantry platoon in Northern Iraq for a year after he graduated from the Army's highly competitive Infantry Ranger School, where he underwent rigorous training in mountain warfare and in the Florida swamps. Besides facing the enemy in Iraq, Curtis aided in the rebuilding of war-torn Mosul by helping to retrofit two dilapidated schools, acquire much-needed medical supplies for a clinic and repair a water treatment plant so residents would have clean drinking water.

During the panel, Curtis remained calm, outlined the hurdles that cities face, and explained his role as an associate with BB&K. Curtis

not only provided a superb example of why more employers should hire veterans of our armed forces, but also demonstrated the excellent legal skills possessed by so many young attorneys in our community. He credits the mental and physical discipline that he gained in the military for giving him the skills to be successful in law school and his career. "The law is very complicated and nuanced," Curtis said, "and the person who is willing to put in more time researching the cases and dotting every 'i' and crossing every 't' is going to win more often than not."

To expand the opportunities for more Barristers like Curtis to develop leadership in our legal community, the Barristers Board has introduced an amendment to the Barristers bylaws that will add additional directors-at-large to our board. The vote will take place at the Barristers' October 12, 2011 "Wine Law: Dinner, Wine Pairing and Panel" at Falkner Winery in Temecula. The social, tastings and tours will take place from 6 p.m. to 7:30 p.m., followed by a wine pairing dinner and panel featuring Riverside

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County Supervisor Jeff Stone, Temecula wine lawyer Michael Newcomb and Falkner Winery Owner Ray Falkner from 7:30 p.m. to 8:30 p.m., with one hour of MCLE.

Should Barristers members approve the proposed amendment, a vote will be held that night to fill the new vacancy for a director-at-large on the Barristers board. In light of Curtis Wright's exemplary job representing veterans and his law firm, I am confident he will set a fantastic example as a member of our Barristers board, should the membership concur.

For more information, visit our new website at riversidebarristers.org.

Scott Talkov is the 2011-12 President of Barristers as well as an attorney with Reid & Hellyer, where he practices real estate and business litigation.



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THE BANKS V. THE SERVICEMEMBER

by Alan R. Sims

Sgt. James B. Hurley was in Iraq when he fell behind on his mortgage. Deutsche Bank Trust Company and Saxon Mortgage Services foreclosed on Mr. Hurley's home in October 2004 and sold it in November 2005. In March 2009, a federal judge ruled that the foreclosure violated the Servicemembers Civil Relief Act (SCRA or Act).

What Is the SCRA?

This law was enacted in 1918 to protect servicemembers during the First World War. It was reenacted in 1940 and has been amended repeatedly since. (The Act may now be found in the Appendix to Title 50 of the U.S. Code, sections 501-596.)

The Act's purposes are to allow servicemembers to devote their time to the defense needs of the nation, and to provide temporary suspension of judicial and administrative proceedings that may adversely affect the civil rights of servicemembers during their military service.

In general, litigants must prove that an individual is not on active duty before any adverse action is taken, e.g., judgments, attachments, garnishments, evictions, and foreclosures. The benefits are extended to servicemembers even after active duty.

Why Did This Happen to Sgt. Hurley?

Under the SCRA, homes with mortgage contracts that predate a service member's entry onto active duty cannot be foreclosed on during that active duty or within nine months after the release from active duty without a court order.

Saxon Mortgage Services had a duty to verify Sgt. Hurley's military service. The court also has a duty to verify the same information. There is a website at the Defense Manpower Data Center that can be used to verify a servicemember's status, <https://www.dmdc.osd.mil/scra>. You will need the servicemember's first name, last name, and Social Security number.

Saxon hired a private law firm that did not comply with the SCRA even after Sgt. Hurley and his family disclosed his active duty status.

If the court knew that Sgt. Hurley was on active duty, then it could not enter a default judgment against him without appointing an attorney. A default judgment means any order, ruling, or decree that is adverse to the servicemember's interest.

In the case of Sgt. Hurley, the court would have appointed an attorney and would have issued a 90-day initial stay so the attorney could have represented Sgt. Hurley in the foreclosure proceedings.

Current Status

Sgt. Hurley sued in May 2007, and in March 2011 the defendants entered into a settlement with Sgt. Hurley. No details of the settlement are available.

What Relief Does the SCRA Provide Regarding Leases?

Under the SCRA, a servicemember can terminate a preservice dwelling, professional, business, agricultural, or similar lease executed by or for the servicemember and occupied for those purposes by the servicemember or the servicemember's dependents.

The Act as amended in 2003 also includes a provision extending coverage to leases entered into by a servicemember on active duty who subsequently receives orders for a permanent change of station or a deployment for 90 days or more.

The amended SCRA allows the termination of automobile leases (for business or personal use) by servicemembers or their dependents under certain circumstances.

Does the SCRA Stop Eviction by a Landlord?

Under the SCRA, a landlord may not evict a servicemember or the dependent of a servicemember from a leased residence without a court order when the monthly rent does not exceed a specified amount (\$2,400 in 2003, adjusted for inflation since).

Does the SCRA Apply to Time Payments or Installment Contracts?

Under the SCRA, servicemembers who signed an installment contract for the purchase of real or personal property before active duty will be protected if their ability to make the payments is materially affected because of their active duty service. The vendor is thereafter prohibited from exercising any right or option under the contract to rescind or terminate the contract or to repossess the property, unless authorized by a court order.

The SCRA Protects Against Foreclosure.

Under the SCRA, the servicemember is protected against foreclosure, provided the following conditions are met:

- a. The relief is sought on an obligation secured by a mortgage, deed of trust, or similar security on either real or personal property;
- b. The obligation originated prior to entry upon active duty;

c. The property was owned by the servicemember or dependent before entry on active duty status;

d. The property is still owned by the servicemember or dependent at the time that relief is sought;

e. The ability to meet the financial obligation is materially affected by the servicemember's military service.

f. The action is filed during, or within 90 days after, the servicemember's period of military service.

Courts can stay a proceeding until a servicemember is available to answer, extend the mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by the servicemember, and extend the period of redemption by a period equal to the servicemember's military service.

Alan R. Sims is the CEO of the Center for Litigation and Consumer Real Estate Education.



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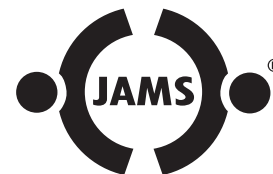
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THE RESOLUTION EXPERTS



SERVICEMEMBERS CIVIL RELIEF ACT AS APPLIED TO CHILD SUPPORT

by Christopher J. Buechler

In order to provide some peace of mind to active duty military servicemembers, Congress enacted the Servicemembers Civil Relief Act (SCRA)¹ to prevent default judgments from being entered against active-duty or recently separated members of the Army, Navy, Air Force, Marine Corps, Coast Guard and National Guard (including reservists called to active duty). The act, formerly known as the Soldiers' and Sailors' Civil Relief Act, has been around in its current form since 1940, when it was designed to protect servicemembers heading off to fight in World War II; it was based on a similar act passed in 1918 to protect servicemembers heading off to fight in World War I. The 1918 act had a sunset provision that is not present in the current act, and indeed, the SCRA has been updated many times since 1940, the most recent major changes occurring in 2003. The SCRA has some sections relating to very specific civil actions servicemembers may find themselves facing, but for purposes of child support, the general provisions contained in 50 U.S.C. App. §§ 521-27 apply.

Appointment of Counsel

Section 521 of the SCRA requires any plaintiff seeking a default judgment in a civil action or proceeding to file an affidavit stating whether the defendant is in military service, plus sufficient facts in support. For defendants who are identified as being in military service, section 521(b)(2) requires the court to appoint counsel for the servicemember before any judgment can be entered. If the attorney cannot contact the servicemember, then the attorney may still appear, but the attorney's appearance cannot waive any defense (e.g., lack of personal jurisdiction) or otherwise bind the servicemember. The Child Support Attorney Sourcebook points out that the attorney's appointment is for the limited purpose of protecting the servicemember's rights under the SCRA and not for the merits of the case.²

Stay of Proceedings

Section 521(d) requires the court to stay any civil proceeding for at least 90 days on the application of counsel or the court's own motion if the court determines that (1) there may be a defense that cannot be presented without the servicemember present and (2) counsel has not been able to contact the servicemember after due diligence. The

court may also grant a similar stay after the servicemember has received notice of the action, provided the servicemember submits to the court (1) a letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear, and (2) a letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.³ Additional stays are allowed under section 522(d) based on a showing of continued material effect, but such additional stays are discretionary.⁴ Any denial of an additional stay requires the court to appoint counsel to represent the servicemember's interests.⁵

Set-Aside Remedy

Failure to follow these procedures could enable the servicemember to move to have the judgment set aside, provided he or she shows that military service had a material effect on mounting a defense to the action and that the servicemember has a defense to the action or some part of it.⁶ Such motions to set aside or vacate must be filed within 90 days of separation from military service.⁷

Keep in mind, though, that the military is dedicated to seeing that a servicemember fulfills his or her family support obligations. Failure to meet these obligations could be construed as conduct unbecoming an officer and a gentleman (or gentlewoman). In these cases, it may be advisable to have the custodial parent contact the servicemember's commanding officer to ensure that adequate support is provided by the servicemember once the court has provided the procedural safeguards required under the SCRA.

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¹ 50 U.S.C. App. § 501 et seq.

² Davenport, ed., *Child Support Attorney Sourcebook* (2010), p. 189.

³ 50 U.S.C. App. § 522(b).

⁴ *George P. v. Superior Court* (2005) 127 Cal.App.4th 216, 223.

⁵ 50 U.S.C. App. § 521(d)(2).

⁶ 50 U.S.C. App. § 521(g)(1).

⁷ 50 U.S.C. App. § 521(g)(2).

OBTAINING CITIZENSHIP THROUGH MILITARY SERVICE

by Sophia Choi & Curtis Wright

United States citizenship is highly regarded and desired by many people around the world. However, applying for and being awarded U.S. citizenship can be a long, painstaking process. One way to expedite the citizenship process is through military service. Certain provisions of the Immigration and Nationality Act (INA) allow expedited naturalization for current and recently discharged members of the U.S. armed forces. Additionally, civilian spouses of U.S. armed forces members who are or will be deployed may also be eligible for expedited naturalization.

According to U.S. Citizenship and Immigration Services, an agency of the Department of Homeland Security, a member of the U.S. armed forces must meet certain “qualifications” to become a U.S. citizen. These qualifications include proof of good moral character, proficiency with the English language, knowledge of U.S. government and history (civics), devotion to the United States, and an oath of allegiance to the United States Constitution. However, there are additional naturalization requirements from which qualified members of the U.S. armed forces are exempt, such as physical presence and residency qualifications.

United States Code, title 8, section 1427 sets forth the general requirements for naturalization. Subsection (a) provides that an applicant for naturalization must meet certain residency requirements and that the applicant must at all times be “a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.” (8 U.S.C. § 1427(a).) Notwithstanding this naturalization statute, there are two sections of the INA providing for expedited naturalization based on military service and one section providing for posthumous naturalization based on military service.

Section 328 of the INA (8 U.S.C. § 1439) applies to all members of the U.S. armed forces and those already discharged from service; it provides for expedited naturalization through military service during peacetime. To qualify for naturalization under this provision, the applicant must have served honorably in the U.S. armed forces for at least one year, obtained lawful permanent resident status, and filed an application while still in the service or within six months of separation.

Section 329 of the INA (8 U.S.C. § 1440) provides for expedited naturalization through military service during wartime. In fact, on July 3, 2002, President Bush, under

special provisions authorized by section 329 of the INA, allowed all noncitizens who have served honorably on or after September 11, 2001 to file for immediate citizenship. This increased political and popular interest in expanding citizenship benefits to those serving in the military was undoubtedly prompted by the events of September 11, 2001 and the emerging global war against terrorism.

Nonetheless, Americans who gain their citizenship through military service also face additional consequences and challenges. For example, if a person separates from the military under “other than honorable conditions” before completing five years of honorable service, that person may have his or her citizenship status revoked.

United States Code, title 8, section 1440 deals with the requirements for expedited naturalization through military service during wartime. In the case of *O’Sullivan v. United States Citizenship and Immigration Services* (2006) 453 F.3d 809, a question arose as to whether section 1440 “excuses aliens who served honorably in the U.S. military in times of war from making a showing of good moral character when applying to become naturalized citizens.” (*O’Sullivan* at p. 812.) Under section 1440(b), wartime veterans are exempted from the residence requirements of naturalization, but it was unclear whether this exemption also applied to the good moral character requirement in the same subsection. *O’Sullivan* insisted that the expressly stated moral character requirement for peacetime veterans under section 1439(e) showed that Congress would have expressly required wartime veterans to prove good moral character if it was its intent to do so.¹ The court of appeals disagreed and ruled that section 1440 does not excuse alien wartime veterans from showing good moral character, holding that sections 1427 and 1440 both require wartime veterans to show that they possess good moral character to become naturalized citizens of the United States. (*O’Sullivan* at p. 814.) Thus, while military service lends credibility to the right to citizenship, it does not subrogate for the servicemember’s obligation to actually be a good, upstanding citizen.

Section 329A of the INA (8 U.S.C. § 1440-1) provides for grants of posthumous citizenship to certain members of the U.S. armed forces who died in service to their country during World War I, World War II, the Korean War, the Vietnam War, and other periods of military conflict. This

¹ *Id.* at p. 814.

provision applies to a member of the U.S. armed forces who served honorably during a designated period of military conflict and died as a result of injury or disease related to that service.

Naturalization is also available to family members of U.S. citizens who have died while serving honorably. Under section 319(d) of the INA (8 U.S.C. § 1430(d)), a spouse, child, or parent of a fallen hero is entitled to file for naturalization. While there is much political debate about immigration in our country, there is wide popular and political support to allow those who defend our freedom and serve our country through the military to have expedited access to U.S. citizenship. Undoubtedly, those who have fought, and especially those who have died, in service to our country are the most deserving of all to be called Americans.

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MISSING IN ACTION: A VETERANS' COURT FOR RIVERSIDE COUNTY

by Amy Leinen Guldner

Nick Stefanovic enlisted in the Marine Corps when he was 20 years old. He served two tours in Afghanistan and one in Iraq as a rifleman with the 3rd Battalion, 6th Marines. He received the Combat Action Ribbon for valor in fighting, but his real battle began when he returned home. "The trauma after the war was almost worse than the trauma during the war."¹ "I had nightmares, anxiety, panic. I didn't know why it was happening," he said. "I knew that nobody was going to be able to help me because nobody was going to be able to understand what was happening to me. I think that was the worst feeling."² He felt completely severed from both society and the Marines. He had accepted that his days were numbered and that he would never again be a contributing member of society. He just wanted peace and relief.³

"His war story was no different from countless other foot soldiers. A roadside bomb came so close, it blew the door off his Humvee. One of his closest friends was killed in action. 'A significant portion of veterans have turned to substance abuse as a way to self-medicate and deal with the flashbacks and the nightmares,' says Tom Cray of the Rochester Outreach Center in New York."⁴ Drugs and alcohol gave Stefanovic that relief, along with criminal activity and jail time. He went to more than six treatment centers but nothing worked – until he entered Judge Marks' veterans' treatment court in Rochester, New York.⁵ Stefanovic is convinced that Judge Marks has saved his life.⁶

Stefanovic's coming-home story is becoming all too common. According to a recent article in the *Economist*, unemployment among veterans who have served since 2001 is higher than for non-veterans, veterans make up 20% of all suicides, nearly 20% of the homeless are veterans, substance abuse is pervasive among veterans, and many more veterans have mental-health problems, which often lead to criminal behavior.⁷ Our military service personnel who are returning from a combat zone deployment are an underserved population in terms of effective mental health treatment to address

post-traumatic stress disorder (PTSD), substance abuse, traumatic brain injury and other serious mental health problems stemming from their service to our country. As they struggle with these mental issues, an increasing number of these veterans find themselves as defendants in the criminal justice system.

Fortunately, courts across the country – like the one in Rochester that saved Stefanovic – are recognizing that these veterans have a unique set of problems, and they are developing specialized tracks to address the underlying issues. These hybrid drug and mental health courts use the drug court model to serve veterans who are struggling with addiction, serious mental illness and co-occurring disorders. They change lives by promoting sobriety, recovery and stability through a coordinated response that involves cooperation and collaboration with the traditional partners found in drug and mental health courts, in addition to the U.S. Department of Veterans Affairs, health care networks, the Veterans' Benefits Administration, and, in some programs, volunteer veteran mentors and veterans' family support organizations. The goal of these specialized courts is to help rehabilitate veterans and avoid convictions that might cost veterans their future military benefits and their freedom.⁸ Unfortunately for veterans here, Riverside County has yet to implement such a track or court for them.

Here are some more telling facts:

- There are 23,440,000 veterans in the United States (per the U.S. Department of Veterans Affairs).
- There are 1.7 million veterans of Iraq and Afghanistan (per Iraq and Afghanistan Veterans of America),
- 19% of veterans of Iraq and Afghanistan report symptoms of PTSD and/or major depression (per the RAND Center for Military and Policy Research).
- In 2006, 1.8 million veterans (including 25% of veterans aged 18-25) met the criteria for having a substance abuse disorder (per the Substance Abuse and Mental Health Services Administration).

According to the U.S. Department of Justice, 1.16 million veterans were arrested in 2007 – nearly 10% of total arrests.⁹ Exact statistics are not available, but judges throughout the

1 Tough Love Judge a Veteran's Lifesaver, CBS News, March 1, 2010.

2 CBS News, *supra*.

3 Nick Stefanovic's speech at NADCP's 17th Annual Drug Court Training Conference, July 2011, available at nadcp.org/learn/veterans-treatment-courts/veterans-treatment-court-news-and-events/general-ret-barry-mccaffrey or youtube.com/watch?v=wmiemEfUag&feature=player_embedded.

4 CBS News, *supra*.

5 Stefanovic speech, *supra*.

6 Stefanovic speech, *supra*.

7 Leave No Veteran Behind, *Economist*, June 2, 2011.

8 Courts for Veterans Spreading Across U.S., *National Law Journal*, December 22, 2008.

9 *National Law Journal*, *supra*.

United States report that military service-members who have recently returned from deployments are appearing in their courts in unprecedented numbers. Judges “are concerned that PTSD and brain injuries underlie drug and alcohol abuse that leads to arrests for everything from domestic violence to driving while under the influence.”¹⁰

The nation’s first veterans’ court was in Buffalo, New York, started by Judge Robert Russell of the Buffalo City Court. According to the *National Law Journal*, “Russell pursued the idea of a court exclusively for veterans in Buffalo after he realized he was seeing more young veterans in his drug and mental illness treatment courts. He believed they might benefit from being in the courtroom together, given the military’s strong sense of camaraderie. He collaborated with staff from the Buffalo VA Medical Center to design a court that would handle only veterans who had committed nonviolent felonies and misdemeanors.” “Each veteran is assigned a mentor, also a veteran from the same service, who acts as a coach and, if need be, an ‘ass-kicker.’ If the veterans follow the program’s regimen, which involves regular court appearances, mandatory drug treatment and testing, they could see their charges reduced or dismissed and they could stay out of jail.”¹¹ “You have a totally therapeutic, supportive environment to afford a veteran the best opportunity to be successful,” Judge Russell said.¹²

Approximately 70 other veterans’ courts have been launched, and 12 more are in the works.¹³ Eight counties in California have veterans’ courts, the first of which was created in November 2008 by Orange County Superior Court Judge Wendy Lindley after a 27-year-old man who had served in Iraq died from a drug overdose within weeks of passing through her courtroom. “I just thought, ‘I really don’t want to see anything like this happen to anyone again,’” Lindley said a few weeks after starting up the veterans’ court.¹⁴ The Santa Ana court handles veterans who have committed violent crimes, as well as nonviolent offenders.¹⁵ This

court is one of four nationwide chosen to serve as a Mentor Veterans Treatment Court.

Judge Lindley accepts those veterans who had no problems during school and no contacts with the criminal justice system when they joined the military.¹⁶ She requires that participants adhere to three rules: be honest, show up, and try hard. Her program has four phases, is highly structured and lasts a minimum of 18 months. Most in this program are 20-somethings who served in Iraq or Afghanistan, but some are older. The mentors are mostly volunteer Vietnam veterans who take quite seriously their motto: “Never again shall one generation of veterans forget another.”¹⁷

The mentors work on getting veterans to tap into the sense of pride they had in the military. “There’s something about that pride from the past that they’re able to resurrect, and they’re able to move forward. I’ve seen it,” said Danielle Michael, a public defender with Buffalo’s Legal Aid Bureau.¹⁸ “Structure. They respond well to structure,” said Judge Lindley.¹⁹ The mentors and VA staff also guide the veterans “in accessing military benefits that might help solve substance abuse, health, marriage, employment and financial problems.”²⁰

In January 2011, San Diego County started its Veteran Treatment Review Calendar.²¹ Judge Roger W. Krauel, a Vietnam veteran who spent 35 years in

16 Justice for Veterans, *California Litigation*, Vol. 24, No. 1, 2011

17 *California Litigation*, *supra*

18 Finding a new normal: Special courts help vets regain discipline, camaraderie by turning to mentors who’ve served, *Military Times*, February 14, 2011

19 *Military Times*, *supra*.

20 *National Law Journal*, *supra*.

21 First county veterans’ court date set, *North County Times*, January 21, 2011,

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10 *National Law Journal*, *supra*

11 *Economist*, *supra*.

12 *National Law Journal*, *supra*.

13 *Economist*, *supra*

14 *National Law Journal*, *supra*.

15 *National Law Journal*, *supra*.

uniform and has been on the bench since 1991, spends one day a week concentrating on veterans' cases from across the county. "If you send someone to DUI school when they need to go to PTSD counseling, you are doing a disservice to both the veteran and the public," said San Diego attorney Jude Litzenberger, who co-chaired the legal task force that established the San Diego program²².

San Bernardino County also has a veterans' court. Unlike Orange County's program, it generally accepts only those with nonviolent charges.²³ After pleading guilty to felony criminal charges, the veterans in the program are put on probation for two to five years, during which time they are directly supervised by Veteran Affairs New Start. They also must complete an intensive program at the VA Loma Linda Healthcare System, consisting of treatment for drug and alcohol abuse, psychological counseling, and job training.²⁴ The treatment program typically lasts six to nine months but can be extended.²⁵ Upon successful completion of the program, if a defendant has not violated probation, has not picked up any new criminal charges, is employed, and has refrained from further drug and alcohol abuse, probation can be terminated early. In appropriate cases, the felony conviction can be reduced to a misdemeanor.²⁶

According to the *National Law Journal*, Veterans Affairs provides most of the funding for veterans' courts, but the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services also contributes.²⁷ State legislatures are also weighing funding proposals. Given the success of the programs and the increase in veterans returning from combat zones, it's not surprising that many people (including even actor Martin Sheen) are pushing Congress to authorize the \$88.7 million needed to fund veterans' courts in 2012.²⁸

Supporters are gravitating to the concept because of its effectiveness in reducing recidivism among veterans. For example, of the 120 veterans enrolled in Judge Russell's program in New York, 90 percent successfully completed the program, and the recidivism rate is zero.²⁹ According to the National Association of Drug Court Professionals (NADCP), 70 percent of defendants finish the programs, and 75 percent are not rearrested for at least two years after.³⁰ In Orange County's 2009 annual report on "collaborative" courts, Judge Lindley wrote that studies show they enhance public safety, cut recidivism and are more cost-effective than the typical manner of processing offenders. The programs also help

veterans get the military health and disability benefits and treatment that they struggle to receive on their own.

One controversy that has arisen with these courts is whether they are open to all veterans or just those who have served in combat.³¹ California courts are in the latter camp because of Penal Code section 1170.9. This statute permits the courts to divert into a program any veteran "who served in combat" and "suffers from post-traumatic stress disorder, substance abuse, or psychological problems as a result of that service."³²

In a speech he gave in July of this year at the NADCP's 17th Annual Drug Court Training Conference, General (ret.) Barry McCaffrey called for an increase in veterans' courts to ensure returning veterans get the treatment and services they have earned. "We've got 80 veterans' treatment courts. It's working like magic. It's unbelievable. You put these people back together and tell them 'depend on each other' and get the older veterans to reach out to them. And get the compassion and the expertise of the judge with American justice as it was supposed to work."³³ Stefanovic is just one example of how well these courts work; he is now one semester away from his college degree in substance abuse counseling and plans to attend graduate school.³⁴

Although there is no veterans' court in Riverside, some judges here are known for their efforts to help rehabilitate veterans. This is a good beginning, but our veterans "are better served when they are separated from others because combat veterans share a common bond, understand each other and are accustomed to structure."³⁵ According to Sherri R. Carter, Executive Officer for the Riverside Superior Courts, "It is the desire of Riverside County to develop a veterans' court at some point in the future, but not now, considering the potential treatment and related costs to implement such a program when faced with the current budget and staff reduction." Advocates for such courts would point to the cost savings and the heightened need in a tough economy. Let's hope our struggling veterans won't have to wait much longer. A veterans' court here in Riverside County will help ensure that we are truly doing everything we can to help those who have risked everything for us.

Amy Leinen Guldner, a member of the Bar Publications Committee, is a Lead Attorney with Montage Legal Group, a network of experienced freelance attorneys. Her husband is a combat veteran who served in both Iraq and Afghanistan.



22 *North County Times*, *supra*.

23 Veterans' Court Established in San Bernardino, *ROTW News*, March 13, 2009

24 *ROTW News*, *supra*.

25 *ROTW News*, *supra*.

26 *ROTW News*, *supra*.

27 *National Law Journal*, *supra*.

28 *Navy Times*, *supra*

29 *North County Times*, *supra*.

30 *Military Times*, *supra*.

31 *Military Times*, *supra*.

32 *California Litigation*, *supra*.

33 General McCaffrey's speech at NADCP's 17th Annual Drug Court Training Conference, July 2011, available at nadcp.org/learn/veterans-treatment-courts/veterans-treatment-court-news-and-events/general-ret-barry-mccaffrey or youtube.com/watch?feature=player_embedded&v=-rOr1tB14RI

34 Stefanovic speech, *supra*

35 *California Litigation*, *supra*.

THE AIR AND MARINE OPERATIONS CENTER AT MARCH AIR RESERVE BASE PROTECTS THE NATION DAY AND NIGHT

by Jamie Wrage

March Air Reserve Base sits between Riverside and Moreno Valley. Residents of the Inland Empire drive by the enormous airfield every day, but only a small percentage have any idea what goes on there now that it has ceased housing an active-duty military presence. In addition to reserve unit activities, March ARB is home to numerous tenant organizations, both military and civilian. For example, Armed Forces Radio and Television operates worldwide from March ARB. One of the lesser known non-military tenants of the base is one of the most interesting, and one of the most important to our nation's security.

March ARB houses the Department of Homeland Security's Customs and Border Protection's (CBP's) Air and Marine Operations Center (AMOC). AMOC's mission is to secure the airspace along the country's borders. It monitors threats in the continental United States up to 100 nautical miles offshore (and up to 150 nautical miles from Puerto Rico). U.S. airspace and border waterways see more than 150,000 operations in one day alone; AMOC monitors them all, 24 hours a day, seven days a week.

Fully integrated sensors and databases allow AMOC to locate and identify every craft within its operating zone and to direct law enforcement agents to prevent and intercept terrorist or criminal activity. This is the only such operation in the country. In a post-9/11 world, its task of monitoring activities in-country have become even more important. AMOC accomplishes its work using 250 different radar systems, including information gathered from air traffic control radars, satellites, P-3 Orion aircraft, and unmanned Predator B aircraft.

While CBP oversees AMOC, personnel from many different agencies work together to gather and use the information for the safety of the nation. Agencies whose personnel operate out of AMOC in Riverside include the Federal Aviation Administration, the Coast Guard, and the Air National Guard.

AMOC carries out its function of protecting our borders using the Air and Marine Operations Surveillance System



U.S. Customs and Border Protection
Photo by Jaime Ruiz, Public Affairs Specialist
U.S. Dept of Homeland Security

(AMOSS), the most advanced law enforcement air and marine surveillance system in the United States. AMOSS combines its unique communication capabilities with real-time analysis of AMOC intel by personnel, rendering it the most effective tool in federal law enforcement. For example, when personnel are alerted to an aircraft completing a pattern of activity that matches activity previously involved in some sort of criminal enterprise, AMOC notifies its law

enforcement agency partners to allow them to interview the pilot and determine the purpose of the flight.

AMOC came to a new facility at March ARB in 1988. It acts as a federal law enforcement interdiction center. The personnel operating AMOC use investigative data, intelligence data, and maritime domain awareness data to find people who are using general sea and aircraft for illicit purposes. At the same time, the Office of Air and Marine operates a fleet of unmanned predator aircraft for law enforcement land and air operations. And more recently, those operations have expanded to include maritime operations – an important tool in fighting the entry of illegal drugs into the nation by sea or waterway.

All of the information that flows into AMOC can be utilized and analyzed by the various law enforcement offices in concert to get results. In an action resulting from information from AMOC, cooperating agencies can include CBP office field operations, the Border Patrol, the DOD, the FAA, or other international liaisons (such as Mexico). The intel can be used to communicate with the people on the ground and to link various law enforcement officers anywhere in the United States for the purpose of intercepting drug traffickers and smugglers and stopping terrorist attacks.

AMOC quietly fulfills its mission to protect our nation every day from its home at March ARB. That will give us all something to think about and be thankful for next time we drive by the base.

Jamie Wrage, a member of the Bar Publications Committee, is a partner at Gresham Savage Nolan & Tilden.



THE TRIAL OF MARY SURRETT

by Richard Brent Reed

Military courts have been established by Congress, pursuant to Article I of the Constitution. In time of war, even when civil courts are functioning, a military court may try enemy combatants under the law of war. One of the first instances of a civilian being tried by a military tribunal was the trial of Mary Surratt at the end of the Civil War.

On April 14, 1865, President Abraham Lincoln was assassinated at Ford's Theatre in Washington, DC by John Wilkes Booth, a famous actor and Confederate sympathizer. Booth stole into the box where Lincoln sat, shot him in the back of the head, and leaped onto the stage, crying, "Sic semper tyrannis!," which, loosely translated, is Latin for "That's how you deal with tyrants." Despite a broken ankle, Booth bolted across the stage and out the door to his horse waiting outside.

The presidential murder was planned in concert with other confederates, who were supposed, simultaneously, to murder Secretary of State William Seward and Vice-President Andrew Johnson. The attempt on Seward's life failed when his attacker, whose gun had misfired, couldn't manage to land a mortal blow with his knife. The attack on Johnson never took place, due to the inebriation of his designated assassin.

On April 17, Mary Surratt was arrested at her boarding house to stand trial with seven other accused conspirators. On May 1, the new president, Andrew Johnson, ordered the formation of a military tribunal to try the conspirators for "traitorous conspiracy." Under the Habeas Corpus Act of 1863, those charged with murder, conspiracy, treason, or other common-law offenses were to be handed over to civilian authorities. However, a charge of "traitorous conspiracy" was not triable in the civilian courts. In fact, it has been argued that neither traitorous conspiracy nor assassination was prohibited by federal law at the time.

The public was barred from the proceedings until Generals Grant and Comstock, both of whom had testified at the trial, complained to President Johnson about the secrecy. Two days later, the trial was opened to the public.

The charges against Surratt included abetting, concealing, and harboring the conspirators. The case against her turned on three allegations:

- 1) She had met with Booth hours before the assassination;
- 2) She had lied when asked if she recognized one of the conspirators who had shown up on her doorstep just two days after the assassination;

- 3) She had delivered a package containing binoculars, at Booth's request, to her tavern in Surrattsville the day before the assassination. (It should be noted that the tavern had already become an arsenal, with guns hidden in the walls.)

Her counsel consisted of attorneys Frederick Aiken, John Clampitt, and Senator Reverdy Johnson of Maryland.

The chief witnesses against Mary Surratt were Louis Weichmann, one of her boarders, and John Lloyd, who ran the tavern in Surrattsville. Weichmann had taken part in Booth's failed attempt to kidnap Lincoln in March. According to Weichmann, Surratt had met with Booth regularly, both with and without the other conspirators. Sometimes she met with him privately up in her bedroom – if not in the middle of the day, certainly in the middle of the Victorian era. It was Weichmann who had driven Surratt to the tavern on April 14 to deliver Booth's package – binoculars – to Lloyd. Lloyd, for his part, testified that Surratt had instructed him to get the shooting irons ready, referring to the guns that had been secreted in the tavern in March.

The trial lasted six weeks. Judge Advocate John Bingham gave the government's closing argument, in which he defended the tribunal's jurisdiction, as the crimes had been committed in a military zone during a time of war with a treasonous purpose. Secretary of War Edwin Stanton, who was adamant about punishing the South's rebellion, took a keen interest in the outcome of the trial. (Ironically, eliminating Lincoln, Johnson, and Seward would, probably, have put Stanton in charge of the country, which would have benefited no one but Stanton.)

On June 30, the tribunal found Surratt guilty on all charges but two and sentenced her to hang. Even though five of the nine judges later petitioned President Johnson to commute her sentence to life in prison, Johnson went ahead and signed the order for execution, noting that Surratt had "kept the nest that hatched the egg."

On July 7, in a last-ditch effort to save his client, attorney Frederick Aiken got a writ of habeas corpus from Justice Andrew Wylie, ordering Major-General Hancock to deliver Surratt to Wylie's courtroom immediately. Attorney-General Joseph Speed did an end-run around the writ by securing an order to Hancock from higher up, which read:

"I, Andrew Johnson, President of the United States, do hereby declare that the writ of habeas corpus has been heretofore suspended in such

cases as this; and I do hereby suspend this writ, and direct that you proceed to execute the order heretofore given upon the judgment of the Military Commission; and you will give this order in return to this writ.”

In July 1865, Attorney-General Speed wrote an opinion in support of the military tribunal as the proper forum for the trial of civilian offenders in time of war. Citing Wheaton’s *Elements of International Law*, he wrote:

“The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent power in a state of mutual hostility . . . The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States were allowed to plunder and slay indiscriminately the enemy’s subjects, without being in any manner accountable for his conduct. Hence it is that, in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practiced by civilized nations.”

Speed’s opinion even enlisted the support of Patrick Henry: “A pirate, an outlaw, or a common enemy to a mankind, may be put to death at any time. It is justified by the law of nature and nations.” “The law of nature and nations” was a phrase used often by the Founders and is a reference to Baron von Pufendorf’s venerable tome, *The Law of Nature and of Nations*.

The trial of civilians by a military tribunal in the middle of the city seemed uncalled for and out of place, since, even though Washington was, more or less, an armed camp, civilian courts had remained open for business. Speed addressed the jurisdictional issue thus:

“The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, or bandit or other offender against the law of war, may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business.”

Earlier in the proceedings, Walter Cox, one of the defense attorneys, had launched an eloquent peroration against the tribunal’s claim of jurisdiction under the “law of war” doctrine:

“Is it possible that American citizens can be judged and punished by an unwritten code that has no definitions, no books, no judges or lawyers;

which, if it has any existence, like the laws of the Roman Emperor, is hung up too high to be read?”

On April 26, 1865, Booth was trapped in a burning barn and shot dead. His diary revealed that he was dejected over the universal outrage – even among Southerners – at what he had done. The diary was barred from evidence in the Surratt trial.

No one thought that the federal government would actually hang a woman – it had never done so before – but life is full of surprises. Surratt was hanged on the morning of July 7, 1865, along with three of her codefendants.

In 1866, the Supreme Court decided, in *Ex parte Milligan* (1866) 71 U.S. (4 Wall.) 2, that military trial of civilians was unconstitutional when civilian courts were open. Mary Surratt’s son, John Surratt, a Confederate spy who had conspired to kidnap Lincoln, was apprehended later that year and was tried by a Maryland court. After a mistrial, he was released: the statute of limitations on all of the charges but murder had run out. He died in 1916.

In 1867, Congress impeached Andrew Johnson after he had attempted to replace Edwin Stanton as Secretary of War with Ulysses S. Grant. The tally fell short of removing Johnson from office by just one vote. That same year, Secretary of State Seward, who had been permanently disfigured by the knife attack, persuaded the government to buy Alaska from Russia for about \$7 million. He died five years later.

In 1869, Edwin Stanton was appointed to the Supreme Court and promptly dropped dead.

In 1874, the state of Tennessee returned Andrew Johnson to the Senate. He died the following year.

Case law seems to favor military tribunals during time of war – that is, when war has been declared – but disfavors such tribunals when war has not been declared. Mary Surratt’s trial took place at the end of the Civil War – well after Robert E. Lee had surrendered his sword to U.S. Grant on April 12, 1865 – which puts the Surratt court’s validity in a gray area, so to speak. There is little doubt that the trial was not fastidiously conducted and much of the lawyering on both sides was slipshod. Despite the proceeding’s defects, to argue, in light of the evidence, that seven innocent men and one innocent woman were convicted would be a stretch. Nevertheless, Surratt’s trial remains controversial to this day.

The primary sources for this article were (1) *American Brutus* by Michael W. Kauffman, and (2) the Wikipedia article on Mary Surratt, last modified on September 4, 2011 at 8:43 a.m.

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



NEW LAW PROVIDES GREATER PROTECTION FOR HOMEOWNERS IN DEFAULT

by DW Duke

On July 15, 2011, Governor Jerry Brown signed Senate Bill 458 into law. S.B. 458 amends Code of Civil Procedure section 580e (section 580e) to preclude the holder of any trust deed securing residential properties, consisting of dwellings of one to four units, from pursuing a homeowner (trustor or mortgagor) for a deficiency after the holder of the trust deed has agreed in writing to a short sale, unless the homeowner has been guilty of fraud or waste, or unless the homeowner is a corporation or a political subdivision.

Prior to January 1, 2011, there was some uncertainty as to whether the holder of the first trust deed could pursue a deficiency judgment after a short sale had occurred. The reason is that a short sale is not a foreclosure and thus was not subject to the antideficiency protection of Code of Civil Procedure section 580d. In a short sale, the lender in the first position forgives the balance due on the loan and releases its security interest in the real estate in exchange for a payment of an agreed-upon amount by a third party, called the "short sale purchaser." While there is no known case in which a holder of the first has successfully pursued a deficiency after a short sale, many home owners were unwilling to accept the risk that the lender might attempt to do so, and for that reason, they allowed their homes to be foreclosed rather than enter into a short sale transaction.

To resolve any ambiguity concerning the ability of the holder of the first trust deed to pursue a deficiency after a short sale, the California legislators enacted S.B. 931, which went into effect as section 580e on January 1, 2011. Section 580e precluded the holder of a first trust deed from pursuing any deficiency after agreeing to a short sale and releasing the security interest. However, section 580e did not address the holders of junior trust deeds. As a result, many holders of junior deeds were agreeing to a short sale, but only if the borrower agreed to negotiate with the junior lienholder after the short sale escrow had closed.

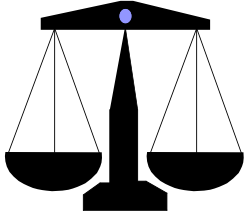
To protect homeowners from holders of junior trust deeds who would seek to recover the deficiency,

the legislators amended section 580e to include all trust deed holders on qualifying property, regardless of the position they hold, provided the short sale is agreed to by said trust deed holders, and the homeowner has not been guilty of waste or fraud and is not a corporation or a political subdivision. In other words, holders of junior trust deeds are now barred from seeking a deficiency judgment or suing the homeowner for breach of contract on the loan after a short sale that they have agreed to. There is no requirement that the property be the residence of the party who obtains the short sale.

As amended, section 580e now provides even greater protection for homeowners facing foreclosure. This amendment also specifically states that the borrower cannot be required to pay any additional compensation, aside from the proceeds of the sale, in exchange for written consent to the sale. Previously, lenders engaged in fraudulent practices whereby the homeowner, or the buyer, would often be required to negotiate outside of escrow and to secretly pay some amount of money to the second trust deed holder in exchange for a release of the lien. Not only did this activity constitute mortgage fraud, but it was illegal. Now it is spelled out clearly by statute that this is prohibited. Further, the amendment states that any waiver of these protections shall be deemed void and against public policy. While this amendment may lead to borrowers having a more difficult time obtaining the approval of junior lien holders, it will provide those who do obtain approval with peace of mind, knowing that they are no longer responsible for any deficiency.

DW Duke manages the Inland Empire office of Spile, Siegal, Leff & Goor, LLP and is a member of the California Association of REALTORS Strategic Defense Panel. Michael Wilson is an associate in the Encino office of Spile, Siegal, Leff & Goor, LLP and specializes in real estate law.





21st ANNUAL RED MASS

Tuesday, October 11, 2011, at 6:00 p.m.

**OUR LADY OF THE ROSARY CATHEDRAL
2525 North Arrowhead Avenue, San Bernardino**

The entire legal community and persons of all faiths are invited to attend the 21st Annual Red Mass on Tuesday, October 11, 2011, at 6:00 p.m. The mass will be held at Our Lady of the Rosary Cathedral, which is located at 2525 North Arrowhead Avenue in the City of San Bernardino. The chief celebrant will be the Most Reverend Gerald R. Barnes, Bishop of the Diocese of San Bernardino. A dinner reception in the parish hall hosted by the Red Mass Steering Committee will follow the mass.

The Red Mass is a religious celebration in which members of the legal community of all faiths invoke God's blessing and guidance in the administration of justice. All who are involved in the judicial system, including lawyers, judges, legal assistants, court personnel, court reporters, court security officers, and peace officers, are encouraged to attend the Red Mass.

Wilfrid C. Lemann Will Be Honored with the Saint Thomas More Award

Wilfrid C. Lemann, Esq. will be honored with the Saint Thomas More Award for his extraordinary service and devotion to church, community, and justice. The Saint Thomas More Award is given to attorneys or judges in the community whose professional life is a reflection of their faith, who give hope to those in need, who are kind and generous in spirit, and who are exemplary human beings overall. The Honorable John M. Pacheco will present this award at a complimentary dinner reception in the parish hall following the mass.

The Tradition of the Red Mass

The Red Mass is celebrated each year in Washington, D.C., where Supreme Court justices, members of Congress, and the President attend at the National Shrine of the Immaculate Conception. Since 1991, the Red Mass has been offered in the Diocese of San Bernardino, which covers both Riverside and San Bernardino Counties. For further information about this event, please contact Jacqueline Carey-Wilson at (909) 387-4334 or Mitchell Norton at (909) 387-5444.

TRUST AND THE MISSION OF MEDIATION

by B. Kent Warner

I have often marveled at how much of the thinking of ancient philosophers applies to modern-day law and mediation. Consider the concept of trust, as discussed by Aristotle, and the application of trust in modern-day tort mediation. The mediator is called upon to step out of whatever role he or she may have practiced and be trusted to put all of his or her efforts toward striking a deal. The parties need to trust that my job as the mediator is not to drive the case toward my evaluation, but rather to drive the case to an agreed-upon settlement both sides can live with. In short, the mediator needs to leave personal biases and judgment out of the negotiation. Pondering the concept of trust presents a conundrum for the mediator, in that he or she must be trustworthy while orchestrating a settlement that frequently none of the litigants totally embrace. The focus of a trustworthy mediator becomes the application of skill and honorable practices to implement and close a deal, guiding all parties to settle.

In Aristotle's *Rhetoric*, the speaker persuades the audience with language, character, and skill. Rhetoric represents a linguistic tool for practical debate and a means for persuading, using probable knowledge to resolve practical issues. According to Aristotle's *Rhetoric*, there are three modes of persuasion: *ethos*, *logos*, and *pathos*. *Ethos* represents the guiding beliefs of the community and moral character; it is the origin of the English word "ethics." According to Aristotle, the speaker must establish *ethos* from the start. For purposes of this article, "mediator" or "advocate" may be substituted for "speaker."

There are three things which inspire confidence in the orator's own character – the three, namely, that induce us to believe a thing apart from any proof of it: good sense, good moral character, and goodwill. False statements and bad advice are due to one or more of the following three causes. Men either form a false opinion through want of good sense; or they form a true opinion, but because of their moral badness do not say what they really think; or finally, they are both sensible and upright, but not well disposed to their hearers, and may fail in consequence to recommend what they know to be the best course. These are the only possible cases. It follows that any one who is thought to have all three of these good qualities will inspire trust in his audience. – Aristotle, *Rhetoric*

The mediator brings together an audience consisting of two or more opposing parties within a forum of con-

flict resolution. As they posture for position, the parties' need to project power and to achieve their vested interests heightens the peak of opposition. Resolution hangs in the balance of trust and negotiation. The mediator assesses and compares each individual to arrive at a projected level of reconciliation. In order to bend and facilitate stances and viewpoints, the mediator projects the ability to absorb negative emotions and reflect logic. The audience before him must acquire an attitude of comfort and trust to relinquish defensive emotions and reach a common platform. Even before the moment of introduction and seating, the process of establishing trust begins.

The three categories of Aristotle's *ethos* include practical skills and wisdom (*phronesis*), virtue (*arete*), and goodwill toward the audience (*eunoia*). Therefore, the establishment of *ethos* requires competency, honesty, and unbiased intentions on the part of the speaker, which together establish trust. In the adversarial system, the establishment of trust can indeed be challenging. Trust is a goal toward which the participants in mediation should all strive, balancing the demands of advocacy with professionalism and ethical behavior. Trust lowers defenses, diffuses emotions, and opens discussion. Violations of *ethos* would include a lack of expertise or a direct or vested interest that would destroy trust. Trust is a two-way street between all parties as a practical matter in mediation. Certain unwritten conventions dictate that attorneys will be more or less candid while presenting their case in the best light, yet acknowledging weaknesses so the matter can be compromised. An advocate must trust the mediator to be candid, confidential, and trustworthy. Advocates at arm's length deal in good faith, while still being entrusted to not give their side away and to negotiate vigorously in the best interest of their client. The mediator will handle the mediation in accordance with the rules, both unwritten and written, and act honorably. Therefore, in mediation everyone is an audience and everyone is a speaker, not just the mediator. Trust becomes a necessary transaction between however many participants are present in the conversation. The idea of trust becomes linked with the idea of ethics for both the mediator and the attorneys. The concept of ethics is consistent with the development of trust.

Trust begins with reputation. As an advocate, an attorney hopefully develops a reputation of skill, professionalism, and dignity. My reputation has been based on nearly 40 years of trial experience, dominating the court room, vigorously defending my clients, and achieving exceptional

victories for my clients. Transitioning to the role of mediator, my client becomes “the deal.” Arriving at a settlement result may be perceived as unjust if a disparity of the bargaining power or of the motivation to settle exists. As the advocate morphs into the mediator, the reputation needs to morph into that same professional, utilizing many of the same skills, advocating not for one party or another or one value or another, but for the deal – a deal that will result in the litigants having a resolution they can live with and perceive as a sound economic decision, if not a victory for both sides.

A successful mediator will project an honest reputation, experience, expertise, and neutrality. In law and in any profession, your reputation precedes you. Being diligent at maintaining character, integrity, and ethics will amplify your success. An air of trust will permeate the mediation quarters with the presence of a trustworthy and competent mediator. Confidence reflects and reinforces trust.

With the establishment of ethos and trust, the mediator and attorneys may draw upon *logos*, or argument from reason. According to Aristotle, *logos* makes it possible to make clear through reasoned discourse the perception of what is advantageous and what is harmful, what is just and what is unjust, what is good and what is evil. *Pathos*, persuasion by way of emotional appeal, puts the hearer in a certain frame of mind, appealing to sympathies and imagination, leading to identification with the point of view of the speaker.

But since rhetoric exists to affect the giving of decisions – the hearers decide between one political speaker and another, and a legal verdict is a decision – the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character look right and put his hearers, who are to decide, into the right frame of mind. Particularly in political oratory, but also in lawsuits, it adds much to an orator’s influence that his own character should look right and that he should be thought to entertain the right feelings towards his hearers; and also that his hearers

themselves should be in just the right frame of mind. That the orator’s own character should look right is particularly important in political speaking: that the audience should be in the right frame of mind, in lawsuits. – Aristotle, *Rhetoric*

A mission statement of mediation using Aristotle’s ethos, logos, and pathos would include ethics, logic, and emotion. Trust built through ethos enhances the power of persuasion with arguments of reason. Building and maintaining your ethical reputation, expertise, knowledge, and human relatedness will create a forum of trust, results, and satisfaction. Develop your own mission statement to serve your clients, your career, and your reputation. A mission statement defines your goals clearly, guides your decisions, and motivates action. Here is a mission statement for mediation built on centuries of philosophy, reason, and persuasion: “Just as advocates must be trusted to vigorously represent the interests of their clients within the boundaries of professional ethics, so the mediator must be trusted to advocate for the deal, the settlement arrived at between the parties and facilitated by the skill of the mediator.” – B. Kent Warner

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B. Kent Warner brings nearly 40 years of trial and settlement experience to his mediation company, Warner Dispute Resolution. Mr. Warner has served as a settlement officer in superior court for over 20 years, as well as a settlement judge pro tem and private mediator for the past 10 years, achieving excellent results. Serving all counties in Southern California, Warner Dispute Resolution offers exceptional full-service mediation. Visit WarnerDisputeResolution.com or email BKW@WarnerDisputeResolution.com for more information.



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OPPOSING COUNSEL: HERBERT H. WILLIAMS, III

by Alexandra Fong

Vietnam Veteran Honors Others

Herb Williams was born in Beaumont, Texas and came from a family that served in the military. He graduated from Lompoc High School and began working for Southern California Edison (SCE). He was with SCE until he began his service in the United States Army in 1966 and was sent to Vietnam, where he was a helicopter mechanic and crew chief on a "Huey." After completing his service to his country, he returned to SCE. He remained in the reserves, both active and inactive, until 1977.

In 1977, he began working in nuclear power construction. He decided to enroll in law school after nuclear power in the United States died. He entered Western State University, College of Law in Fullerton in 1988. Upon graduating and passing the bar examination in 1991, he began practicing law as an associate at a local Riverside firm. He then decided to open his own practice in 1993. He has handled various types of civil litigation. In 1992, he began volunteering at the Public Service Law Corporation (PSLC) in order to give back to the community. In 1998, he became the supervising attorney for the PSLC's Family Law Clinic.

Herb is actively involved in a local veterans' organization, Honor Flight of the Inland Empire. Honor Flight is a nonprofit organization, created to honor America's veterans for their sacrifices for this country. Honor Flight transports our veterans to Washington, D.C. to visit and reflect at their respective memorials. Due to the number of World War II veterans dying each day, top priority is given to them, as well as to terminally ill veterans of all wars.

It costs several thousand dollars to transport and house each veteran in Washington, D.C. for a weekend (Friday to Sunday) visit. Honor Flight relies on the generosity of others to assist in funding this noble cause. Tax-deductible donations may be sent to: Honor Flight of the Inland Empire, P.O. Box 70362, Riverside, CA 92513. Honor Flight is also looking for guardians to assist in looking after the veterans while in the nation's capital. Guardians will receive training on their duties and responsibilities and funding for all but \$400 of their travel expenses.¹

¹ Honor Flight is also looking for a volunteer certified public accountant, as well as volunteers to assist with its website and marketing.



(l-r) Peter DeLeyser, Herb Williams and Carl Woods at Red Beach in 1968



Herb Williams (left) with friend Peter DeLeyser 37 years later in 2005

Additional information about Honor Flight of the Inland Empire may be found on its website at honor-flightie.org.

Herb's philanthropy has also extended to participating in 16 "Stand Down" events for homeless veterans. "The original Stand Down for homeless veterans was modeled after the Stand Down concept used during the Vietnam War to provide a safe retreat for units returning from combat operations. At secure base camp areas, troops were able to take care of personal hygiene, get clean uniforms, enjoy warm meals, receive medical and dental care, mail and receive letters, and enjoy the camaraderie of friends in a safe environment. Stand Down afforded battle-

wearry soldiers the opportunity to renew their spirit, health and overall sense of well-being. That is the purpose of the Stand Down for homeless veterans, and achieving those objectives requires a wide range of support services and time. The program is successful because it brings these services to one location, making them more accessible to homeless veterans.”²

Herb also supports the Veterans of Foreign Wars (VFW), the USO, and Disabled American Veterans (DAV).³ Additional information about these groups may be found on their respective websites: vfw.org, uso.org, and dav.org. He was the Judge Advocate for the VFW in California for four years.

When he is not assisting others in his efforts to help veterans, Herb enjoys reading W.E.B. Griffin and Clive Cussler novels.

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



² This information was provided courtesy of and is used with the permission of the National Coalition for Homeless Veterans. See nchv.org/standdown.cfm.

³ The VFW is an organization whose mission is to foster camaraderie among United States veterans of foreign conflicts. The VFW serves and advocates on their behalf.

The USO is a private, nonprofit organization whose “mission is to support the troops by providing morale, welfare and recreation-type services” to our military personnel and was founded in 1941.

The DAV is a nonprofit charity dedicated to build better lives for our disabled veterans and their families and was founded in 1920.

ATTORNEY COACHES NEEDED FOR 2012 MOCK TRIAL COMPETITION

The 2012 Riverside County Mock Trial Competition dates have been set and a number of high schools are in need of assistance from dedicated attorney coaches.

Under the direction of a teacher coach, teams practice or meet at various times during the day/evenings. Teams needing attorney coaches include schools from the following areas: Riverside, Corona, Norco, Hemet, Lake Elsinore and Nuview.

If you are interested in becoming an attorney coach, please contact Tracey Rivas with the Riverside County Office of Education via email at trivas@rcoe.us or by phone at (951)826-6570.

The dates for the 2012 competition include:

- (Wednesdays, 6 p.m.) February 8, February 15, February 22
- Saturday, February 25, 9 a.m.
- Wednesday, February 29, 6 p.m.
- Saturday, March 3, 9 a.m.

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JUDICIAL PROFILE: MAGISTRATE JUDGE SHERI PYM

by Sophia Choi

Magistrate Judge Sheri Pym was appointed as a United States Magistrate Judge for the United States District Court for the Central District of California, and on April 15, 2011, she was sworn in. She filled the position vacated by Magistrate Judge Rosalyn M. Chapman and sits in Riverside in the court's Eastern Division.

Having come from a family in which her father is an attorney, Judge Pym was ultimately led in the direction of pursuing a career in the legal profession. She saw her father working all the time, and she initially had no intention of becoming an attorney. However, as she began to learn more of what law school was about and started to get extremely interested in legal issues, she decided to pursue a career in the direction of her father.

Judge Pym graduated from Williams College in Massachusetts in 1989, with a major in philosophy. At that time, she did not know a major in philosophy would make for a good transition to the study of law. Prior to attending law school, Judge Pym was a Victim Advocate for the King County Prosecutor's office in Washington, at which time she gained a keen interest in criminal law. She then came to California for law school, graduating and earning her law degree from UCLA in 1994.

Starting her legal career in private practice, Judge Pym was an associate at Milberg Weiss LLP in San Diego, practicing civil law for seven years. She then joined the United States Attorney's office and was there for nine years, serving as chief of the United States Attorney's Riverside office. She handled a wide variety of cases there and loved the experience she gained. She thoroughly enjoyed being a lawyer and trying to get to the right answer, trying to obtain justice. She enjoyed practicing both civil and criminal law, and her experience in both areas, as well as her experience in both private practice and government, has helped her transition smoothly into her role as a Magistrate Judge. Judge Pym indicated that she was aware who her Riverside colleagues would be and was convinced that she would like to work with them. She stated that she really likes fellow Magistrate Judges



Sheri Pym

Oswald Parada and David Bristow, as well as District Judge Virginia Phillips.

With an official start date of April 18, 2011, Judge Pym trained in Los Angeles for one week and then immediately started in her new assignment. The types of cases she deals with include habeas corpus petitions, Social Security appeals, and pro se civil rights cases. She said that although there are many things to be learned, she undoubtedly likes the work.

Judge Pym is a member of the Riverside County Bar Association and the San Bernardino County Bar Association. She is currently President-Elect of the Federal Bar Association, Inland Empire Chapter, and will become President in January 2012.

Living in Claremont, Judge Pym is happily married; she is raising a son, who is going into kindergarten, and a daughter, who is going into the fourth grade. She enjoys spending time with family, including playing with Legos with her son and reading various book series with her daughter. She enjoys watching movies of all kinds, but since she mainly watches movies with her kids these days, her favorites have become Japanese animated fantasy films by Hayao Miyazaki, including *Howl's Moving Castle*, and most of the Pixar movies. As her husband loves comedies, Judge Pym also watches a great amount of comedies. She is also an avid Seattle Seahawks fan. The genres of music enjoyed by Judge Pym include '80s new wave. She is fortunate that her husband is a fabulous cook who can cook all types of tasty meals. She also enjoys outdoor activities, such as running, biking, hiking, and swimming. She takes pleasure in travelling and has been to many different parts of the world, including Austria, Costa Rica, Portugal, Japan, France, Germany, and Ireland.

Upon walking into her chambers, it was immediately apparent what a workaholic Judge Pym is. She grew up seeing her father as a hard-working attorney, and it is clear that his work ethic has followed her.

Sophia Choi, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside.



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are needed to volunteer their
services as arbitrators on the
RCBA Fee Arbitration Program.

If you are a member of the RCBA
and can help, or for more info,

please contact Lisa

at (951) 682-1015

or feearb@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, 2011.

James L. Bauchert – Law Office of James Bauchert, Grand Terrace

Jeffrey A. Holcomb – Sole Practitioner, La Quinta

Jamie M. Holian – O’Kane & McKee, Palm Springs

Justin K. Miyai – State Compensation Insurance Fund, Riverside

Tobias Nicholson – Law Student, Riverside

Jo-Anna M. Nieves – Sole Practitioner, Murrieta

Melissa R. Pratt – Graves & King LLP, Riverside

Robin J. Shea (A) – Shea Fiduciary Services, Sun City

Ryan A. Shores – Law Student, La Verne

Alan L. Siegel – Sole Practitioner, Hemet

Michael B. Silverman – Office of the District Attorney, Riverside

Ashkan Yekrangi – Graves & King LLP, Riverside

(A) = Designates Affiliate Member



ATTENTION RCBA MEMBERS

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

The website includes bar events
calendar, legal research,
office tools, and law links.
You can register for events,
make payments and
donations, and much more.



Riverside
County

LAWYER

Riverside County Bar Association

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RCBA 951-682-1015

LRS 951-682-7520

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- Neutral perspective by an attorney with at least 10 years' experience

DRS benefits attorneys:

- Saving clients' money creates satisfied clients
- Solving problems quickly enhances your reputation
- Innovative solutions can restore faith in lawyers

DRS benefits the courts:

- Prevents nuisance cases from getting to court
- Enables case settlements before going to trial
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