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In This Issue:

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RIVERSIDE LAWYER
MAGAZINE

CONTENTS

Columns:

COVER STORIES:

Features:

Departments:

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 our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), 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

MARCH

8 **Family Law Section**
Minor's Counsel Training (Day 1)
RCBA 3rd Floor – 8:00 a.m. – 5:30 p.m.
MCLE

13 **Barristers Meeting**

15 **General Membership Meeting**
Topic: "Turning the State Budget Crisis Into Opportunities for ADR in Riverside"
Panel Discussion: Benjamin Oberman, Catherine Conner & Susan Nauss Exon
ADR Recognition and Awards
RCBA Gabbert Gallery – Noon
MCLE

19 **Family Law Section**
"The Process of Drug/Alcohol Screening/ Assessment"
Speakers: Sue Ervin, MS, MFT, Patrick MacAfee, Ph.D., MFT
RCBA Gabbert Gallery – Noon
MCLE

20 **Estate Planning, Probate & Elder Law Section Meeting**
"Eligibility for Veteran's Benefits: How, When, and Who Can Help"
Speaker: Katrina Eagle, Esq.
RCBA Gabbert Gallery – noon
MCLE

22 **Family Law Section**
Minor's Counsel Training (Day 2)
RCBA Gabbert Gallery
8:00 a.m. – 1:00 p.m.
MCLE

22-24 **California State Mock Trial Competition**
Riverside Hall of Justice

27 **CLE Event**
"Substance Abuse"
Speaker: Justice Carol Codrington, Court of Appeal
RCBA Gabbert Gallery
MCLE

APRIL

1 **Cesar Chavez Holiday**
Courts & RCBA Closed

President's Message

by Christopher B. Harmon

As I write this column, a terrible tragedy has befallen not just our legal community, but our society as a whole. A Riverside police officer has been killed and another grievously injured in a senseless act of violence. I pray that, as you all read this, there has been a peaceful resolution, but at this moment, the search is ongoing. This tragedy should remind us all what great risk law enforcement professionals take to protect the rest of us every day. As lawyers, we owe an extra debt of gratitude, as these peace officers keep our courts, the places where we conduct our business and seek justice for our clients, safe. We are able to resolve disputes in court according to the rule of law only because we know that our courtrooms are protected and that the legal decisions made by judges and juries will be enforced. No matter what type of law we practice or what side of the counsel table we sit at, we are all a part of a small community that works to enforce our nation's laws. This type of tragedy affects all of us within our small community. We should be sure to pause and remember to give thanks for those who put their lives on the line so that we may all enjoy the protection their sacrifice provides.

The theme of this month's Riverside Lawyer is "Mediation and Arbitration." I would be remiss if I did not mention the good work our sister organization, Dispute Resolution Services, Inc. (better known as DRS), does to help resolve cases outside of court in our county. For many years, the RCBA has been involved in a variety of ways with ADR training and services, and DRS was born of these endeavors. DRS now provides thousands of hours of volunteer and reduced-fee mediation services to the courts and private parties. The DRS mediators and arbitrators who volunteer their time are among the most experienced and accomplished attorneys in our community. Please consider either volunteering your time with DRS or using its services in your next case.

Chris Harmon is a partner in the Riverside firm of Harmon & Harmon, where he practices exclusively in the area of criminal trial defense, representing both private and indigent clients.

Bankruptcy Mediations in the Central District

by Peter C. Anderson and Abram S. Feuerstein

Many non-bankruptcy Inland Empire attorneys are surprised to learn that the Bankruptcy Court for the Central District of California maintains a well-organized and effective mediation program.

In establishing the nearly 20-year-old program in 1995, the court recognized that the economic burdens and associated delays of contested litigation were particularly harsh in bankruptcy cases. At the time, the court had growing concerns about the use of limited judicial and party resources in an environment of a heightened volume of cases, contested law and motion matters, and lawsuits or adversary proceedings. It observed: "A Court-authorized mediation program, in which litigants and counsel meet with a mediator, offers an opportunity for parties to settle legal disputes promptly, less expensively, and to their mutual satisfaction."[1]

Since its inception, the program has handled almost 5,000 mediations, with a success rate ranging between 63 to 67 percent, or nearly two-thirds of the disputes mediated.[2] Confidential questionnaires and surveys returned by mediation participants evidence a high degree of satisfaction with the program, with an overwhelming 90 percent majority indicating that they would utilize the system again.

The program maintains a panel of approximately 200 mediators, all of whom agree to serve on a pro bono basis.[3] Mediators are designated for and agree to cover mediations in various geographic locations. Most are bankruptcy attorneys; however, the panel includes attorneys who specialize in other areas of law, including family and real estate law. And with an understanding that there are a large number of self-represented parties in bankruptcy matters who are suspicious of attorneys or who might view bankruptcy attorneys as part of a "club," the program has non-attorney mediators, including accountants, realtors, nurses, and other professionals. Also, to increase the program's effectiveness, the program selects mediators with proficiency in numerous languages, including Spanish, Chinese, Bengali, and even Yiddish. The court's website maintains biographical, language, geographic and other information relating to the mediators.

Practice and Procedure

The court has outlined in a general order its detailed rules pertaining to mediation procedures. Pretty much any matter that arises in a bankruptcy matter is ripe for mediation. Courts have assigned parties to mediation in complex, Fortune 500 Chapter 11 cases to resolve the best way of assembling a reorganization plan; even ugly family law disputes, which are not any prettier in a bankruptcy setting, can find their way to mediation. Typically, mediation is intended to be a voluntary process, with the parties requesting in writing that the court assign a dispute to the mediation program. However, matters also may be assigned by order of a judge at a status conference or other hearing. Indeed, a judge can designate a matter for inclusion in the mediation program over the objections of the parties.

The rules provide guidance as to the disclosure and handling of conflicts of interest that might arise; the scheduling of the mediation conference; the maintenance of confidentiality; the format and content of mediation briefs; and required attendance at mediation by decision-makers. Most of the questions that participants might have about the process can be answered by reference to the court's general order, available at cacb.uscourts.gov/mediation-program, or by contacting the program's staff.

Inland Empire Issues

Historically, the court's mediation program was used less frequently in the Inland Empire than in other parts of the Central District. With significant changes over the past three years in the composition of the local bankruptcy bench, an increased number of practitioners in the local system from outside the immediate geographical area, the widespread acceptance of mediation as a form of dispute resolution, and a continued high volume of filings straining judicial resources, it is likely that the local system will see more traffic. In light of the need for more mediators, local professionals might consider applying to be selected for the panel maintained by the court. Also, attorneys and self-represented parties who find themselves in a dispute pending in the local bankruptcy courts should take the opportunity to explore the mediation options afforded by the court's program.

Peter C. Anderson is the United States Trustee for Region 16, Central District of California, serving in that position since his appointment in August 2006. Abram S. Feuerstein is an Assistant United States Trustee who supervises the Riverside Field Office of the Office of the United States Trustee. The views expressed in this article do not represent the views of the United States Department of Justice, the Office of the United States Trustee, or the United States Trustee, but belong solely to the authors.

1 Of note, a paramount goal of the bankruptcy system is "to secure the just, speedy, and inexpensive determination of every case and proceeding" arising in a bankruptcy matter. (Fed. R. Bankr. Proc. 1001.)

2 At the time of this article, the program had mediated 4,861 matters. The statistics are maintained by the mediation program and were related to the authors by Susan M. Doherty, the coordinator of the mediation program. Contact information for Ms. Doherty is maintained on the court's website, cacb.uscourts.gov/mediation-program.

3 Program mediators must agree to volunteer their services without compensation "for the first full day of at least one Mediation Conference per quarter per year." (Third Amended General Order of the United States Bankruptcy Court for the Central District of California, § 9.1, entered January 5, 2010.)

A Law and Economics Approach to Mediating Settlements

by Christopher J. Buechler

For those readers far removed from the legal academy, Law and Economics is a field of legal scholarship primarily concerned with designing rules and systems – with an eye toward civil litigation – to achieve the most efficient outcome for society as a whole. This article will broadly discuss two areas of interest to Law and Economics scholars that will also be of interest to attorneys and mediators looking to achieve efficient outcomes that should satisfy parties' expectations and reduce the number of cases going to litigation.

To keep our discussion from becoming too abstract, let's create a litigation scenario:

Peter Plaintiff is suing Donna Defendant after Donna's dog bit him. Peter is hoping for an award of at least $5,000, but to avoid the time and expense of trial he is willing to settle for, at the least, $2,000. Donna is aware that she will likely be found liable, but would like to limit her damages. Donna is hoping to limit Peter's award to no more than $1,000, but to avoid the time and expense of trial she is willing to settle for, at most, $3,000.

We would expect, then, that the parties should be able to achieve a settlement for some amount between $2,000 and $3,000 (representing Peter's floor and Donna's ceiling, respectively). I realize that there are other kinds of cases that do not have dollar figures attached to outcomes, but economists would attach a value to those cases based on the net happiness achieved by the litigants.

Mediating the Settlement "Sweet Spot"

Traditionally, Law and Economics approaches settlement negotiations with a focus on the litigants' reserve amounts – i.e., the amount a party is willing to settle at in order to avoid the time and expense of trial. In our scenario, they would correctly predict that a settlement can be reached for some amount between $2,000 and $3,000. But that is a pretty broad spectrum for determining a final award. It also implies there is a fundamental tension between both sides, each wanting to land on the side of the spectrum most favorable to him or her, which will likely be resolved in mediation.

There is scholarship[1] pointing out that the aspirational goals – the maximum or minimum desired settlement – of both sides will likely have an effect on how settlement negotiations will proceed. Notice that the happy medium between Peter's reserve and aspirational amounts is $3,500, and Donna's happy medium is $2,000; we'll assume that, the further we stray from these amounts, the more each party's satisfaction will be affected. In this scenario, Peter's happy medium is unobtainable through settlement, but Donna's happy medium is obtainable. A settlement of $2,000 would make Donna moderately satisfied and Peter very dissatisfied (but still willing to settle). The other end, a $3,000 settlement, would leave Peter somewhat dissatisfied and Donna very dissatisfied.

Why does this matter? Well, when it comes to the parties trying to achieve the most satisfaction, they will probably be willing to prolong negotiation and mediation to nudge the final amount closer to their end of the spectrum. Mediators, then, should be conscious of both sides' reserve and aspirational amounts to find an amount that will distribute satisfaction (or dissatisfaction) proportionally as a way to expedite the negotiation process. Attorneys will want to analyze this scenario with an eye to setting aspirational and reserve amounts that are realistic and that will move the settlement spectrum closer to their client's side. For example, if Peter can realistically aspire to a $10,000 award, the settlement amount will likely be a lot closer to the $3,000 ceiling (although his dissatisfaction will probably grow as well, thus increasing the amount of time he would be willing to prolong settlement to nudge the final amount in his favor).

Doubling Down on Litigation[2]

Another area of interest to Law and Economics scholars when it comes to the brinksmanship of settlement mediation is the rules governing the risk allocation of litigation. Primarily, they are looking at the American Rule – where each side bears its own litigation costs – versus the English Rule – where the losing side pays all the litigation costs for both sides – and how they affect parties' settlement positions and ultimate outcomes.

Studies are showing that the English Rule, adopted in many foreign jurisdictions, tends to cut down on cases

1 Russell Korobkin, *Aspirations and Settlement* (2002) 88 Cornell L.Rev. 1.

2 For an article providing a good, nuanced discussion of the points addressed in this section, see Marie Gryphon, *Assessing the Effects of a "Loser Pays" Rule on the American Legal System: An Economic Analysis and Proposal for Reform* (Spring 2011) 8 Rutgers J. L. & Pub. Pol'y 567.

with a small probability of recovery. And in cases that do go to trial, cases litigated under the English Rule typically produce larger outcomes for plaintiffs than cases litigated under the American Rule.

From the settlement and mediation standpoint, if parties agree upfront to adopt the English Rule if their case ultimately does go to trial, then it should dramatically affect their calculations of their reserve amounts. And growing the settlement spectrum allows parties to reach a point on that spectrum that distributes outcome satisfaction more equally.

Law and Economics, then, gives both mediators and attorneys a lot to think about when it comes to how they should evaluate their cases in order to conduct settlement mediation more efficiently while maximizing the satisfaction of all parties.

Chris Buechler, a member of the Publications Committee, is a family law attorney in Riverside and the 2012-2013 Chair of the RCBA Solo/Small Firm Section. He can be reached at christopher@riversidecafamilylaw.com.

The Art of Mediation in the Real World

by Donald B. Cripe, SCMA/ACR/AAA/AHLA

I am a full-time mediator, I train new mediators, and I teach mediation in law school. Most of us who teach this art or discipline seem to have a universal ideal that is a part of our lesson plans. We teach that the facilitative approach is the way to "pure" mediation. We teach the stages of mediation and the ideal for each stage.

I suppose that is how all practical materials are taught. I certainly know that much of what I learned in law school applied only loosely to the actual practice of law, yet we had to be taught the "right" way on which we would build our careers (and pass the bar exam). The same method applies to training mediators. However, because there are as many "right" ways to mediate as there are cases to mediate, the career cloak that covers the basic framework hangs far more loosely than in many other avocations. This article is intended to address some of the deep folds within that cloak.

Styles of Mediators

Are we facilitative or evaluative – or some hybrid? The answer is – wait, there is no answer, other than the "pat" mediator's response, "It depends."

I suspect that almost all formally trained[1] mediators begin every mediation in the facilitative style, but as the mediation progresses, they drift toward evaluative. In fact, in my experience, there comes a point in many mediations when the parties or attorneys actually ask their mediator to become evaluative. Those of us who like to be in control of our situations jump at this opportunity, believing that telling counsel or the parties what their case is "really worth" or what they should do to settle are shortcuts to settlement. The truth of the matter is that this is many times just what the parties are looking for, i.e., for a "neutral" evaluator to tell them what to do without the expense of trial. Many times, the old adage, "be careful what you ask for" affects the process. After asking for an evaluation or a "mediator's proposal,"[2] the defense may storm out of the mediation complaining that the proposal is too high or, conversely, the plaintiff may complain that it is too low. Typically, the offended party (sometimes, both parties are offended) will take the position that the mediator is biased because there can be no other reason for such a ridiculous recommendation.

A mediator's proposal is something that must be used with care and a lot of thought by the mediator. When the mediator is requested to make a proposal, he or she should take care to make sure that the parties and counsel are on the same page and know what they are requesting. Often, a rejected mediator's proposal will end the mediation, at least for the time being.

The proposal generally happens when the parties have reached an impasse on the numbers. This is complicated by the situation in which neither side wants to move because they do not want the other side to know how high or low they are willing to move. Of course, the first impulse is to simply "split the difference,"[3] but that is seldom appreciated or successful. An effective mediator's proposal should be principled and based on the best judgment of the mediator rather than some simple mathematical magic.

But I digress. Back to the styles of mediation.

In my opinion, all mediators should be well-versed in and should default to the facilitative mediation approach. Doing so allows the parties and attorneys to have the most control over the process. When the approach works, it is almost like magic. (When it goes wrong, the mediator may need to be wearing an outfit similar to a behind-the-plate umpire in major league baseball.) This approach – being a buffering agent or communicator between the sides – is on the "touchy-feely" end of the spectrum, and for mediators who have been civil litigators in their law practices, it may seem tedious. But once the mediator learns to use open-ended questions to their maximum efficiency, the tedium diminishes and the mediation moves along. In my experience, the major resistance to facilitative mediation in civil cases tends to come from the lawyers. I have had colleagues tell me that, as "learned" mediators, we should guide the process into the facilitative mode – essentially, don't take "no" for an answer.

I disagree. While mediators should guide the process, we always have to remember whose case we are mediating and why we are there. If we do our opening and information-gathering phases well, we will know very quickly what the parties want of us. It is my view that, once we figure out what is expected of us, we should conduct the mediation as closely to what we have been requested to do as possible. At

1 As opposed to retired judges or senior attorneys who become mediators without the benefit of formal mediation training and theory.

2 The ultimate in the evaluative approach. The mediator provides his or her own subjective opinion, within the parameters of the negotiations, about the value of a case. It is much like having a bench trial without the rules of evidence or, often, without even hearing all of the facts and evidence. The approaches to this tactic are also many.

3 I personally find this approach to be escapist. Also, counsel frequently say, "We could have done that." Sometimes a mediated agreement is "splitting the difference," but it should be arrived at through a reasoned mediation.

the same time, we need to keep in mind that the reality is that we will eventually fall back into the method that works best for us, irrespective of how it might appear to others.

Joint Sessions or Individual Caucuses?

I think there is as wide a division among mediators about which of these approaches is the "right" approach as in any other area of this discipline. Some well-known and widely respected mediation professionals insist that the only way to satisfy the emotional needs of the parties is to allow the catharsis of the joint session. It is suggested that some of those mediations must become quite loud before they become quiet and the road to settlement is blazed. The theory is that when the matter is settled and the mediation is completed, the parties will leave the session satisfied that they said their pieces. Maybe.

On the other side are the individual caucus practitioners. The joint session side of the issue seems to be convinced that caucus practitioners fear conflict and want to avoid the uncomfortable feeling of being in the middle of angry disputants. It is also said that this method puts too much power and pressure with the mediator. The pressure is knowing all of that stuff the sides don't want the mediator to share, and the power (intentionally or not) is when the mediator has the discretion about what to share and what to keep secret. On the other hand, the caucus advocates argue that, when properly conducted, a separate session will yield the same satisfactions and maybe even allow the parties to "vent"[4] more freely than in a joint session. The argument is that there is no reason that either party should feel constrained in individual sessions. Of course, there are occasions where the logic doesn't fit the circumstances. In one of my last litigated cases before retiring from the practice of law, I participated in the mediation of a small case involving a contract for the sale of a maintenance vehicle. My client sold the vehicle to the opposing party, who decided a few months after taking possession of the vehicle under a poorly written sales contract to stop making payments. Since they were former friends, the emotions were rather raw. Our opposition wanted separate caucuses, while my client seemed not to care. Our mediator did a good job, and we came to a settlement with which both sides could live. However, as we adjourned, my client became quite agitated that he had not been able to say his piece to the "bad guy" in the other room. That has happened infrequently in my law or ADR practice. When I mediate in caucuses, I encourage the parties to tell me anything they want me to say to the other side, and then some. I also always promise that I will convey what they have to say to the other side.[5] Consequently, in those situations, I have frequently been the recipient of bilious rants and anger.[6] Yes, it creates stress, but my experience has been that, in the end, even the angriest of the parties seems to be far more relaxed and relieved.

In my "real world" of mediation, most attorneys and parties in civil cases request – sometimes insist on – separate caucuses, while in family law cases, I have rarely mediated cases in caucus.

Distributive, Integrative or Transformative?

I have been mediating for a long time, and for some time before that, I was an advocate in mediated cases. I have never experienced what is known as a transformative ("kumbaya") mediation, nor have I ever spoken to any of my colleagues who have. A loose description is convincing one side, or maybe both, that their convictions about the dispute are wrong in the mediator's hopes that it will go away. In fact, many of the trainings I have attended have expressly excluded transformative mediation, except for the definition, completely.

Most of the mediation we do for litigated cases involves an almost purely "distributive" model in which the parties all want money or something of monetary value in the end. Certainly, integrative bargaining, which includes a mixture of alternatives, is often employed to a significant extent, but though there are phases, for the most part, we distribute items of monetary value.[7] Almost always, in spite of our mantra of creating a "win-win" situation, in the end, someone goes home with a little more value than they came in with and the other leaves with less. The hope, of course, is that neither party gives up too much.

In family law, integrative bargaining is probably the most effective, because there is such a mix of fear, anger and insecurity. Achieving the distribution of generally inadequate assets while at the same time keeping the parties focused on moving forward requires quite a balancing act.

At Bottom

In the end, the real world of mediation muddles along, with the practitioners using their skill, patience and experience to guide litigants of all stripes to a place where they can find peace from their disputes. We facilitate evaluatively to reasonably integrate the needs of the party with the assets to be distributed in a forum that each mediator will decide is best for the case he or she is mediating on that particular day.

That is my real world of mediation.

See Mr. Cripe's profile on page 23.

4 This, too, is a touchy term. Some insist that we should control venting, while others are determined to open the flood gates of emotion. I suppose each conflict resolution professional must make his or her decision as to what works best.

5 I never promise to use the same words or tone when I convey it.

6 To lighten the mood, I will sometimes explain that I am married, so I am used to being yelled at; it does change the temperature in the room.

7 I have created swaps of land parcels and other pieces of property in lieu of cash.

Riverside's Court-Connected ADR Programs

by Barrie J. Roberts

"Mediation Week" in California is the third week of March. One way to acknowledge Mediation Week is to review and take to heart Local Rule 3200, which states in part: "The Court finds that it is in the best interest of civil litigants to participate in alternatives to traditional litigation and trial at the earliest appropriate date."

Another way to mark Mediation Week is to review Riverside's court-connected ADR programs, all of which are designed to assist parties and counsel in complying with Rule 3200.

The court has developed a wide range of ADR options, thanks to ongoing partnerships with – and the continuing generosity and support of – the RCBA and its Dispute Resolution Service, Inc. (DRS) (special thanks to Chris Jensen, President), the Desert Bar Association and its Family Law Section (special thanks to Thurman W. Arnold, III, Chair), the Chapman University School of Law Mediation Clinic, under the direction of the indefatigable and omnipresent Professor David Dowling, the Community Action Partnership (CAP) of Riverside, and the court's own Self-Help Center, Susan Ryan, managing attorney.

A review of current programs follows. In these challenging budgetary times, it is important to recognize that few of these programs would exist without Dispute Resolution Program Act (DRPA) funding, which is collected from civil filing fees and administered by the county.

Judicial Arbitration and Court-Ordered Mediation: Cases valued at $50,000 and under can be ordered to judicial arbitration (at no cost) or to mediation (at no cost for the first three hours, including one hour of mediator preparation time, with a Civil Mediation Panel member).

Parties in cases valued between $50,000-100,000 can request a reduced-cost "VALUE" mediation with a participating panel mediator. (See riverside.courts.ca.gov/adr/valuemediation_infosheet.pdf.) Most panel mediators also provide reasonably priced mediations for cases of any value.

Mandatory Settlement Conferences (MSCs): Cases are generally scheduled for MSCs at trial setting conferences.

Indio's "First Friday" Program: On the first Friday of each month, local attorneys volunteer to help settle cases at the Larson Justice Center.

Day-of-Trial Mediation: Each Friday morning at the 8:30 trial calendar in Department 1 of the Historic Courthouse, DRS provides several mediators who offer parties and attorneys one last chance to settle their cases.

Limited Civil Cases: The Chapman University School of Law Mediation Clinic provides day-of-trial mediations for collections, civil harassment, unlawful detainers, small claims appeals, and other limited civil matters.

Family Law: Local attorney-mediators on the Countywide Family Law Private Mediation Panel provide reasonably priced private mediations for family law cases. (See adr.riverside.courts.ca.gov/adr/fl.) Voluntary settlement conferences (VSCs) for self-represented parties are provided twice a month in Riverside by the DRS and once a month in Indio by the DBA and Family Law Panel members .

Probate: The DRS Probate Panel provides mediations at no cost to parties in cases referred from the probate departments countywide. A new probate guardianship mediation panel is now forming to mediate visitation issues. Please contact me for information.

Small Claims Court: The Community Action Partnership (CAP) of Riverside County provides volunteer mediators for small claims cases countywide and for limited civil collections cases in Indio.

Juvenile Hall Mediation: For almost 20 years, the Juvenile Hall Mediation Program at California Western School of Law has been successfully mediating disputes between youth in San Diego's juvenile hall. Last month, a similar program started in Riverside's Juvenile Hall, thanks to a partnership between the Probation Department and the Chapman University School of Law Mediation Clinic. In this new program, Chapman mediators not only mediate disputes but also present conflict prevention and peer mediation training to the minors.

For more information about the court's ADR programs, visit riverside.courts.ca.gov/adr/adr.shtml.

And for more information about the possible future of ADR in Riverside, see the related article in this edition, "Turning the State Budget Crisis into Opportunities for ADR." You may also attend the general membership meeting on March 15 and the events before and after, probably the best way of all to celebrate Mediation Week in Riverside.

Barrie J. Roberts received a J.D. from UC Hastings College of the Law and an LL.M. in Dispute Resolution from the Pepperdine University School of Law (Straus Institute). She practiced law for 14 years in Northern California and became the court's first ADR Director in March 2008. She can be contacted at Barrie.Roberts@riverside.courts.ca.gov.

Turning the State Budget Crisis into Opportunities for ADR in Riverside

by Barrie J. Roberts

This article includes a preview of Riverside's annual ADR Appreciation Event in celebration of Mediation Week. Events take place on March 15, before, during, and after the General Membership Meeting. The schedule of events follows the article.

Hypo: You're a mediator. The court, the bar, and the state walk into your office with the following dispute. The state is cutting the court's budget to the bone. The bar wants civil, family, probate, and criminal departments to be open and unclogged. The court is exploring all options, including cuts to optional services such as alternative dispute resolution (ADR). How do you approach this "opportunity" for ADR?

If you've taken mediation training or read Getting to Yes, you start by banishing thoughts about dividing the shrinking "pie" and instead encouraging ideas about "expanding the pie," "inventing options for mutual gain," and "thinking outside the box." After you move the parties from positions to interests, they might be inspired to brainstorm options like these:

Criminal Justice: Can restorative justice (RJ) cut costs by promoting diversion and reducing recidivism while empowering victims?

RJ, or "victim-offender mediation and restitution," can take a variety of forms, but all RJ programs provide a structured process with a specially trained facilitator where, in carefully selected cases, victims, offenders, and others who were affected by a crime, including family and friends, come together. The facilitator guides participants in describing in detail how the crime has affected them, invites them to ask questions about what happened, and helps them explore ways to repair the harm and prevent future harm.

According to RJ practitioners, the offenders' experience of being confronted by the totality of what has happened to the people in the room – including what has happened to themselves and their own families – in a dignified yet direct manner can give them powerful incentives to "wake up,"[1] make amends, and not reoffend.[2]

To learn more about RJ, listen to an NPR story (see footnote 1), read an article,[3] or attend the March 15 film and events described below.

Civil, Family, Probate:

1. Can collaborative and cooperative practices keep cases out of court, protect clients, save clients time, money, and stress, and provide a good living for attorneys?

According to collaborative law practitioner Catherine Conner, "Collaborative Practice combines the positive qualities of litigation and mediation. As in litigation, each party has an independent attorney who will give her or him quality legal advice and assist in putting forward his or her interests. Drawing from mediation, the parties and their Collaborative Attorneys commit to both an open information gathering and sharing process and to resolve their differences without going to court."[4]

Thus, collaborative attorneys are negotiating partners instead of adversaries. They and their clients agree that there will be no litigation during the process and that if they can't settle, the attorneys will withdraw and the parties will seek new counsel if they want to litigate.

Besides the agreement to withdraw, another unique feature of collaborative law is that parties may retain professionals, such as accountants and therapists, who become part of the process.

While collaborative practice is more common in family law matters, "cooperative"[5] practices are more widely applicable to civil and probate cases as well as family law. In both practices, parties retain attorneys for the purpose of settling the dispute, and all agree to cooperate in providing informal discovery, including expert opinions. One difference, however, is that cooperative practitioners need not withdraw if settlement is not reached.

To learn more about these practices, including setting up local practice groups, attend the March 15 events with Catherine Conner, described below.

1 Robert Johnson, former president, National District Attorney Association, NPR Interview, npr.org/2011/07/28/138791912/victims-confront-offenders-face-to-faceorgiveness-play-a-role-in-criminal-justice.html?pagewanted=all&_r=0.

2 John McDonald, Restorative Justice: Adults and Emerging Practice (2011).

3 nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html?pagewanted=all&_r=0 [about RJ in a murder case]; villagerpublishing.com/film-sets-stage-for-justice-process-discussion [about Colorado's new RJ laws].

4 clr829.com/faq/collaborative-practice.

5 cuttingedgelaw.com/page/cooperative-law.

2. Can Technology Mediated Dispute Resolution (TMDR) reduce mediation costs and settle cases?

TMDR includes Online Dispute Resolution (ODR) and any use of technology to promote settlement, such as phones, email, instant messaging, videoconferencing, systems like eBay's online Resolution Center, Smartsettle, and Cybersettle, and someday, perhaps, robots and avatars.[6] TMDR offers convenience and cost savings, particularly by reducing travel time and expense, and it may be ideal when the parties need to save face or avoid potential physical violence. Before logging on or setting up a conference call, however, there are challenges to consider, including privacy, confidentiality, establishing trust, and thinking through new guidelines, billing practices, and opening statements. These challenges will have to be addressed sooner rather than later, because "[a] generation raised on technology soon will enter adulthood and that generation is well-prepared for TMDR . . . dispute resolution providers need to work with developers to harness TMDR's true potential."[7]

To learn more about TMDR and ODR, see this article[8] by Susan Nauss Exon, Professor of Law, University of La Verne College of Law, and Civil Mediation Panel member, and attend her March 15 presentation, described below.

General Civil Cases: After weighing the costs and benefits of business-as-usual adversarial practices in these dire budgetary times, brainstorming might continue with suggestions like these:

1. Shifting settlement discussions from substance to process: When resolution is not possible, can mediators and attorneys consider an expedited jury trial,[9] a neutral evaluation from an agreed-upon expert, or binding arbitration?

2. Moving from court-ordered to voluntary "VALUE"[10] mediation for unlimited civil cases: Can shifting to a voluntary mediation program in which parties pay Civil Mediation Panel members reduced rates improve parties' good-faith participation and settlement rates, while saving the court thousands of dollars in staff time and payments to mediators?

3. Educating attorneys on "Planned Early Negotiation"[11] strategies for accurately assessing case value and managing client expectations, and creating billing practices to incentivize settlement and cooperative rather than adversarial approaches. Can MCLE programs on these subjects prevent motions, hearings, and trials and promote settlement at the earliest appropriate time, while providing a good living and a good life for attorneys?

You and the parties would certainly come up with more ideas than the present space allows, so brainstorming continues on March 15 and anytime by phone and email with me.

Barrie J. Roberts received a J.D. from UC Hastings College of the Law and an LL.M. in Dispute Resolution from the Pepperdine University School of Law (Straus Institute). She practiced law for 14 years in Northern California and became the court's first ADR Director in March 2008. She can be contacted at Barrie.Roberts@riverside.courts.ca.gov. Additional information about ADR in Riverside Superior Court is available at riverside.courts.ca.gov/adr/adr.shtml.

6 See David Larson, *Brother, Can You Spare a Dime?*, mediate.com/articles/LarsonTechnology.cfm.

7 *Id.*, at p. 37.

8 riverside.courts.ca.gov/adr/1112_newsletter.pdf at p. 4.

9 riverside.courts.ca.gov/civil/expeditedjurytrial.shtml.

10 riverside.courts.ca.gov/adr/valuemediation_infosheet.pdf.

11 John Lande, Lawyering with Planned Early Negotiation, law.missouri.edu/lande/plannedearly.htm.

Settlement Conference Program, Court of Appeal, Fourth District, Division Two

by Presiding Justice Manuel A. Ramirez

At a time when our state courts are struggling because of severe reductions in court budgets, which result in a smaller work force and extremely limited resources, our Court of Appeal in Riverside is especially proud of its settlement conference program. "Why," you ask? There are two very important reasons.

The first and foremost reason is the mediators, to whom we will return to at the end of this article. Second, the court has developed an efficient process for selecting the cases, matching and informing the mediators, and accomplishing the settlement conference. A summary of that process follows, as depicted in the adjacent flow chart.

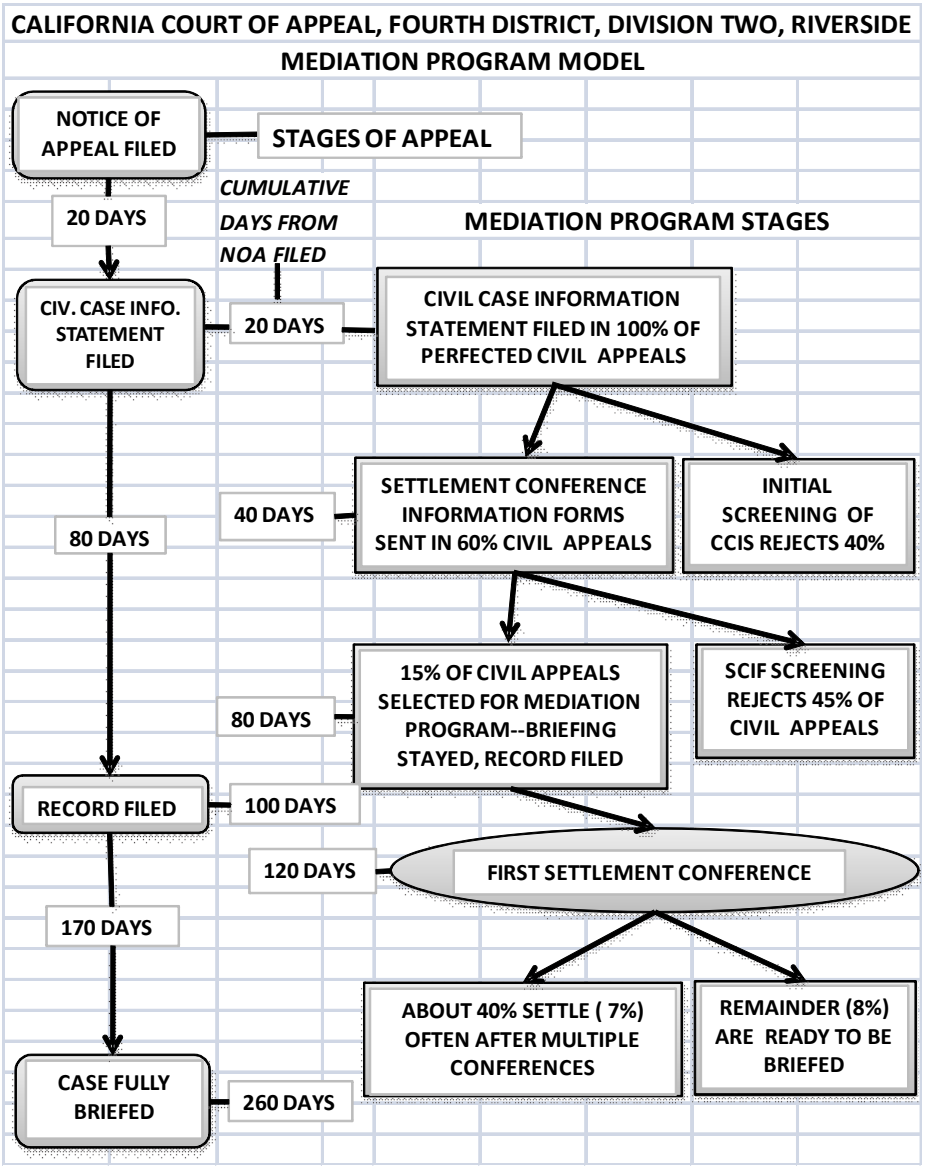
One hundred percent of civil appeals are eligible for the settlement program. The referral decision process begins when the settlement coordinator receives a copy of the civil case information statement (CCIS), with an attached copy of the judgment or order being appealed. The CCIS is a form used by the California Courts of Appeal to screen civil appeals for jurisdictional defects. The settlement coordinator reviews the CCIS for each case according to policies set by me as the Presiding Justice. Some 60% of appeals pass this screening.

Next, the settlement coordinator obtains settlement conference information forms (SCIFs) from the parties. SCIFs elicit information about the character of the action, the issues on appeal, previous settlement negotiations, and preliminary settlement offers the parties are willing to make. SCIFs are confidential and are not served on, or shared with, opposing counsel. Once a group of SCIFs have been received, the settlement coordinator delivers them to my chambers, and I decide whether to admit each appeal to the settlement program. To date, I have reviewed in excess of 4,000 cases. The goal is to complete selection of cases for the program before the appellate record is filed (on the average, about 100 days after the filing of the notice of appeal) so as to avoid delay in cases not selected for the settlement program. On the average, approximately one quarter of the 60% of all civil appeals in which SCIFs are received are selected for the program. Thus, out of all civil appeals, 15% are selected for the settlement program, and 85% go through the usual decisional process of briefing, oral argument, and decision.

As soon as I select a case for the settlement program, the parties' participation in the settlement conference program becomes mandatory. Briefing is stayed, but preparation of the record continues. The settlement coordinator selects the mediator according to area of expertise, availability, and appropriateness for the particular appeal. Once selected, the mediator is screened for conflicts with the parties and counsel. Our settlement coordinator sets the settlement conference on a date convenient to the mediator and notifies the parties in writing, generally giving at least 30 days' advance notice. The parties are required to file settlement conference statements at least 15 days before the settlement conference. Prior to the settlement conference, copies of the SCIFs and settlement conference statements are sent to the mediator. Typically, by the time of the settlement conference, the record on appeal has been filed, and on the day of the conference, it is made available to the mediator. Should the case not settle, the stay is lifted and the matter is set for briefing. Approximately 40% of the cases going through the settlement program settle, which is about 7% of all civil appeals. The efficiency and timeliness of this process contribute to the overall cost-effectiveness of the program.

Returning to the mediators, they are the engine that makes the settlement program run. What makes this court's mediation program even more impressive is that it has been operating for more than 20 years, and a number of our volunteer attorney mediators who began with the pro-

gram back in 1991 are still mediating for us today. The level of commitment and dedication of all our volunteer attorney mediators to the court and to the legal community at large is to be commended and recognized. Without all of these individuals, there would never have been a settlement conference program at our court, nor would it have continued over these many years without their selfless participation. With immense gratitude and respect, it is my distinct honor to recognize the many attorneys, judges, and justices, past and present, who have given their time and expertise to our court (with the names of those who have served since the beginning of the program noted by an asterisk): Ward Albert (deceased); Marlene Allen-Hammarlund; Richard Anderson (deceased); Donna Bader; Roland Bainer;* Cari Baum; Steven Becker; Michael Bell; John Belton; the Hon. M. Ross Bigelow (deceased); Caywood Borror (deceased); David Bowker; John Boyd;* Terry Bridges; Harry Brown; Don Brown (deceased); Raymond Brown; George Bruggeman (deceased); William Brunick; Robert Chandler; Timothy Coates; the Hon. Carol Codrington; Mary Ellen Daniels; Darryl Darden; Robert Deller; William DeWolfe;* James Dilworth; the Hon. Douglas Elwell (ret.); Lloyd Felver; Edward Fernandez; Thomas Flaherty (deceased); Joyce Fleming; Michael Fortino; Victor Gables; the Hon. Frank Gafkowski, Jr.; Raymond Gail; Florentino Garza; Lawrence Gassner; the Hon. Barton Gaut (ret.); Debra Gervais; Kevin Gillespie; Howard Golds; Michael Goldware; Richard Granowitz; Don Grant; Jordan Gray; Hollis Hartley; James Heiting;* Ralph Hekman; Denah Hoard; Walter Hogan; J.E. Holmes III; Brian Holohan; Simon Housman; the Hon. Thomas Hudspeth; Charles Hunt, Jr.; Thomas Jacobson;* Muriel Johnson; Albert Johnson, Jr.; James Johnston; Carl Jordon; the Hon. Jeffrey King; Kira Klatchko; Karl Knudson; Kary Kump; Rick Lantz; Cyrus Lemmon; the Hon. Jean Leonard; Randolph Levin; Richard Lister;* Christopher Lockwood; Elliott Luchs;* Thomas Ludlow, Jr. (deceased); the Hon. Cynthia Ludvigsen; Bruce MacLachlan (deceased); Donald Magdziasz; Larry Maloney; John Marshall;* Justin McCarthy (deceased); Robert McCarty, Sr.;* Thomas McGrath (deceased); Dan McKinney; Thomas McPeters; Greg Middlebrook; Thomas Miller; Barbara Milliken; Stephen Monson; David Moore; Bruce Morgan; Peter Mort; John Nolan; Vincent Nolan; Daniel Olson; Stanley Orrock;* Andrew Patterson; Brian Pearcy; Ann Pelikan; Douglas Phillips; Donald Powell (deceased); Jude Powers; Padgett Price; the Hon. Manuel A. Ramirez; Daniel Reed; D. Brian Reider; the Hon. Duke Rouse; the Hon. Stephan Saleson; Walter Scarborough (deceased); Charles Schultz; Kurt Seidler; Elizabeth Shafrock-Glasser; William Shapiro;* Patricia Short; the Hon. Elisabeth Sichel; Neal Singer; Ronald Skipper; Warren Small, Jr.; Ellen Stern; Robert Swortwood; Leighton Tegland; George Theios; James Tierney, III; Bruce Todd; William Ungerman; Brian Unitt; Lucien Van Hulle; Scott Van Soye; C.L. Vineyard (deceased); Alexandra Ward;* the Hon. James Ward (ret.);* the Hon. Christopher Warner (ret.); Samuel Wasserson; the Hon. Sharon Waters; Lawrence Winking; Victor Wolf; and Ray Womack (deceased).



Sorrow in the Southland

by Jacqueline Carey-Wilson

Riverside Police Officer Michael Crain was killed in the line of duty on Thursday, February 7, 2013, when he and Officer Andrew Tachias were ambushed at approximately 1:30 a.m. while stopped at a red light on the corner of Arlington and Magnolia in the City of Riverside. Officer Tachias was seriously wounded during the assault. Officer Crain was 34 years old and an 11-year veteran of the Riverside Police Department. He served two deployment tours in Kuwait as a rifleman in the 15th Marine Expeditionary Unit, 3rd Battalion, 1st Marines. Officer Crain left behind a wife and two children.

The shooting and death of Officer Crain sparked a massive manhunt across the Southland for Christopher Dorner, the suspected shooter. Dorner's vehicle was later found engulfed in flames in the City of Big Bear in the San Bernardino Mountains. Police search teams were dispatched to the mountain community to search for Dorner. On February 12, the search came to a violent end when Dorner shot and killed San Bernardino County Sheriff's Detective Jeremiah MacKay and seriously wounded his partner, Deputy Alex Collins. Dorner then barricaded himself in a cabin, where he died from what is believed to have been a self-inflicted gunshot wound. Detective MacKay had been on the force 15 years and left behind a wife and two children. Detective MacKay was known for his love of playing bagpipes, often in tribute to other fallen law enforcement officers.

Dorner is also suspected of shooting to death Monica Quan and her fiancé, Keith Lawrence, on February 3. Monica Quan was the daughter of former Los Angeles Police Department Captain Randal Quan, who represented Dorner following his termination from the LAPD in 2009. Monica Quan was the assistant woman's basketball coach at Cal State Fullerton, and Lawrence was a campus police officer at USC.

The loss of these brave public servants and civilian victims shocked, dismayed, and deeply saddened many in the Southland. We are publishing the commentary from San Bernardino County Sheriff John McMahon as he reflected on the loss of Detective Jeremiah MacKay and the message sent to the Riverside community from Chief of Police Sergio Diaz as he reflected on the loss of Officer Michael Crain.

Jacqueline Carey-Wilson is a Deputy County Counsel for San Bernardino County, President-Elect of the RCBA, and Editor of the Riverside Lawyer.

Service for Officer Michael Crain

Officer Michael Crain

Detective Jeremiah MacKay

Commentary by Sheriff John McMahon

The tragedy of February 12, 2013 and the following days will likely be remembered as one of the most difficult times in the 160-year history of the San Bernardino County Sheriff's Department. On that fateful day, we lost Detective Jeremiah MacKay. We lost him at the hands of an evil man – a man intent on wreaking havoc and terror on our profession and our community.

Deputy Alex Collins was also seriously injured. And although he has made tremendous strides, he has a long road of rehabilitation ahead. Both men encompass the values of what a true law enforcement officer should be – bravery, determination and a relentless pursuit of justice. Both men were engulfed in a gunfight – at a tremendous disadvantage in terms of firepower and tactical positioning – but they remained because it was their duty. It was their duty to the citizens of San Bernardino County to risk their lives to stop an evil man. And Jeremiah MacKay paid the ultimate sacrifice, ultimately giving his life to apprehend a mass murderer.

Jeremiah proved his affinity for success at a young age, becoming the youngest person to scale Mt. San Gorgonio, at the age of 4. He lived his life with tenacity. And when he was convinced his calling was law enforcement, he enrolled in the San Bernardino Sheriff's Academy before he turned 21. He graduated from the 131st basic academy on his 21st birthday and was hired as a deputy sheriff on July 4, 1998. He was a terrific deputy sheriff and a fine detective.

Jeremiah was very much in touch with his Scottish heritage and loved playing the bagpipes. He was primarily responsible for the addition of the bagpipes to the Sheriff's Honor Guard and regularly played at department events. He had a wonderful sense of humor, and he loved to laugh. He laughed loudly and often. He had a distinctive laugh that came from deep inside him, the laugh of someone who truly enjoyed life.

Most importantly, Jeremiah was a dedicated husband and father. He was a hands-on dad to daughter Kaitlyn and son Cayden. Jeremiah recently taught six-year-old Kaitlyn to ride a bike and tie her shoes. And he made sure to be involved in all aspects of four-month-old Cayden's life. He changed diapers, helped with middle-of-the-night feedings, and wiped away tears.

And although he was determined to do all in his power to apprehend the subject of the massive manhunt in Big Bear – working tirelessly throughout the weekend of February 9 – he gladly took Monday off to spend with his children before returning to work on Tuesday. Tuesday night he did not come home.

We will never forget Jeremiah MacKay and the MacKay family. They are going to need our continued prayer and support. We also support Alex Collins and stand by him as he works to return to the job he loves. Please pass on encouragement to him and his family.

There are times I worry that support for law enforcement is eroding. We are often scrutinized and second-guessed. And while there was certainly some of that occurring during this incident, I was astounded by the support we received from the citizens of this county and from all around the country. Thank you to all who attended Jeremiah's funeral and who showed their support along the processional. Thank you to the leaders of the community and chiefs of police who united in support of our fallen hero. The overwhelming majority of people have expressed sorrow for our loss and gratitude for what we do. This is encouraging.

I watched with tremendous pride as the law enforcement family came together. In my 27 years with the San Bernardino County Sheriff's Department, I have never been more proud of the work we do for the citizens of this county. From our initial response to protect the scene where our Riverside brothers were cowardly ambushed to the final stand at the cabin on Glass Road, we demonstrated a united front. All law enforcement agencies in this region came together as a team to overcome unimaginable odds. We responded with strength and solidarity during times of adversity, showing the true character of not only our organization but our entire law enforcement family.

Thank you,
Sheriff John McMahon

Message from Chief of Police Sergio Diaz

As the entire community of Riverside knows by now, on Thursday morning, February 7, 2013, the Riverside Police Department suffered incalculable pain when we lost our brother, Patrol Officer Michael Crain, in a cowardly ambush attack which also gravely injured his partner, Officer Andrew Tachias. The facts of that attack and the subsequent events and the resolution of that crime have been exhaustively covered in other communications. I want to take this opportunity and this medium to speak directly to the community about what our loss means to me, to the members of the RPD and to our City.

I hope that all of you avail yourselves of the opportunity to learn more about the extraordinary character of Mike. His was truly a life well lived. He was a classic, American hero. A quiet and soft-spoken man, Mike embodied the character traits that decent people would like to see in themselves, and most importantly, in their children. Mike served our country with distinction in the United States Marine Corps. He returned to Riverside and joined the RPD in 2001. Since his earliest days in the police department, Mike distinguished himself with his police skills, his courage, and his dedication to the community and with the decency that marked his conduct in his work and his personal relationships.

You may notice that I use the words "decent" and "decency" repeatedly. I can think of no higher praise to describe another human being. We live in a time in which, sadly, we tolerate too readily the lack of decency in ourselves and in others. Frankly, I don't have the time, nor the space, nor the words to adequately praise Mike's many positive traits, but those traits, and his conduct over a life that was too short, can best be summed up with the concept of decency. When we examine the record that he left, we can't help but note that in his deportment, his words, and his deeds, Mike gave all for others. Even discounting the ultimate sacrifice that he made, Mike gave more than he received to his country, his community, and his family. And he always did it with class and (yes, there's that word again) Decency.

In the days following Mike's death, you, the community of Riverside, showed your character. I have no words to express how humbled and grateful I am to our community for your countless expressions of sorrow, mourning, and thanksgiving. Individuals, businesses, churches, government organizations and private associations have contacted me and others in your police department with your condolences and material contributions and, most importantly, with your prayers. Please know that we feel the power of your prayers, and the entire RPD takes strength from those prayers.

Don't stop praying. Please pray for us and especially for Mike's family. The RPD will move on from this loss, and we will continue to do our duty on your behalf, following the example that Mike left for us. The loss to his family is, as hard as this is to accept, infinitely more painful and significant to his wife, his parents, his siblings, and most especially, to his children. Daddy can't come home. His physical body will be absent from all the important milestones in the lives of Ian and Kaitlyn. He will have to watch from heaven the dance recitals, the sports celebrations, graduations, weddings, and births of grandchildren. The RPD family will do what we can to support the family in their needs, but ours will necessarily be a poor and unsatisfactory substitute for Mike's presence. In the end, though, that is all we can offer.

In closing, I can only promise the community of Riverside that your police department will continue to strive to be worthy of your support and your trust in us. The memory of Mike and of all of RPD's fallen heroes who have given their all for our City will guide us forward.

Thank you, and God bless you.

Sergio

The Inland Empire's New Lawyer Organization: Asian Pacific American Lawyers Inland Empire

by Sophia Choi

The desire to form an Asian-American lawyers association in the Inland Empire, i.e. Riverside and San Bernardino Counties, has been the sentiment of many of the Asian-American lawyers either working or living in these counties for quite some time. There are various Asian-American lawyer organizations already in existence in different areas of Southern California, such as the Asian Pacific American Bar Association. However, these ideas and desires had not actually come to fruition in the Inland Empire until now.

The initial formation of Asian Pacific American Lawyers Inland Empire ("APALIE") began with a single email. On November 21, 2012, Eugene Kim (partner at Gresham Savage Nolan & Tilden) emailed me, Sophia Choi (Deputy County Counsel at the Riverside County Counsel's office), Sylvia Choi (Deputy District Attorney at the Riverside County District Attorney's office), Lloyd Costales (attorney at Page, Lobo, Costales & Preston), Ricky Shah (attorney at the Law Offices of Ricky S. Shah), and Jerry Yang (Assistant U.S. Attorney at the Office of the U.S. Attorney located in Riverside). All of us were enthusiastic about this endeavor. With a wide range of practice areas and offices located in different areas of the Inland Empire, we shared a common goal: to form an organization of Asian Pacific American lawyers in the Inland Empire.

We had our first formation meeting on December 4, 2012. By this time, we already had additional interested members, including Justin Kim (attorney at Welebir Tierney & Weck), Julius Nam (law clerk for the Central District of California), and Niti Gupta (attorney at Los Angeles Dependency Lawyers). At this meeting, we discussed possible names for our organization, our mission and goals, events, and means for membership growth. APALIE's goals are to promote access to legal opportunities in the Inland Empire for its members, to provide mentorship opportunities, to support fellow members to advance in the legal profession, and to provide community service, to name a few. It was a successful meeting of the co-founders of the organization. APALIE's mission statement is: *APALIE is a professional association supporting the professional growth and advancement of the Asian Pacific American legal community in the Inland Empire. APALIE strives to ensure justice, equal access, and opportunities in the legal profession for all persons. The association fosters professional development, legal scholarship, advocacy and community involvement.*

Our next meeting was held on January 17, 2013. With a slowly yet steadily growing membership, we had four additional members, Warren Chu (Deputy County Counsel at the County of Riverside's County Counsel's office) and Angela Park, as well as Ami Sheth (Assistant U.S. Attorney) and Young Kim (Deputy Federal Public Defender in Riverside). APALIE will hold monthly meetings to discuss formation and membership.

APALIE will hold its inauguration and installation dinner on April 18, 2013. The Honorable Jackson Lucky will be our keynote speaker. Specific details including location and time will be announced.

With a diverse group of Asian Pacific American attorneys who have already started working together in efforts to establish and foster this organization, we are confident that APALIE's membership will continue to grow and positively impact the Inland Empire legal community and the community in general. I know some may think this organization is being formed exclusively for Asian-Americans; however, I would encourage all who identify with our mission statement to attend one of our meetings and become involved in this exciting new endeavor. For more information regarding our organization or if you would like to join as a member, please email me at sochoi@co.riverside.ca.us.

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

Settlement: Beware of Client's and Attorney's Competing Interests

by Stefanie G. Field

I recently had occasion to watch *A Civil Action*, a movie based on a true story about the litigation of a complex personal injury action. Watching that movie was somewhat painful (did he really turn down a $20 million settlement from a party against whom he had not established liability?), but also provided food for thought about the intersection of ethics and settlement negotiations. Superficially, settlements in civil litigation are simple matters – typically, an exchange of consideration to resolve pending litigation. But this seemingly simple transaction can involve competing interests that raise complex ethical issues. Two such interests that can raise a quagmire of ethical issues are the attorney's own financial interests and his or her ego.

Of course, it all starts with the settlement offer. I would hope that anyone reading this article is aware that, in general, they must transmit settlement offers to their client for the client's consideration. Rules of Professional Conduct, Rule 3-510 requires written settlement offers to be communicated to the client. Interestingly, the rule is silent as to oral settlement offers, but its discussion section clarifies that oral settlement offers fall under Rule 3-500, which requires an attorney to keep the client informed of significant developments in the client's case. So, if the offer is oral, the attorney is required to transmit the offer only if it is "significant." (Prudence would dictate that all settlement offers, even if insignificant in the attorney's opinion, be transmitted to the client.)

Once you have the settlement offer, you have to decide how to respond to it. Although the client is the ultimate decision-maker, it is the attorney's duty to counsel his or her client. The response – yea, nay or counter-offer – invariably will be impacted by how the attorney transmits the offer to the client.

The first potential ethical landmine identified above was where the attorney's own financial interests come into play. For example, in *A Civil Action* (ignoring other ethical communication issues), the attorney accepted an $8 million settlement offer because the amount would pay off the worst of the debt that his firm and partners had incurred in litigating the case. Although this may seem extreme, in any case where the attorney has a financial interest in the outcome, there can be tension between the client's and the attorney's interests.

Likewise, an attorney's pride can also come into play, resulting in ethically questionable handling of settlement negotiations. For example, the offer is "insultingly" low or "outrageously" high in the attorney's opinion. Underlying this perception is the attorney's belief that either he or she can beat the other side in court or the other side is not giving due deference to the attorney's skills and the merits of the attorney's case. However, allowing pride to get in the way of settlement can result in disaster for the client. A plaintiff could end up with a defense verdict, or the defendant could end up paying unnecessary attorney fees and a verdict far larger than the settlement amount.

There are a variety of tactics an attorney can employ to avoid these ethical quandaries (open communication with the client, continuing risk assessments, etc.), but how to handle and respond to a settlement offer is inherently a dynamic of the relationship between the attorney and client. That relationship and the communication and trust levels therein will inevitably inform the attorney on how to counsel the client and proceed with respect to a settlement offer.

In sum, handling a settlement offer is a delicate process in which many factors come into play. This article is not intended to provide any hard and fast guidelines as to what to do or how to handle an offer. Rather, it is intended to provide some food for thought.

Stefanie G. Field, a member of the Bar Publications Committee, is a Senior Counsel with the law firm of Gresham Savage Nolan & Tilden.

Advice to Young Lawyers: Take a Mediation Class

by Abram S. Feuerstein

We live in a time period when it is difficult to get through a business day without stumbling across a Lincoln quotation. Movies and television programs about Lincoln seem to litter the landscape. Literally, there are Lincoln quotations to the left of us and Lincoln quotations to the right. And so I hesitate to add another Lincoln reference to the mounting pile.

Yet, when writing in an issue of the *Riverside Lawyer* devoted to mediation, there is one Lincoln quote that is difficult to resist. Drawing on his experiences in practicing law for nearly 25 years, Lincoln wrote: "Discourage litigation – Persuade your neighbors to compromise whenever you can – Point out to them how the *nominal* winner is often a real loser, in fees, expenses, and waste of time – As a peace-maker, the lawyer has a superior opertunity [*sic*] of being a good man – There will still be business enough –"[1]

A review of the full text in which the quotation appears makes it clear that Lincoln's words were focused on such weighty topics as the morality of the legal profession, the honesty of young individuals choosing the law as a calling, and popular beliefs and perceptions of lawyers. I do not intend here to discuss anything nearly as heavy as these subjects, and unlike the mythic Lincoln, after my own 25 years of practice, I certainly have and claim no right or ability to do so. But I do want to dispense one bit of advice for young lawyers while keeping the focus on mediation: the benefits of taking mediation classes.

Approximately five years ago, I had the opportunity to take a six-day training program conducted by faculty of the Straus Institute for Dispute Resolution. The Straus Institute is located at the School of Law at Pepperdine University. Certainly, it has a deserved reputation as a leader in dispute resolution, but there are other well-regarded dispute resolution programs with equally deserved national reputations.[2] Notwithstanding their price tags, the Institute's programs usually sell out, and waiting lists form.[3] At the time, the San Joaquin County Superior Court was attempting to "jump-start" its court mediation program and provided grant money to subsidize attendance by area lawyers. I lucked out.

Tips and Tactics

At a practical level, the program quickly put to a deserved rest such shibboleths as, "Why should I bargain against myself" by "going first" in a negotiation? After all, car salesman – no slouches when it comes to negotiations – always go first by posting a manufacturer's suggested retail price (MSRP) on the windows of new cars at the lot; teenagers in negotiations with parents always go first and ask for permission to drive the new family car before the parties settle on the older car in the driveway; and TV hucksters always go first by revealing that the Snuggie and the Ginsu knife have a purported $99.00 value, notwithstanding the $19.95 special promotional price. No attorney who attended the training will have future hesitations about going first in a settlement negotiation.

Beyond revealing the secrets of car salesman, teenagers, and TV hucksters, the training focused on the impact of cultural differences and variations in upbringing on negotiations – analyzing whether some individuals "left money on the settlement table" because they were simply too polite to engage in another round of negotiations against an adversary who had no such inhibitions. Clearly, some want the negotiation game to end, while for others, it is "game on." Having taken the training, I developed surefire strategies for spending less on souvenirs when traveling overseas to countries where bargaining is not viewed as unpleasant but, instead, is accepted as a part of daily living.

Other noteworthy topics included negotiating with individuals who have mixed monetary and *non-monetary* motivations; practical methods of dealing with difficult personalities; understanding mediation protocols; handling the impact of discovery issues; and confidentiality issues and other ethical considerations surrounding mediations.

A well-known insurance company, Mutual of Omaha, proudly touts its sponsorship of "life's aha moments" – moments of clarity, defining moments when one gains real wisdom, wisdom that is life-changing. The six-day program overflowed with aha moments, if not aha hours. Finally, I possessed meaningful explanations for two decades of negotiations that succeeded and those that crashed; rational reasons for the seemingly irrational

continued next page

1 Abraham Lincoln, Draft of a Lecture on Practicing Law (1860), The Abraham Lincoln Papers at the Library of Congress, available at memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d0045500)).

2 For instance, the University of Missouri School of Law maintains the Center for the Study of Dispute Resolution and publishes the Journal of Dispute Resolution.

3 Tuition for its recent sold-out six-day program, "Mediating the Litigated Case," was $2,195. (See law.pepperdine.edu/straus/training-and-conferences/mediating-litigated-case/irvine.htm.)

Profile of a DRS Mediator

by Christopher Jensen

As most members are aware, RCBA has a sibling corporation, RCBA Dispute Resolution Services, Inc. (DRS). DRS has a talent-laden panel of mediators. One simply needs to access the DRS web page to view a list of the mediators and their backgrounds. Nevertheless, we will endeavor to profile mediators throughout the year. Our first to be profiled is Don Cripe.

Don Cripe has been a mediator and arbitrator for DRS since 1999. As his skills and technique have evolved, Don has become an integral part of the DRS management team, taking the lead on behalf of DRS with the court's Family Law Mediation Program.

Donald B. Cripe

Don's background serves him well. He is a Vietnam-era Navy veteran, nuclear submarine (fleet ballistic missile) veteran, and radioman/electronics technician; he gained an honorable discharge in 1972. Don was educated at the University of Hawaii, West Oahu College, earning a B.A. with distinction in Psychology in 1985 (class rank: 1). Don then attended Southwestern University School of Law, earning a J.D. in 1988 (in the top 25%).

Before becoming a full-time mediator, Don owned a general civil practice, plaintiff and defense, in matters including, but not limited to, business litigation (contracts, shareholder litigation, etc.), personal injury, civil rights, insurance, real estate (brokers, agents, buyers, quiet title, judicial foreclosure, etc.), construction, construction defect, medical malpractice (medicine, surgical, obstetric, chiropractic, dental and oral surgery, etc.), municipal law, commercial litigation, adversary proceedings in bankruptcy court, family law, and general collections. As one can see, Don has had a varied career in the trenches with significant court and jury trial time. Don has also served the community as a temporary judge since 1996.

Don's mediation training experience includes both sides of the lectern: as a student, at the prestigious Straus Institute for Mediation Training, Dispute Resolution Service's Mediation Training, and Inland Valleys Justice Center's "Mediating the Litigated Case," by Robert Tessier; and as a teacher, at the University of La Verne College of Law's ADR Symposium (co-sponsor), Inland Valleys Justice Center's 40-hour Mediation Training, and a variety of other seminars.

As to the Riverside Superior Court Family Law Program, DRS provides mediation services to self-represented litigants at a stage when the self-represented case bogs down in technicalities. Since the program provides mediation services for all family law issues, the mediators are confronted with everything from child visitation issues to the division of complicated retirement plans, and most other issues that one can imagine in a family law dispute. Judge Lucky saw the need for people like Don to assist, and Don dove in without question. Last year, in 2012, under Don's leadership, the DRS panel of mediators resolved 138 of 240 cases. DRS and the court are hopeful the program can expand to other parts of the county beyond the Riverside branch. It's looking positive.

Don is a workhorse. Don doesn't like the word "no." Don wants resolution. DRS is lucky to have Don Cripe on its panel.

Take the time to visit the DRS web page and review the names and qualifications of the other outstanding DRS mediators available to serve you.

Christopher Jensen of Reynolds, Jensen and Swan is the Chairman and President of DRS.

continued from page 22

behavior of opposing counsel and clients; and, more significantly, a vocabulary for describing the doers and deeds I had encountered in my legal career.

The 40 or so attendees at the training with me uniformly scratched their heads and wondered why dispute resolution had not been part of law school coursework; they walked away wishing that they had taken the training in their first few years of practice.

The ostensible goal of the program had been to train would-be mediators, but the real value of the training was to enhance the tools we use daily to manage client expectations and help our clients achieve their goals. And at a less Lincolnesque level, knowing what to say to the approaching car salesman doesn't hurt, either.

Abram S. Feuerstein is employed by the United States Department of Justice as an Assistant United States Trustee. In that capacity, he supervises the Riverside Field Office of the Office of the United States Trustee. The views expressed in this article do not represent the views of the United States Department of Justice, the Office of the United States Trustee, or the United States Trustee, but are solely those of the author.

Why Plea Bargaining?

by Daniel J. Tripathi

Imagine you are a defendant in a criminal case, facing 20 years in prison, but you feel you are innocent. If the prosecutor offered two years in prison, would you accept it? Suppose you are a prosecutor and your star witness recants his prior testimony. Would you offer a lesser sentence to obtain a conviction? What if you were a judge in a courtroom full of criminal defendants and they all demanded a jury trial? What would you do? Dilemmas such as these suggest why the parties involved sometimes agree to a plea bargain.

A plea bargain is a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty in return for a concession by the prosecutor.[1] At an early stage of criminal proceedings, the defendant is presented with the maximum charge or punishment that he or she would be held to if he or she goes to trial. Subsequently, the prosecutor presents the defendant with an opportunity to plead guilty to a lesser charge or to the original charge with less than the maximum sentence.[2]

Prosecutors may, during such plea bargains, put the defendant to a hard choice, requiring him or her to forego the constitutional right to a jury trial in return for escaping what is likely to be a much more severe penalty if he or she does elect to go to trial.[3] The Supreme Court has held that a guilty plea that is entered voluntarily, knowingly, and intelligently, even to obtain an advantage, is sufficient to overcome constitutional objections.[4]

The modern plea bargaining system is a fairly new invention. As late as the 18th century, a jury trial was a judge-dominated, *lawyer-free* procedure conducted so rapidly that plea bargaining was unnecessary. Sources show that well into the 18th century, courts tried between 12 and 20 felony cases per day. Jury trials were expedited in criminal trials because neither the prosecution nor defense was represented by a lawyer. The accused was forbidden counsel; the prosecution might be conducted by a lawyer, but rarely was.[5] Historically, there was no distinction between the accused's roles as defender and as witness. The defendant spoke continuously at the trial, replying to prosecution witnesses and giving his or her own version of the events.[6]

Since that time, criminal proceedings have evolved and are significantly more complex. In modern times, the privilege against self-incrimination encourages the accused to rely entirely upon counsel and say nothing in his or her own defense. The landmark 1963 decision in *Gideon v. Wainwright* provides even indigent defendants with the right to counsel.[7]

Due to the sophistication of jury trials today, they can no longer be used as the exclusive dispositive proceeding for criminal cases. Trials now may last several months, at great cost to the courts and the defendant. Harvard law professor William Stuntz noted that "due to docket pressure, prosecutors lack the time to pursue even some winnable cases," and that "prosecutors in most jurisdictions have more cases than they have time to handle them." The McMartin Preschool trial, one of the longest and most expensive criminal trials in U.S. history, had a life span of three years and cost the government alone roughly $15 million.[8]

Consequently, plea bargains now are used to dispose of the vast majority of criminal cases. In 2011, 97 percent of the convictions in federal courts were the result of guilty pleas.[9] In 2012, in Riverside Superior Court, there were 13,924 felony and 29,012 misdemeanor case dispositions. During the same period, Riverside Superior Court conducted 776 criminal jury trials, which means fewer than two percent of the criminal cases resulted in a jury trial.[10]

The Supreme Court has endorsed plea bargaining, calling it "an essential component of the administration of justice."[11] Chief Justice Burger explained that plea bargaining "is to be encouraged" because "if every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."[12] We live in a world of limited resources, and we as lawyers have a duty to maximize those resources. Prosecutors, public defenders, and defense attorneys appointed by the government have a duty to utilize the public resources available

1 *Black's Law Dictionary* (3rd pocket ed., 2006).
2 United States Department of Justice, Bureau of Justice Assistance *Plea and Charge Bargaining Research Summary* (2011) 3.
3 *Bordenkircher v. Hayes* (1978) 434 U.S. 357.
4 *North Carolina v. Alford* (1971) 400 U.S. 25.
5 Langbein, John H., "Understanding the Short History of Plea Bargaining" (1979) 13 Law & Soc'y Rev. 261, 262-263.
6 *Id.* at pp. 263-264.
7 *Gideon v. Wainwright* (1963) 372 U.S. 335. The 50th Anniversary of this landmark case will occur on March 18, 2013.
8 http://floridainnocence.org/content/?p=8304 [internal citations omitted].
9 Liptak, Adam, "Justices' Ruling Expands Rights of Accused in Plea Bargains," New York Times (Mar. 21, 2012).
10 Thank you to the Riverside Superior Court Executive Office for supplying the data.
11 *Santobello v. New York* (1971) 404 U.S. 257, 260.
12 *Ibid.*

to most effectively achieve justice, while private attorneys must efficiently use the resources provided by the client.

Many factors affect an attorney's ability to settle a criminal case. Resources for investigation on both sides are an extremely important part of the process. Pretrial motions should also be utilized, when appropriate, to resolve key issues. Successful plea agreements occur when the prosecutor and the defense attorney are able to realistically evaluate their case. This often occurs when seasoned trial lawyers are on both sides. The most important component of just plea bargains is the free exchange of information through the discovery process.

The basic aims of discovery in criminal cases include: enabling parties to obtain information on disputed issues, protecting against surprises at trial, delineating issues clearly and narrowly, helping to ascertain the truth, detecting perjury, encouraging settlements, and assuring that probative evidence is available to the party whom it benefits.[13] The object of the justice system is not to convict, but to see that the truth emerges.[14] Penal Code section 1054.1 outlines the prosecutor's obligations, while Penal Code section 1054.3 states the defense's discovery requirements. The suppression by the prosecution of evidence favorable to an accused, where the evidence is material either to guilt or to punishment violates due process.[15]

The Penal Code places a time constraint on when the plea bargain must be accomplished in serious or violent cases. Penal Code section 1192.7, subdivision (a)(2) prohibits plea bargaining in any strike case after the preliminary hearing, (unless there is insufficient evidence). This requires the defense to evaluate all of the evidence at an early stage of the proceeding or risk being uninformed during plea negotiations. Justice Brennan advised that to achieve better justice, the defense should receive expanded discovery.[16] On the other hand, defense attorneys should be timely in producing discovery, as well. The ascertainment of the truth should not be a one-way street.[17] Although the term plea bargaining is occasionally associated with a negative connotation, after a further, deeper analysis, it is apparent plea bargains are beneficial to all parties involved.

Daniel J. Tripathi is a trial attorney who represents private and indigent defendants in criminal cases and the underlying civil claims. He has a bachelor's degree from USC in Systems Engineering and a J.D. from Southwestern, and he has been practicing in the Inland Empire since 2006.

13 Nakell, Barry, Criminal Discovery for the Defense and the Prosecution – the Developing Constitutional Considerations (1972) 50 N.C. L. Rev. 437, 437.

14 See, e.g., *Giles v. Maryland* (1967) 386 U.S. 66, 98 [conc. opn. of Fortas, J.].

15 *Brady v. Maryland* (1963) 373 U.S. 83, 87.

16 See Brennan, William J., The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L.Q. 279, 282.

17 E.g., *Izazaga v. Superior Court* (1991) 54 Cal. 3d 356, 370 [internal citations omitted].

Mediation As a Useful Tool to Resolve Disputes Between Community Associations and Their Members Short of Litigation

by Lisa Copeland and Jamie E. Wrage

In common interest developments, disputes between community associations or homeowners associations and their members abound. By their very nature, community association disputes usually involve legal issues and, in many cases, challenging personalities. Mediation is a flexible form of alternative dispute resolution (ADR) that provides an opportunity to avoid the emotional angst and monetary cost of a lawsuit.

California's Legislature has mandated the mediation of many such disputes in the Davis-Stirling Act (Title 6 of the Civil Code) (Act). The Act sets out the laws of governance for common-interest developments in California and requires or encourages ADR in several different contexts.

Initially, the Act requires that association members and the association be afforded access to an optional internal dispute procedure that is "fair, reasonable, and expeditious." (Civ. Code, §§ 1363.820-1363.840.) This requirement is often satisfied by the governing documents of the association, as those documents commonly include some form of internal dispute resolution procedure. A summary of the association's internal procedure must be distributed annually at the time of the pro forma budget along with a summary of provisions of the Act that apply to enforcement actions under Civil Code section 1369.510, subdivision (b). (Civ. Code, § 1369.590.) That summary must inform the association members that they could lose the right to sue the association or another member if they do not comply with the alternative dispute resolution requirements. (Ibid.)

If the association's governing documents do not include a fair, reasonable, and expeditious dispute resolution procedure, Civil Code section 1363.840 provides a substitute process that must be used if invoked by either party. Under this section, the parties to the dispute must meet and confer in writing and in person and make a good-faith effort to resolve the dispute.

An enforcement action cannot be filed in court by either an association or a member if the action seeks declaratory, injunctive, or writ relief, or damages within small-claims jurisdiction (under $5,000), unless the parties have "endeavored to submit their dispute to alternative dispute resolution . . . ." (Civ. Code, § 1369.520.) "Alternative dispute resolution" is defined as "mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decisionmaking process. The form of alternative dispute resolution chosen pursuant to this article may be binding or nonbinding, with the voluntary consent of the parties." (Civ. Code, § 1369.510, subd. (a).) Should ADR fail, when filing the court action, the plaintiff must certify compliance with this rule or face having the complaint or claim dismissed on a demurrer or motion to strike. (Civ. Code, § 1369.560.)

Even if litigation is not looming on the horizon, mediation can provide a way to resolve a dispute that threatens community harmony before it escalates too far. Almost any community manager can relate at least one horror story about the full-scale war that erupted over what at first appeared to be a somewhat minor issue of the interpretation of a provision of the CC&R's. Emotions are aroused and controversy grows as the complaining member seeks to elicit the support of other members as allies. The dispute then starts to take on a life of its own that may bear little resemblance to the issue that initially provoked it. At this stage, the community manager is likely bearing the brunt of the storm and is in desperate need of qualified outside assistance to defuse emotions and bring the light of reason to bear on the subject. No matter how hard you try to be fair, impartial, and neutral when dealing with different members in a dispute, there is usually a perception that the association's manager or attorney is biased toward one side or the other in cases of mounting controversy. A third-party mediator brings the commodity of neutrality to a dispute that is simply invaluable.

Mediation allows the association's attorney, appropriate board and association members, and the community manager to share their differing concerns and viewpoints in confidentiality. California law prohibits parties from calling a mediator to testify later in a lawsuit about statements or positions during mediation. (Evid. Code, § 1119.) Based on this confidential exchange, a qualified mediator is able to gain a picture of the dispute that the parties themselves cannot see because of their opposing positions. This, in turn, allows the mediator to develop creative options that increase the chance to resolve the dispute, while still satisfying legal concerns that may be involved. Resolution actually begins when initial contact is made, and good use can be made of the flexibility of the Act, which allows the parties themselves to define the method they wish to use to resolve their dispute – whether mediation, arbitration, or some combination of procedures.

A mediator qualified to handle the wide range of legal and personality issues involved in community association disputes is important. When emotions are running high and people are demanding their day in court, a dose of reality brought by someone experienced with the litigation process can usually go a long way toward achieving a positive result. The truth is that once a lawsuit has been filed, the parties lose rather than gain control of their own fate because they

put the decision of the outcome into the hands of a judge or a jury. Plus, litigation is almost always more costly than initially expected – both in monetary and emotional terms. By comparison, mediation and other forms of ADR are a far more effective means to achieve a positive result for those concerned at a fraction of the cost of a lawsuit.

Lisa Copeland is an attorney and mediator with experience representing community associations and nonprofit boards. She operates Desert Cities Mediation and can be reached via email at lisacopeland@dc.rr.com or via www.desertcitiesmediation.com.

Jamie E. Wrage is a Shareholder with the firm Gresham Savage Nolan & Tilden practicing business, employment, and appellate litigation. She has served as mediator in a wide range of disputes.

Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective March 30, 2013.

Benjamin R. Anderson – Bonnie R. Moss & Associates, Riverside

David Bergquist – University of California, Riverside

Larissa A. Branes – Rosenstein & Hitzeman, Temecula

Amber L. Condron – Rosenstein & Hitzeman, Temecula

Erika D. Green – Sole Practitioner, Riverside

Ferrill E. Jordan – Law Office of Ferrill Jordan, Victorville

Fred J. Knez – Law Offices of Fred J. Knez, Riverside

Karen L. LaMadrid – Sole Practitioner, Riverside

David A. Leicht – Sole Practitioner, Wrightwood

Darren J. Lewis – Law Offices of Darren Lewis, Encino

Rosemarie McElhaney – Law Office of Rosemarie McElhaney, Anaheim Hills

James L. Migler – Sole Practitioner, Riverside

Bryan S. Owens – Callahan Thompson Sherman & Caudill, Irvine

Alexander C. Payne – Reid & Hellyer APC, Riverside

Jessica C. Real – Riverside County Superior Court, Riverside

Thomas A. Rice – Best Best & Krieger LLP, Ontario

Isabel C. Safie – Best Best & Krieger LLP, Riverside

Sheniece Smith – Children's Hospital of Orange County, Orange

Renewal:

Elio Palacios, Jr – Palacios Law Office, Riverside

It's Not Too Late to Settle Your Case, Even If It's on Appeal

by Marlene L. Allen-Hammarlund

Some attorneys might think it's too late to settle a case once one party has prevailed at the trial level. However, the Court of Appeal Settlement Conference Program has a very impressive settlement success rate. During the last two years, 40 percent of the cases that entered the settlement program were resolved without further action being required. This means that the parties did not need to file briefs, motions, or attend oral argument; and the court did not need to process any further paperwork, read through the briefs, write an opinion, or conduct oral argument. The settlement conference program has saved litigants and the State of California hundreds of millions of dollars.

The settlement conference program in our Court of Appeal (Fourth District, Division Two) in Riverside celebrated its 20th anniversary in 2011. Over 2,000 settlement conferences have been held since 1991. Many of the attorney mediators who started volunteering with the program over 20 years ago are still volunteering today. Our court has the only appellate settlement conference program in the State of California where attorneys volunteer 100 percent of their time. Other appellate settlement conference programs in the state are designed so that attorneys donate from three to six hours, and, if more time is needed, the parties must pay the mediator directly.

As a volunteer mediator at the Court of Appeal in Riverside, I have found that most attorneys are amenable to engaging in mediation at the appellate level. Even though statistics show that only 20 percent of cases on appeal are overturned, there is still an element of uncertainty looming over the parties. There is a benefit to certainty and finality.

Oftentimes there is something that one or more of the parties want (other than money) that has not yet been identified. Or there may be aspects of the case that the parties have not considered. An experienced mediator is usually able to dig below the surface and get to the bottom line of what can settle a case. There are many strategies that mediators use to settle cases, but a winning formula is having sufficient knowledge of the law combined with the ability to work with the parties and their counsel to find a solution to whatever is hindering a resolution.

Marlene L. Allen-Hammarlund is Senior Counsel for Gresham Savage Nolan & Tilden in Riverside.

Preventing Workplace Violence Requires Employer Vigilance

by Laura Hock

According to the Workplace Violence Research Institute, every workday, an estimated 16,400 threats are made in the workplace, 723 workers are attacked, and 43,800 workers are harassed. Workplace violence can include such acts as assault, intimidation, threats, obscene phone calls, and harassment, among others. Workplace violence results in increased absenteeism and turnover among employees, lower workforce productivity, and decreased employee morale, which can result in significant costs to employers. Preventing workplace violence in the first place, and addressing it promptly and appropriately when it does occur, are crucial to reduce an employer's potential liability in the event an incident occurs.

Employer Liability

Workplace violence can arise in various contexts: (1) where the perpetrator has no relationship with the workplace and enters to commit a criminal act; (2) where the perpetrator is a recipient of the service provided by the workplace (i.e., as client, customer, patient, etc.); and (3) where the perpetrator has some employment-related involvement with the workplace, usually as either a current or former employee or someone who has a relationship with a current or former employee (such as a relative, spouse, or friend).

California has a "fundamental and substantial" public policy requiring employers to take reasonable steps to provide a safe and secure workplace for their workers, which is based on Labor Code section 6400 et seq. and Code of Civil Procedure section 527.8. (*Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252, 259.) Courts have interpreted this responsibility to include the duty to adequately address potential violence in the workplace. (*Ibid.; City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 336-337.)

In California, an employer may be held liable for the violent acts of an employee on a common-law negligence theory if the employer:

- Negligently hired the employee, such as by failing to investigate the employee's work history for evidence of prior violent conduct;
- Negligently trained the employee, such as by failing to provide appropriate employee training regarding prohibited conduct and the consequences of engaging in that conduct;
- Negligently supervised the employee, such as by failing to discipline an employee who has engaged in threats or acts of violence; or
- Negligently retained the employee, such as by failing to terminate an employee who has engaged in threats or acts of violence.

Workplace Violence Policy

A clear workplace violence policy is crucial in preventing workplace violence and should be communicated to all employees in the employee handbook. The policy should include the employer's commitment to protecting employees against the hazards of workplace violence, including both verbal threats and physical acts. Additionally, the policy should state that the employer has a "zero tolerance" policy towards such threats or acts of violence and will take appropriate disciplinary action against those employees who engage in workplace violence. The policy should emphasize the importance of reporting all threats or acts of violence as soon as possible and identify the means and methods for employees to make such reports to the employer in a confidential manner. Establishing the methods by which an investigation of threats or acts of violence will be conducted also is important. Finally, the policy should provide that the employer will not retaliate against individuals who report threats or acts of violence.

While adopting a workplace violence policy is an important first step, the policy requires ongoing enforcement if it is to be effective. The policy must be applied consistently and fairly to all employees, including managers and supervisors, and appropriate supervisory and employee training is needed to identify signs and symptoms of employee behavior that may predict potential violence.

Assessment and Management of Threat

In a common scenario, a coworker or supervisor observes or learns of an employee's questionable or threatening verbal or physical behavior either within or outside the workplace. As a result, the coworker or supervisor experiences concern and sometimes even fear that the employee is about to engage in an activity that could result in injury to the employee or to others in the workplace. The coworker or supervisor then brings this information to the employer to address the issue.

Dealing appropriately with such situations can be difficult for an employer, which must assess all the information and determine the threat posed to the workplace. An employer should begin an investigation to assess whether the reported threatening or hostile behavior is credible and what response, if any, is necessary. Such an investigation should determine (1) the past work history of the person making the threat; (2) the exact nature and context of the threat; (3) the target of the threat; and (4) the ability of the person making the threat to carry it out.

Employers often are tempted to engage in hasty reactions, such as imposing significant discipline, due to increased media attention on workplace violence incidents. But in doing so, employers run the risk that their actions may later be found to have no merit if a subsequent investigation reveals the context in which the comments or conduct occurred, that the comments were misquoted, or that the threat was fabricated by another employee for a self-serving motive. Deciding what to tell employees about the situation also requires careful balancing by the employer of the employer's duty to provide a safe workplace against the need to avoid causing unnecessary fear and anxiety in employees.

During the investigation, one option is to temporarily suspend the accused employee to prevent any incidents of violence. If the investigation reveals a credible threat, the employer can involve law enforcement, which may conduct its own investigation. Another option available to the employer is to seek a court-issued restraining order pursuant to Civil Code section 527.8.

Workplace Violence Safety Act

Code of Civil Procedure section 527.8, as part of the Workplace Violence Safety Act, permits an employer to seek a temporary restraining order and injunction to prevent violence or threatened violence against employees when an employee has suffered unlawful violence or a credible threat of violence that can reasonably be construed to be carried out or to have been carried out at the workplace. (Civ. Code, § 527.8, subd. (a)). While other California laws allow victims of violence or threats of violence to seek court orders themselves, workplace violence protective orders must be requested by an employer on behalf of an employee who needs protection.

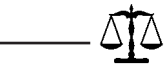
Both public and private employers can request a workplace violence protective order on behalf of an employee, which includes volunteers and independent contractors who perform services for the employer. (Civ. Code, § 527.8, subd. (b)(3).) A credible threat of violence is defined as a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety or the safety of his or her immediate family and that serves no legitimate purpose. (Civ. Code, § 527.8, subd. (b)(2).) Examples of such conduct include following or stalking an employee to or from the workplace, entering the workplace, making telephone calls to an employee, and sending correspondence to an employee through the mail, by fax, or by email. (Civ. Code, § 527.8, subd. (b)(1).)

The court can grant a temporary restraining order if the employer shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence, and that great or irreparable harm would result to an employee if the temporary restraining order is not granted. (Civ. Code, § 527.8, subd. (e).) A temporary restraining order remains in effect for up to 25 days, until a court hearing can be held on the injunction request. (Civ. Code, § 527.8, subd. (g).) Following a hearing, if the court finds by clear and convincing evidence that the employee suffered unlawful violence or a credible threat of violence, the court will issue an injunction prohibiting further unlawful violence of threats of violence. (Civ. Code, § 527.8, subd. (j).) The injunction can last up to three years and will be enforced by law enforcement. (Civ. Code, § 527.8, subd. (k).) The temporary restraining order or injunction can protect certain family or household members of the employee, as well as other employees at the employee's workplace or other workplaces of the employer. (Civ. Code, § 527.8, subd. (d).)

The Judicial Council has developed form pleadings to aid employers in seeking a workplace violence protective order on behalf of an employee, and courts require employers to use them. These forms can be accessed at courts.ca.gov/1286.htm.

All employers have a duty to take steps to prevent workplace violence and to address effectively threats of violence that arise. Incidents of workplace violence expose an employer to various grounds of potential liability. By devising and enforcing a strong workplace violence policy, accurately assessing reports of possible threats, and seeking restraining orders from the court when necessary, employers can limit significantly their potential liability.

Laura Hock is an associate attorney at Gresham Savage Nolan & Tilden, where she is part of the firm's Litigation Department and a member of the Labor and Employment Law practice group.



The Central District's Mediation Panel Mediators Agree: Preparation Is Key

by Gail Killefer

The U.S. District Court's Mediation Panel was busy with cases filed in the Eastern Division in 2012. Panel members mediated 37 cases and settled, or partially settled, 20 (a 54% settlement rate!).

The Honorable Virginia A. Phillips hosted an Appreciation Reception for panel mediators in the court's Eastern Division on November 5, 2012. Magistrate Judges David Bristow, Oswald Parada and Sheri Pym also attended. Judge Phillips offered her insights on mediation and the Mediation Panel and thanked the panel mediators for their service.

By January 2013, the Mediation Panel consisted of 195 attorneys available to mediate cases in the Central District. Some 45 panel mediators volunteer to mediate federal cases in Riverside County. Their profiles are available on the "Alternative Dispute Resolution (ADR)" page of the court website and may be searched alphabetically, by county, and by area of legal specialization.

Tips for a Successful Mediation

I asked several panel mediators who mediate cases in the Eastern Division what they would suggest to counsel to ensure a productive mediation session. "Preparation, preparation, preparation" was the uniform response.

Steve Geeting, a panel member in Riverside since 2009, has litigated on behalf of plaintiffs for more than 30 years. He understands the plaintiff's perspective – and wants counsel to be fully prepared to settle the case when they mediate with him. He asks that counsel evaluate the plaintiff's expenses and damages prior to mediation. A plaintiff cannot evaluate a settlement offer without assessing his or her own share, then subtracting the amounts needed to reimburse expenses or indemnify third parties.

An essential component for defense counsel, Mr. Geeting claims, is the preparation of a release – brought to the mediation on a flash drive – that will satisfy his or her client. "When counsel mediate with me," he says, "they should assume that they will settle the case that day."

Terry Bridges, a long-time panel mediator who is known for thoroughly preparing for each mediation he conducts, wants counsel to "take the mediation seriously." Mr. Bridges routinely schedules a pre-session phone conference with counsel to discuss scheduling, the discovery necessary for an evaluation of the case, and any impediments to settlement, such as the need for a ruling on a dispositive motion.

All the panel mediators noted the importance of lawyers preparing their clients for mediation. Mr. Bridges expects attorneys to have a conversation with their clients, before mediation, about a realistic evaluation of the case. He urges attorneys to explain to their clients what to expect from the mediation process and the importance of staying open-minded to the exchange of information in the session, including an evaluation from the mediator. Parties should be prepared to compromise in mediation and should not expect to get everything they want.

Neil Okazaki, an attorney with the Riverside City Attorney's office who mediates ADA and personal injury cases, suggests attorneys prepare their clients to try "to work out a resolution" at mediation – not "win the case." He emphasized the importance of mediation statements: statements prepared by counsel that focus on key issues both positively and negatively impacting the case. He, too, uses a pre-session telephone conference with counsel to discuss scheduling and issues in the case.

Ivan Stevenson, a Long Beach attorney who has settled civil rights cases in the Eastern Division, wants good, detailed, confidential mediation statements in advance of the session. If a statement suggests problems, Mr. Stevenson will call counsel before the session. He also wants counsel to work efficiently during mediation: "Come with a game plan," he says, "knowing that you may modify the game plan" during the session.

Art Cunningham, a partner with Lewis Brisbois Bisgaard & Smith LLP in San Bernardino, noted the importance of submitting the mediation statements to the mediator well in advance of the session so the mediator has time to prepare. He reminds counsel to be sure that the mediator can open and view the exhibits they provide, such as videos and other media.

Mr. Cunningham and Mr. Bridges expect counsel to be prepared to engage in a candid discussion with the mediator in private caucus about the strengths and weaknesses of the case.

Leonard Gumport, a Los Angeles lawyer who in 2012 settled two cases alleging fraudulent debt collection prac-

tices in the Eastern Division, insists that counsel take the discovery they need to evaluate the case before mediating. He encourages the attorneys to talk directly before the mediation about their views of the value of the case so they are not surprised by their opponent's view at the session.

If the parties have a dispositive motion that must be decided before they are willing to seriously engage in settlement negotiations, Mr. Gumport wants counsel to tell the mediator that a productive mediation will not occur until after the court has ruled. Mr. Gumport does not expect that all cases will settle in one session; last year he settled one case during the fifth session!

Appointment to the Mediation Panel

The Central District's panel mediators meet strict qualification standards: they must have at least ten years of legal practice experience, substantial experience with or knowledge of civil litigation in federal court, and significant expertise in one or more designated areas of law. A panel member must also complete a court-conducted or court-approved training course in mediation.

Panel mediators generously volunteer their preparation time and the first three hours of a mediation session. If the parties choose to continue mediating beyond three hours, panel mediators may request their market rate.

For those interested in applying for appointment to the court's Mediation Panel, all applications must be received by the ADR Program Office by April 30, 2013. Appointments are for a two-year term, beginning July 1, and may be renewed.

For more information about the court's ADR Program and for an application to join the Mediation Panel, visit the "ADR" page of the court website, cacd.uscourts.gov.

Gail Killefer is the ADR Program Director for the U.S. District Court, Central District of California.

Classified Ads

Office in Rancho Mirage
Nice, large, window office w/ optional secretarial space. Partial law library, conference room, lounge, phone system, built-in cabinets, copier/fax privileges, part-time reception, other amenities. Near Palm Springs & Indio Courts. Thomas A. Grossman, PLC (Desert ADR), (760) 324-3800.

Office Space – Downtown Riverside
1 block from the Court Complex. Full service office space available. Inns of Court Law Building. Contact Vincent P. Nolan (951) 788-1747, Frank Peasley (951) 369-0818 or Maggie Wilkerson (951) 206-0292.

Office Space – Grand Terrace
Halfway between SB Central & Downtown Riverside. 565 to 1130 sq ft., $1.10/sq ft. No cams, ready to move in. Ask for Barry, (951) 689-9644

Holstein Professional Building
3 office suites available. 895 to 8,884 sq ft at $1.15 per. Lease 1-3 years. Tenant improvements negotiable. Minutes from downtown Riverside. On site parking. Easy freeway access 60, 215, 91. Contact Rene, KRB Properties, to schedule a walk through. Phone (949) 548-0040; Cell (714) 336-8559; krbprop@aol.com.

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

Office Space – Downtown Riverside
Riverside Legal & Professional Center. Downtown Riverside walking distance to Courthouse. Private Executive Suite offices, virtual offices and conference rooms rental available. We offer a state of the art phone system, professional receptionist and free parking for tenants and clients. Accessible from the 91, 60 and 215 freeways. (951) 782-8089.

Virtual Office Space in Murrieta, CA
$55 per month with discounted conference room at $10 per half hour. 7 miles from Southwest Justice Center and 4 miles from Riverside County Superior Court in Temecula. Less than 1 mile from the 215 and 15 freeways. Close to shopping and dining. www.JeffersonPointeOffices.com

Conference Rooms Available
Conference rooms, small offices and the third floor meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance, by contacting Charlene or Lisa at the RCBA office, (951) 682-1015 or rcba@riversidecountybar.com.

Interested in writing? Seeing your name in print? Advancing your career? Addressing your interests? Being published? Expressing your viewpoint?

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and be a part of our publication.
Contact Charlene or Lisa at the RCBA office
(951) 682-1015 or lisa@riversidecountybar.com

Riverside County LAWYER

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