Riverside Lawyer

July/August 2016 • Volume 66 Number 7 MAGAZINE

We the People

In This Issue

Your Electronic Fourth Amendment

"Help Them!": A Simple Look at *Pro Bono* Service and the *Pro Se* Clinic

The Federal Bar Association's Chapter for the Inland Empire

Government Healthcare Exposed: *Caring Hearts v. Burwell* and the "Mischievous Effects of Mutable Government"

Visiting John Marshall's House in Richmond

Campbell and the Curious Case of Unaccepted Settlement Offers

The Second Amendment Right to Bear Arms

When the Supreme Law of the Land is Not So Supreme: How State and Local Governments Impact Individual Rights

What's the "Big Deal" About the December 2015 FRCP Amendments?

CalECPA and Suppression

The Case of Al Capone, an Application of the Taxing Power to Prosecute an Elusive Criminal

The official publication of the Riverside County Bar Association

Let us help you...

Trial Exhibits & Large Format Printing

Fast Legal Reproduction (Digital Color and Black & White)
Ask About Free Local Pick-up & Delivery

printmystuff.com
IS
PIP PRINTING
RIVERSIDE / CORONA

PIP Printing Riverside • 951.682.2005
4093 Market St. Riverside, CA 92501

PIP Printing Corona • 951.737.1820
501 East 6th St. Corona, CA 92879

Riverside County LAWYER

Riverside County Bar Association
4129 Main St., Ste. 100, Riverside, CA 92501
RCBA 951-682-1015 LRS 951-682-7520
www.riversidecountybar.com rcba@riversidecountybar.com

PRSRT STD
US POSTAGE
PAID
PERMIT #1054
RIVERSIDE, CA

You KNOW Who We Are...
You've SEEN Our Results.*

RIZIO LAW FIRM

We Would Be Honored To Be YOUR PI Trial Team!**

1-951-781-6500

www.riziolawfirm.com

* Not a guarantee, warranty or prediction regarding the outcome of any future legal matter. **Consistent with State Bar requirements.

Riverside County Bar Association
4129 Main Street, Suite 100
Riverside, California 92501

Telephone
951-682-1015

Facsimile
951-682-0106

Internet
www.riversidecountybar.com

E-mail
rcba@riversidecountybar.com

RIVERSIDE LAWYER
MAGAZINE

CONTENTS

Columns:

3 ..... **President's Message** *by Kira L. Klatchko*

5 ..... **Barristers President's Message** *by Christopher Marin*

COVER STORIES:

6 ..... **Your Electronic Fourth Amendment** *by Robert L. Rancourt, Jr.*

8 ..... **"Help Them!": A Simple Look at *Pro Bono* Service and the *Pro Se* Clinic** *by Ruben Escalante*

10 .. **The Federal Bar Association's Chapter for the Inland Empire** *by Joseph B. Widman*

12 .. **Government Healthcare Exposed: *Caring Hearts v. Burwell* and the "Mischievous Effects of Mutable Government"** *by Boyd Jensen*

14 ..... **Visiting John Marshall's House in Richmond** *by Abram S. Feuerstein*

18 .. ***Campbell* and the Curious Case of Unaccepted Settlement Offers** *by Mohammad Tehrani*

20 ..... **The Second Amendment Right to Bear Arms** *by DW Duke*

22 .. **When the Supreme Law of the Land is Not So Supreme: How State and Local Governments Impact Individual Rights** *by Kimberly Phan*

24 ..... **What's the "Big Deal" About the December 2015 FRCP Amendments?** *by Daniel S. Roberts*

26 ..... **CalECPA and Suppression** *by Bryan Boutwell*

27 ... **The Case of Al Capone, an Application of the Taxing Power to Prosecute an Elusive Criminal** *by DW Duke*

Feature:

28 ..... **Mentoring Cafe** *by Mike Gouveia*

Departments:

Calendar 2
Classified Ads 28
Membership 25

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, 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.

The 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 the* Riverside Lawyer.

The material printed in the 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

SEPTEMBER

29 **RCBA Annual Installation of Officers Dinner**
Mission Inn – Grand Parisian Ballroom
Social Hour – 5:30 p.m.
Dinner – 6:30 p.m.

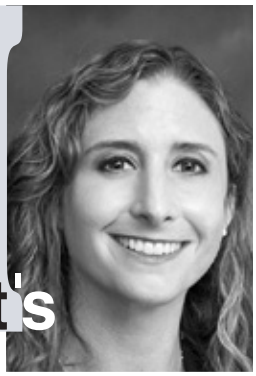
NOTICE

Notice is hereby given that the RCBA Board of Directors has scheduled a "business meeting" to allow members an opportunity to address the proposed budget for 2017. The budget will be available after August 15, 2016. If you would like a copy of the budget, please go to the members section of the RCBA website, which is located at riversidecountybar.com or a copy will be available at the RCBA office.

Thursday, August 23, 2016
at 5:15 p.m. in RCBA Board Room

RSVP by August 19 to:

(951) 682-1015 or
charlene@riversidecountybar.com



President's Message

by Kira L. Klatchko

Friends, this is my last Message for the *Riverside Lawyer*. It has been an honor and privilege to serve as your President. I write today in dedication of the many amazing things the RCBA has accomplished this year, and for the many amazing people who have made those accomplishments possible.

Few realize how much good the Bar does in our community. It was not until this year that I fully appreciated it myself. When most people think of the RCBA, they think of lunch time CLE programs. And, there are certainly many of those. As President, I can attest to the fact that on almost any given day you can attend a wonderful educational program hosted by the RCBA or one of its Sections. But the Bar is much more than a CLE provider. I will not attempt to share with you everything your Bar has been doing as that would take more than one article. But, let me share with you a few of the highlights from the past year.

- In December, the RCBA hosted State Bar President David Pasternak. Mr. Pasternak participated in the excellent new attorney swearing-in ceremony presided over by Presiding Justice Manuel A. Ramirez of the Court of Appeal and then joined RCBA members for lunch and a presentation at the Court of Appeal. I could say many wonderful things about both programs, but the high point for me was hearing Mr. Pasternak praise our Bar and our legal community. He spoke eloquently at the event about the work of the State Bar and about the importance of local bar associations and of fostering community. And he spoke with me after the event, explaining that he had been absolutely dazzled by the hospitality and warmth of our Bar. His comments were sincere and heartfelt, and touched on the uniqueness of our Bar.
- In a previous column, I mentioned the Legal Leaders Summit hosted by the RCBA. This Summit brought together leaders from our community, courts and local and affiliated bar associations to focus on the access to justice problem facing our community. While only a beginning, the Summit has resulted in our Bar taking concrete steps to begin increasing awareness of, and involvement in, access issues. As a result of the Summit, the Bar also intends to increase opportunities for members to get involved in community-based programs with direct and indirect benefits for our courts and the justice system. Thank you to all who attended the Summit and to the many RCBA Board members who have begun implementing resulting recommendations. Particular thanks to Jack Clarke, Kelly Moran, Nick Firetag, and Robyn Lewis for their work.
- As we do every year, the RCBA ran an outstanding mock trial competition among schools in Riverside County. I was fortunate enough to serve as judge in the final round of competition this year. I attest that the students were outstanding in every respect and that they gave me great hope for the future of our profession. My sincere thanks to the Mock Trial Steering Committee and all of the many parents and attorney coaches who ensure that every year the program is outstanding.
- The RCBA also continued to sponsor the Good Citizenship Awards. The Good Citizenship Awards recognize high school juniors from across the County that are known for their dedication to their fellow students and to the community at large. These students represent the best in young leadership, and the RCBA, joined by the Riverside County Superior Court and numerous local legislative offices, was pleased to be able to honor and recognize these students in a lovely ceremony in Department 1. My thanks to all involved in organizing the event, including our wonderful RCBA staff.
- The RCBA also continues to put out the *Riverside Lawyer*, an outstanding publication that is widely-read. I was, in fact, surprised by the commitment of our loyal readers, many of whom wrote to me throughout the year to complement the magazine or particular articles. I even received comments from bar leaders in other parts

of the state. The magazine is a regular reminder of the wonderful programs our Bar works on throughout the year, and its success is attributable entirely to the RCBA Publications Committee and to Editor Jacqueline Carey-Wilson. My sincere thanks to them for their excellent work this year.

- As mentioned at the beginning of the year, the RCBA has incorporated a non-profit Foundation that will focus in the coming years on raising funds for RCBA programs. The Foundation currently supports Adopt-A-High School, Elves, Project Graduate, and the Good Citizenship Awards. I look forward to seeing the Foundation grow to support new programs, and thank the Foundation Steering Committee for their work this year.

More than a professional association, our Bar has been the place where life-long friendships have been fostered and meaningful work relationships built. That much is evident when you see old friends, or former law partners, greet each other at meetings after a long absence. It is also evident in the work the RCBA does every day, much of it unseen by our members.

Although I have noted some of the Bar's work in this article, and in past articles, watching what our staff does every day has been a highlight for me. Our staff provides much needed support to the community; they answer questions from people who do not understand the legal system, who need a lawyer, who need direction; they help students find internships and jobs; they coordinate community events and with community leaders; they support other bars and affiliated organizations, including LRS and DRS; they manage our building. My sincere thanks to the entire RCBA staff, and particular thanks to Charlene Nelson—I would not have made it through the year without her!

I would also not have made it through the year without our incredible Board. This year, the Board has focused on outreach, advocacy, and many of the wonderful projects you have all heard about. We have also focused on issues that few of you have heard about, like updating our building, financial reports, bylaws, and website. The Board's work on these issues has been exceptional, and has improved the quality of the Bar this year and going forward. I have served on the Board with some of the most imp ressive, dedicated, thoughtful, and kind lawyers in our community, and it has been a pleasure. Thank you to all of you for a wonderful year.

Kira Klatchko is a certified appellate law specialist and co-contributing editor of Matthew Bender Practice Guide: California Civil Appeals and Writs. *She is also a vice chair of the appellate practice at Lewis Brisbois Bisgaard & Smith, where she is a partner.*

Barristers President's Message

by Christopher Marin

Over the last few months I have been able to use this monthly message to air my struggles as a young attorney trying to figure out where he belongs in the greater legal community of Riverside and the Inland Empire. I am grateful for all of the supportive feedback I have received, and I know that no matter where I end up, I will be okay. Thank you Riverside lawyers for living up to your reputation as some of the most collegial and kind professionals that you'll find anywhere in this country.

I also know that Barristers will be okay, if not better, because of the energetic, enthusiastic and committed group of individuals we have elected to next year's Board of Directors. It bodes well that every time I see Robyn Lewis, she always tells me of new attorneys in the New Attorney Academy who ask her, "How can I get involved?" She is quick to point out Barristers as well as other RCBA sections and committees, and we at Barristers hope to tap into that enthusiasm even further by setting up several standing committees to allow even more opportunities for our young attorneys to get involved in the Riverside legal community and beyond. Regardless of how formally these new attorneys become involved with Barristers and the RCBA, I know we can expect great things from them.

As my year as Barristers President draws to a close, I would like to give a special thanks to the Board of Directors who worked so hard to keep this group running. Thanks to the efforts of Ben Heston, Kris Daams, Erica Alfaro, Shumika Sookdeo and Mona Amini, we were able to host several MCLE events as well as launch a monthly social gathering that is expected to continue next year. Additionally, thanks to our event attendees and sponsors, we were able to close out this year with a small gain to our operations account as well as raise a modest amount of seed money for the newly formed RCBA Foundation.

I look forward to a great 2016-17 with our new Barristers President, Erica Alfaro, and I look forward to seeing all of you at our future events.

Christopher Marin, a member of the bar publications committee, is a sole practitioner based in Riverside. He can be reached at christopher@riversidecafamilylaw.com. Erica Alfaro can be reached at emalfaro@scif.com.

Your Electronic Fourth Amendment

by Robert L. Rancourt, Jr.

May the government force a private company to help unlock an encrypted smart device the company made? After trying earlier this year, the government withdrew its request when the FBI reportedly paid more than $1 million to a third party who voluntarily helped the government unlock the San Bernardino shooter's iPhone.

We have come a long way since the eighteenth century when the British King's agents ransacked homes and had blanket authority to search—and even make anyone help them—almost anything or anyone. Frustrated, the Founders enshrined in the Fourth Amendment the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." They backed it up with the requirement that no warrant to search or seize be issued except upon probable cause with a particular description of the place to be searched and the person or things to be seized.

Almost three centuries later, these principles are still being tested. The Pew Research Center reports that almost three-quarters of U.S. adults have computers and almost half have tablets. It said last year that 92 percent of U.S. adults and almost 75 percent of U.S. teenagers have cell phones, mostly smartphones. Are these devices "effects" worthy of Fourth Amendment protection?

In *Riley v. California* (2014) 134 S.Ct. 2473, the Supreme Court said "yes." Mr. Riley was stopped for expired registration tags and was arrested for driving on a suspended license. The vehicle was impounded and two handguns were found under its hood during an inventory search. An officer searching Mr. Riley incident to the arrest seized a cell phone from Mr. Riley's pocket. The officer looked at the phone and saw use of a term associated with a gang. A gang detective later reviewed the phone and opined that photographs on it connected Mr. Riley to a gang shooting that had occurred a few weeks earlier. Mr. Riley moved to suppress all evidence that the police had obtained from his cell phone.

The prosecution relied upon the well-established exception to the warrant requirement that when an individual is lawfully arrested, for officer safety or evidence preservation purposes, he or she and the area within his or her immediate control may be searched incident to the arrest without a warrant. The Supreme Court disagreed, holding that the warrantless search of the digital contents of a cell phone incident to a lawful arrest is unconstitutional.[1] The court found that digital data found on cell phones involves substantial privacy interests and does not present officer safety risks or sufficiently significant evidence preservation concerns. Far from "just another technological convenience," the court noted that the fact that technology now allows someone to carry information about the privacies of his or her life in one's hand does not make the information any less worthy of the protection contemplated by the Founders.

While the Founders did not have cell phones, they had the idea of security in our effects. Does this include your hard drive or data transferred from your hard drive to a flash drive?

People v. Michael E. (2014) 230 Cal.App.4th 261 seems to think so. There, at the request of police, a private citizen the defendant employed to work on his computer transferred some files from the computer onto a flash drive after the technician alerted police to sexually suggestive images of children found elsewhere on the computer. Later, without a warrant, police examined the files on the flash drive, which revealed child pornography. The court, relying on *Riley*, ordered suppression of the flash drive's contents, noting that a computer hard drive implicates at least the same privacy concerns as the search of a cell phone.

The state likes its technology too.[2] Is the government's use of a Global-Positioning-System (GPS) tracking device a "search" within the meaning of the Fourth Amendment? Yup.

In *United States v. Jones* (2012) 132 S.Ct. 945, the government attached a GPS tracker to a car registered to Mr. Jones's wife, tracked it for 28 days, and used its data in prosecuting Mr. Jones for drug distribution conspiracy. Obtaining information from the tracker on the car was indeed a "search" of Mr. Jones's "effects." The court explained that not only does the Fourth Amendment encompass the more modern view of protecting one's reasonable expectation of privacy (e.g., *Katz v. United States* (1967) 389 U.S. 347 [eavesdropping on public telephone booth conversation violates reasonable expectation of privacy]), but so too does it include the more classic view of protecting things in which we have a possessory interest against trespass, like our physical belongings.

1 Just as this issue was going to press, the Supreme Court issued a significant decision on warrantless searches incident to arrest. In *Utah v. Strieff*, case number 14-1373, an illegal detention was held sufficiently distinct from a valid traffic warrant for the subject of the unconstitutional detention and ensuing search incident to arrest on the warrant, such that the attenuation doctrine exception to the exclusionary rule saved the search. Search of Mr. Strieff's electronics were not at issue.

2 California takes its electronic communications privacy seriously. This year's enactment of the Electronic Communications Privacy Act (Penal Code, §§ 1546-1546.4) imposes upon a government entity the requirement of a search warrant for the acquisition of data or metadata, with narrow exceptions (like subscriber identification information), which will likely make warrantless acquisition of electronic information in California rare, absent a wiretap order or consent.

What about those satellite-based, electronic ankle monitors that track a person's location? Citing *Jones, Grady v. North Carolina* (2015) 135 S.Ct. 1368 invalidated a state program using such ankle monitors on recidivist sex offenders. Such devices physically intrude upon one's body and thus are indeed Fourth Amendment searches. Whether such satellite-based monitoring programs are nonetheless otherwise constitutionally reasonable under the Fourth Amendment is another matter. The courts are beginning to answer that question. (See, e.g., *Belleau v. Wall* (7th Cir. 2016) 811 F.3d 929 [yes].)

Can someone bargain away his or her cell phone security for probation? A typical probation term includes a Fourth Amendment waiver that the probationer agrees, in accepting probation, to be subject to search of his or her person and things while on probation, regardless whether probable cause exists. (E.g. *People v. Bravo* (1987) 43 Cal.3d 600.) As long as searches under such conditions are reasonable and not arbitrary, capricious, or harassing, they pass muster under the Fourth Amendment.

The Fourth Amendment protects probationers too. In *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, probation officers conducted a home visit of someone on probation for drug sales and searched his cell phone, based upon the probation term permitting search and seizure of his person and property, including home, premises, container, or car, without a warrant, probable cause, or reasonable suspicion. Data from the cell phone search linked the probationer to other crimes that were federally prosecuted later. However, the court ordered suppression of all evidence attributable to the cell phone search, as the probation term did not specifically include cell phones and the probationer still has a weighty—albeit diminished—expectation of privacy.

May probation search conditions include requirements that officials be able to access the probationer's social media accounts on any of his or her devices? Can the court include a term requiring the probationer not to delete his or her Internet browsing history? In *People v. Appleton* (2016) 245 Cal.App.4th 717, the defendant met his victim using a social networking application, so the trial court imposed a probation term that the defendant's computers and all other electronic devices, including cell phones, be subject to search for material prohibited by law. The trial court also imposed a condition that the defendant not clean or delete Internet browsing activity on any of his electronic devices and maintain a minimum of four weeks of such history.

The appellate court found that the first condition would allow searches of vast amounts of personal information unrelated to the probationer's criminal conduct or potential for future criminality. The court therefore struck it as unconstitutionally overbroad and remanded the case back to the trial court "to fashion a more narrowly tailored version of that condition." However, the court approved the condition requiring maintenance of the probationer's Internet browsing history, finding it minimally intrusive to enforce probation terms and narrowly-fashioned to serve the valid state interest of monitoring whether the probationer uses social media for unlawful purposes.

Kids in particular really love their electronics. The Pew Research Center finds that 95 percent of teenagers are online—24 percent of them "almost constantly"—and three in four teens access the Internet on cell phones, tablets, and other mobile devices. Not surprisingly, juvenile courts grapple with delineating appropriate probation terms to monitor minors' online lives, such as requiring warrantless search of their electronic devices and compelled production of passwords necessary to enforce compliance.

In *In re P.O.* (2016) 246 Cal.App.4th 288, the juvenile court sustained a petition for public intoxication of a teenager who admitted using hashish oil earlier in the day. The court imposed a probation term that the minor submit to warrantless search of his person, car, room, property, and electronics, including passwords. Although the court noted the broad discretion juvenile courts enjoy to fashion conditions of probation to further a minor's rehabilitation, it found this term not narrowly tailored to furthering the minor's drug rehabilitation. The court instead ordered the term modified to read:

> "Submit all electronic devices under your control to a search of any medium of communication reasonably likely to reveal whether you are boasting about your drug use or otherwise involved with drugs, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified. Such media of communication include text messages, voicemail messages, photographs, e-mail accounts, and social media accounts."

Still, exercising broad discretion can result in constitutional overbreadth. The validity of a juvenile probation condition requiring minors generally to submit their electronics or electronics under their control, including passwords, to warrantless searches by law enforcement or the probation department is currently pending before the California Supreme Court in *In re Ricardo P.*, case number S230923.

Whether the government may force a private company to help unlock its encrypted smart devices remains an open question. Reuters reports that draft legislation in the U.S. Senate would let judges order technology companies to assist law enforcement agencies in breaking into encrypted data.

Wait! What about wireless-enabled, wearable activity trackers? Drones? ☺

Bob Rancourt is a Deputy Public Defender with the Law Offices of the Public Defender, County of Riverside, where he has worked for 14 years and is currently assigned as lead attorney of the Indio Juvenile Court unit. He also sits as a judge pro tempore *for the Riverside County Superior Court.*

"Help Them!": A Simple Look at *Pro Bono* Service and the *Pro Se* Clinic

by Ruben Escalante

I remember a time when I was walking around the Loma Linda University Hospital Campus with my son on my shoulders. He was only four years old at the time. We passed by a statue of "The Good Samaritan." He was too young to understand the complexities of the story, but we stopped and stared at it nevertheless. I took him off my shoulders and put him in front of me, and with my arms around him I asked him, "Son, when someone is hungry, what do you do?" He answered, "Give them something to eat." I followed up, "When someone is thirsty, what do you do?" He answered, "Give them something to drink." I continued to ask, "How about when someone needs clothes, a place to stay, or is sick?" He answered, "Help them!"

After chuckling, I remember thinking not only how simple the answers were, but also how easy the questions must have been. Is it that simple that even a four year old gets it? If there are people in our community who have needs, legitimate needs, we should meet them. As lawyers, of course, we strive to meet the legal needs of the community, and we in large part charge a fair price for it. As we all know, however, there are those in our community who cannot afford that price, but nevertheless still have unfulfilled legal needs. This is where pro bono legal services come in. For example, this is the goal of organizations like the Riverside Legal Aid and projects like the *pro se* clinic at the United States District Court.

At the *pro se* clinic the staff and volunteers address different types of needs. Some people come needing to complete bankruptcy petitions and paperwork; we help them. Some people come in after they spent their life savings prosecuting or defending a case through a complaint or answer, only to be left without any resources to litigate the remainder of the case; we help them. Some people come in because they do not know what to do with a complaint and summons they received; we help them. Some people need help propounding discovery, preparing for a scheduling conference, or even preparing for trial; we help them. Some people need help navigating the waters of a Social Security Appeal; we help them. Some people come in just looking for someone to tell them "how it is"; we help them. Perhaps the one type of case that pulls at my heart strings most is when someone comes in who has been beaten down by the process so much that they have lost hope; we help them. At the *pro se* clinic, we help real people.

Sculpture portraying the story of the Good Samaritan on the grounds of Loma Linda University

As lawyers, an easy way to help would be to write a check to the various organizations that can do this for us, such as the Riverside Legal Aid. The harder thing is to take our most valuable asset, "time," and simply give it away. I would challenge the practitioners in the Inland Empire to reenergize the commitment to *pro bono* legal services in our community. For the legal institutions of the Inland Empire, such as law firms, this means actively encouraging its attorneys to engage in *pro bono* activities and setting an example of commitment to *pro bono* service.

Understandably, not everybody has the wherewithal to go out on their own and find those who need legal assistance but cannot afford it. Even less have the ability to take on the direct representation of such individuals. The *pro se* clinic tries to lessen this burden and facilitate that process as much as possible. Indeed, all you have to do is show up; those who need help with the legal process and its complexities come to you. When that happens, as my son would say, "Help them."

Ruben Escalante is an Inland Empire native and continues to call it his home. He is a partner at Sheppard, Mullin, Richter & Hampton LLP, is the President-Elect of the Federal Bar Association—Inland Empire Chapter, a Board Member of the Public Service Law Corporation, and a Central District Lawyer Representative.

The Federal Bar Association's Chapter for the Inland Empire

by Joseph B. Widman

The Inland Empire is home to over 4.4 million people (and counting) and vast swaths of real estate to match. Readers of this magazine presumably are well-acquainted with the state court system in Riverside and San Bernardino counties and the several regional bar associations that have grown up alongside it, including, of course, the venerable Riverside County Bar Association. What you might not be as familiar with are the federal court system in the Inland Empire and its bar association, the Federal Bar Association's Inland Empire Chapter.

The Federal Bar Association's (or FBA) Inland Empire Chapter is the primary voluntary bar association for private and government lawyers and judges practicing and sitting in the Inland Empire's federal courts. In existence for over 20 years, our FBA chapter holds about 12 events per year, including the annual Judges' Night reception and dinner at the Mission Inn, the Constitutional Law Forum featuring a roundup of Supreme Court news by Dean Erwin Chemerinsky, and monthly educational lunch programs at the Riverside federal courthouse featuring distinguished and notable speakers and panel discussions.

The Inland Empire's federal court is part of the U.S. District Court for the Central District of California, which is based in downtown Los Angeles. The George E. Brown, Jr. Federal Courthouse in downtown Riverside covers both Riverside and San Bernardino counties, which together make up the Central District's "Eastern Division." The Eastern Division's court houses a total of eight federal judges, including one U.S. District Judge (the Honorable Jesus G. Bernal), three U.S. Magistrate Judges, and four U.S. Bankruptcy Judges. Local branches of the U.S. Attorney's Office, the Federal Public Defender's Office, and the U.S. Trustee's Office also are located in downtown Riverside.

Longtime U.S. District Judge Virginia A. Phillips recently moved her chambers from Riverside to downtown Los Angeles in anticipation of becoming Chief District Judge for the entire Central District of California. With the move, the Eastern Division now has only one federal district judge, despite its enormous population, which is larger than that of half of all American states and many major federal judicial districts, including the Southern District of California (San Diego and Imperial counties), which currently has 16 federal district judges.

Membership in our FBA chapter offers several valuable benefits. Members are able to attend our monthly educational events on a discounted basis, regularly interact with the federal judges of the Central District outside the courtroom, and network with a wide variety of federal and state criminal and civil practitioners. In addition to these benefits, members also receive value from the FBA's national organization, including a listing in the FBA's "Need an Attorney" public directory listing, advocacy on behalf of federal attorneys nationwide, and opportunities to meet and work with distinguished attorneys and judges across the nation, including in practice area-specific sections. If you are not already a member, please consider joining this outstanding organization.

Together with the Riverside and San Bernardino County Bar Associations, on **Thursday, September 8**, our FBA chapter is presenting a panel discussion on sentencing reform featuring the heads of all local public defenders' offices. Riverside County Public Defender Steve Harmon, San Bernardino County Public Defender Phyllis Morris, and Federal Public Defender Hilary Potashner will be representing their respective offices. And United States Attorney Eileen Decker will be moderating the discussion. I hope you are able to attend what promises to be a topical and engaging program.

Joseph B. Widman is the president of the Federal Bar Association, Inland Empire Chapter.

Government Healthcare Exposed: *Caring Hearts v. Burwell*[1] and the "mischievous effects of mutable government"

by Boyd Jensen

In fashioning our constitutional government James Madison—not Hamilton[2]—in Federalist Paper number 62 decries mutable government: "It poisons the blessings of liberty itself. It will be of little avail to the people, that the laws made by…choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood…, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow."[3] And following that introduction, the 10th circuit of the United States Court of Appeals publicly excoriated the Department of Health and Human Services ("HHS") and its Centers for Medicare and Medicaid Services ("CMS"). Mutable government unleashed through so-called "delegated" legislative authority of the executive branch via over 175,000 pages of regulations and perhaps millions of pages of "sub regulatory" policy in manuals, directives, bulletins and letters, raised constitutional and stark statutory problems to the point that even the "legislative agencies don't know what their own 'law' is."[4]

Constitutional questions of "fair notice," what is "reasonable and necessary?" Terms which conservatively 90% of all lawyers deal with at one time or another, when autocratically created, arbitrary disseminated and capriciously enforced, become an unconstitutional taking and "irrational government action."

In the *Burwell* case, the Medicare Act Health Insurance for Aged and Disabled (42 USC § 1395 et.seq.) was evaluated against the efforts of the plaintiff home care facility to provide care for "reasonable and necessary"[5] homebound services. The court found that the regulatory standards of what was "reasonable and necessary" for the homebound services provided, was not even in effect at the time the services were rendered, and thus easily ruled against the defendants $800,000 collection efforts. The court found that "this isn't (and never was) a case about willful Medicare fraud. Instead, it's a case about an agency struggling to keep up with the furious pace of its own rulemaking."[6] The court also discussed skilled nursing services supplied by plaintiff and ruled similarly.

There is no question that Medicare fraud and wasted resources are a constant concern for all branches of government. Hearings in both the House of Representatives and Senate very often deal with allied medical/healthcare issues. Joint replacement has become pedestrian with the concomitant costs. The interaction between physicians and drug companies is a source of political and scientific tension, and physician financial arrangements with medical device manufacturers are recent topics at congressional hearings. These issues are largely derived, not just by our free-market system, but also by our mutable government, which in this age of regulatory preeminence, though perhaps unwittingly, yet fosters many misunderstandings and disputations.

In the very next paragraph, Madison warns about our mutable government: "Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people. Every new regulation concerning commerce or revenue, or in any way affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens."

On a final note the court volunteered—"suggesting" the lawyer mind would conclude—that plaintiffs may have access to the remedies of the Equal Access to Justice Act 28 U.S.C. § 2412(d).[7] This act authorizes a payment of

1 *Caring Hearts Personal Home Services, Inc. v Sylvia Mathews Burwell, Secretary of the United States Department of Health and Human Services* (2016) (D.C. No. 2:12-CV-02700-CM-KMH) ("Opinion.")

2 Garnering 16 Tony Award nominations the musical *Hamilton* reminds us of his primary authorship role in the *Federalist Papers*, but Article 62 – 63 were Madison's.

3 Complete passage reads: "The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?"

4 Opinion pp 2-3.

5 42 USC § 1395y(a)(1)(A).

6 Opinion pp 4-5 & 19.

7 Opinion p 19.

attorneys' fees and costs to the prevailing party in actions against the United States, absent the government demonstrating that their position in defending the litigation was "substantially justified."[8] There are some limitations, but the party must prevail and demonstrate that the government's defense was not "reasonable" or that it did not have a reasonable basis in truth or law.[9]

The rising age of life expectancy and the escalating costs of medical care, bring squarely into issue these laws as their constitutional effect reaches everyone. Also healthcare is very personal. When we are young we are less inclined to be concerned about healthcare, as we move with alacrity and ambition through life. But that changes for everyone. Healthcare and its options and the consequences of personal choice come squarely into issue when the government is expected to pay the freight AND ALSO what freight qualifies. At different times and in different eras our constitution and the malleable government it fosters, has been called upon to fairly and with due process mitigate our very personal world of religious choice, political choice, access to education, race relations, sexual orientation and increasingly healthcare. The *Burwell* case is an example of the challenges facing both citizens and the government during this process.

Boyd Jensen, Attorney at Law, has been a civil practitioner in Riverside County since 1979.

8 28 U.S.C. § 2412(d)(1)(A) & (B)
9 See , 487 U.S. 552 (1988).

SAVE THE DATE

The Riverside County Bar Association requests the pleasure of your company at the

Annual Installation Dinner

Honoring President Jean-Simon Serrano, the Officers of the RCBA and Barristers for 2016-2017

Special Presentations to Honorable Virginia A. Phillips Recipient of the Krieger Award & Terry Bridges Recipient of the E. Aurora Hughes Meritorious Award for Service

Thursday, September 29, 2016
Social Hour 5:30 p.m.; Dinner 6:30 p.m.
Mission Inn, Grand Parisian Ballroom
3649 Mission Inn Avenue, Riverside

Visiting John Marshall's House in Richmond

by Abram S. Feuerstein

The John Marshall House in Richmond, Virginia is not located at the intersection of Marbury and Madison, or McCulloch and Maryland, but is on East Marshall Street in the Court End historic district. A sign in front of the two story, Federal-period style brick building advises visitors that, "(t)he most influential man to never be president slept here." And for 45 years—35 years of which he was Chief Justice of the Supreme Court—from 1790 until his death in 1835, John Marshall resided at the house with his family, and enjoyed life as an influential member of Richmond society.

Marshall, the man most identified with making the judiciary an equal branch of our government, early on knew he was going to be a lawyer. His father had purchased Blackstone's *Commentaries on the Laws of England*, and upon consuming the four-volume set in his late teen years, Marshall said he was "destined for the bar."[1] During an extended leave in 1780 while serving as an officer in the Revolutionary War, Marshall "read the law" for a few months at the College of William and Mary under the tutelage of George Wythe, a well-known legal scholar who also had trained Thomas Jefferson.[2] By August 1780, Marshall won admission to the Virginia bar.[3]

After the war, Marshall made Richmond his permanent home, married Polly Ambler—the love of his long life—and opened an office to practice law full time.[4]

1 Harlow Giles Unger, *John Marshall: The Chief Justice Who Saved the Nation* ("Unger"), p. 15 (Da Capo Press, Paperback Ed., 2016, 374 pp).
2 Unger, pp.35-36.
3 *Id.*
4 Unger, pp. 40-41.

Built in 1790 by John Marshall, the Chief Justice resided at this Federal period style house until his death in 1835.

His political career, which included a prominent role at the Virginia convention to ratify the Constitution, heightened his profile and elevated his status among the Federalists. In turn, his law practiced flourished as Virginia's wealthiest planters, including the new president George Washington,[5] entrusted their legal affairs to him.[6] By 1790, Marshall's roster of approximately 300 clients

5 Marshall's father, Thomas Marshall, had befriended the young George Washington and joined him on surveying expeditions. Later, during the Revolution, Marshall had become one of George Washington's valued officers, serving in the battles of Brandywine and Monmouth and living through the hardships of Valley Forge. Unger, pp. 10-11. Of note, Marshall was the co-author of the five-volume *Life of George Washington*, which remained a definitive work through the first half of the 19th Century. Unger, p. 158.
6 Unger, p.72.

St. John's Episcopal Church, the only Richmond building of any significance after the Revolutionary War, was the site of Patrick Henry's legendary "Liberty of Death" speech. During the summer tourism season, members of the Congregation re-enact the famous speech in full costume at the Church, which was built in 1741.

made Marshall "the state's most prominent and wealthiest lawyer."[7]

Shortly after the Revolution, Richmond was a frontier town with an estimated population of 1200 people living on an "edge of the wilderness."[8] Characterized by dirt roads and walkways and several hundred poorly constructed wooden houses, the only building of any significance was its sole Church—St. John's—where Patrick Henry had delivered the great "Liberty of Death" speech in 1775 calling for American Independence.[9]

When Marshall built his home in 1790, the nearby neoclassical State Capitol building, designed by Thomas Jefferson, had been completed only two years earlier, and Richmond's transformation into a modern city had begun. The Marshall home had 9 rooms, including a paneled dining room where Marshall hosted monthly lawyer dinners.[10] A visitor today has to use a little imagination to envision the small buildings on the property grounds that are no longer there, including a kitchen, horse stables, and slave quarters.[11]

The Aaron Burr Treason Trial

During infrequent sessions of the Supreme Court,[12] Marshall stayed at a D.C. boarding house; otherwise he continued to reside in Richmond after his appointment as Chief Justice in the closing days of the Adams presidency, when Adams rushed to "pack" the judiciary with Federalists.[13] In the early days of the Court, justices were required to "ride the Circuit," which Marshall did in Richmond Circuit Court.[14] And, Richmond became the focal point of one of the most famous trials in American history.

Thomas Jefferson designed the central building of the State Capitol Building, which was completed in 1788.

Looking out the tall and numerous windows of the Marshall house today, there is a busy transit center located across the street, government and private office buildings surround the house, and traffic is everywhere. However, with the assistance of the Marshall House tour docent, one tries to envision the streets of Richmond in 1807 when the population swelled by thousands as spectators hoped to witness the trial in *United States v. Burr*, presided over by Marshall.

Burr had been pursued relentlessly by Thomas Jefferson, who had come to hate Burr, his first-term Vice President. Among other things, Burr went back on his word when Burr challenged Jefferson for the presidency in 1800;[15] and then Burr presided over the Jefferson-inspired Samuel Chase impeachment trial in the Senate, which dealt Jefferson a crushing blow when it returned a "not guilty" judgment on the articles of impeachment.[16] At the end of the trial, Burr resigned as Vice President. Unable to return to New York, where he was subject to arrest for his role in the Hamilton duel, Burr headed west. Accused falsely by Jefferson of assembling a military force in a complicated plot to create an independent nation in western territory to be headed by Burr, Jefferson arranged for Burr's arrest and Burr was brought to Richmond under military escort. In presiding over the trial, Marshall

7 *Id.*

8 Unger, 41.

9 *Id.;* During the summer tourism season, the historic St. John's Episcopal Church, which continues to serve its parish, re-enacts the session of the second Virginia revolutionary convention at which Henry delivered the speech. Members of the congregation dress-up in the roles of convention attendees, including Thomas Jefferson and Richard Henry Lee, and bring history to life. The performances are free but audience members are asked to make a well-deserved donation. Of note, the old cemetery at the Church is the final resting place of Marshall's law professor, George Wythe, and Elizabeth Arnold Poe, the mother of Edgar Allan Poe.

10 Unger, p. 72. Unger refers to these dinners as "acclaimed stag affairs." The docent-led tour of the dining room highlights a porcelain dinner service purportedly purchased by John Marshall from President James Monroe, and which may have been used when they hosted Lafayette in 1823-1824. *See http://preservationvirginia.org/visit/property-detail/collection-highlights1.*

11 *Id.*; Marshall did not farm the thousands of acres of land he and his family owned. However, he purchased slaves to run his household and assist Marshall's wife, Polly, who seemed forever housebound as a result of physical and mental illnesses associated with childbearing. [On a tour taken by the author on August 28, 2015, the docent at the Marshall house explained that Polly stayed in her second-story bedroom for most of her adult years, and seldom left the house.] Unger's biography of Marshall suggests that Marshall gave his dozen or so slaves, and particularly his head slave Robin Spurlock, "relative autonomy" in managing household affairs. According to Unger, Spurlock—who stayed with Marshall his entire life—obtained Marshall's assistance in local anti-slavery causes such as the freeing of illegally enslaved children of African/Indian parents. Unger, pp.73-75.

12 Prior to Marshall's appointment, the Court had only heard 11 cases in its first 11 years. *See* Unger, p. 178.

13 Twenty-five years later Adams referred to the 1801 appointment as a "gift" to the American people and "the proudest act of (his) life." Unger, p. 181.

14 Unger, p.249.

15 Unger, p. 185-86.

16 *See generally*, Unger, pp. 227-234.

John Marshall's dropfront writing desk with an accompanying bookcase is on display at the house to inspire lawyer visitors.

Richmond's Hollywood Cemetery is the final resting place of two U.S. presidents, James Monroe, and John Tyler. Confederacy President Jefferson Davis also is buried there.

made several important rulings which led ultimately to Burr's acquittal.[17]

With the exception of bloodied battlefields, ghosts are seldom where you expect to find them. The urban noise around the Marshall House prevents a visitor from feeling any type of supernatural presence. Moreover, the physical tools lawyers use to ply their trade—a writing desk or a bookcase with legal treatises—certainly are underwhelming and do not provide a personal connection to the person that used them. Even when they are John Marshall's desk and bookcase. But as a historic building in a historic City, the Marshall House ultimately makes its contribution to an understanding of the men who founded our country.

Other Richmond Historic Sites

Although John Marshall is not buried there, a short distance away from the Marshall House is Richmond's Hollywood Cemetery, whose notable residents include two United States Presidents, James Monroe and John Tyler (or three if Confederacy President Jefferson Davis is included in the count).

Interestingly, Monroe and Marshall had been boyhood friends and fellow officers under Washington, and had fought at Monmouth and survived Valley Forge together.[18] In later life, the two men at times would be on opposite political sides,[19] but their friendship and respect for each other remained steadfast.[20] When Monroe died on July 4, 1831, Marshall chaired the committee charged with making the funeral arrangements.[21] As to John Tyler, Marshall knew the much younger man when Tyler had been a Virginia Court of Appeals Judge. However, Marshall

17 Lawyers and law students who are well-versed in Marshall's Supreme Court decisions may not be familiar with several significant written decisions penned by Marshall during the trial. They are collected in the Library of America's volume, *Marshall: Writings*, which is on sale in the gift shop in the basement of the Marshall House. The writings include Marshall's opinion *Regarding a Motion for a Subpoena* in which Marshall chastises the prosecution for withholding evidence from Burr. *See John Marshall: Writings* (Library of America ed. 2010).

18 Unger, pp. 26-28.

19 *See, e.g.*, Unger, pp 62-64, 72.

20 Unger, p. 308-309.

21 *Id.*

This building, constructed in 1818, served as the White House of the Confederacy during the Civil War.

The Edgar Allan Poe Museum is located in the oldest building still standing in Richmond.

resisted efforts by Jefferson to pressure president James Madison to appoint Tyler, a staunch Jeffersonian republican, to a Supreme Court vacancy in 1810.[22]

Supreme Court Justice Lewis F. Powell, Jr., who served on the Court from 1972 to 1987, also is buried at the Hollywood Cemetery.

One would expect Jefferson Davis to have an impressive gravesite at the Cemetery; and he does. However, arguably of more historic interest and within walking distance of the Marshall House, is a building constructed in 1818 which housed the "White House of the Confederacy."[23] Serving from 1861 to 1865 as the executive mansion for the Confederate States, Davis and his family lived at the house until confederate forces evacuated the city in April 1865. The tour provides a solid understanding of Davis' working life during the Civil War.

The Edgar Allan Poe Museum

The oldest building in Richmond still standing is believed to date from 1737. In the early 1920s, the building was donated to the Edgar Allan Poe foundation. Poe certainly is associated with other East Coast Cities, including Baltimore, Philadelphia, and New York City, but he spent long periods of his life in Richmond. Born in 1809,[24] his parents had been traveling actors.[25] By age three, Poe's father had abandoned his family and his mother had died of tuberculosis.[26] Poe was raised by well-to-do foster parents, John and Frances Allan.[27] Richmond was the center of Poe's formative years and early love interests.

The collection of Poe material at the museum, including manuscripts, letters, memorabilia and personal belongings, is impressive. The collection includes everything from first editions of his famous work to a lock of Poe's hair. A separate building in the museum complex houses an entire set of illustrations of Poe's most famous poem, "The Raven," by a relatively unknown street artist, James Carling. Carling died at age 29, and these incredible illustrations were unpublished during his lifetime and located in a trunk decades after his death.[28] Carling's Raven illustrations, covering the walls of the museum's Raven Room, are remarkable and haunting, and enhance the enigmatic mood and beauty of Poe's poem.

Abram S. Feuerstein is employed by the United States Department of Justice as an Assistant United States Trustee in the Riverside Office of the United States Trustee Program (USTP). The mission of the USTP is to protect the integrity of the nation's bankruptcy system and laws. The views expressed in the article belong solely to the author, and do not represent in any way the views of the United States Trustee, the USTP, or the United States Department of Justice. All of the photographs accompanying the article were taken by the author using a cell-phone camera.

---

22 Unger, p. 268.

23 The source of the information is from the historic marker in front of the building, erected in 1998 by the Virginia Department of Historic Resources. *See http://dhr.virginia.gov/HistoricMarkers/.*

24 In 1809, John Marshall—then age 54—authored an important decision, *United States v. Peters*, which established the supremacy of federal laws over state laws. Unger, p. 322. When asked by the author if there were any known connections between the two Richmond residents, docents at the Marshall House and employees at the Poe museum were not aware of any such connections between Marshall and Poe.

25 *See http://www.poemuseum.org/life.php.*

26 *See* Christopher P. Semtner, *The Raven Illustrations of James Carling* ("Semtner"), p. 11 (The History Press 2014 ed). Semtner is the curator of the Edgar Allan Poe Museum and the author of Edgar Allan Poe's Richmond.

27 Semtner, p. 11.

28 Semtner, pp. 9-10.

Campbell and the Curious Case of Unaccepted Settlement Offers

by Mohammad Tehrani

I. Introduction

Class action lawsuits for monetary damages cleared a disputed hurdle on January 20, 2016. In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the court held that a case or controversy exists even after a plaintiff rejects a defendant's settlement offer which would have fully resolved the plaintiff's claim. Consequently, class-action defendants are no longer able to moot class action lawsuits by picking off pre-class certification individual plaintiffs.

However, the court self-identified, and then left unanswered, a potential loophole to their holding: what if a defendant in a purely monetary suit does not merely offer, but deposits, the full potential claims in the individual plaintiff's bank account? The answer will likely be decided on basic contract principles.

II. Class Action Lawsuits and the Case or Controversy Requirement

Judicial power extends only to cases or controversies.[1,2] With limited doctrinal exceptions,[3] a case or controversy exists only where the plaintiff has standing,[4] the action is ripe,[5] the action is not moot,[6] and the action does not involve certain political questions.[7] In effect, the case or controversy requirement limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[8]

The case or controversy analysis is less clear with respect to class action lawsuits. Occasionally, a lead plaintiff may obtain relief separately from the class. Whether the satisfaction of the lead plaintiff moots the class litigation depends on whether the class has been certified.

A. Pre-Certification

The members of a pre-certification putative class are not yet bound by a judgment in the action, and are only "interested parties."[9] Upon certification, class members who do not opt out are bound by the action.[10]

After determining that class members are not parties to the litigation pre-certification, the effect of a full settlement of the lead plaintiff's claims is undisputed: "[A] suit brought as a class action must as a general rule be dismissed for mootness when the personal claims of all named plaintiffs are satisfied and no class has been properly certified."[11]

B. Post-Certification

Generally, "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot."[12] The court implicitly followed this general rule in its early class action cases.[13] However, the court changed course in *Sosna v. Iowa*, allowing a class action lawsuit against Iowa's one-year residency prerequisite for a divorce petition to proceed even after the lead plaintiff had obtained a divorce.[14] The court reasoned that a certified class of unnamed persons acquires a legal status separate from the interest asserted by the lead plaintiff.[15]

III. Basic Principles of Contract Law

One class action defense strategy that has evolved is aggressively settling a class action lawsuit with the lead plaintiff before class members become additional parties upon certification. The defendant in *Campbell* implemented this strategy by offering Gomez, prior to class certification, more than the full amount of his potential recovery, plus reasonable costs. Gomez did not accept the settlement offer

1 U.S. Const. art. III, § 2.
2 Cases and controversies are, for all intents and purposes, synonyms. *Jones v. Griffith*, 870 F.2d 1363, 1366 (7th Cir. 1989).
3 For instance, mootness concerns may give way to situations "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).
4 *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).
5 *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).
6 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*. (TOC), Inc., 528 U.S. 167, 189 (2000).
7 *Baker v. Carr*, 369 U.S. 186, 210 (1962).
8 *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755 (1976).
9 *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper,* 445 U.S. 326, 359 n. 21 (1980).
10 *Ibid.*
11 *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 924 (9th Cir. 2007) [quoting *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1045 (5th Cir.1981)].
12 *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528, 185 L. Ed. 2d 636 (2013).
13 *See Hall v. Beals*, 396 U.S. 45 (1969), finding that post-certification, the lead plaintiffs no longer represented the class; the U.S. Supreme Court remanded the case with directions to dismiss the case as moot; *Indiana Employment Sec. Div. v. Burney*, 409 U.S. 540 (1973) remanding case to district court to determine the mootness of the class action after lead plaintiff obtained relief.
14 *Sosna v. Iowa*, 419 U.S. 393, 395-97 (1975).
15 *Id.*, at 399. The court later clarified in *Franks v. Bowman Transp. Co.*, that *Sousa* was not an aberration or an exercise of the "evading review" exception. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 753-54 (1976).

and Campbell moved to dismiss the action, arguing that no case or controversy existed because Gomez had been offered complete relief.[16]

A divided court rested its decision on the "basic principles of contract law."[17] Under the basic principles of contract law, an offer, no matter how good, is a legal nullity once rejected. Thus, Gomez was still able to pursue his claim in court, and so a case or controversy remained.

Simple enough. But then the court emphasized the fact that Gomez, despite the offer, was presently "emptyhanded."[18] The court proceeded to question, unprompted, "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff..."[19] Justice Thomas, writing separately, concurred: "Because Campbell–Ewald only offered to pay Gomez's claim but took no further steps, the court was not deprived of jurisdiction."[20]

Thus, the court appears to have endorsed a new defense strategy: a defendant will deposit, without the plaintiff's consent, the settlement amount directly into the lead plaintiff's bank account to moot a class action lawsuit. The plaintiff will not be "emptyhanded" and the defendant will have done more than "only offered to pay" the claim: it would have actually paid it.

Based on basic principles of contract law, however, "[a]cceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror."[21] Depositing funds directly into a bank account, uninvited and returned, similarly does not constitute acceptance. Thus, a direct deposit of funds, promptly returned, does not moot an action.[22]

16 *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 668 (2016).
17 *Id.* at 670.
18 *Id.* at 672.
19 *Id.*
20 *Id.* at 676 (Thomas, J., concurring).
21 *Russell v. Union Oil Co.*, 7 Cal. App. 3d 110, 114 (Ct. App. 1970).
22 In this hypothetical, the court apparently also required a court-entered judgment in addition to a direct deposit. This additional requirement is illusory. A court cannot enter judgment in a moot case; it must dismiss. *Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015) .

It is not clear why the court created an awkward hypothetical rather than applying the general contract rules of acceptance, having already relied on such rules for offers. One reason may be that the court didn't want to overturn three late 19th century railroad cases cited by Campbell, in which the court ruled that the cases were "extinguished" upon the plaintiff's full satisfaction of claims.[23] Instead, the court created a strange distinction and one which will likely not last for long.

IV. Conclusion

The court's self-created hypothetical will likely result in another U.S. Supreme Court challenge. Defendants have already implemented the tactic and courts have ruled generally, that such actions do not moot a class action lawsuit.[24] The court should look towards its own reasoning in *Campbell* and hold that, once again, there was no acceptance of the offer and that there remains a case or controversy.

Mohammad Tehrani is employed by the United States Department of Justice as a trial attorney in the Riverside Office of the United States Trustee Program (USTP). The views expressed in the article belong solely to the author, and do not represent in any way the views of the United States Trustee, the USTP, or the United States Department of Justice.

23 *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308 (1893), Little v. Bowers, 134 U.S. 547 (1890), and San Mateo County v. Southern Pacific R. Co., 116 U.S. 138 (1885).
24 *See Brady v. Basic Research, LLC*, 2016 WL 462916 (E.D.N.Y. Feb. 3, 2016); *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, 2016 WL 872914 (S.D. N.Y. Mar. 7, 2016); *Bais Yaakov of Spring Valley v. Varitronics, LLC*, 2016 WL 806703 (D. Minn. Mar. 1, 2016)

The Second Amendment Right to Bear Arms

by DW Duke

Few topics have generated as much disagreement among legal scholars as the Second Amendment to the United States Constitution, which affirms the right of American citizens to keep and bear arms. The Second Amendment provides:

> "A well-regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed."

If any language in the Constitution or its amendments generates debate, the Second Amendment likely holds the lead. Does this amendment mean that the right of citizens to bear arms exists solely for the purpose of maintaining a well-regulated militia? Or does it mean that the right to bear arms exists for personal protection against unknown dangers and/or the government itself?

The Second Amendment was one of the ten Constitutional amendments known as the Bill of Rights, which were adopted on December 15, 1791. Early Supreme Court cases found that the Second Amendment applied only to the federal government and did not limit the right of states to regulate the ownership of guns. (*See United States v. Cruikshank*, (1875) 92 U.S. 542, 553; *see also, Presser v. Illinois* (1886) 116 U.S. 252, 265.)

In *United States v. Miller* (1939) 307 U.S. 174, the U.S. Supreme Court reviewed a case which interpreted the National Firearms Act of 1934. In this case, the Supreme Court construed the Second Amendment in the context of the Militia Clause of Article 1, Section 8, and held that unless possession of a modified weapon (sawed off shotgun) is reasonably related to the preservation of efficiency of a well-regulated militia, the Second Amendment does not guarantee the right to keep and bear such a weapon.

On June 26, 2008 in *District of Columbia v. Heller* (2008) 554 U.S. 570, the U.S. Supreme Court dealt with the Second Amendment for the first time since 1939. The District of Columbia had adopted a statute that banned possession of handguns in the home and another that required that lawful firearms be disassembled or trigger locked when in the home. The Supreme Court held that both of these provisions violate the individual's right to possess a firearm for lawful purposes such as self-defense.

In *District of Columbia v. Heller*, the Supreme Court examined the prefatory clause of the amendment "a well-regulated militia, being necessary to the security of a free State," concluding that this language does not limit the right to bear arms established in the second clause of the amendment. In other words, the right to bear arms exists independently of the need to maintain a well-regulated militia. The Court examined the history of the Second Amendment and noted that it arises from the ancient right to life and the right to defend oneself even from one's own government if necessary. The Court further noted that the right to bear arms is subject to reasonable regulation such as prohibitions on concealed weapons, limitations on the rights of felons and the mentally ill, as well as time and place restrictions. The Court compared the Second Amendment to the fundamental rights of the First and Fourth Amendments, which would imply that restrictions on the right to bear arms should be judged by the strict scrutiny, compelling interest test, rather than the rational basis test of lower tiered scrutiny.

Even after the *Heller* decision, the Supreme Court had not held that the Second Amendment is incorporated by the Fourteenth Amendment and thereby made applicable to the states. Finally, in 2010, the Supreme Court ruled in *McDonald v. City of Chicago* (2010) 561 U.S. 742, that the Second Amendment is incorporated into the Fourteenth Amendment and thereby made applicable to the states. This will no doubt leave the District Courts the tremendous task of determining what restrictions on the Second Amendment would be permissible under state law.

The State of California is likely to be the testing ground for determination of the proper limitations on the Second Amendment. In June of 2016, the California legislature passed a number of gun control bills which were sent to Governor Brown.

On July 1, 2016, Governor Brown signed into law bills that will do the following:

AB 1135 and SB 880: Reclassify numerous semi-automatic rifles as assault weapons and outlaw magazine locking devises commonly known as "bullet buttons."

AB 1511: Restricts gun owners from loaning them to anyone except close family members unless the borrowing person undergoes a background check;

AB 1695: Creates a 10-year firearm prohibition for anyone convicted of falsely reporting a lost or stolen firearm.

SB 1235: Requires that online ammunition sales be conducted through a licensed vendor and that all ammunition sales be registered and reported and

creates a database of ammunition purchasers.

The below bills were vetoed by Governor Brown:

SB 894: Would require a victim of a crime to report to local law enforcement the theft of a firearm within five days and the recovery of the firearm within 48 hours.

AB 1673: Would expand the definition of "firearm" to include unfinished frames and/or receivers that are "clearly identifiable as being used exclusively as part of a functional weapon."

AB 1674: Would expand the existing limitation on the purchase of one handgun per month to include all guns, including those acquired through a private party transfer.

AB 2607: Would expand the class of individuals who could seek a Gun Violence Restraining Order (GVRO) to include employers, co-workers, mental health workers and employees of secondary and post-secondary schools.

The below bill has passed the legislature and is waiting to be transmitted to the Governor who must sign or veto it within 12 days or it becomes law without his signature.

AB 857: Would require an individual obtain a serial number from the DOJ for home-built firearms prior to its use.

As terrorist attacks and mass executions continue to occur, the parties assert their respective positions on the issues. The gun control advocates assert that if guns were more difficult to obtain, and more limitations were placed on their availability, these mass killings could be curtailed. They assert that a person who is on a no fly list should automatically be prohibited from owning a gun and that a ten day waiting period, to allow a person to cool down, would reduce the number of homicides committed by individuals out of anger.

Gun rights advocates counter these claims by asserting that, in comparison to deaths by other causes, such as automobile accidents and alcohol, the number of deaths caused by firearms is statistically insignificant. They point to the fact that the media seizes each of these events to promote gun control that gives the impression these events are far more frequent that they really are. They further contend that the media intentionally fails to broadcast the numerous cases where a person in possession of a hand gun was able to prevent a terrorist attack or a mass shooting. Gun rights advocates cite the fact that the cities with the strictest gun control laws, such as Chicago, have the highest gun related homicides. And they commonly remind us that if restricting the possession of guns would reduce instances of violent crimes, then outlawing drugs should eliminate drug abuse. In other words, criminals will not follow these gun restriction laws and therefore, only the innocent law abiding gun owners will be the persons impacted by the control laws.

The issue of control does not follow typical Democrat vs. Republican party lines though Democrats tend to favor gun control measure more than Republicans. It is an issue on which there will be much debate over the next few years. Quite likely, the appointment of the next Supreme Court justice will set the rudder that guides the ship through these murky waters. Perhaps it is not an understatement to say that the next presidential election will determine the final outcome of these cases.

DW Duke is the managing partner in the Inland Empire office of Spile, Leff & Goor LLP and the principal of The Duke Law Group. He is the author of five books and a frequent contributor to the Riverside Lawyer.

When the Supreme Law of the Land is Not So Supreme: How State and Local Governments Impact Individual Rights

by Kimberly Phan

Most people think of the United States Constitution as all-powerful; indeed it is the supreme law of the land.[1] But state and local governments are so great in number (89,004 municipalities according to the 2012 census)[2] and often operate with such discretion that they have the potential to impact the lives of every U.S. citizen in ways that the Constitution does not.[3]

The "superpowers" possessed by state and local governments include zoning regulations and the use of eminent domain. These tools enable local authorities to control the use of private property. This article describes how local governments regulate constitutional rights by exploring: 1) how zoning restrictions can undermine the protections afforded to speech and; 2) how the exercise of local eminent domain powers impact Fifth Amendment rights.

Zoning and First Amendment Rights: Sexually-Oriented Businesses

It may be hard to imagine that protecting the speech rights of sexually-oriented businesses is a goal intended by the First Amendment. Yet courts consistently have affirmed the principle that expression, regardless of whether it imposes on our individual moral views, is worth protecting.[4]

In a series of cases from 1957-1974, the Supreme Court granted First Amendment protection to non-obscene but sexually explicit movies, books and entertainment. These protections have created difficulties for local governments in their efforts to control businesses that engage in sexually explicit forms of expression.[5] To moderate these challenges, in 1976, the Supreme Court bolstered local government's ability to regulate sexually-oriented content by introducing the "secondary-effects doctrine."[6]

The secondary-effects doctrine deems certain content-based regulation, otherwise subject to strict scrutiny, as "content-neutral and subject to intermediate scrutiny […] if the primary purpose of the regulation is to control the secondary effects rather than the primary effects of speech."[7] Essentially courts permit regulation over the *impact* of the business on the environment rather than the speech it promotes. Secondary effects can be viewed in simple terms as the direct impact a business has on "crime rates, property values, and the quality of the city's neighborhoods."[8] Consequently, the Supreme Court has been deferential to municipal regulation of sexually-oriented businesses, stating that an ordinance is constitutional if it serves a substantial governmental interest and there are reasonable alternative avenues of communication available.[9] The evidence necessary to establish undesirable secondary effects needs only be "reasonably believed to be relevant" to the secondary effects that they seek to address.[10]

Despite this deferential test, some cases involving local government regulations have been ruled unconstitutional. A survey of Supreme Court and appellate court cases relating to ordinances that have been ruled unconstitutional involve zoning restrictions that leave no sites available for sexually oriented businesses to operate—effectively zoning these businesses out of the area.[11]

In essence, cities have one of two ways to control the location of sexually oriented businesses: (1) dispersing these businesses around the city to minimize the impact on the surrounding neighborhoods or; (2) by concentrating these businesses in several areas.[12] In using these tools, cities can

1 *Marbury v. Madison*, 5 U.S. 137 (1803).
2 U.S. Census Bureau, (Aug. 20, 2012), https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html.
3 *See Local Government Authority*, Nat'l League of Cities, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority, (last visited June 18, 2016) (local governments operate according to powers derived from the Tenth Amendment's state-authority giving power, and thus by state legislative powers, along with judicial interpretation of municipal reach. However, it is difficult for any state to "police" municipal functions unless they are challenged through litigation, leaving the potential for wide discretionary actions at the local level).
4 *See generally Cohen v. California*, 91 S. Ct. 1780 (1971).
5 John Fee, *The Pornographic Secondary Effects Doctrine*, 60 Ala.L.Rev 291, 294 (2009).
6 *Young v. American Mini Theatres*, 427 U.S. 50, 75 (1976).
7 Fee, *supra* note 6, at 292.
8 Clay Calvert & Richard D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*,7 N.Y.U.J. Legis. & Pub. Pol'y 287, 296 (2009).
9 *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002).
10 *Id.* at 426.
11 *See generally Calvert & Richards, supra* note 9.
12 Bryan H. Beauman, *Reining in Mayberry's Red-Light District: Local Community Control of Adult Businesses*, 49 NO. 6 DRI for Def. 42 (2007).

go too far. For instance, in *Fly Fish, Inc. v. City of Cocoa Beach*, the city dispersed sexually-oriented businesses by designating less than one percent of the available land along the coast (1.71 acres out of 2,672 acres along Florida's east coast) for their use.[13] The zoning effectively offered only three parcels of land, which were already occupied by adult establishments.[14] The Eleventh Circuit held that the ordinance was unconstitutional because it did not leave ample alternative mechanisms for expressing a constitutionally protected speech for the plaintiff.[15]

By contrast, in *City of Renton v. Playtime Theatres, Inc.*, the city chose to concentrate sexually-oriented businesses in specific areas by prohibiting them from locating within 1,000 feet of any residential zone, church, park or school.[16] Even though the Supreme Court found that the five percent of land available was not suitable for sexually-oriented businesses, since most of the land was already occupied by industrial buildings for industrial use rather than retail commercial use, the Supreme Court upheld the ordinance.[17]

Zoning restrictions on sexually-oriented businesses are an example of how local governments restrict First Amendment rights and how such regulation can significantly impact individuals and businesses, ultimately altering the makeup of cities and the character of neighborhoods.[18]

Eminent Domain and the Takings Clause of the Fifth Amendment

Another example of how federal constitutional rights are affected by local government is when property is "taken" through eminent domain ostensibly for the purposes of "rehabilitation." But often towns invoke eminent domain powers with political objectives in mind, such as eliminating "undesirable" properties when an area is not truly blighted.[19] Such practices arguably violate the Fifth Amendment right to be free from the taking of private property for public purposes without just compensation.

Recent Supreme Court cases have upheld eminent domain decisions when doing so is part of a "comprehensive economic scheme," meaning private property can be transferred to private economic entities as long as there is some public benefit.[20] Although the right to condemn property for public purposes has long been established as inherent in the exercise of local police powers -- when doing so is necessary for protecting the health and welfare of the public at large -- the Fifth Amendment does not confer a right on local governments as much as it imposes a limitation on unbridled abuse of power.[21] As such, eminent domain is justified only when there is a public need and when there is just compensation.

Yet, as is the case with local regulations affecting speech, local governments exert great control over private property rights by virtue of the sheer number of municipalities making eminent domain decisions and the subjective nature of local regulations. This makes intervention on unconstitutional municipal practices impractical without litigation.[22] Often, it is the poor and minority communities that do not have the resources to contest eminent domain.[23] These significant impacts on individual liberties warrant consideration of whether there should be some federal oversight or secondary review on local government's use of eminent domain.[24]

Conclusion

The zoning powers of local governments have a significant impact on individuals' constitutional rights. Zoning restrictions can directly impact First Amendment, as with the regulation of sexually-oriented businesses, and subsequently can influence the layout of cities and neighborhoods. Similarly, local governments' eminent domain powers impact Fifth Amendment rights and give local governments wide discretion in determining which areas are deemed "blighted" and in need of "rehabilitation." Although the Constitution is the supreme law of the land, it is more often the local governments and local regulations that directly influence individuals and their constitutional rights.

Kimberly Phan is a 2016 summer intern with the United States Department of Justice in the Riverside Office of the United States Trustee Program (USTP). She attends UCLA School of Law and will be entering her second year of study. The views expressed in the article belong solely to the author, and do not represent in any way the views of the United States Trustee, the USTP, or the United States Department of Justice.

13 *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301 (11th Cir. 2003); Calvert & Richards, supra note 9 at 303.
14 *City of Cocoa Beach*, 337 F.3d at 1303.
15 *Id.* at 1315.
16 *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986).
17 *Id.* at 938.
18 Edward H. Ziegler Jr., S*exually Oriented Businesses, the First Amendment, and the Supreme Court's 1985-86 Term: The New Prerogatives of Local Community Control*, 32 Wash. U.J. URB & Contemp. L. 123, 130 (1987).
19 Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 Fordham Urb. L. J. 1119 (2011); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005) (finding condemnation justified when taking property promoted economic redevelopment as part of a comprehensive scheme).
20 *Id.*
21 *Chicago Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897).
22 Gold & Sagalyn, *supra* note 20 at 1119.
23 Will Lovell, *The Kelo Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes are a Maginot Line-Defense Mechanism for all Non-affluent and Minority Property Owners*, 68 Ohio St. L.J. 609 (2007).
24 Gold & Sagalyn, *supra* note 20 (discussing that some state courts have elevated powers of review to limit condemnations and that some states appoint an independent panel of experts to review reformed eminent domain legislations).

What's the "Big Deal" About the December 2015 FRCP Amendments?

by Daniel S. Roberts

Unless you're a rules geek like me, not every amendment to the Federal Rules of Civil Procedure is a big deal. After all, the abrogation of former Rule 84 (and with it the appendix of official forms) is not likely to have a major effect on your everyday practice, let alone get your blood boiling (if you even knew there was an appendix of official forms). Why, then, did Chief Justice Roberts write in his 2015 Year-End Report on the Federal Judiciary that the amendments which took effect on December 1, 2015 "may not look like a big deal at first glance, but they are"? In short, the changes to the federal rules that took effect last December are a "big deal" because they provide a significant change to the scope of discovery in federal civil actions—and widen the gap even further between discovery practice in state and federal courts in California. [1]

Hello "Proportionality"

The December 2015 amendments make three main changes to the scope of discovery under Rule 26(a): the inclusion of the concept of "proportionality" within the scope of discovery itself, the final elimination of discovery relevant merely to the "subject-matter" of the dispute (rather than any party's claim or defense), and the elimination of the misleading phrase "reasonably calculated to lead to the discovery of admissible evidence."

The biggest of these changes (and the most substantive in all of the 2015 amendments) is the elevation of the concept of proportionality into the very definition of the scope of discovery itself. There are now three prongs to the scope of discovery as set out in Rule 26(b)(1). Discovery may be a matter that is (1) non-privileged, (2) relevant to any party's claim or defense, and (3) proportionate to the needs of the case. Born from the conclusion that "in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts," the amendment is intended to focus discovery "on what is truly necessary to resolve the case."[2]

Rule 26(b)(1) also now includes a list of six factors to consider in determining whether a request is proportionate to the needs of the case: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. The Advisory Committee Notes make clear that these truly are factors that must be given varying weight among them based on the circumstances of each case. The amount in controversy is not alone determinative, nor is consideration of the parties' respective resources. All applicable factors must be considered and balanced against each other.

Thus, the parties now have a new tool to control excessive discovery by objecting that a given request is not proportionate to the needs of the case. But proportionality is best considered (and most effective in controlling the cost and burden of litigation) even earlier in the process when drafting requests, or when developing the overall discovery plan. By doing so, the parties can properly focus their discovery to ensure they get what they actually need to make their case, without so much excess that serves only to increase the cost and burden of litigation.

Goodbye "Relevant to the Subject Matter"

In 2000, Rule 26(b) was amended to narrow the scope of discovery from non-privileged items "relevant to the subject matter involved in the action" to non-privileged items "relevant to the claim or defense of any party" (subsequently restyled "relevant to any party's claim or defense"). The purpose was to reduce litigation expense. From 2000 to 2015, however, the Court retained the ability "for good cause" to allow discovery of any matter "relevant to the subject matter involved in the action."

That option to seek court permission to use the former "subject matter" standard has been deleted in the 2015 amendment. The Advisory Committee noted that the option was rarely invoked. Practically speaking, then, this change will not mark a substantial change from prior practice, but it does illustrate the continuing trend toward clamping down on discovery as a way of reducing the burden and expense of litigation. It also, of course, marks a further departure from the scope of discovery in California state court, which under Code of Civil Procedure section 2017.010 remains non-privileged matter "relevant to the subject matter" of the case.

Good Riddance to "Reasonably Calculated to Lead to the Discovery of Admissible Evidence"

Finally, the 2015 amendments delete the troublesome phrase "reasonably calculated to lead to the discovery of

1 Although the December 2015 amendments affect several provisions under the FRCP, literally beginning with Rule 1 and going all the way through to Rule 84, this short article will focus only on the changes to the scope of discovery under Rule 26(b). Other rule changes are important, however, in particular the changes to the sanctions provisions under Rule 37 for preservation and loss of ESI. Federal practitioners should of course be familiar with all applicable rules.

2 2015 Year-End Report on the Federal Judiciary at pp. 4-5, available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

admissible evidence." The Advisory Committee notes that "[t]he phrase has been used by some, incorrectly, to define the scope of discovery." The phrase was intended to convey the concept that material need not itself be admissible in order to be discoverable. Thus, non-privileged matter that is relevant to any party's claim and defense (and now proportionate to the needs of the case) is discoverable even though it may not itself be admissible. The phrase was commonly misunderstood, however, to mean that any request was permissible (regardless of its relevance to claims and defenses) if it was "reasonably calculated to lead to the discovery of admissible evidence."

To eliminate that misunderstanding of the scope of discovery, and better convey the true concept, the confusing "reasonably calculated" phrase has been deleted. It has been replaced with the more-direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Hopefully this change will put to rest once and for all (at least in federal court – the state standard retains the problematic "reasonably calculated" language) the argument that a request is proper merely because it is "reasonably calculated to lead to the discovery of admissible evidence."

Dan Roberts is the managing partner of Cota Cole LLP's Southern California office in Ontario and a member of the Board of Directors of the Inland Empire Chapter of the Federal Bar Association.

MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective July 30, 2016.

Alberto Argueta – Law Student, Inglewood

Leigh Collins (A) – Law Offices of Richard K. Isles, Riverside

Hannah R. Hammersmith – Solo Practitioner, Perris

Robert E. Levy – Sole Practitioner, Temecula

Ryan J. McKinney – Solo Practitioner, Colton

Marty V. Miller – Office of the Public Defender, Murrieta

Heather N. Munoz – Law Student, Riverside

Joshlyn R. Pulliam – Office of the District Attorney, Riverside

Greg A. Rollins – Office of the District Attorney, Riverside

Victoria C. Scarth – Law Office of Victoria C. Scarth, Temecula

CalECPA and Suppression

by Bryan Boutwell

From time to time, the lawmakers in Sacramento issue forth new, amended, or abridged legislation into the criminal realm. Typically, the new laws are targeted to provide a solution to some perceived problem, occasionally without the problem being clearly defined, or worse a problem that seems not to have really existed in the first place. The challenge for those of us that practice criminal law—from either side of the table—is to incorporate the changes by attempting to interpret how the law will work in the real world, and try to minimize the disruption to case outcomes as issues meander their way through the appellate process. This process is sometimes complicated when the statutes in question seem not to have been written by lawyers with actual experience practicing, well, criminal law.

The recent enactment of the California Electronic Communications Privacy Act or "CalECPA"[1] is an example of just such a situation. Under the Act, privacy rights relating to electronic communications are expanded and/or protected by requiring a government entity to first obtain a warrant, wiretap order, or specific consent to access an electronic communications device; or a warrant, consent, or subpoena in order to access electronic communications information depending on whether the information is sought from a provider, sender, or addressee. Furthermore, the warrant process involves a sort of "super warrant" that includes a notice requirement and a form of minimization.

The previously established Federal ECPA essentially focused on the information itself broken down to 1) content of the message or electronic file, 2) transactional information (e.g. IP addresses, device location, or electronic headers), and 3) subscriber information (such as name and billing information). CalECPA expands the protection to the device information which is "stored on or generated by" an electronic device.

Seems straightforward and clear as mud, correct? Well, never fear, CalECPA comes equipped with a built-in remedy for failure to properly follow each new requirement, namely suppression under Penal Code section 1538.5 as outlined in Penal Code section 1546.4(a). The new rules also include an exception to the suppression remedy if the government entity accesses the "electronic device information by means of physical interaction or electronic communication with the device" after having obtained "the specific consent of the authorized possessor of the device."[2] As the kids say: "Wait, What?"

Specific consent is defined in the statute as "consent provided directly to the government entity seeking information."[3] Additionally, we also have a definition for authorized possessor as "the possessor of an electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device."[4]

As for consent, there are issues that are not cleared up by the definition. For example, how is a "Fourth Amendment Waiver" typically included in the search terms for defendants placed on probation going to be impacted? Most likely, the broad inclusion of any "peace officer"[5] to detain and search a suspect's home and possessions fall outside the requirement that consent be obtained by the specific government entity seeking information despite the fact that the consent was freely and voluntarily given and would seem to include electronic devices in the possession of the suspect. Similarly, although a search of a parolee's device being conducted by his or her parole officer would probably satisfy the specific government entity seeking information requirement, the question of specific consent would likely be missing due to parole searches being imposed on the parolee involuntarily.

The authorized possessor definition also presents some challenges. In the horrific attacks in San Bernardino County last December, the question of access to one of the suspect's cell phones was in the news because law enforcement was seeking information from a phone owned by the suspect's employer. That would appear to be easily answered as one's expectation of privacy in an employer provided device would be significantly less than a personally owned device and the employer/owner's consent to access falls squarely within the definition. The question is much less clear outside of employment situations however. For example, what about a device purchased and service provided by a parent to a child? For minor children, a parent's consent to access seems quite logical, but what about an adult child? Can the parent (or partner, roommate, or friend) maintain the ability to consent as "owner" even if the device is for the exclusive use of another adult? How about if a device regularly used by one adult is temporarily loaned to another, does the temporary possessor have the ability to give consent to access the device as an authorized possessor?

As with most new statutes, CalECPA's questions will be answered over time. In the interim we will have to proceed according to our best understanding and follow the remedies provided in those areas where the laws are somewhat vague.

Bryan Boutwell is a Riverside County Deputy District Attorney. Now in his tenth year of service to the citizens of Riverside County, he is currently assigned to the Consumer Protection Unit.

1 *Senate Bill 178; Penal Code sections 1546 et. seq.*
2 Penal Code section 1546.1(c)(3).
3 Penal Code section 1546(k).
4 Penal Code section 1546(b).
5 Penal Code sections 3067(a), 3453(f)) or "law enforcement officer" (Code of Regulations Title 15 section 2511

The Case of Al Capone, an Application of the Taxing Power to Prosecute an Elusive Criminal

by DW Duke

The incarceration of Al Capone remains one of the most interesting applications of the Internal Revenue Code for law enforcement purposes. Capone was a "Prohibition Era" gangster who evaded prosecution for acts of murder, theft, gambling and alcohol and narcotic trafficking. Born, Alphonse Gabriel Capone, in Brooklyn, New York to Italian immigrants, on January 17, 1899, Capone spent his teen years working in syndicate owned brothels as a bouncer, where he quickly earned a reputation as one whose use of force kept patrons compliant. He reached his 20s during the height of Prohibition and moved to Chicago, where he became a body guard for Johnny Torrio, the head of a Chicago crime syndicate that operated under the protection of the Unione Sicilliane, more commonly known as the Sicilian-American mafia. Torrio and Capone built an empire distilling and selling illegal alcohol. They expanded into prostitution, gambling, narcotics trafficking, robbery, and murder, though they also operated legitimate businesses and established a network of influence within labor unions.

Torrio was injured during a gunfight with a rival faction known as the North Side gang and shortly thereafter surrendered control of the syndicate to Capone. Utilizing force, Capone quickly expanded his operation under the protection of corrupt Chicago Mayor William Hale Thompson. In this environment, Capone became one of the most powerful men in Chicago. Making large donations to various charities brought him popularity until the infamous St. Valentine's Day Massacre, wherein seven men of a rival gang were executed by gunfire in broad daylight, at Capone's bidding. Thereafter, a chorus calling for his arrest and conviction brought him into disfavor and he soon earned the title of "Public Enemy Number One."

Notwithstanding Capone's support by corrupt Chicago politicians, the Justice Department viewed Capone's activities with contempt and eventually the FBI was tasked with building a case against him. Given the abetting by local officials, finding a basis for conviction was not easy. Prohibition violations were under the authority of the Bureau of Prohibition and most of the other crimes were under the jurisdiction of local law enforcement, who refused to prosecute or even share evidence with the FBI. On February 27, 1929, Capone was subpoenaed to appear before a grand jury concerning violation of Prohibition laws. He claimed to be too ill to appear, so the FBI undertook surveillance and discovered that he was going to race tracks and enjoying outdoor recreation. Based on this information he was cited for contempt.

On March 27, 1929, Capone was arrested for contempt in Florida and released on bond. A month later, Capone was arrested in Philadelphia for carrying illegally concealed weapons. He was eventually convicted and sentenced to one year in prison. Capone was released in 1931 then convicted by a federal court of the original contempt charge and sentenced to six months in prison.

While Capone was serving his sentences for these relatively minor offenses, the FBI was gathering evidence that he had failed to pay his income taxes to the federal government. Capone was again arrested and finally, on June 16, 1931, Capone pled guilty to federal charges of tax evasion. On October 31, 1931, he was sentenced to eleven years in prison at Alcatraz. During his years in prison, his health continuously decline and he showed signs of syphilitic dementia. Due to his declining health, he was released after serving eight years of his eleven year sentence. He never recovered from his illness and he died from cardiac arrest on January 25, 1947, after suffering a stroke.

The Capone case demonstrates the use of the federal taxing power to prosecute criminals who would have otherwise likely continued to avoid prosecution indefinitely. Since the Capone case, violation of federal tax laws has served as a basis for prosecuting individuals who could not otherwise be convicted on other charges. While RICO (Racketeer Influenced and Corrupt Organizations Act) and other racketeering laws have made it much easier to convict criminals for racketeering, even to this day, tax evasion is used to convict members of organized crime when prosecution for other crimes would be difficult or impossible to obtain.

Partial List of References and Further Reading Materials:

1. *Farewell, Mr. Gangster!,* Herbert Corey, D. Appleton-Century Company, Inc., New York, New York, 1936
2. *The FBI Story*, Don Whitehead, Random House, New York, New York, 1956
3. *Organized Crime In America,* Gus Tyler, University of Michigan Press, Ann Arbor, Michigan, 1962
4. *The Devil's Emissaries*, Myron J. Quimby, A. S. Barnes and Company, New York, New York, 1969
5. *Capone*, John Kobler, G. P. Putnam's Sons, New York, New York, 1971
6. *Mafia, USA*, Nicholas Gage, Dell Publishing Company, Inc., New York, New York, 1972
7. *The Mobs And The Mafia*, Hank Messick and Burt Goldblatt, Thomas Y. Crowell Company, New York, New York, 1972
8. *Bloodletters and Badmen*, Jay Robert Nash, M. Evans and Company, Inc., New York, New York, 1973
9. *G-Men: Hoover's FBI in American Popular Culture*, Richard Gid Powers, Southern Illinois University Press, Carbondale, Illinois, 1983
10. https://www.fbi.gov/news/stories/2005/march/capone_032805

DW Duke is the managing partner in the Inland Empire office of Spile, Leff & Goor LLP and the principal of The Duke Law Group. He is the author of five books and a frequent contributor to the Riverside Lawyer.

Mentoring Cafe

by Mike Gouveia

Do you want basic legal practice information from approachable presenters in a fun "no judgement" environment?

Welcome to the Mentoring Cafe!

As we evolve the RCBA's Mentoring Program 2.0, we present a unique approach to group mentoring through the Mentoring Cafe. This twice a month program caters to the new attorney. We will provide the mentor attorneys, the fun and informal setting. You provide the questions.

Most MCLE presentations are content heavy with little time for true interaction between the presenter and the audience. The Mentoring Cafe is the opposite. The planned content is less than the designed time to interact with the Mentor Presenters. The regular MCLE program is more like a college lecture, but the Mentoring Cafe is like a small graduate seminar with few students and time for small group interaction with the Professor.

The Mentoring Cafe provides new attorneys the opportunity to meet and talk with leaders in the Riverside legal community. This Fall season, we plan to showcase mentors from Probate, Family Law, Criminal Law, and Civil Litigation. Twice a month these small seminars will feature mentors willing to pull back the curtain on their expertise and share with the community.

To kick off our Fall season, we present a lively discussion on business development.

Attorney David Ruegg, local Family Law QDRO expert, will present "Hustle, The Art of Business Development" on Friday, September 16, 2016 on the third floor of the RCBA building. He will share the tools, tips and techniques he uses to develop his QDRO representation business in Southern California.

Come learn from David's irreverent style in a "no holds barred" discussion of how he developed and grew his boutique Family Law QDRO practice. Whether you are in a big firm or are a solo practitioner, you will learn insights to grow your business.

This informal presentation will highlight David Ruegg's unique marketing model and then he will lead a question and answer period geared to the new attorney questions.

This will not be your typical MCLE seminar, as there are no MCLE units provided since this talk deals with business development, an area not recognized by the State Bar for MCLE credit. However, the knowledge you will gain will push you to exercise your marketing muscle.

In addition "no ties or jackets are requested" as we create an informal setting to share wisdom and promote camaraderie. This is not your traditional MCLE program as we bring group mentoring to the RCBA.

All are invited for this community discussion. No matter if you are new to the law practice or an old hand, join us as we kick off the Mentoring Cafe season. We will also be discussing the RCBA traditional mentoring program and the ways the RCBA can facilitate attorney mentoring in our legal community.

Come to the Mentoring Cafe.

Mike Gouveia is the Mentoring Committee Chairman. If you would like information about the Mentoring program or the Fall schedule for the Mentoring Cafe, please email Mike at mgo29@att.net.

Classified Ads

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

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.

Seeking Associate Attorney
Established Palm Desert AV rated law firm emphasizing community association law is seeking an associate with 5 years strong civil litigation and transactional experience. Applicant should possess excellent oral and written communication skills. Strong academics required. Email resume to gwangler@fiorelaw.com.

Legal Administrative Professional Certificate Available at RCC
Online classes begin August 29. Classes fill up fast so don't delay. Registration starts July 25. Topics include legal procedure, discovery, document preparation, tables of authorities, grammar, transcription and terminology. Contact Shaylene.Cortez@rccd.edu for more info or visit http://www.rcccat.net/legal-secretarial_certificate.html and www.rcc.edu.

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@riverside-countybar.com.