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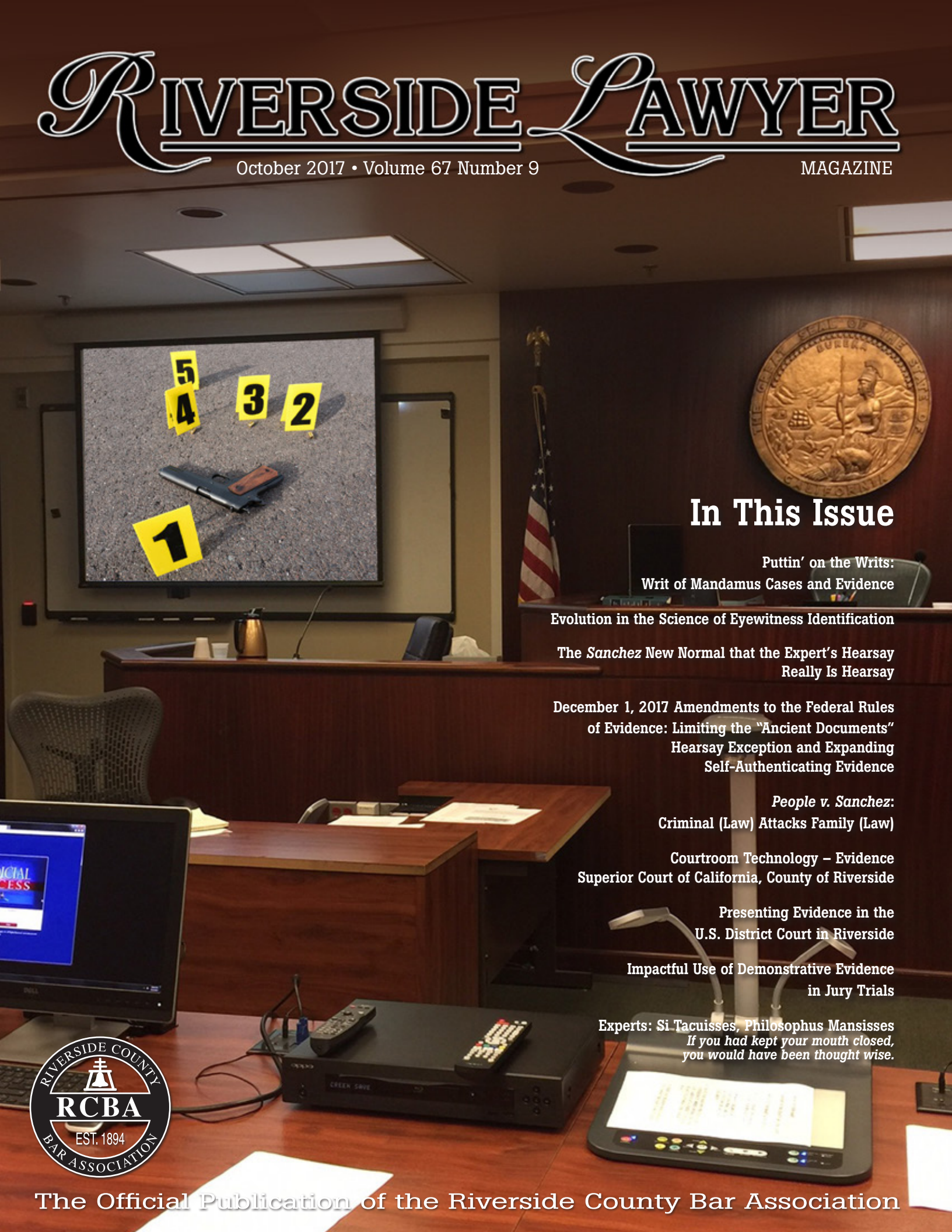

In This Issue

The Official Publication of the Riverside County Bar Association

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Riverside Community Health Foundation

the pink ribbon place

RYAN BONAMINIO PARK / MT. RUBIDOUX
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All proceeds will go towards the programs at The Pink Ribbon Place and stay in our community. Join us in giving hope and support to our families, friends, and neighbors.

2 ROUTES 1 CAUSE
5K Mt. Rubidoux Route / 1.8K Family Fun Route

REGISTRATION & EXPO 7:30 AM - 12:00 PM · 5K ROUTE 8:00 AM · FAMILY FUN ROUTE 9:00 AM

Allyson Mandry & Family

* Prices increase on 10/9. Online registration closes on 10/19. T-shirts are available on a first come first serve basis.

RIVERSIDE COMMUNITY HEALTH FOUNDATION'S CORPORATE SPONSORS

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"All of us at Rizio Law Firm encourage you to support "Pink on Parade" - Riverside's Breast Cancer Walk. Statistically, 1 in 8 women in the U.S. will be diagnosed with breast cancer in their lifetime. This staggering statistic has become personal to us as Allyson Mandry, sister of our associate Breanne Wesche, is currently fighting breast cancer. The Riverside City Fire Department has formed a team for this event in support of Allyson named the "Fire Pink Brigade." If you would like to support this cause, feel free to join this team or a different team of your choice. We hope to see you there!"

GREG RIZIO, Rizio Law Firm

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RIVERSIDE LAWYER
MAGAZINE

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Mission Statement

Established in 1894

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

RCBA Mission Statement

The mission of the Riverside County Bar Association is:

To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, and the RCBA - Riverside Superior Court New Attorney Academy.

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

OCTOBER

13 General Membership Meeting
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: The Honorable Gloria Trask
Topic: "Tips on the Best Techniques of Advocacy (and Some Examples of Not the Greatest Techniques)"
MCLE

17 Family Law Section
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Laurel Starks & Denise Fontyn
Topic: "The Useless Order: Pitfalls & Solutions to Real Estate Orders in Family Law Court"
MCLE

26 CLE Brown Bag Series
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Theodore K. Stream, Esq.
Topic: "Developing and Implementing a Litigation Discovery Plan"
MCLE

NOVEMBER

3 RCBA Dispute Resolution Presents:
"Current Practices & Techniques for the STAR Approach to Mediation"
Guest Speaker: Peter Robinson, Esq., Professor of Law, Straus Institute for Dispute Resolution, Pepperdine University School of Law
9:00 a.m. to 4:00 p.m. (Check-in 8:30 a.m.)
DRS Mediators & Riverside Superior Court Mediation Program Mediators – Free
RCBA Members - $50
Non-RCBA-Members - $95
RSVP by October 30 to DRS office, 951-682-2132 or Drs@riversidecountybar.com
MCLE Credit - 5.50 hours General

7 CLE Presentation
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speakers: Christopher Aitken & Atticus Wegman
Topic: "Demonstrative Evidence"
MCLE

EVENTS SUBJECT TO CHANGE.
For the latest calendar information please visit the RCBA's website at riversidecountybar.com.

President's Message

by L. Alexandra Fong

This month's *Riverside Lawyer* focuses on evidence. As deputy county counsel for the County of Riverside, I practice in the field of juvenile dependency law. I represent social workers with the Department of Social Services (Department) when a decision is made to file a petition seeking to place a minor within the jurisdiction of Welfare and Institutions section 300 *et seq*.[1] The parents and minor are represented by attorneys, who are either appointed by the court, are independent contractors falling under the umbrella of the juvenile court defense panel, or are retained at the parent's own expense.

The first hearing on the petition is called a detention hearing, at which time the court may order a minor removed from the parent(s) and placed in the protective custody of the Department pursuant to section 319. Before a minor can be removed from a parent, the court must find the following:

(1) The minor comes within section 300;
(2) Services that would prevent the need for detention are not available;
(3) Continuance in the home is contrary to the minor's welfare;
(4) A substantial danger exists; and
(5) There are no reasonable means to protect the minor without removal;

If the child is removed, a jurisdiction/dispositional hearing is set, usually within fifteen days.

The attorneys deal with the admissibility of the social workers' reports at various stages of the proceedings. Social workers' reports contain multiple instances of hearsay as the social workers are involved in interviewing all parties involved in the case, witnesses, and various health care professionals. Section 355, subdivision (b), provides that the social worker's report and the hearsay evidence contained within it is admissible in court and constitutes competent evidence upon which a finding of jurisdiction may be based. Any party may raise a timely objection to the admission of specific hearsay evidence, which would not be sufficient by itself to support a jurisdictional finding unless the Department establishes that the hearsay evidence falls within one of four exceptions.

Social worker's reports are admissible at all stages of the dependency proceedings: detention, jurisdiction, disposition, review, and hearings pursuant to section 366.26.[2] At hearings, other than the jurisdictional hearings, social workers' reports are admissible subject to the basis fundamental fairness principles of due process regarding notice and an opportunity to be heard.[3] Even the requirement that the Department have the social worker available for cross-examination does not apply at other hearings, although the parents must have the ability to obtain the presence of the social worker.[4] As long as each party receives a copy of the report, given an opportunity to cross-examine the social worker who prepared the report, given the opportunity to subpoena and examine the witnesses whose statements are contained in the report, and permitted to introduce rebuttal evidence, no constitutional due process violation exists.[5]

So what does this mean? If you practice in the field of juvenile dependency law, be prepared for contested hearings challenging all aspects of the social worker's reports at every stage in the proceedings. If you want to learn more about evidence, the CLE committee has a three-part series on the subject, beginning this month. Please keep an eye out for our monthly mailers and check the announcements on the RCBA website, which can be found at the following link: www.riversidecountybar.com.

On a final note, thank you to everyone who attended the installation dinner last month. We are grateful for your support of the RCBA. As a reminder, RCBA board meetings are open to all members, except for executive sessions. I invite you to attend our board meetings, which are generally scheduled on the third Wednesday of the month. Please call the RCBA at 951-682-1015 and let us know if you plan to attend. I look forward to seeing you at one of our upcoming board meetings or one of the many other events hosted at the RCBA!

L. Alexandra Fong is a deputy county counsel for the County of Riverside, handling juvenile dependency cases. She is also president-elect of the Leo A. Deegan Inn of Court.

1 All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

2 Seiser & Kumli on California Juvenile Courts Practice and Procedure, 2017 edition, Dependency Proceedings §2.110(3).
3 *Ibid.*
4 *Ibid.*
5 *In re Malinda S.* (1990) 51 Cal.3d 368, 382-385.

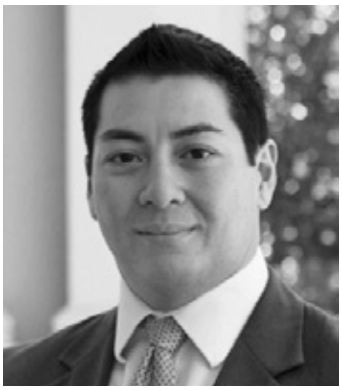
Barristers President's Message

by Shumika T. R. Sookdeo

Board Member Q&A: Paul L. Lin

Paul was raised in Río Piedras, Puerto Rico. He currently resides in Moreno Valley with his beautiful wife. Paul earned his Juris Doctorate from California Southern Law School, located right here in Riverside. His private practice is exclusively criminal law.

What Paul appreciates about practicing law in Riverside is that it feels like any major city, but has the benefit of a small town community. In Riverside, it is typical to walk into a courtroom and know just about everyone, which Paul thinks is fantastic. This led to Paul quickly getting active in the legal community. Currently, he is the president-elect for the Asian Pacific American Lawyers of the Inland Empire (APALIE).



Paul L. Lin

Paul started attending Barristers events and now heartily enjoys gathering with all of the members who are new attorneys. With the Barristers, Paul feels a sense of comradery among the members; smashing all challenges on our journey to create meaningful careers in law. Paul has had similar experiences in his involvement with other local organizations that strive to improve our legal and social community. Most importantly, Paul loves the synergy that the group has that enables us to work well together. Paul delights in the fact that not only do the Barristers work hard in the community; we also get together for social events to get to know one another on a more personal level.

As a new board member, Paul is looking forward to more opportunities to give back to the community, including helping to recruit more members, and creating a better pipeline for more students to get involved in our organization.

In his spare time, Paul likes to work out at the gym, perform yoga, rock climb, hike and eat. A fascinating fact about Paul is that he is the former national record holder for Puerto Rico in solving the 3x3x3 Rubik's cube. The fastest he can solve it is in 17.42 seconds. Currently, he averages 30 seconds. He plans to get his title back one day. How awesome!

Upcoming Events

On October 18, 2017, Barristers in conjunction with JAMS will be hosting an MCLE on "Best Practices in Mediation," from 5:30 p.m. to 7:30 p.m., at the JAMS office located at 3800 Concurs Street, # 320, Ontario, CA 91764. Food and drinks will be provided. The event is free for RCBA members; $20.00 for non-RCBA members. RSVP by October 16, 2017 to RCBABarrsiters@gmail.com.

Finally, please stay informed about Barrister events by joining our mailing list at http:www.riversidebarristers.org or follow Riverside Barristers on Facebook and LinkedIn.

Shumika T. R. Sookdeo, managing attorney of Robinson Sookdeo Law, is a past president of the Richard T. Fields Bar Association, a commissioner on the California Commission on Access to Justice, and a board member of John M. Langston Bar Association and California Association of Black Lawyers.

Puttin' on the Writs: Writ of Mandamus Cases and Evidence

by Melissa R. Cushman

Whether a case is won or lost depends largely on the evidence that is before the judge or jury when it makes its decision on the case. When people think of "evidence" in the legal context, they generally think of live testimony, and maybe think of declarations, affidavits, depositions, and documents produced in response to discovery. While most types of litigation do rely to varying degrees on these types of evidence, there are types of litigation that do not. These include writ of mandamus cases, which may also be referred to as writ of mandate cases (the two names are used interchangeably). In such cases, the complainant, who is referred to as the "petitioner" instead of the plaintiff, objects to a particular action (or lack of action) by a governmental agency or public official, who is referred to as the "respondent" instead of the defendant. Ultimately, the petitioner in writ of mandamus cases seeks an order from a court compelling a specific action to be taken by the respondent. The evidentiary basis for these cases is distinct from many other types of cases because instead of testimony, writ of mandamus cases rely, usually solely, on an administrative record for their evidence.

There are two types of writ of mandamus cases, which have slightly different requirements relating to the administrative record. The more common of these are traditional mandamus cases, which are brought pursuant to Code of Civil Procedure section 1085. These are used to challenge ministerial[1] or quasi-legislative administrative decisions.

There are many examples of different types of cases that may be brought as traditional mandamus actions. For example, if the applicant for dog license pays the applicable fee and properly fills out the application form, the public agency processing the application likely has a ministerial duty to issue the license. In that situation, the agency must issue the license to the applicant and cannot exercise its discretion to refuse to do so. If the dog license applicant has completed all of the necessary requirements, but the licensing agency does not issue the license, the applicant can then bring a traditional mandamus action requesting a writ of mandate from the court that orders the agency to issue the license.

A traditional mandamus action can also be brought if a governmental official or agency has a duty to exercise its discretion, but refuses to do so. In that situation, a court can issue a writ of mandate ordering the respondent to exercise its discretion, but the court cannot compel the discretion to be exercised in a particular way. If the governmental official or entity has taken a legislative or quasi-legislative action, however, that action is not properly subject to a mandamus action unless the official or entity exercised its discretion in a way that constitutes an abuse of discretion or the decision was in excess of that decision-maker's authority. In those situations, even if the petitioner prevails and the court issues a writ of mandate, that writ can do little more than order the respondent to rescind the approval in question and, upon any re-approval, to comply with the law when making its decision. Again, the court cannot order the governmental entity to exercise its discretion in any particular way.

The second type of mandamus cases are brought in administrative mandamus and challenge a public official or agency's quasi-judicial decisions. These cases are brought pursuant to Code of Civil Procedure section 1094.5. An administrative mandamus case can best be thought of as a judicial appeal of an administrative adjudicatory decision. Administrative mandamus actions are generally less common than traditional mandamus actions because administrative mandamus action are only appropriate where: (1) a hearing in the administrative proceeding was required by law; (2) evidence was required to be taken at that hearing; and (3) the administrative decision-maker is vested with discretion to determine contested factual issues. (Code of Civ. Proc., § 1094.5.) If all three of these requirements are not met, a traditional mandamus action is appropriate instead.

For either type of mandamus action, it is the petitioner's responsibility to ensure the court is provided with a complete set of all relevant documents relating to the specific issues raised by the writ petition. An administrative record for a mandamus action properly includes all relevant documents and testimony that were before the

1 A "ministerial" act is one where "a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given set of facts exist." (*California Assn. of Professional Scientists v. Dept. of Finance* (2011) 195 Cal.App.4th 1228, 1236.) If the public officer can exercise discretion or judgment in making the decision, it is not ministerial.

decision-maker when it made the decision being challenged. The statutes relating to administrative mandamus actions contain a description of the appropriate contents of the administrative record for such actions. These include, "the transcript of the proceedings, all pleadings, all notices and orders, any proposed decision by a hearing officer, the final decision, all admitted exhibits, all rejected exhibits in possession of the local agency or its commission, board, officer, or agent, all written evidence, and any other papers in the case." (Code Civ. Proc., § 1094.6.) While the statutes relating to traditional mandamus actions are silent as to the specific types of documents required for the administrative record for such cases, similar types of documents are likely appropriate, so the traditional mandamus statutes can be used as guidance. In either type of case, the administrative record is generally limited to documentary evidence that was in existence prior to the decision-maker's decision being challenged in the mandamus action and that was actually before the decision-maker when it made its decision.

A mandamus action raising a claim for lack of compliance with the California Environmental Quality Act ("CEQA") may be brought as a traditional mandamus action or an administrative mandamus action, depending on the nature of the underlying approval being challenged. However, regardless of what type of mandamus action is being brought, CEQA cases have many additional, very specific requirements for the contents, order, and format of the administrative record. These are set forth in Public Resources Code section 21167.6 and California Rules of Court, rules 3.2205 through 3.2208. Because these identify several types of documents not listed in Code of Civil Procedure section 1094.6 and mandate very particular requirements for CEQA administrative records, parties should review these requirements carefully and ensure they are in compliance with them for all CEQA actions.

Preparing and reviewing an administrative record can be quite time-consuming. However, once the record is complete, mandamus cases are decided on briefing and oral argument before a judge, both of which are based (usually solely) on the evidence in the administrative record. Because of this, mandamus cases almost never require discovery or live testimony, the absence of which can streamline the litigation process considerably.

Melissa Cushman is a deputy county counsel with the County of Riverside specializing in land use and CEQA mandamus actions and related transactional work.

Evolution in the Science of Eyewitness Identification

by Steven E. Clark

An eyewitness has identified a person as the perpetrator of a crime, and the case is headed to trial. The trial court will need to determine whether the identification evidence is sufficiently reliable that it may be presented at trial, and if the evidence is presented at trial, the jury will need to determine what weight to give to it. The fundamental question is about whether the identification of the defendant is a correct identification of the perpetrator or a false identification of an innocent person.

An eyewitness identification expert may be consulted and may testify at a pre-trial hearing or at trial. The expert will base his or her testimony on decades of scientific research on eyewitness identification. This research is in the midst of substantial change. Some issues considered to be settled science just a few years ago seem decidedly unsettled now.

Relative Judgments as a Root Cause of Eyewitness Identification Errors

A central premise in the research is that eyewitness errors are due to witnesses' use of a "relative judgment" decision strategy that is "flawed," "dysfunctional," and "dangerous." Witnesses using a relative judgment strategy may identify the person in the lineup who is the best match to their memory of the perpetrator. It is easy to see the problem. In every lineup, someone will be the best match, and this can be easily (but erroneously) achieved by placing the suspect in a lineup with fillers who look nothing like the perpetrator. The problem is clear; the best match to memory is not necessarily a good match. What is not clear is how often witnesses actually engage such relative judgment strategies or how to deal with the problem when, or if, they do.

Recommended Procedures that Do Not Increase Accuracy

Based on the relative judgment analysis, researchers developed several reforms designed to increase accuracy by decreasing witnesses' tendencies to make relative judgments. These recommended procedures include:

1. Instructing the witness that the perpetrator may not be in the lineup;
2. The witness is not required to identify anyone;
3. Creating lineups with fillers who match the general description of the perpetrator, rather than the physical appearance of the suspect;
4. Presenting lineups sequentially, one lineup member at a time, rather than simultaneously with all lineup members at the same time;
5. Administering lineups with a "blind" lineup administrator who does not know the position of the suspect in the lineup (and thus cannot steer the witness toward the suspect).

Some of these procedures seem quite sensible – and have long been standard procedure in California.

But, there is little evidence that they increase the accuracy of identification evidence. Instead, they often produce a trade-off: procedures that reduce the false identification rate also reduce the correct identification rate. Thus, many of the recommended procedures reduce the likelihood that the witness will make any identification, but they do not increase the accuracy of the identifications.

Some recommended procedures may actually decrease accuracy. The sequential lineup was developed specifically to minimize witnesses' tendencies to make relative judgments. However, sequential presentation may also preclude witnesses from carefully comparing lineup members to each other. Research suggests that side-by-side comparisons of lineup members may increase accuracy by focusing witnesses on the critical features of lineup members that most clearly distinguish between those who are guilty and those who are innocent. By making it difficult for witnesses to make those close, careful comparisons between lineup members, the sequential lineup – once thought to increase identification accuracy – may actually decrease identification accuracy.

Confidence and Accuracy

It seems intuitive that an identification made by a very confident witness is more likely to be accurate than an identification made by a less confident witness. This view is not only intuitive; it is part of the U.S. Supreme Court's opinions in *Neil v. Biggers* (1972) and *Manson v. Brathwaite* (1977), and it is a core element in pattern jury instructions.

However, many researchers (including this author) have argued that the Court was wrong, and that the rela-

tionship between confidence and accuracy is so weak as to have "limited utility" in assessing the accuracy of an eyewitness's identification. According to this view, trial courts should give little weight to an eyewitness's confidence when deciding whether the evidence should be admitted at trial, and jurors should give little weight to the eyewitness's confidence when assessing the accuracy of the identification and the guilt of the defendant.

This view is incorrect. A reconsideration and reanalysis of the research shows that the confidence expressed by the witness *at the time of the identification* is a very strong indicator of the accuracy of that identification. Witnesses who express high confidence in their identification of a suspect are very likely to be accurate. The Court was right in *Neil v. Biggers* when it listed "the level of certainty demonstrated by the witness at the *confrontation*," (emphasis added) as a factor to be considered in evaluating the likelihood of misidentification.

What about expressions of confidence made later? Research shows that memory can be malleable and feelings of confidence can change over time. Consider a hypothetical case of a witness who identifies the suspect from a lineup, but does so with low confidence. Six months later, at the evidentiary hearing on the admissibility of the identification, that same witness expresses high confidence. Research suggests that the witness's first expression of confidence, made at the time of the identification, is a more reliable indicator of accuracy than the expression of confidence made months later. Thus, decisions about admissibility (by the trial court) and decisions about guilt (by the jury) should consider the witness's initial statement of confidence at the time of the identification, rather than expressions of confidence made from the witness stand months, or years, later.

The Future of Eyewitness Identification Research

This evolution in our understanding of eyewitness identification reminds us that science is a dynamic enterprise. Our understanding has sharpened and improved, but there is still much that we – the experts – do not know. We know there are trade-offs associated with the recommended procedures, but we need to better understand the implications of those trade-offs. We know that confidence is a strong predictor of accuracy, but we need to better understand how the relationship between confidence and accuracy may vary across conditions.

Steven E. Clark is a professor of psychology and the director of the Presley Center for Crime and Justice Studies at UC Riverside.

The *Sanchez* New Normal that the Expert's Hearsay Really Is Hearsay

by Robert L. Rancourt, Jr.

Most are familiar with the venerable evidentiary quandary of the expert witness relating out-of-court statements as the basis for an opinion but not, ostensibly, for the substantive truth of the statements. The expert's opinion is:

> " . . . limited to such an opinion as is . . . [b]ased on matter (including his special knowledge, skill, experience, training, and education) ***perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible***, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . ." (Evid. Code, § 801, emphasis added.)

The very significant, recent case of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) brings a new normal to this area.[1] Mr. Sanchez was convicted of possession of a firearm by a felon, possession of a controlled substance while armed with a loaded firearm, and committing these offenses for the benefit of, and also active participation in, a criminal street gang.[2] In the past, non-testifying police officers had issued notices to Mr. Sanchez that he was associating with a known gang that engages in criminal activity and that if he commits certain crimes with the gang, he may face increased penalties.[3] On one such occasion, the defendant allegedly told a police officer, who did not testify at trial, that Mr. Sanchez had kicked it with guys from the gang for four years and had gotten busted with two guys from the gang.[4] On another occasion, Mr. Sanchez reportedly was arrested by a police officer, who did not testify at trial, in a garage in which gang members, narcotics, and a firearm were found.[5]

A longtime police detective with 17 years of gang suppression experience and training, who had never met Mr. Sanchez and was not present during any of Mr. Sanchez's alleged prior police contacts, opined that, given hypothetical facts similar to Mr. Sanchez's case, Mr. Sanchez was a member of the gang at issue whose conduct benefitted his gang.[6] Previously, the prior police contacts' hearsay evidence could be admitted not for the truth of the matters asserted in the prior police contacts, but rather as the basis for the expert's opinion, as long as the hearsay evidence was sufficiently reliable.[7]

Sanchez drew a distinction between general background information (albeit hearsay or derived from hearsay) acquired by the expert through training and experience and widely accepted in the expert's field, to provide specialized context necessary to resolve an issue, and case-specific facts about which the expert has no independent knowledge.[8] Finding "the line between the two has now become blurred" by way of admitting hearsay through experts as the bases for their opinions, the court concluded that "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion ***must*** be considered for its truth by the jury."[9] "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth."[10] The Sanchez court then found that the gang detective's recitation of prior police contacts

1 Although beyond the scope of this article, in criminal cases, when hearsay is offered against the defendant, an added constitutional layer of analysis beyond state rules of evidence will often be necessary. (See U.S. Const., 6th Amend. ["In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."]; accord Cal. Const., art. I, § 15; see generally *Crawford v. Washington* (2004) 541 U.S. 36 [testimonial hearsay violates constitutional confrontation principles if the declarant is available and the defendant has no opportunity to cross-examine].)

2 See former Pen. Code, § 12021(a)(1) (now renumbered Pen. Code, § 29800(a)(1)), Health & Safety Code, § 11370.1(a), and Pen. Code, §§ 186.22(a), (b)). *Sanchez, supra*, 63 Cal.4th at p. 673.

3 S*anchez*, at p. 672.

4 *Ibid.*

5 *Id.* at p. 673.

6 An expert may give an opinion based upon his or her direct knowledge of the facts derived from firsthand observation, such as having personally done testing in the case, but the traditional method of conveying expert opinion testimony is to ask the expert to assume hypothetical facts mirroring the facts of the case and to give an opinion assuming the stated facts are true. (CACI No. 220; CALCRIM No. 332; 3 Witkin, Cal. Evid. (5th ed. 2012) Presentation at Trial, § 208.) Importantly, the assumed hypothetical facts must be reasonably established by the evidence. (*People v. Richardson* (2008) 43 Cal.4th 959, 1008; 3 Witkin, *supra*.) *Sanchez, supra*, 63 Cal.4th at pp. 671, 673.

7 See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619, disapproved by *Sanchez, supra,* 63 Cal.4th at p. 686, fn. 13.)

8 *Sanchez, supra*, 63 Cal.4th at pp. 675-676.

9 *Sanchez* at pp. 678-679, emphasis in original.

10 *Id.* at p. 682.

for which he was not present and had no personal knowledge were inadmissible, case-specific hearsay facts.[11]

Thus, the new normal: An expert may not relate as true case-specific facts asserted in hearsay statements unless those facts are independently proven by competent evidence or are covered by a hearsay exception.[12] In *Sanchez*, for example, perhaps witnesses could have testified independently of the gang expert that they personally saw and advised Mr. Sanchez that he was associating with a known gang that engages in criminal activity and that if he commits certain crimes with the gang, he may face increased penalties. Independent of the gang detective, maybe the police officer to whom the defendant allegedly said he had kicked it with guys from the gang for four years and had gotten busted with two guys from the gang could have testified. The officer who arrested Mr. Sanchez in a garage in which gang members, narcotics, and a firearm were found possibly could have testified separately from the gang expert. Then, presumably, the *Sanchez* expert could have proceeded with his opinion testimony based upon independent competent evidence and/or appropriate hearsay exceptions.

To litigate this issue is to know its vexation. Now, perhaps there is less of a blurry line and more of a bright-line rule. "Like a house built on sand, the expert's opinion is no better than the facts on which it is based."[13] After *Sanchez*, hearsay really is hearsay, even if uttered by an expert.[14]

Bob Rancourt is a deputy public defender with the Law Offices of the Public Defender, County of Riverside, where he has worked for 15 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.*

11 *Id.* at pp. 694-697

12 The court notes that the expert still may relate background information about his knowledge, expertise, and premises generally accepted in the field, as well as rely on and describe in general terms the kind and source of the matter upon which his or her opinion rests, all of which is technically but acceptably hearsay. (*Sanchez, supra*, 63 Cal.4th at pp. 676, 685-686.)

13 *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.)

14 For example, in *People v. Stamps* (2016) 3 Cal.App.5th 988, the court applied Sanchez and found that an expert criminalist's identification of drugs as controlled substances solely by comparing their appearances to pills on a website called "Ident-A-Drug" was inadmissible hearsay; there was no independent, competent evidence of identification of the drugs or an applicable hearsay exception.

December 1, 2017 Amendments to the Federal Rules of Evidence: Limiting the "Ancient Documents" Hearsay Exception and Expanding Self-Authenticating Evidence

by Daniel S. Roberts

Unless Congress acts before then, on December 1, 2017, two amendments to the Federal Rules of Evidence will take effect, both in a further effort to update the Federal Rules to deal with issues presented by Electronically Stored Information or ESI. The "ancient documents" exception to the hearsay rule (FRE 803(16)) will be substantially limited and two new types of "self-authenticating" evidence will be recognized in Rule 902(13) and (14) for ESI.[1]

FRE 803(16) – The "Ancient Documents" Hearsay Exception

The Federal Rules of Evidence have always included a hearsay exception for "ancient documents." Now located in Rule 803(16), the exception allows the admission, for the truth of the matter asserted, of statements in "ancient documents," so long as that document is sufficiently authenticated. "Ancient" is presently defined in the Rule to mean "a document that is at least 20 years old." Apparently teenagers were right – anything older than 19 is "ancient."

The exception has only two requirements: that the document containing the statement be "ancient" and that it be properly authenticated. There is no separate requirement to establish any indicia of reliability of the offered statement. As such, the exception has been criticized; after all, it allows (at least in theory) admission of statements that would otherwise be inadmissible hearsay simply because someone wrote them down a long time ago. But the mere fact that a document survives 20 years does not provide any indicia of reliability to statements contained in such a document. The Advisory Committee Notes accompanying the 2017 Amendments state the Committee's concurrence with this criticism, but addressing the matter was not previously a priority because of the infrequent use of the exception.

That calculus has changed, however. The rolling 20-year period that has defined "ancient" is now hitting the dawn of the internet age and is fast approaching the age of social media. In the words of the Committee on Rules of Practice and Procedure, "because electronically stored information can be retained for more than 20 years, a strong likelihood exists that the ancient documents exception will be used much more frequently going forward." Thus, the danger of admitting unreliable out-of-court statements simply because they are "ancient" is no longer an infrequent issue not in need of the Committee's attention. It appears the Committee realized that if unchanged, Rule 803(16) could soon be used to admit someone's random blog post, webpage comment, Facebook rant, or tweet, all for the truth of the matter asserted, without any indicia of reliability other than the fact that the post or tweet was 20 years old. This terrifying thought convinced the Committee that it was time to address the "ancient documents" exception.

The Committee initially proposed to eliminate the exception entirely. Many commentators objected, however, as did practitioners in certain practice areas where facts underlying claims can stretch back several decades, such as product-liability with latent disease, land-use disputes, and environmental clean-up cases. Therefore, the exception was not scrapped entirely.

Instead, the Committee changed the definition of what makes a document "ancient," thus qualifying for the exception. The amended rule replaces the rolling 20-year period with a hard date of January 1, 1998, as delineating "ancient" documents that can be admitted under the exception from modern ones that will have to meet some other hearsay exception, and therefore establish some indicia of reliability, such as the business-records exception under Rule 803(6), or the residual exception under Rule 807.

The thought is that post 1997, there has not only been substantial unreliable ESI generated that should be kept out of evidence, but also that after that date there should be more reliable ESI for which it will be easier to lay a business-records foundation than may have been the case for old paper documents (thus limiting the need to rely on an ancient records exception to admit paper documents from that era). While that may or may not be the case (finding a qualified witness to certify data from an early

1 The text, redline comparison to current rules, and various committee reports for each of these pending amendments (as well as pending amendments to the FRAP, FRCP, and FRBP) is available at http://www.uscourts.gov/sites/default/files/2017-04-27-congressional_package_rev._4-25_final_final_with_signed_letters_and_orders_0.pdf.

2000s legacy server may not necessarily be easier than finding the custodian of records from 1995, for example), the amendment serves well its primary purpose of, going forward, preventing the "ancient documents" exception from being used as a pipeline to admit the flood of unreliable ESI now floating through cyberspace.

FRE 902(13) and (14) – New Additions to the List of Self-authenticating Evidence

Also, effective on December 1, will be new subdivisions (13) and (14) of Rule 902 related to self-authenticating evidence of certain items of ESI. Subdivision (13) applies to "a record generated by an electronic process or system that produces an accurate result" (e.g., a web page) and subdivision (14) applies to "data copied from an electronic device, storage medium, or file." Both new provisions allow a proponent to authenticate such items by submitting a certificate – for example explaining the process by which a web page was retrieved – in lieu of calling a live authentication witness at trial. The express purpose of these new provisions is to make authentication easier for certain kinds of ESI by eliminating the need for a live witness at trial, and are intended to work similarly to the provisions for business records under subdivisions (11) and (12).

The Advisory Committee found that often a party incurs the expense of producing an authenticating witness for such items at trial, only to learn there is no challenge to authenticity from the opponent. The amendment is intended to provide a procedure for the parties to determine prior to trial whether a real challenge to authenticity will be made. Of course, in the Central District the pretrial requirements under LR 16-2 through 16-7 and the Civil Trial Orders for many of our judges require the parties to meet and confer on a stipulation on such issues before trial, but the new provisions of Rule 902 provide yet another avenue to avoid the need to call an authentication witness when there is no true dispute as to authenticity.

So, there you have it – the Federal Rules continue to adapt in the face of the growing importance of ESI. The incredible volume of such material and the ease of long-term storage has convinced the Rules Committee finally to address problems with the "ancient documents" exception to the hearsay rule, and also to ease the process of authenticating such items at trial. These are almost surely not the last amendments necessitated by the ESI revolution. Stay tuned!

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

People v. Sanchez: Criminal (Law) Attacks Family (Law)

by Judge James Mize

What is a nice criminal case (*Sanchez*) doing in a column like this (family law)?

The short answer is that *People v Sanchez* (2016) 63 Cal 4th 665 may have a bigger influence on the day to day practice in our courts than any family law case may have had in this decade. *Sanchez* is a criminal gang case, but it is also a case about the general scope of expert witness testimony. The California Supreme Court explained why it felt compelled at this time to clarify the rule regarding expert testimony and then clearly restated appropriate restraints upon certain expert testimony.

The facts in *Sanchez* are illustrative. Sgt. Stow, the gang expert for the prosecution first of all testified generally about the nature of gangs, gang culture and the general activities of the Delhi Gang. That testimony was reasonably within the preview of an expert and his testimony on these facts was admissible in the case against Sanchez.

However, Sgt. Stow then testified that this particular defendant (Sanchez) "kicked it with guys from Delhi," "got busted with two guys from Delhi" and received a STEP notice pursuant to the California Street Terrorism Enforcement and Prevention Act. However, the witness, Stow, was not personally present for the "busting," was not a witness to Sanchez "kicking it with guys from Delhi" and did not personally deliver the STEP notice to the defendant.[1]

While the Supreme Court recognized that the general testimony about gangs and the specific testimony about the defendant's association with the gang were both forms of hearsay, the Court reaffirmed the distinction between the former basis testimony (which would be admissible) and the later particular testimony which the Court denominated as "case-specific testimony" (and which would not be admissible).[2]

It would not be surprising for some judges to ask, "Why the big deal?" "Hasn't that always been the law?" The answer is that while some attorneys and judges have, over the years, recognized and respected the distinction, many more have not. The appellate court in *People vs Roa* (2017) 11 Cal. App. 5th 428 explained how some courts navigated around this problem:

> At the time of *Roa*'s trial, "the general rule was that 'out-of-court statements offered to support an expert's opinion are not hearsay because they are not offered for the truth of the matter asserted. Instead, they are offered for the purpose of assessing the value of the expert's opinion."[3]

The Court then summarized the importance of the *Sanchez* case, why we are talking about it now (and, not incidentally, why it is the subject of this column).

> 'The court (the Supreme Court in *Sanchez*) observed that over time, the line between expert testimony as to general background information and case-specific hearsay had become blurred, and that trial courts sought to remedy the problem by instructing jurors that matters admitted through an expert should not be considered for their truth but only as the basis for the expert's opinion. …This approach, the Supreme Court reasoned, obviated the "need to carefully distinguish between an expert's testimony regarding background information and case-specific facts."'[4] (Parenthetical insert added.)

> Finally, the court in Roa repeated the clarified rule:

> 'The court in *Sanchez* rejected the not-for-the-truth limitation when applied to expert basis testimony and adopted in its place the following rule: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth."'[5]

> "An expert may… "rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so... ¶] What an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.'[6]

The Supreme Court in *Sanchez* precluded the expert's testimony based upon this improper "blurred" distinction between general basis testimony (admissible) and case-specific testimony (not admissible), but it also excluded the testimony based upon the violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution. While that is an additional barrier to this testimony in criminal

1 *Sanchez, supra* at 672-673
2 *Sanchez, supra* at 684-685
3 *Roa, supra* at 446
4 *Roa, supra* at 447
5 *Roa supra* at 448
6 *Roa supra* at 448

cases, this column will not discuss that additional evidentiary problem since it is not relevant to civil cases in family court.

Therefore, generally, while case-specific testimony is subject to increased scrutiny, it, nevertheless, may be relied upon by the expert and stated to the jury if that particular testimony is admissible by some other exception to the hearsay rule.

Finally, the Appellate Courts have made the *Sanchez* holding applicable to civil cases in *People ex rel. Reisig v Acuna* (2017) 9 Cal. App. 5th 1.

> "This aspect of *Sanchez* concerning state evidentiary rules for expert testimony (Evid.Code, secs 801-802) applies in civil cases such as this nuisance lawsuit."[7] (Parenthetical phrase added.)

> "…we focus in this appeal on evidence that did not depend on experts' assuming the truth of case-specific hearsay not proven by independent competent evidence or subject to a hearsay exception…"[8]

The consequence of the *Sanchez* case to family law cases is apparent. It has not been the practice in family law trials to exclude case-specific facts from an expert's testimony, nor has it been customary to exclude the expert's opinion and testimony when the court has become aware of non-admissible case-specific facts relied upon by the expert before the court.

This is a game changer in family law cases. For example, in family law hearings and trials, Child Custody Recommending Counselors (CCRCs) are perhaps the most common experts appearing in family law cases. Further it is common, if not essential, for the CCRC to interview the child and to relate to the court exactly what that child said to the CCRC. Unless there is another hearsay exception to the admissibility of the child's statements, the child's statements can be excluded and, if the CCRC relied upon those revealed statements, the entire testimony can be excluded.

There is a nuance here that, perhaps, only legal folks would appreciate or even acknowledge. The expert may, in fact, rely upon any hearsay, even inadmissible hearsay to form his or her opinion stated to the court. However, if the testimony includes the particular case-specific facts that are not admissible by some hearsay exception, then, and only then, may the evidence of the case-specific facts be excluded and the opinion of the expert who relied upon that inadmissible hearsay may also be excluded.

So what do we do now?

First of all, attorneys may try to convince the court that the otherwise inadmissible case-specific facts are, in fact, admissible under some exception to the hearsay rule. If so, there is no problem with the holding in Sanchez.

Second, attorneys may now have to present testimony in court regarding all the case-specific facts relied upon by the expert in formulating his/her opinion. Obviously, that would result in much longer and much more expensive trials and more frequent appearances in trials by child witnesses.

Third, attorneys (and judges) may wish to obtain a stipulation from the attorneys (and the parties) that the expert may consider, rely upon and recite hearsay that may otherwise be inadmissible BEFORE the actual appointment of any expert. Certainly, the attorneys are not going to stipulate to the testimony of the expert after the parties discover exactly the opinion and recommendation of the CCRC and the fact that the CCRC relied upon otherwise inadmissible hearsay that was prejudicial to their client.

Fourth, the parties may participate in an intentional or unintentional pas de deux in which, for whatever reason, the expert may testify that he/she relied upon otherwise inadmissible testimony, but either by agreement between the parties or incompetence by one of the parties, the expert does not reveal the substance of the inadmissible hearsay.

Fifth, we may hope for a partial bailout from the Courts of Appeal. With respect to CCRCs, for instance, has the legislature already announced an exception to the hearsay rule when a CCRC interviews a child? See for example the following statute:

> Family Code § 3180(a) "In mediation proceedings pursuant to this chapter, the mediator has the duty to assess the needs and interests of the child involved in the controversy, and is entitled to interview the child where the mediator considers the interview appropriate or necessary." (Interlineation added)

If the legislature has instructed CCRCs to interview the child when "appropriate or necessary" (like almost always?) what would be the purpose of that legislative suggestion if the results of the interview were not admissible in court?

This column has focused upon CCRCs since they are involved in almost every contested dissolution involving children; however, the Sanchez rule would be just as relevant for any expert proposed in court whether in a hearing or a trial. For instance, in attempting to prove the income from a business for purpose of a business evaluation or as an element of spousal support, the accountant/business evaluator may be able to rely and pronounce his/her reliance upon the parties fiscal records (business records and/or party admission exception), but that same expert may not be able to announce the results of an interview with a supervisor or manager of the business (who may otherwise have been able to supply valuable information about the activities of the business).

Family law hearings and trials have been altered as a result of the California Supreme Court announcing a rule in a criminal case. That case arguably did not change what some criminal and civil attorneys and judges were practicing in their trials. However, based upon how family law attorneys and judges have been practicing for many years, it certainly seems that Sanchez will correct what now appears to have been the frequent misuse of expert testimony in family law cases.

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7 *Acuna supra* at 34
8 *Acuna supra* at 10-11

Courtroom Technology – Evidence
Superior Court of California, County of Riverside

by Pete Pappas

Keeping up with the business needs and demands of our justice partners has propelled Riverside Superior Court to make several technological advances. Over the past couple of years, the Court's Information Technology Division has outfitted all courtrooms throughout the county with the latest in audio/visual technology.

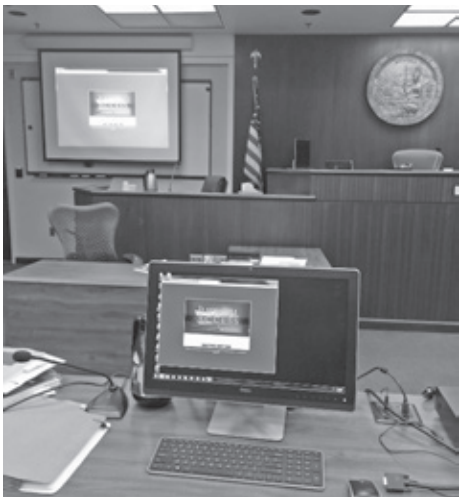
Today, attorneys have the ability to electronically present evidence in digital as well as physical formats. All criminal courtrooms have computers on the counsel tables and those courtrooms that do not, afford our justice partners the ability to plug in a laptop. Moreover, all courtrooms have the capability to receive electronic documents and evidence via CD/DVD media as well as USB devices (upon Judicial Officer review and approval). Physical evidence such as printed documents, transparencies, slides or x-rays can be displayed using the document camera. Courtroom assistants will facilitate the process by which evidence is gathered and presented in the courtroom.

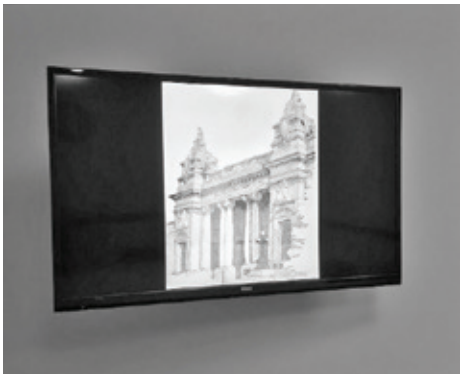
Jurors can review approved evidence in all jury deliberation rooms throughout the county on non-Internet connected SMART Televisions. These 42" video screens have an integrated CD\DVD player as well as USB capabilities. Digital evidence requires photos to be in a JPG/JPEG format, audio files to be in a WAV format and video files to be in a MPG format. All documents must be in a PDF format.

Detailed information about the use of courtroom technology will be provided on the Court's website in the not too distant future.

Pete Pappas is the Chief Deputy of Information Technology for the Superior Court of California, County of Riverside.

Photos courtesy of Pete Pappas.





Presenting Evidence in the U.S. District Court in Riverside

by Dominic Estrada

The United States District Courthouse in Riverside is equipped with a wide variety of audio and visual equipment that is available for use by anyone who is presenting their case. Each courtroom is equipped with a 50" plasma monitor, a 50" portable LCD monitor next to the jury stand, a DVD/VHS combo player, a document camera (commonly referred to as an "ELMO"), and two touch screens located at the lectern and witness stand, which has a Pointmaker system. The Pointmaker system allows the operator and/or witness to make electronic pencil marks of various colors on the projected image. It simultaneously allows the witness to "write" in different colors on the projected image on the screen by using his or her finger as a writing instrument.

To improve the court experience, the Court Room Deputy (CRD) and judge have the ability to black out all monitors on command, as well as the ability to enable white noise over the overhead speakers while a sidebar is in progress. This helps reduce the probability of jurors hearing a private conversation between counsel and the judge.

Each counsel table is equipped with Video Graphics Array (VGA) connector for a computer, a 19" monitor, and a 3.5mm stereo input that allows the attorney to connect his or her laptop computer for an evidence presentation. This allows the computer to be displayed on all the monitors in the courtroom and to also project sound throughout the speaker system in the courtroom. Unfortunately, we do not support HDMI at this time or any type of wireless streaming, nor do we provide adapters for iPads or other Apple devices.

The courthouse is also equipped with wireless infrared headphones, which provides amplified audio to the user, granting the user the ability to listen to court proceedings at their desired volume in real time. This technology is also utilized by an interpreter, who has a personal channel that a user can listen to a language translation with the wireless infrared headphones.

We strongly recommend that each attorney make an appointment with the CRD to visit the courthouse prior to the start of his or her hearing to allow time for computer compatibility testing, to make any adjustments that might be needed, or for requesting any required special equipment. Scheduling an appointment allows court staff to train and provide hands-on experience with the equipment and it provides an opportunity to have questions answered.

Please note that the court is not responsible for troubleshooting compatibility problems. Attorneys should/must provide their own technical assistance in preparing their laptop evidence presentation. Below is a link to the Central District website where more information can be found on technology in the courtroom:

http://www.cacd.uscourts.gov/clerk-services/courtroom-technology

Dominic Estrada is Deputy in Charge, United States District Court for the Central Division, Eastern Division.

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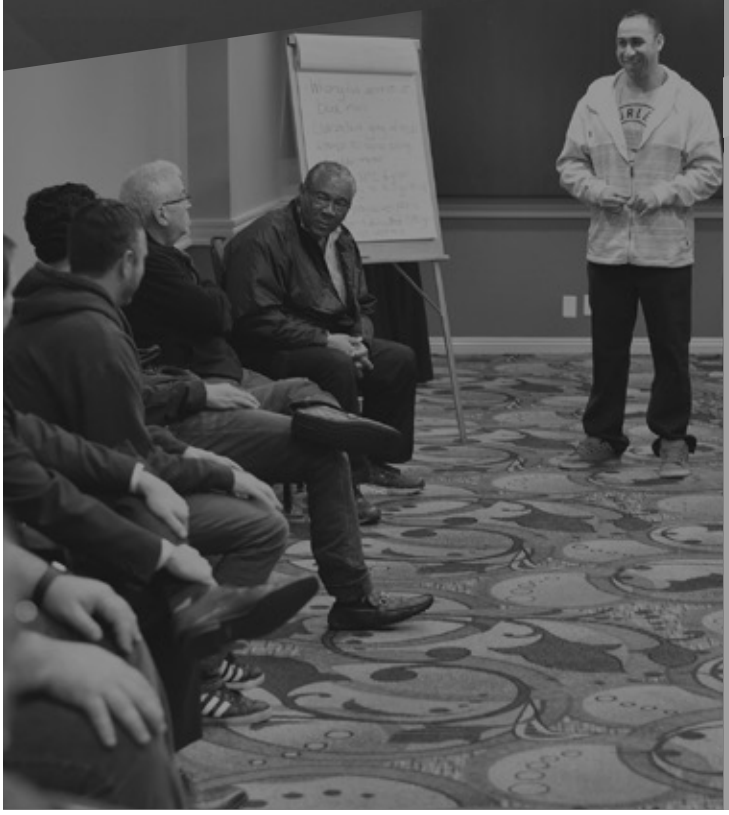

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Impactful Use of Demonstrative Evidence in Jury Trials

by Christopher R. Aitken & Megan G. Demshki

In today's fast-paced world, succinct and impactful communication of the most relevant evidence is vital in a jury trial. Demonstrative evidence is a necessary tool in the presentation of evidence in a way that both effectively educates and holds the attention of the jury. Charts, maps, timelines, photographs, lists, videos, diagrams, models, documents, and animations are all common types of demonstrative evidence.

Demonstrative evidence can be thought of as an exhibit used to illustrate evidence, while documentary evidence is an exhibit used as evidence of a fact. Demonstrative evidence is admissible for the purposes of illustrating and clarifying a witness' testimony.[1] Trial judges have wide discretion in admitting demonstrative evidence.[2]

Some types of demonstrative evidence may be permitted by the trial judge for the purpose of assisting jurors in understanding testimony, such as a writing out a chart of adjectives used by the witness. However, if demonstrative evidence is in any way testimonial, proper foundation must be laid for the use of that evidence.[3]

Counsel may be permitted to question a witness regarding demonstrative evidence, such as during cross-examination, without offering it as evidence.[4]

Demonstrative evidence is useful in all different types of cases and the creative possibilities are endless. From skeleton models and animations of surgeries, to a simple butcher paper list of injuries listed by plaintiff during her testimony, demonstrative evidence can be as complex or as simplistic as you are comfortable with.

It is important that every piece of demonstrative evidence you intend to show to a jury is well thought out, examined for potential use in cross-examination, and tested by the trial attorney who will be utilizing the exhibit. Our top ten tips for impactful use of demonstrative evidence include:

1. Be comfortable with presenting the exhibit, and the technology used in doing so. While technology can generate incredible demonstrative exhibits, the impact of those exhibits can be lost if the presentation is ruined by a clumsy execution or technical glitch.
2. Ensure your case theme is consistent throughout your demonstrative exhibits and doesn't create conflicts in your case messaging.
3. Utilize exhibits that succinctly make the point to avoid sustained objections for consumption of undue time.[5]
4. Make sure your demonstrative exhibits are clear and large enough that all jurors can easily see the content.
5. Be prepared to defend Evidence Code section 352 objections that the demonstrative evidence is more prejudicial than probative.
6. Lay foundation for the demonstrative exhibits you would like to use in your closing argument carefully during direct examination of your expert witnesses.[6]
7. Don't be afraid to go back to the basics and utilize mediums that are available to you when creativity strikes. Butcher paper, white boards, the Elmo, or a highlighter can make your point just as effectively as a flashy PowerPoint with the right delivery.
8. Evaluate your matter and budget your demonstratives accordingly. While high value demonstrative exhibits can make sense in some matters, creatively generating low cost demonstratives can be just as effective.
9. Test your demonstrative exhibits on friends, family members, co-workers, and mock jurors to ensure that the message you are hoping to communicate to the jury is consistent with the exhibit's first impression.
10. Always remember to diligently mark demonstrative exhibits for identification if the judge will not allow the demonstrative exhibit to be formally admitted into evidence to ensure the demonstrative evidence is part of the record on appeal.

While demonstrative evidence is an effective tool for trial, it is appreciated that most cases do resolve prior to

1 *People v. Ham* (1970) 7 Cal.App.3d 768, 780; *People v. Kynette* 15 Cal.2d 731, 755; *St. George v. Superior Court* 93 Cal.App.2d 815, 816.

2 *Culpepper v. Volkswagen of America* (1973) 33 Cal.App.3d 510, 521-22.

3 *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224; *People v. Boyd* (1990) 222 Cal.App.3d 541, 565-566.

4 *People v. Cossey* (1950) 97 Cal.App.2d 101, 112.

5 *Culpepper v. Volkswagen of America* (1973) 33 Cal.App.3d 510, 521.

6 *People v. Barnett* (1998) 17 Cal.4th 1044, 1135-1136.

trial (e.g. in mediation). Demonstrative evidence is a necessary tool to maximize the settlement value of your cases whether through effective demand letters, or through the formal process of mediation. We look forward to sharing with you what our firm has found effective to maximize your settlement opportunities that are both cost effective and compelling, or on the appropriate case, more robust. Even if the settlement efforts do not lead to a conclusion of the matter, many of the demonstratives generated as a settlement tool can also be helpful at trial.

We hope you will join us at the Riverside County Bar Association CLE Brown Bag Series on November 7, 2017, at 12:00 noon to see, in action, how our firm utilizes different types of demonstrative evidence to aid in our presentation of evidence to a jury.

Christopher R. Aitken is a partner with the firm Aitken Aitken Cohn and Megan G. Demshki is an associate with the firm. Christopher can be reached at chris@aitkenlaw.com and Megan can be reached at megan@aitkenlaw.com.

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Experts: Si Tacuisses, Philosophus Mansisses

If you had kept your mouth closed, you would have been thought wise.[1]

by Boyd Jensen

Selecting, retaining, informing, preparing, and examining experts will reveal whether the title fits or whether it discloses a charade. This article will address the selecting, retaining, and examining of experts in deposition and trial. The wisely chosen, ethically retained, and thoroughly informed and prepared expert may fail from an inadequate examination. Likewise, the most experienced expert can be undone, and should be undone, by capable cross-examination. The process starts when the expert is chosen and that choice must be made with the expert examination in mind, as the examination is ultimately why they were chosen.

(1) Choosing the Expert: *Experto Crede Trust the one who has had experience.*[2]

California Evidence Code, section 720, subdivision (a) has it right, but they track better in reverse order. The section reads "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." However, education always trumps ignorance, training requires education, and experience is the surest training, the result of which is skill; and the skillful are such because of acquired special knowledge. Thus, experience to me is most persuasive of the qualifiers.

In California, we enjoy the opportunity of "retained" or "unretained" experts. California Code of Civil Procedure, section 2034.210, subdivision (b) provides the following, "any expert designated by a party under subdivision (a) [who] is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action" is an expert who requires disclosure. A retained expert is a witness hired for the purpose of forming opinions and aiding the litigator with reports or testimony. An unretained or non-retained expert is similar except they normally have already provided their opinion or acted upon a relevant experience, for example a health-care professional, a doctor, a designer, or an engineer employed by a manufacturer, or a government official such as a police officer.

If they are available, I prefer unretained experts. We have all used retained experts, and respect what they provide, but I believe unretained experts are more persuasive, than the otherwise well educated and qualified person being paid to testify. Many unretained experts are employees of parties or vendors of parties, so this preference is not without risk, requiring careful analysis.

(2) Examining Experts: *Logistikos – If my campaign fails, they are the first to die.*[3]

Contrary to conventional order, examining an expert normally commences with cross-examination during deposition. The purposes of expert depositions are surveillance and logistics. Within minutes before and during the disposition, witness confidence, appearance, voice tone, command of the subject, and other characteristics of an expert can be determined. Now that the expert hired to defeat you is analyzed, the only requirement is logistic and only logistics. Going beyond logistics will reveal tactics, strategy, and may reveal too much about you as an advocate. Experts also assess the attorneys they expect to face. No need to prove one's ability to tackle difficult science or erudite principles of the relevant subject matter at a deposition. This should be saved for the jury or other trier of fact.

By logistics essentially two things are intended, but sometimes three. The "sometimes three" is when there is no resume or other documentation of the background and experience of an expert. Normally, that is provided by demand for production or expert disclosure and if complete with articles, and other representations from the expert's past, no questions are needed. Why teach your opposing advocate about an expert's extensive qualifications? Let your opponents learn them for themselves.

The two logistical requirements of an expert deposition are first all opinions and second, everything relied

1 The direct translation is "If you had kept your silence you would have stayed a philosopher."

2 Literally; believe one or trust one who has had experience.

3 Alexander the Great, about his "Logista" military administrators skilled in numbers and calculation.

upon to formulate those opinions. With those two requirements satisfied, an able lawyer can formulate the best strategy for cross-examination during trial to expose the weaknesses of those opinions and unseat them altogether. It requires planning and sometimes, extensive work, but that is the nature of logistics. "Amateurs talk tactics and strategy, while professionals study logistics."[4] Excellent logistics grants control of the environment in any controversy.

(3) Credibility: *Auctoritas*[5]

The ultimate goal in any trial is credibility. Your credibility as an advocate and the credibility of your client within the four corners of your case. Credibility is not just what you say, but what you don't say. It is your control of the environment. Observers instinctively assume that you know what you are doing and that you can be trusted. Feed those conventional presumptions and control all witnesses, including experts, starting with the first words spoken.

When occasionally called upon to teach or train young lawyers or even interested high school students, I ask them, "What is the most powerful part of any speech?" They routinely suggest the speech goals or the conclusion. These are important parts, but the most important part of any speech or trial presentation, such as an expert examination, is the first words spoken. Juries, judges, clients, spectators, witnesses, and your opponents will start to judge you as soon as you start to speak.

AND why not establish your control by using silence…by not speaking. When the floor is yours and you are standing at the podium, for your time to question an expert, wait three seconds. It will seem like a much longer time, but you will hear the rustling in the courtroom stop and total silence envelope, while people turn to you, wondering what you are going to say, precipitated by just plain silence. You are in control and you have credibility and as you maintain it, you will prevail.

Boyd Jensen, a member of the Bar Publications Committee, is with the firm of Garrett & Jensen in Riverside.

4 1980 attributed to General Robert H. Barrow (USMC) US Marine Corp Commandant.

5 As an authority – prestige

MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective October 30, 2017.

Laurie N. Burns – Juvenile Defense Panel, Riverside

Jose Chavez – Law Student, Irvine

Thomas Chisum – Office of the City Attorney, Riverside

Kimberly Hasler – Juvenile Defense Panel, Riverside

Ruth Ann Heavrin – Law Student, Riverside

Priscilla Hernandez – Thompson & Colegate LLP, Riverside

Angela Jones – Office of the City Attorney, Riverside

Tiffany Lewis (A) – Law Office of Robert Deller, Riverside

Patricia G. Mejia – Office of the Public Defender, Riverside

Daniel S. Moffatt – Pereira & Moffatt, Riverside

Sarah Nadeem – Law Offices of Sarah Nadeem, Corona

Pauline Obata-Hirose – Juvenile Defense Panel, Riverside

Nicole Varner Orue – Varner & Brandt LLP, Riverside

Alejandro Quinones – Law Student, Fontana

Catherine Rupp – Law Student, Irvine

Mark Anthony Said – Law Office of Mark Anthony & Associates, Riverside

Wesley W. Stanfield – Solo Practitioner, Riverside

Denise M. Tessier-Gluzerman – Solo Practitioner, Palm Springs

Esther C. Wang – The Elder and Disability Law Firm, Riverside

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(A) – Designates Affiliate Member

YOU ARE INVITED TO OUR INLAND EMPIRE FAMILY LAW MIDWINTER GALA

DATE AND TIME: Saturday, November 18, 2017 at 5:30 PM

LOCATION: Victoria Club, 2521 Arroyo Drive, Riverside, CA 92506
http://www.victoriaclub.com/

HONOREES:

Hon. Michael Gassner, Judicial Officer of the Year
Hon. Jackson Lucky, Family Law Legacy Award

Early Bird Ticket Cost: $90/Person with Check payable to "Riverside County Bar Association"
RSVP and Payments Received On or After October 19, 2017: $120/Person

Evening Events Include:

- Awards Ceremony for 2017 Honorees
- A Premium "Director's Buffet" Prepared by Victoria Club Chefs to include Beef, Chicken, Seafood, and Vegetarian Entrées
- Cocktails, Music, Dancing

~ Black Tie Attire Optional ~

Name of Attendee(s): _____

Organization (Optional): _____

Telephone: _____ E-mail: _____

Number of tickets: _____ x $90 on or before October 18, 2017 = _____ (Total)

Number of tickets: _____ x $120 on or after October 19, 2017 = _____ (Total)

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October 3, 2017

Members Riverside County Bar Association

Re: Open Position on the Board of
RCBA Dispute Resolution Services, Inc.
File No.: 2736-121

Dear Fellow Bar Members:

The Bar Association's sibling non-profit organization RCBA Dispute Resolution Services, Inc. (DRS) is with a current vacancy on the Board of Directors. DRS is thus seeking to fill that board position.

As you probably know DRS provides mediation and arbitration services to our legal community for a dramatically reduced rate as compared to competitors in our area. DRS is also under contract with the Riverside County Superior Court to provide mediation services for the Family Law Court, Probate and Civil Court.

DRS board members are responsible for operating the business of DRS, marketing, creating and implementing the DRS business model as it is revised from time to time and otherwise being tasked with a hands-on management of the business of DRS.

If you are interested in becoming involved in our austere organization above and beyond being a mediator or arbitrator please contact Charlene Nelson, Executive Director of RCBA and DRS for more information.

We are looking forward to working with you.

Very Truly Yours,

Christopher G. Jensen
President and Chairman of the Board
RCBA Dispute Resolution Service, Inc.

CGJ/amm

On Moral Equivalency, The Problem of Charlottesville

by DW Duke

On Saturday, August 12, 2017, a group of alt-right protestors consisting of neo-Nazis and Ku Klux Klan (KKK) members appeared on the University of Virginia campus in Charlottesville, Virginia, to protest the removal of a statue of Confederate General Robert E. Lee. This was a continuation of a "Unite the Right" protest that had begun the night before, lawfully with a permit obtained on behalf of the alt-right groups by the American Civil Liberties Union. Within a few hours after the protest began on Saturday morning, the alt-right groups were countered by alt-left groups consisting primarily of Antifa and Black Lives Matter members. According to some witnesses, as the alt-right groups marched they were attacked by the alt-left groups using bottles filled with cement, Molotov cocktails, balloons filled with urine and feces and other projectiles. The alt-right groups fought back resulting in clashes and injuries on both sides. Events escalated around 11:28 a.m. when a state of emergency was declared by the City of Charlottesville and the County of Albemarle. At 1:42 p.m., a Dodge Challenger driven by 20-year old James Alex Fields, Jr. drove up a crowded street and rear-ended another vehicle. The driver then placed the car in reverse and backed away from the scene at a high rate of speed, hitting and injuring several protesters in the process. One of those was 32-year old protestor, Heather Heyer, who later died from her injuries in the hospital.

On Saturday, August 12, 2017, President Donald Trump issued a statement, via Twitter, wherein he did not specifically condemn the alt-right groups, but instead stated that there was violence on many sides. He did not say what groups he was referring to by the term "many sides." Meanwhile, on Sunday, August 13, his daughter Ivanka Trump tweeted the following: "There should be no place in society for racism, white supremacy and neo-Nazis," she continued. "We must all come together as Americans -- and be one country UNITED. #Charlottesville." At a press conference that same day, Vice President Mike Pence said: "We have no tolerance for hate and violence, white supremacists or neo-Nazis or the KKK."

Despite the condemnation by both his daughter and the Vice President, it was not until Tuesday, August 15, 2017, that President Trump finally condemned neo-Nazis and the KKK. But in the process of condemning the neo-Nazis and the KKK, he also placed blame on the alt-left groups saying they came prepared for violence. He further stated that in the march by the KKK and neo-Nazis, there were also people who were not part of those groups who were simply there to protest the removal of national monuments. Immediately after his Tuesday comments, the media pounced saying that he supported the neo-Nazis and the KKK with these comments. Shortly after, politicians joined in, many on Twitter, accusing President Trump of racism. Even fellow Republicans joined in the "pile on" with the following tweets:

House Majority Leader Paul Ryan: "We must be clear. White supremacy is repulsive. This bigotry is counter to all this country stands for. There can be no moral ambiguity."

Arizona Senator Jeff Flake: "We cannot accept excuses for white supremacy and acts of domestic terrorism. We must condemn them. Period."

Arizona Senator John McCain: "There's no moral equivalency between racists & Americans standing up to defy hate & bigotry. The President of the United States should say so."

Former Massachusetts Governor Mitt Romney: "No, not the same. One side is racist, bigoted. The other opposes racism and bigotry. Morally different universe."

Florida Congresswoman Ileana Ros-Lehtinen, said: "Just no. Blaming 'both sides' for #Charlottesville?! No. Back to relativism when dealing with KKK, Nazi sympathizers, white supremacists? Just no."

While many criticized the measured response by President Trump to the Charlottesville disaster, others disagreed that his words were flawed in any way. In a speech at the Kennedy Center on August 18, 2017, Muriel Parks-Rosenberg, the daughter of the gentle activist Rosa Parks, had this to say, "President Trump's reaction has been criticized by the Left, but I don't see what he did wrong. He strongly spoke out against hate both from those who make racial animus their primary cause and anarchists who showed up hoping to watch the world burn. My mother would have been proud of the president's words . . . To me Donald Trump is a modern civil rights icon."

Housing and Urban Development Secretary Ben Carson described the criticisms against President Trump's comments "little squabbles" that are being "blown out of proportion." He blamed the media for orchestrating a "pile on" against Trump in an effort to diminish his credibility. Shortly after making these comments, Carson's home was vandalized.

As we look at these strange developments we have to ask ourselves what is really going on here? It seems that no

one in the media or in government has taken the time to slow down and look at the big picture. This is not simply a situation where there is only one issue to consider. There are conflicting constitutional rights at play.

On the one hand, we have the prohibition on racial and ethnic discrimination found not only in the Civil Rights Act of 1964 but in the Equal Protection clause of the 14th Amendment. Nearly every American agrees that racial, religious and ethnic discrimination is wrong. It is the nearly undisputed moral claim of the 21st Century. Considering that for the most significant neo-Nazi, KKK rally in the last 60 years, the movement could only get 6,000 people to attend, the lack of influence these groups really have in America today is apparent. So, we can almost all agree, Republicans and Democrats alike, that racial and ethnic discrimination and the views of the KKK and the neo-Nazis are despicable and an affront to everything we consider sacred in America today. The prohibition against racial and ethnic discrimination is entrenched in our laws. For Mitt Romney and others quoted above, that appears to be the end of the inquiry, but did they really complete their constitutional analysis? Did they consider all issues?

In addition to the rights to be free from racial and ethnic discrimination are the First Amendment Rights to Free Speech and the Freedom of Association. In the present case, this right was specifically affirmed for neo-Nazis in National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977), wherein the United States Supreme Court held that the swastika was a form of speech that did not constitute fighting words. Thus, the right of the neo-Nazi group to march through a predominantly Jewish neighborhood with Holocaust survivors, was upheld. In order to limit this right to free speech, the court would apply the test of strict scrutiny and determine that there is a compelling state interest that overrides the burden to those seeking to march. In this case, protecting the sensibilities of those in the Jewish neighborhood was not sufficient to prohibit the free speech of the neo-Nazis.

So, on the one hand we have the rights of free speech and freedom of association of the neo-Nazis and on the other hand we have the right to be free from racial and ethnic discrimination. These competing fundamental rights of the alt-right members on one hand and the alt-left members on the other are protected in the Constitution. The issue is much more complex than the media and the politicians have presented. When considering the constitutional right of the neo-Nazis to rally and march in light of the tragic events in Charlottesville and the death of Heather Heyer, we have to ask whether the Supreme Court made the right decision in the Skokie case or more appropriately, should that case be reconsidered?

I recall reading the Skokie case when I was in law school and finding it quite disturbing. Is the pain the swastika would cause to the Holocaust survivors and others sufficient to say that the government has a compelling interest that overrides the right to free speech and freedom of association of the neo-Nazis. In my mind, it did. But I recognized the other view. If the court begins questioning the quality or the morality of speech then we have a form of censorship and what one court considers legitimate and quality speech another court at another time may consider improper. Further, by controlling the content of speech and freedom of association could we find ourselves slipping back into the McCarthy era mentality? After great deliberation, I concluded that indeed the Court probably did make the correct decision which allowed me to focus my frustration on the ACLU for choosing to use donations to represent the neo-Nazis; a frustration I hold to this day. Why is it necessary to accommodate evil? Let them pay for their own lawyers and accommodate themselves.

So, is Mitt Romney correct when he says about the Charlottesville incident "No, not the same. One side is racist, bigoted. The other opposes racism and bigotry. Morally different universe." Is it true that the organizations Black Lives Matter (BLM) and Antifa oppose racism and bigotry? It is well documented that violence has broken out at BLM rallies and violence has occurred when Antifa is present.

BLM was founded in 2012 by Alicia Garcia, Patrisse Cullors, and Opal Tometi in response to the death of Trayvon Martin. On their website BLM clearly states that they are "committed to acknowledging, respecting and celebrating differences and commonalities." They further state "We are committed to collectively, lovingly and courageously working vigorously for freedom and justice for Black people and, by extension all people."

BLM has been criticized for using the name Black Lives Matter in contrast to a broader phrase such as All Lives Matter. BLM responds by saying "In affirming that Black Lives Matter, we need not qualify our position. To love and desire freedom and justice for ourselves is a necessary prerequisite for wanting the same for others." BLM further states on their website "We are committed to embodying and practicing, justice, liberation, and peace in our engagements with one another."

Despite the foregoing statements by BLM certain members of BLM have engaged in violent activities on some occasions. In addition, Essex County College adjunct professor Lisa Durden, a BLM voice, appeared on Fox News's Tucker Carlson Show openly spewing racial comments against whites. She was promptly fired from her position at the university. But are these instances of misconduct of certain members enough to say that BLM is a bigoted or racist organization? In contrast to these unsavory acts by certain BLM members, the organization itself has not advocated violence. Furthermore, BLM has appeared on behalf of victims of other races and showed support such as at a rally after the shooting death of Australian Justine Ruszczyk, a Caucasian, and members of BLM demanded the resignation

of the mayor of Minneapolis. They also appeared in support of Native Americans during the Dakota Pipeline protests. Based on the evidence I have seen, I cannot say that BLM is a militant, racist, or bigoted organization due to the conduct of certain members. The evidence appears to the contrary. Antifa, however, is a bit more difficult to assess.

The history of Antifa dates to the 1930s in Germany where they were known as Antifaschistische Aktion. Their objective was to combat rising Nazism and to build a bridge between the fascists and the communists. In the US, they went under the name Anti-Racist Action Network in the 1980s. Technically, Antifa is not a formal organization but is comprised of a number of organizations who share similar ideologies. In recent years, especially since the rise of Trump populism, Antifa has been accused of engaging in acts of violence toward those they consider to be of the alt-right such as occurred at the recent neo-Nazi, KKK rally in Charlottesville. Previously they engaged in acts of violence and vandalism at UC Berkeley in an effort to prevent a forum where conservative Milo Yiannopoulis was scheduled to speak. As a result of the rioting by Antifa, the engagement was cancelled and Yiannopoulis did not speak. Recently, a playbook was discovered purporting to belong to Antifa that chronicles their plan for a violent revolution as they lead America to a world socialist government. The authenticity of the playbook has yet to be confirmed.

While it may be said that BLM as an organization has not clearly shown itself to be violent, racist or bigoted, Antifa has clearly shown that they are prepared to engage in violent acts against those with whom they disagree. Engaging in violence against those who hold an opposing view is, by definition, bigotry is it not? Does the fact that most of us find the beliefs of neo-Nazis and the KKK repugnant mean that we should use violence to silence their opposing view? If our nation's leaders and our national news media praise Antifa for engaging in acts of violence against those with whom we collectively disagree, then have we not relegated our nation to a land of thuggery?

Some of the police officers from Charlottesville have said that they were told to stand down and that they were instructed to bring the opposing forces together to allow the alt-left to brutalize the alt-right. If true, would this not constitute civil rights violations against the alt-right for which those responsible should be found liable both criminally and civilly?

Ultimately, the question is whether we are a nation of laws or a nation of thuggery. And are we going to lie about the facts in order to pile on a president who is unpopular with the media? Perhaps the Skokie case should be revisited to reevaluate whether neo-Nazis and members of the KKK are terrorist organizations or whether their speech should be limited due to the danger created thereby. But as long as they are under the protection of the Constitution as determined by the US Supreme Court in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), they are entitled to protection and federal and state employees and elected officials should not be praising organizations that use violent means to silence them because of their views. This is not moral equivalence. It is plain old honesty.

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 six books and a frequent contributor to the Riverside Lawyer.

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