

# RIVERSIDE LAWYER

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MAGAZINE

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The Public Health or Safety Exception**

**Wildfire Litigation: A Primer**

**State Water Board's Rulemaking on "Water Waste"  
Prohibitions Draws Widespread Interest Throughout California**

**Recent and Upcoming Changes to the California Environmental  
Quality Act**

***Empyrean, Heliacal, Celestial* – ahhhhhh...Maybe not so much!**



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# RIVERSIDE LAWYER

MAGAZINE

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Cover photo: Yosemite's Half Dome on fire at sunset by yggdrasil

# 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 6<sup>th</sup> 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

## APRIL

- 9 Family Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Art Grater, DissoMaster Co-Creator and Consultant  
Topic: “A Review of the Tax Cuts & Jobs Act (TCJA) and How it Impacts Lawyers, Clients and Support Calculations”
- 10 Civil Litigation Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speakers from the Riverside Superior Court: Asst. Presiding Judge John Vineyard, Judge Irma Asberry, Judge Craig Riemer, Judge Sunshine Sykes, Judge Sharon Waters  
Topic: “A View from the Bench: Tips & Insights on Motions in Limine”  
MCLE
- 11 Criminal Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Riverside County District Attorney Michael Hestrin  
Topic: “Update on the DA’s Office and Efforts to Streamline Discovery”  
MCLE
- 13 General Membership Meeting**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: David Gehring  
Topic: “An Intersection Between the Economics of the Open Web and the First Amendment”  
RSVP by April 10  
MCLE
- 17 Family Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Ron J. Anfuso, CPA, ABV, CFF, CDF, FABFA  
Topic: “Moore/Marsden and Real Property Apportionment”  
MCLE
- 18 Estate Planning, Probate & Elder Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speakers from the Riverside Superior Court: Judge Thomas Cahraman, Judge Roger Luebs, Managing Attorney Tom Johnson  
Topic: “2018 Probate Court Update”  
MCLE
- 19 Solo/Small Firm Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: David Foate, Gresham Savage  
Topic: “Implication of New Tax Laws for Small Businesses”  
MCLE
- 27 RCBA & Riverside Superior Court**  
Good Citizenship Awards for High School Students  
Historic Courthouse – Department 1  
1:00 p.m.

### EVENTS SUBJECT TO CHANGE.

For the latest calendar information please visit the RCBA’s website at [riversidecountybar.com](http://riversidecountybar.com).







## President's Message

by L. Alexandra Fong

### Environmental Law

The theme for this month's edition of *Riverside Lawyer* is environmental law. What do you think of when someone says, "environmental law?" For me, I think about our national parks, the Endangered Species Act, and the Environmental Protection Agency of the United States.<sup>1</sup>

My admiration of national parks was born in the late 1980s when my family would take road trips to the various national parks in the West Coast during summer vacation. We would pack the station wagon up and dad would drive us. We visited Yosemite, Sequoia, Yellowstone, Grand Canyon, Grand Teton, Bryce Canyon, Zion and others.<sup>2</sup> By an act of Congress in 1872, Congress declared Yellowstone National Park "as a public park or pleasuring-ground for the benefit and enjoyment of the people" and placed it "under exclusive control of the Secretary of the Interior." The founding of Yellowstone National Park began a worldwide national park movement and in 1916, the National Park Service was established. The National Park Service (NPS) is guardian of our diverse cultural and recreational resources, environmental advocate, partner in community revitalization, world leader in the parks and preservation community, and pioneer in the drive to protect America's open space.<sup>3</sup> NPS preserves unimpaired the natural and cultural resources and values of the National

Park System for the enjoyment, education, and inspiration of this and future generations.<sup>4</sup>

While at various national parks, one can encounter threatened and/or endangered species, which brings me to my next topic of discussion: The Endangered Species Act of 1973 (ESA). "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed," said President Richard Nixon, when he signed the ESA into law. The ESA was signed on December 28, 1973, and provides for the conservation of species that are endangered or threatened throughout all or a significant portion of their range and the conservation of the ecosystems on which they depend. The ESA replaced the Endangered Species Conservation Act of 1969.<sup>5</sup> The ESA is administered by the U.S. Fish and Wildlife Service (Service) and the Commerce Department's National Marine Fisheries Service (NMFS). Under the ESA, species may be listed as either endangered or threatened. "Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. "Threatened" means a species is likely to become endangered within the foreseeable future. All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened.<sup>6</sup> The global icon for extinction – the giant panda of China – was upgraded from endangered to vulnerable on the Red List of Threatened Species by the International Union for Conservation of Nature and Natural Resources (ICUN).<sup>7</sup>

The Endangered Species Act and Environmental Protection Agency (EPA) intersect with the Endangered Species Protection Program (ESPP) of the EPA. The ESPP carries out the EPA's responsibilities under the Federal Insecticide, Fungicide, and Rodenticide Act, while complying with the Endangered Species Act.<sup>8</sup> When registering a pesticide or reassessing the potential ecological risks from use of a currently registered pesticide, EPA evaluates extensive environmental fate. The EPA also evaluates toxicity data to determine how a pesticide will move through and break down in the environment and whether potential exposure to the pesticide will result in adverse effects to wildlife and vegetation. The EPA routinely assess risks to birds, fish, invertebrates, mammals, and plants to determine whether a pesticide may be licensed for use in the United States.<sup>9</sup>

The mission of the EPA is to protect human health and the environment. EPA works to ensure that: (1) Americans have clean air, land, and water; (2) National efforts to reduce environmental risks are based on the best available scientific information; (3) Federal laws protecting human health and the environment are administered and enforced fairly, effectively and as Congress intended; (4) Environmental stewardship is integral to U.S. policies concerning natural resources, human health, economic growth, energy, transportation, agriculture, industry, and inter-

1 I also think about CEQA but I didn't have enough time to research it.

2 We also visited national parks in Hawaii and Taiwan.

3 <https://www.nps.gov/aboutus/history.htm>

4 <https://www.nps.gov/aboutus/index.htm>

5 <http://www.nmfs.noaa.gov/pr/laws/esa/>

6 <https://www.fws.gov/endangered/laws-policies/>

7 ICUN is an organization that has assessed the conservation status of species, subspecies, varieties, and even selected subpopulations on a global scale for the past fifty years. See: <http://www.iucnredlist.org/about/introduction>.

8 <https://www.epa.gov/endangered-species/about-endangered-species-protection-program>

9 <https://www.epa.gov/endangered-species/assessing-pesticides-under-endangered-species-act>

national trade, and these factors are similarly considered in establishing environmental policy; (5) All parts of society – communities, individuals, businesses, and state, local and tribal governments – have access to accurate information sufficient to effectively participate in managing human health and environmental risks; (6) Contaminated lands and toxic sites are cleaned up by potentially responsible parties and revitalized; and (7) Chemicals in the marketplace are reviewed for safety.<sup>10</sup>

EPA has been subject to several citizen suits, which required EPA to conduct scientific assessments and make effects determinations for numerous pesticides, including assessing the effects of products containing any of: (1) 54 pesticide active ingredients to 26 species of listed salmon and steelhead; (2) 66 pesticide active ingredients to the California red-legged frog; and (3) 59 pesticide active ingredients to 11 species in the greater San Francisco Bay area.<sup>11</sup>

We are all grateful for the work of the EPA in protecting our environment.

## The RCBA Reading Day Program

The Riverside County Bar Foundation, Inc. (Foundation) is collecting new and/or gently used children's books

<sup>10</sup> <https://www.epa.gov/aboutepa/our-mission-and-what-we-do>

<sup>11</sup> <https://www.epa.gov/endangered-species/endangered-species-litigation-and-associated-pesticide-limitations>

and funds to donate to a local elementary school shortly, as part of the RCBA Reading Day Program. If you are interested in donating books, please send them to the Foundation, Inc, c/o RCBA.<sup>12</sup> If you are interested in donating funds to purchase books, please send a check, payable to Riverside County Bar Foundation, Inc. Please note that the Foundation is a 501(c)(3) corporation, so your donation may be tax deductible. Please consult your tax advisor for further details.

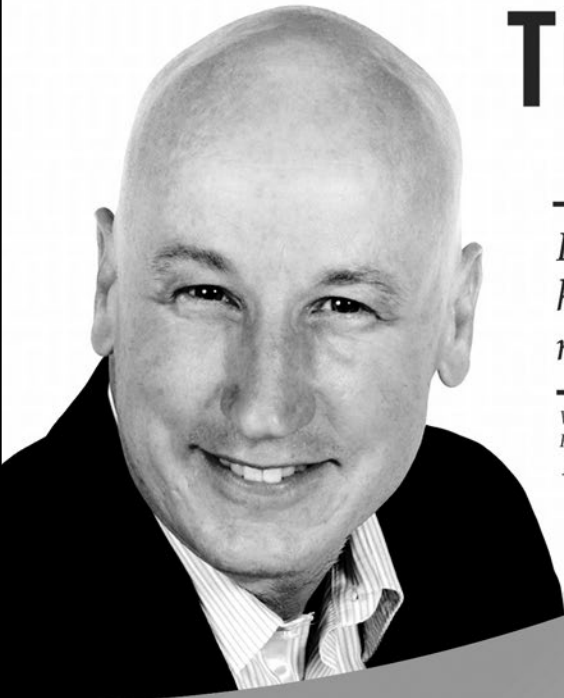
## An Invitation

I close with an invitation to attend the RCBA's next general membership meeting, which is scheduled for April 13, noon, in the John Gabbert Gallery at the RCBA. David Gehring, CEO of Distributed Media Lab and Founder of Project Meridio, is speaking on the economics of the open web and the First Amendment. I hope you will be able to join us for this interesting topic.

*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.*



<sup>12</sup> There are many great children's books about our national parks.




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# BARRISTERS PRESIDENT'S MESSAGE

by Shumika T. R. Sookdeo



Born in Washington D.C., but raised right here in the heart of Riverside, is Barristers' past president, Amanda Daams. Amanda currently resides and practices law in Riverside, the place she calls home. She completed her undergraduate studies at the University of San Diego and continued her education at Norte Dame Law School. She enjoys the closeness of the Riverside legal community.

Amanda is part of the Environmental Law and Natural Resources practice group at Best Best & Krieger. The majority of her practice concerns issues stemming from the California Environmental Quality Act (CEQA).



*Amanda Daams*

In a nutshell, environmental law regulates human effects on the environment. As a practitioner of environmental law, Amanda's work entails analyzing environmental impacts of projects and mitigating adverse effects to the fullest extent. Another important component is assuring that potential impacts to the environment and the subsequent effects are disclosed to the public and decision makers. The goal is to maintain balance between growth

and development and preservation of the environment in its natural state.

Naturally, environmental law is essential in an ever-changing economy. Amanda was not initially drawn to the practice of environmental law, but had her sights on medical malpractice defense. Fortunately for our environment, while Amanda was in her second year of law school, she was exposed to land use law and CEQA as a summer associate and thoroughly enjoyed it. Her reward for choosing this practice area is the joy of seeing the projects she works on come into fruition and benefit the community.

Amanda works with an array of clients. She has noticed that most of her prior clients were private developers, whereas now, the majority of her clients are public agencies. Nonetheless, Amanda thrives when creating pragmatic solutions with her clients who are passionate about their ideas, their communities, and executing their projects in a manner that is safe to the environment.

When joining the Barristers as a new attorney in 2009, Amanda enjoyed networking with her peers, many with whom she maintains

close relationships today. She claims that Barristers is vital to the exposure of young and new attorneys to the close-knit Riverside legal community. That being said, she believes that with the current tension between federal and state priorities regarding environmental law, Barristers should organize programs and MCLEs to educate young attorneys about the current laws and possible changes.

Amanda's knowledge of environmental laws influences her thoughts and actions when making huge personal decisions. For example, she was more informed about what zoning and home owners association requirements to review in detail prior to purchasing her home. Amanda, her husband, and their two young children have a safe home to sleep in and watch college football games after spending a long day at the zoo or other fun and educational activities.

## Upcoming Events

We have our Second Annual Judicial Reception at Grier Pavilion, located at Riverside City Hall, on May 9, 2018, at 5:30 p.m. This year's theme is "Work-Life Balance on the Road to the Bench." Admission is free for RCBA members and \$20.00 for non-members. Space will be limited.

Finally, please stay informed about Barristers events by joining our mailing list at [www.riversidebarristers.org](http://www.riversidebarristers.org) or follow Riverside County Barristers Association on Facebook.

*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 the California Association of Black Lawyers.*







Pictured: Dean Matt Parlow and Park Kennedy,  
chairman of First American Financial Corporation

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# A BANKRUPTCY TRUSTEE'S POWER TO ABANDON PROPERTY OF THE ESTATE: THE PUBLIC HEALTH OR SAFETY EXCEPTION

by Cathy Ta and Holland Stewart

Chapter 7 trustees play a vital and essential role in the United States bankruptcy system. In every Chapter 7 bankruptcy filing, a Chapter 7 trustee is appointed by the bankruptcy court to oversee the administration of the bankruptcy estate, namely to marshal and liquidate property of the bankruptcy estate for ratable payment of creditors. The trustee's duties include investigating the debtor's property, liquidating non-exempt property, and distributing proceeds to the debtor's creditors.<sup>1</sup> The Bankruptcy Code also empowers Chapter 7 trustees to recover property (or their value) that belong to the bankruptcy estate, such as by clawing back preferential and fraudulent transfers.

Another tool available to Chapter 7 trustees, in the course of carrying out their duties, is the power to not administer and otherwise abandon certain property. Section 554(a) of the Bankruptcy Code<sup>2</sup> provides:

After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

Thus, where property is either burdensome or offers inconsequential value and benefit to the bankruptcy estate, a trustee is authorized to abandon the property. Once property is abandoned, it is no longer property of the estate; instead the property reverts to ownership by the debtor. While a trustee's decision to abandon property is routine and typically undisputed, sometimes the decision to abandon property is contested and violates other laws, which is what occurred in the Supreme Court case of *Midlantic National Bank v. New Jersey Department of Environmental Protection*.<sup>3</sup>

In *Midlantic*, the Supreme Court held that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards. Quanta Resources Corporation (Quanta) processed waste oil at two facilities in New York and New Jersey respectively.

The New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had violated its operating permit at the New Jersey facility by accepting oil contaminated with a toxic carcinogen and issued an administrative order requiring Quanta to clean up the site. An investigation of the New York facility revealed that Quanta had stored similarly contaminated oil in deteriorating and leaking containers. The required clean up and disposal costs exceeded the site's value. Facing financial difficulties, Quanta filed for Chapter 11 bankruptcy reorganization, which was then converted to a Chapter 7 liquidation case. The Chapter 7 Trustee appointed to the case sought abandonment of both properties (including the contaminated oil on the sites) as burdensome and of inconsequential value in light of the environmental obligations.<sup>4</sup>

NJDEP and New York objected to the Trustee's proposed abandonment, citing public health and safety concerns and the fact that abandonment would violate state as well as federal environmental laws. They requested that property of the estate be used to bring the sites into compliance with applicable law.<sup>5</sup>

The Bankruptcy Court granted the Trustee's request for abandonment, noting that the public agencies were better situated "in every respect" than the Trustee or creditors of Quanta to protect the public and otherwise clean up the sites. The District Court affirmed.

On appeal, a divided panel of the Third Circuit reversed and remanded for further proceedings. The Third Circuit found that when Congress codified the judicially developed doctrine of abandonment at Section 554(a) as part of its 1978 revisions of the Bankruptcy Code, Congress did not intend to pre-empt all state regulation, but only those grounded on policies outweighed by federal bankruptcy interests. Therefore, the Bankruptcy Court erred in permitting abandonment in contravention of environmental laws. The Chapter 7 Trustee appealed to the Supreme Court.<sup>6</sup>

1 11 U.S.C. § 704.

2 U.S.C. 554(a).

3 *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494 (1986).

4 *Id.* at 496-97.

5 *Id.* at 498.

6 *Id.* at 499-500.



In a 5 to 4 decision, the Supreme Court affirmed the Third Circuit's opinion.<sup>7</sup> Writing for the majority, Justice Powell held that prior to the 1978 revisions of the Bankruptcy Code, a trustee's abandonment power was limited to a judicial equitable doctrine intended to protect legitimate state or federal interests. Thus, when Congress codified the abandonment power in 1978, there were already "well-recognized restrictions on a trustee's abandonment power" that Congress presumably included.<sup>8</sup> The Supreme Court further observed that neither Congress nor courts have ever granted trustees the power to abandon property in contravention of state or federal laws designed to protect public health and safety.<sup>9</sup> Other sections of the Bankruptcy Code, for example, the automatic stay under Section 362, and other federal laws recognize exceptions for public health and safety, all supporting Congressional intent to incorporate longstanding restrictions on a trustee's abandonment power.<sup>10</sup> The Supreme Court held that bankruptcy courts do not "have the power to authorize an abandonment without

7 *Id.* at 496.

8 *Id.* at 500-01

9 *Id.* at 502.

10 *Id.* at 505-06.

formulating conditions that will adequately protect the public's health and safety."<sup>11</sup>

*Midlantic* has produced two lines of cases.<sup>12</sup> "One line of cases hold that abandonment is appropriate unless there is a showing of imminent danger to public health and safety while the other line of cases holds that abandonment is appropriate only upon a showing of full compliance with the applicable environmental laws." In the former, obligations to clean up property could be abandoned alongside abandonment of the property itself, which would pave the way for greater distributions to creditors, at a cost to enforcement agencies and potentially the greater public. In the latter scenario, cleanup costs would be borne by the bankruptcy estate at the expense of its creditors, meaning, cleanup costs would be prioritized over payment to creditors.

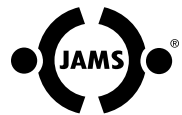
*Cathy Ta is Of Counsel at Best Best & Krieger LLP. She practices in the areas of insolvency, bankruptcy and business litigation. Holland Stewart is a litigation associate at Best Best & Krieger LLP.*



11 *Id.* at 507.

12 See e.g. *In re Eagle-Picher Holdings, Inc.*, 345 B.R. 860, 862 (Bankr. S.D. Ohio 2006).

# Neutrals Like No Others



## Hon. Joseph R. Brisco (Ret.)



Judge Brisco served for 21 years on the San Bernardino County Superior Court, most recently presiding over the mandatory settlement conference department. Regarded as a prompt and thoroughly prepared

neutral who is firm but fair with all sides to a dispute, Judge Brisco is available as a mediator and arbitrator in cases involving **business/commercial, employment, personal injury/tort, professional liability** and **real property** matters.

## Hon. Jeffrey King (Ret.)



Most recently an associate justice for the California Court of Appeal, Fourth District, Division Two, Justice King also handled civil and probate cases during eight years on the San Bernardino County Superior Court. Adept at keeping

cases on track and settling cases on appeal, he serves as a mediator, arbitrator, special master and referee in **appellate, business/commercial, employment, insurance, personal injury/tort, professional liability** and **real property** matters.

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# WILDFIRE LITIGATION: A PRIMER

by Christopher Sieglock

## Wildfire Litigation, What is it?

Eighty-four percent of fires are human-caused, whether by electrical lines and equipment, campfires or arson. Whereas the majority of these fires are not actionable, when litigation of these events does occur, it often stems from electrical lines, facilities and equipment (“electrical distribution systems”) igniting wildfires. Electrical distribution system fires can start in various ways, including: 1) transformers can explode; 2) electrical conductors can “slap” together thereby causing molten aluminum to fall to vegetation below; or 3) trees can lean into powerlines and catch on fire. Utility companies that erect and maintain powerlines have a duty and responsibility to the public to ensure that their electrical distribution systems are safe, reliable, and not causing these unfortunate wildfires.

## Liability in Wildfire Litigation

Plaintiffs typically sue under two theories of liability: inverse condemnation and negligence. In California, it is unnecessary to establish negligence or any fault to have a liability finding against utility companies. This is because California has a long history of analyzing wildfires under an inverse

condemnation theory. Any actual physical injury to property proximately caused by a public improvement as deliberately designed and constructed is compensable under Article I, Section 19 of the California Constitution, whether or not the injury was foreseeable. In *Barham v. S. Cal. Edison Co.*, 88 Cal. Rptr. 2d 424 (1999), the court held that privately held utilities could be liable under the theory of inverse condemnation, stating that no “significant differences exist regarding the operation of publicly versus privately owned electric utilities.” This claim also provides plaintiffs with the ability to recover attorney fees, interest, and costs.

Plaintiffs also often bring a claim under a negligence cause of action. Under this theory of liability, plaintiff will argue causation and unreasonable conduct by the entity that maintain, operate, inspect, and manage their electrical distribution systems. Plaintiffs will often argue that the entity’s unreasonable failure to properly maintain, operate, and inspect the electrical distribution systems or the vegetation surrounding the lines led to the fire. In support of their negligence theory, plaintiffs will often point to regulatory standards, customs, and standards in the industry, and results of internal audits done by the entities themselves. Establishing negligence in wildfire cases can provide for additional damages above and beyond what plaintiffs can receive under an inverse theory.

## Damages for Those Affected By Fires

Plaintiffs can recover various types of damages if they can establish liability, including: (1) the full cost to reconstruct the damaged structure or home; (2) the cost to restore the veg-

etation and mitigate potential erosion issues; (3) the value of damaged personal property; (4) business and wage losses; (5) annoyance and discomfort (which is akin to pain and suffering); and (6) attorney’s fees and costs under an inverse theory.

The courts have provided for restoration damages to individuals affected by wildfires. Individuals with property damage from the fires can restore their properties to the state their property was in before the fire. Restoration is available if the plaintiff has the reasonable intent to restore the property. The restoration of the property can be more than the pre-fire property value as long as it is reasonable. In these fire cases, generally all families who have lost their homes will have real property damages beyond insurance as the cost to restore their properties increases greatly after the fires. Contractors are in high demand, prices soar, and unfortunately, the restoration of these properties is much greater than the plaintiff’s insurance coverage.

## The Present and Future?

The wildfire litigation industry is growing quickly. California has experienced wildfires for many years, but 2017 has been the worst fire season in history. In October and December 2017, California suffered devastating fires in northern and southern California. The northern California fires burned at least 245,000 acres, 8,900 buildings, and tragically took the lives of 44 people. The Thomas Fire destroyed at least 281,893 acres and 1,050 structures. The Thomas Fire also led to catastrophic mudslides in Santa Barbara.

Cal Fire is the California agency that both fights the wildfires and investigates the cause and origin. Cal

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Fire will be releasing reports reflecting its conclusion as to the cause and origin of these fires. However, plaintiffs, their attorneys, and other investigators have already asserted that PG&E is responsible for many of the October northern California fires and that Southern California Edison is responsible for the December southern California wildfires and mudslides. Hundreds of individuals have filed lawsuits against these entities to recover damages.

Plaintiffs' attorneys are looking to put their clients in the position they were prior to the fire and also hope that this litigation can help change the utility companies' practices and procedures to reduce the amount of future wildfires.

*Christopher Sieglock is a principal of Sieglock Law, A.P.C. and Wildfire Legal Group. Mr. Sieglock exclusively practices wildfire litigation and currently represents over 750 individuals, ranches, and businesses in wildfire cases. His offices are located in Del Mar, Elk Grove, Ventura, and Santa Rosa.*



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# STATE WATER BOARD'S RULEMAKING ON "WATER WASTE" PROHIBITIONS DRAWS WIDESPREAD INTEREST THROUGHOUT CALIFORNIA

*by Deb Kollars*

The State Water Resources Control Board (Board) is in the midst of rulemaking that would, for the first time, impose permanent prohibitions on certain wasteful water use practices, such as applying potable water to sidewalks and driveways, and washing vehicles with hoses that do not have shut-off nozzles. The proposed regulation, which is designed to promote conservation, has drawn widespread interest from all corners of the state. While a number of cities, water agencies, and interest groups support the measures within the draft regulation, many water suppliers are concerned about the practical and legal implications if it is adopted.

The Board opened the rulemaking process to permanently ban certain water use practices on November 2, 2017. The initial comment period on the proposed regulation ran through December 26, 2017. In response to comments, the Board issued a revised draft regulation on January 31, 2018, and opened an additional comment period of 15 days. The Board scheduled potential adoption of the regulation at a meeting on February 20, 2018, but postponed action and instead held a workshop on the issue.

The rulemaking process is an outgrowth of Governor Jerry Brown's Executive Order B-37-16 (Order), issued on May 9, 2016, to address drought conditions and future potential water shortages. The Order came during a severe drought that affected most of the state. Called "Making Water Conservation a California Way of Life," the Order called on several state agencies, including the Board and Department of Water Resources, to develop a comprehensive long-term plan for conserving water statewide. The Order required the Board to permanently prohibit wasteful water practices similar to those imposed by the Board through an emergency conservation regulation, which was adopted in 2014, amended and extended several times, and expired on November 25, 2017.

As currently drafted, the Board's proposed permanent regulation would identify the following water uses as wasteful and unreasonable water use practices in a proposed new article within Title 23 of the California Code of Regulations. They include:

- Applying water to outdoor landscapes in a manner that causes more than incidental runoff onto adjacent property, non-irrigated areas, private and public walkways, roadways, parking lots, or structures.
- Using a hose to wash motor vehicles without a shut-off nozzle.
- Applying potable water directly to sidewalks and driveways.
- Using potable water in ornamental fountains or other decorative water features, except where the water is part of a recirculating system or is registered on the National Register of Historic Places.
- Applying water to irrigate turf and ornamental landscapes during and within 48 hours of measurable rainfall of at least one-fourth of one inch.
- Serving drinking water other than upon request in eating and drinking establishments, applicable only during a period for which the Governor has issued a proclamation of a state of emergency based on drought conditions.
- Effective January 1, 2025, irrigating turf on public street medians or publicly owned and maintained landscaped areas between the street and sidewalk, except where the turf (a) serves a community or neighborhood function, (b) is irrigated incidentally by an irrigation system designed for tree watering, or (c) is irrigated with recycled water through an irrigation system installed prior to January 1, 2018.

The draft regulation also would require operators of hotels and motels to offer guests the option of not having their towels and linens washed daily.

The draft regulation would provide an exception to the prohibitions under three scenarios: (1) to the extent necessary to address a health and safety need, (2) to the extent necessary to comply with a term or condition in a state or federal permit, and (3) when water is used exclusively for commercial agricultural uses. Failure to comply



would become an infraction punishable by a fine of up to \$500 for each day the violation occurs.

The Board prepared an Initial Study pursuant to the California Environmental Quality Act to provide preliminary analysis of the proposed action. The Initial Study found the proposed regulation would not have a significant effect on the environment. As a result, the Board prepared a Negative Declaration. The Board stated that the proposed regulation would “safeguard urban water supplies” and “minimize the potential for waste and unreasonable use of water.” In its analysis, the Board acknowledged that potential water savings if the regulation is enacted would likely be “relatively minor.”

The Board’s Economic Impact Analysis estimated an annual water savings of 12,489 acre-feet statewide. This analysis also concluded that the water conservation expected to result from the action could lead to declining water sales and declining utility revenues, thereby leading to rate adjustments for local water agencies.

Public reaction to the proposed regulation was strong, both in terms of support and in terms of opposition. Many commenters said they support the proposed prohibitions as reasonable conservation measures in a state where water needs can outstrip available water resources.

However, many commenters expressed concern over the draft regulation’s categorical determination that certain water uses and practices are per se wasteful and unreasonable. They stated that the proposed regulation is too broad and restrictive, would violate law and due process, and would be unfair to water right holders affected by the regulation. In particular, concerns were raised about the Board’s use of the waste and unreasonable use provisions under Article X, Section 2 of the California Constitution as legal justification for the new regulation.

Practical concerns also were raised. Many municipalities and water suppliers, which have been developing recycled water supplies for local uses such as landscape irrigation, asked the Board to limit the

wasteful water prohibitions to “potable water” rather than the more sweeping “water” terminology applied to some measures. Not everyone agreed, however, with some commenters suggesting that such an exception for recycled water would cause it to be viewed as a less valuable water resource.

One commonly expressed concern involved the proposed measure prohibiting individuals or entities from irrigating turf on public street medians or public landscaped areas between streets and sidewalks, with certain exceptions. Many commenters found this to be overly prescriptive and said it could harm trees and community aesthetics. In response to those concerns, the Board modified this proposed measure somewhat and pushed the effective date to January 1, 2025, to give public agencies time to make changes to landscapes.

No date has been set for final Board consideration of the proposed new regulation. At the February 20 workshop, staff members indicated they hoped for adoption during April of this year. The documents pertaining to this rulemaking, as well as public comments, can be found at this site: [https://www.waterboards.ca.gov/water\\_issues/programs/conservation\\_portal/regs/wasteful\\_water\\_uses.html](https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/wasteful_water_uses.html).

*Deb Kollars is an attorney at Best Best & Krieger, LLP in the environmental and special districts practice group.*



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# RECENT AND UPCOMING CHANGES TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

*by Amanda Daams*

The California Environmental Quality Act (CEQA), codified at Public Resources Code section 21000 et seq., is arguably California's preeminent and most comprehensive environmental law. Adopted in 1970 and patterned after the National Environmental Policy Act, CEQA's overriding goals are to protect the environment and further public disclosure. Most proposals for physical development in California are subject to the provisions of CEQA, as are many governmental decisions which do not immediately result in physical development, such as adoption of a general plan.

Public agencies are required to comply with CEQA when undertaking an activity defined as a CEQA "project." A project is an activity undertaken by a public agency or a private activity which must receive some discretionary approval from a government agency, which may cause either a direct or a reasonably foreseeable indirect change in the physical environment. (14 Cal. Code Regs., [hereinafter "Guidelines"] § 15378.) Thus, every development project which requires a discretionary public agency approval will require at least some level of environmental review pursuant to CEQA, unless an "exemption" from CEQA applies. Depending on the proposed project's potential environmental effects, substantial environmental review may be required in the form of a Negative Declaration, Mitigated Negative Declaration, or Environmental Impact Report. These documents often require a team of expert consultants to prepare, months (or even years) to prepare and publicly circulate, and often come with substantial price-tags well into the six figures or beyond. Ultimately, a project may not be approved if feasible alternatives or feasible mitigation measures are available to avoid or substantially lessen the significant environmental effects of the project while still achieving the project's basic objectives.

CEQA is self-executing. Public agencies are entrusted with compliance with CEQA, and its provisions are enforced by the public through comments and public participation, or litigation or the threat of litigation. While some argue that CEQA and associated CEQA litigation are used to stop projects, the purpose of CEQA is to ensure that environmental impacts are adequately disclosed and mitigated to the extent possible. When deciding CEQA disputes, the courts have played an important role in filling the gaps left in the CEQA statute and its associated Guidelines by

the legislature, as well as resolving ambiguities and uncertainties in the statutory language. However, courts are not empowered to decide whether a project is a good or bad idea, or to re-weigh the policy implications of public agency decisions. To the contrary, the role of the courts is limited to confirming that CEQA's procedural mandates are met and that an agency's decision is supported by substantial evidence in the record.

Given the role of the courts, as well as CEQA's almost 50-year history, the need for "CEQA reform" is often discussed. While outright "reform" may not be on the horizon just yet, there are a number of important refinements to CEQA that have occurred in the past year and are anticipated to occur in 2018. The following summarizes those developments.

## **I. Guidelines Updates**

One of the biggest anticipated changes to CEQA are the proposed revisions to the State CEQA Guidelines (Cal. Code Regs., tit. 14 § 15000 et seq.) The Guidelines are administrative regulations addressing the implementation of CEQA. The Guidelines reflect and elaborate upon the requirements set forth in the CEQA statute itself, as well as court decisions interpreting CEQA. The Guidelines apply to public agencies throughout California, including local governments, special districts, and state agencies. Minor amendments are made to the Guidelines nearly every year, but comprehensive updates are typically brought forward only every few years. The currently proposed set of updates would be the most comprehensive Guidelines update since 1998.

The Governor's Office of Planning and Research (OPR) prepares and develops proposed amendments to the Guidelines and transmits them to the Secretary for Resources. The Secretary for Resources is responsible for certification and adoption of the Guidelines and any amendments thereto. The rulemaking process has been ongoing for years, leading up to OPR's submittal of the comprehensive update package to the Resources Agency, and the release of the proposed Guidelines for public review in November 2017. The proposed Guidelines update contains three overarching types of improvements – efficiency improvements, substance improvements, and technical improvements. For further reference, the full

Guidelines update package is accessible at: [http://www.opr.ca.gov/docs/20171127\\_Comprehensive\\_CEQA\\_Guidelines\\_Package\\_Nov\\_2017.pdf](http://www.opr.ca.gov/docs/20171127_Comprehensive_CEQA_Guidelines_Package_Nov_2017.pdf).

Major proposed efficiency improvements include several changes to the Guidelines Appendix G Checklist, which is used by most agencies to evaluate project impacts when conducting environmental review. Duplicative questions would be eliminated and some issues would be reorganized. Notably, the Checklist adds new questions related to transportation and wildfire, pursuant to Senate Bill 743 (Steinberg, 2013), and Senate Bill 1241 (Kehoe, 2012), respectively. It also relocates questions related to paleontological resources as directed in Assembly Bill 52 (Gatto, 2014).

Major substantive improvements include guidance regarding how to analyze a project's energy usage and impacts. Previously located in Guidelines Appendix F and often limited to EIRs, the energy impact analysis would now be included in Guidelines Appendix G – thus more clearly requiring agencies to address energy consumption as part of all of their CEQA processes. Additionally, the updates propose guidance on the water supply impact analysis stemming from the holding of the California Supreme Court in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412 (*Vineyard*). Specifically, the proposed Guidelines would require the consideration of a proposed project's possible sources of water supply over the life of the project and the environmental impacts of supplying that water to the project. The analysis must consider any uncertainties in supply, as well as potential alternatives. Additionally, the package contains long-awaited updates related to analyzing transportation impacts pursuant to Senate Bill 743, which will require that public agencies use vehicle miles travelled – rather than level of service – for analyzing transportation impacts.

Major technical improvements include clarifications on how agencies should identify the “baseline” conditions against which they compare a proposed project's impacts, and under what circumstances an agency may utilize historical or future conditions (in lieu of current conditions) as the baseline. Finally, the package includes technical changes to Guidelines Appendices D and E to reflect recent statutory requirements and previously adopted amendments to the CEQA Guidelines, and to correct typographical errors.

The Resources Agency made the proposed Guidelines update available for public review, with the comment period closing on March 15, 2018. Once the Resources Agency responds to the public comments received, the Resources Agency will prepare the final rulemaking file and submit it to the Office of Administrative Law (“OAL”) for review and final approval. Guidelines approved by OAL are deposited

with the Secretary of State and go into immediate effect. As the current comprehensive update is far along in the rulemaking process, it is anticipated that a package very close to the proposed Guidelines updates discussed above will be adopted later this year. Finally, as with all Guidelines updates, any modifications to the Guidelines which are enacted will only apply prospectively.

## II. Legislative Updates

The 2017 legislative session was dominated by the need to enact legislation related to California's housing shortage. To that end, the legislature passed 15 housing bills in 2017, many of which have CEQA implications. Several other bills passed in 2017 also have CEQA ramifications in a variety of areas, some of which are highlighted below.

- (1) AB 73 (Chiu D) Planning and Zoning: Housing Sustainability Districts. The Planning and Zoning Law requires a city or county to adopt a general plan for land use development within its boundaries. The general plan must contain seven mandatory elements, including a housing element. Existing law provides for various reforms and incentives intended to facilitate and expedite the construction of affordable housing. This legislation authorizes a city, county, or city and county, including a charter agency to establish by ordinance a housing sustainability district that meets specified requirements, including authorizing residential use within the district through the ministerial issuance of a permit. As it relates specifically to CEQA, this bill directs a lead agency, when designating housing sustainability districts, to prepare an EIR for the designation, as specified. The bill exempts from CEQA, however, housing projects undertaken in the housing sustainability districts that meet specified requirements, including if the project satisfies certain design review standards applicable to development projects within the district provided the project is “complementary to adjacent buildings and structures and is consistent with the [agency's] general plan.”
- (2) AB 246 (Santiago D): Environmental Quality: Jobs and Economic Improvement Through Environmental Leadership Act of 2011. The Jobs and Economic Improvement Through Environmental Leadership Act of 2011 authorized the Governor, until January 1, 2018, to certify projects that meet certain requirements, including the requirement that the project is certified as LEED silver or better by the United States Green Building Council, achieves a 10% greater standard for transportation efficiency than for comparable projects,



and creates high-wage, highly skilled jobs that pay prevailing wages and living wages, for streamlining benefits provided by that act. The act provides that if a lead agency fails to approve a project certified by the governor before January 1, 2019, the certification expires and is no longer valid. AB 246 requires a lead agency to prepare the record of proceedings for the certified project concurrent with the preparation of the environmental documents. The act is repealed by its own terms on January 1, 2019.

This bill increases the certification of the project to LEED gold or better and increases the transportation efficiency to a 15% greater standard than for comparable projects. The bill requires the project applicant to demonstrate compliance with requirements for commercial and organic waste recycling, as applicable. The bill extends the authority of the governor to certify a project to January 1, 2020. The bill provides that the certification expires and is no longer valid if the lead agency fails to approve a certified project before January 1, 2021. The bill repeals the act on January 1, 2021. The bill also requires the Judicial Council to adopt a rule of court to establish procedures for judicial review of a lead agency's certification of the EIR of a certified project or the approval of a project to ensure that the judicial review is completed within 270 days of the certification of the record of proceedings for the project. As a result of this bill, the Judicial Council is instead directed to require the review to be completed within 270 days of the filing of the certified record of proceedings (i.e., administrative record) with the court to the extent feasible.

- (3) AB 1218 (Obernolte R) California Environmental Quality Act: Exemption: Bicycle Transportation Plans. CEQA exempted from its requirements bicycle transportation plans for an urbanized area for restriping of streets and highways, bicycle parking and storage, signal timing to improve street and highway intersection operations, and related signage for bicycles, pedestrians, and vehicles under certain conditions. CEQA also exempted from its requirements projects consisting of restriping of streets and highways for bicycle lanes in an urbanized area that are consistent with a bicycle transportation plan under certain conditions. This bill extends the two exemptions until January 1, 2021.

### III. Case Law Updates

As stated above, the courts play an important role in the interpretation of CEQA, and therefore its implementa-

tion. In 2017, the California Supreme Court decided three cases affecting CEQA review going forward.

First, in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, the court held that even where the California Coastal Commission, and not the lead agency (here, a city), will make a final determination regarding Environmentally Sensitive Habitat Areas, or "ESHA" on a project site, the CEQA lead agency could not defer those questions to a subsequent Coastal Commission permitting process. Instead, the lead agency has the obligation to identify and discuss project impacts to those sensitive areas. The case impacts how lead agencies approach regulatory topics that are the subject of permitting by other agencies and provides a cautionary tale of why environmental analysis under CEQA should not defer discussion of such topics to subsequent processes by other agencies.

Second, in *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, the Supreme Court reversed the court of appeal decision overturning the San Diego Association of Governments' (SANDAG) 2050 Regional Transportation Plan and Sustainable Community Strategy for failing to assess the plan's consistency with the 2050 GHG reduction goal contained in Executive Order S-3-05. In a narrow holding, the court found that SANDAG was not required to use Executive Order S-3-05 targets as a threshold of significance under CEQA, but also confirmed that, in view of rapid changes in science, lead agencies must be nimble in terms of their analysis of GHGs going forward.

Third, in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, the Supreme Court examined whether the federal Interstate Commerce Commission Termination Act ("ICCTA") preempted CEQA review. The court held that while ICCTA is broad and preempts CEQA as applied to private rail owners and operators, it does not preempt CEQA in the case of a state subsidiary, like North Coast Railroad Authority, because there was no indication that Congress intended to preempt states' powers of self-governance. The case is important in that it may weaken claims of federal preemption in instances where a state agency is involved in carrying out a project, beyond merely approving the project.

In summary, proposed CEQA Guidelines, new legislation, and Supreme Court guidance continue to modify and elaborate upon CEQA's requirements for public agencies. With so much accomplished in 2017 and more changes on the horizon, 2018 looks to be a busy year for CEQA practitioners.

*Amanda Daams is an associate attorney at Best Best & Krieger LLP. Please see her profile on page 6.*



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# EMPYREAL, HELIACAL, CELESTIAL – AHHHHHH...MAYBE NOT SO MUCH!

by Boyd Jensen

I came to know her when she was a clerk at the City of Corona. A hard-working, government employee, supporting herself after her husband passed, and to improve her domestic economics, she accepted the solicitation of a solar company with local salesmen. She produced the required utility statements, reviewed the plans, and contractor options, signed the lease financing documents, and the project was never able to get off the ground. The other client, with disabled children whose grandchildren she babysat, thought there would be a savings in going solar. She was required to obtain a loan and half of it was taken before the project was substantially underway.

These examples raised seemingly conventional contractual issues, but in addition introduced the “solar energy” legal environment regarding the installation and operation of not just residential, but commercial, industrial, and agricultural solar energy system, which this article, in summary form, seeks to illuminate. The *McGeorge Law Review* article by Jacqueline Zee states, “In 2005, the governor [Schwarzenegger] took a step towards achieving his ambitious goal, to have *one million solar roofs in California by 2018*, providing 3,000 megawatts of clean, solar-produced energy and reducing greenhouse gas emissions by three million tons.” (Italics added.)<sup>1</sup>

Due to government tax incentives and promised increased home values, solar panels are rapidly being installed on homes. In 2011, the Home Energy Retrofit Opportunity (HERO) program was created by the Western Riverside Council of Governments (WRCOG), a multi-city agency with jurisdiction for development essentially west of the City of Banning. The program’s intention was to aid homeowners in obtaining affordable energy-efficient products. Similar to PACE (Property Assessed Clean Energy) legislation, these government-incentivized programs aid property owners in financing “green energy.”<sup>2</sup>

While seemingly great for the environment, solar panel installations present problems such as the following:

- (1) Untrustworthy contractors and salesmen using accessible home equity in exchange for lower monthly utility bills;
- (2) Increased real estate errors and omission claims;
- (3) Friction with homeowner’s associations, which was addressed in the 1978 Solar Rights Act (Civil Code § 714), barring certain restrictions set by homeowners associations (HOAs);<sup>3</sup>
- (4) Lengthy lease concerns, which were sometimes 20 years;
- (5) Expensive upgrades and repairs due to outdated or obsolete technology, inverter inefficiency, and solar panel maintenance expenses or roof repair; and
- (6) Subsequent home sales complications, do I transfer or buy out the remainder of the solar lease and due to government credits, what hassles exist contacting city or county government offices.

As a further example of the challenges, follow this brief back and forth history of solar credits in the ruling *In the Matter of the Appeal of Nassco Holdings, Inc.*, 2010-SBE-001 Case No. 317434, November 17, 2010. This is a case dealing with a San Diego shipbuilding company’s Enterprise Zone (EZ) hiring credits and Manufacturer’s Investment Credit (MIC) reducing their alternative minimum tax (AMT) liability to zero. The issue was whether MIC and EZ hiring credits could reduce AMT liabilities, pursuant to *R&TC § 23036* (d)(1). In considering this appeal, the California State Board of Equalization “discussed the legislative history of solar energy credits contained in subdivision (d)(1) of *R&TC § 23036*,” pointing out that solar energy credits could be used to reduce the AMT. But “(I)n 1988, Senate Bill (SB) 1801 *repealed R&TC § 23036* and a result of these statutory changes,... the solar energy credits, located in subdivision (d)(1) of *R&TC § 23036*, *could no longer be used* to reduce the AMT.” HOWEVER “SB 1801...amended the solar energy credit statutes and added a clause to *R&TC § 23601.4* which specified that the solar energy credits *could be applied against...the AMT....*” (Italics added.)

1 Ms. Zee’s main article thesis related to the mandatory pricing system of the Public Utilities Code particularly section 2851 and amendments thereto. The reference above was at 39 *McGeorge L. Rev.* 637, 640 (2008.)

2 \$0 down solar loan, where one can normally deduct the interest on payments and enjoy a 30% federal tax credit. The program allows payment of loan financing through tax bills. This is similar to an FHA Title 1 Zero down solar loan, in most cases needing but a 650 credit score.

3 For example reasonable attorney’s fees may be awarded prevailing consumers, HOA civil penalties not to exceed \$1,000 and information requirements such as timely written notification of denials. But see *Tesoro Del Valle Master Homeowners Assn. v. Griffin*, 200 Cal. App. 4th 619 (2011) where the HOA prevailed.



The City of Riverside, similar to other municipalities, provides more predictable and contoured regulatory support. The Riverside Municipal Code, sections 16.22.010 – 16.22.060, enact a Solar Streamlined Permitting Process. The purpose of this ordinance is to “create an expedited, streamlined solar permitting process that complies with the Solar Rights Act to achieve timely and cost-effective installations of small residential rooftop solar energy systems.” It applies to the “permitting of all small residential rooftop solar energy systems in the City.” The City defines the “Solar Energy System” either “Any solar collector or other solar energy device whose primary purpose is to provide for the collection, storage, and distribution of solar energy for space heating, space cooling, electric generation, or water heating...(or)...Any structural design feature of a building, whose primary purpose is to provide for the collection, storage, and distribution of solar energy for electricity generation, space heating or cooling, or for water heating.” These systems should be “no larger than 10 kilowatts alternating current...nameplate rating or 30 kilowatts thermal;...(and) conform to all applicable state fire, structural, electrical, and other building codes.”

All solar energy systems must meet applicable health and safety standards and the requirements imposed by the state, the city, local fire department, and utility director; and as necessary meet the requirements of the California Plumbing and Mechanical Code (swimming pools type

usage), applicable California Electrical Code, and the Public Utilities Commission. Riverside offers online access to the city’s website for application submission and the current version of the consumer friendly, state publication, *California Solar Permitting Guidebook* adopted by the Governor’s Office of Planning and Research (Ord. 7297 §2, 2015). An “expedited permit review” is available to those seeking “small residential rooftop solar energy systems” and generally only one inspection is required and performed by the Building and Safety Division.

The charge to effectively utilize “solar” energy may not be *Empyrean, Heliacal, or Celestial* but it resolutely persists, particularly in California and in Riverside. The market has seen recent declines in system sales,<sup>4</sup> but the investment made in California energy has produced results from which other states also benefit.<sup>5</sup>

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



<sup>4</sup> See *Is California’s Weak Q1 a Sign of Residential Solar’s Future?* by Austin Perea; gtm: GTM Research Spotlight (June 20, 2017) [greentechmedia.com.] KPCC *Rooftop Solar Sales Plummet in California* KQED 2018.

<sup>5</sup> See “California invested heavily in solar power. Now there’s so much that other states are sometimes paid to take it,” by Ivan Penn; *Los Angeles Times* (June 22, 2017) [LATIMES.com.]

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# IN MEMORIAM: JOHN MARCUS, A TRUE GENTLEMAN

*by Don Cripe*

I first met attorney John Marcus several years ago when the Riverside family court VSC program began (when he was in his 70s). I immediately noticed that John was a gentleman and that he had a vast treasure-trove of history to share. I had the pleasure of working with Chris Jensen and Judge Jack Lucky (among many others) who organized the VSC program, so I was gratified that John had signed on to be one of the program mediators. As my admiration and acquaintance of John grew, I was given the privilege of profiling him for the *Riverside Lawyer*, which allowed me even more access into John's mind and history. I recently received the sad news that John had passed away on March 8.

John was admitted to the bar in 1955 and initially his legal career was focused in the Inland Empire and included a broad array of law. He finally settled on a general civil practice in San Bernardino until the last few years of his legal career when he moved to Riverside. John closed his law practice shortly after I met him about ten years ago.



*John Marcus*

John was a remarkable man. Suffering from congestive heart disease and being in his 80s, John remained active in the courts as a mediator. John and his recent bride resided near Palm Springs. With all the obstacles he faced, he was a reliable member of the family court mediation panel. Every first and third Friday, John made the 140-mile round trip between his home and the court to *volunteer* his decades of experience to the court hoping to help litigants settle their cases. Always smiling and seemingly happy (even as his strength and health deteriorated over the last couple of years), those of us who staffed the panel with

John were always at ease when we arrived to see his little red, latest generation, Ford Thunderbird parked in the lot.

I revered and admired John for the consummate professional and gentleman he was. He will be deeply missed.

*Donald B. Cripe is a retired trial lawyer and full time ADR professional and founding member of the California Arbitration & Mediation Services.*



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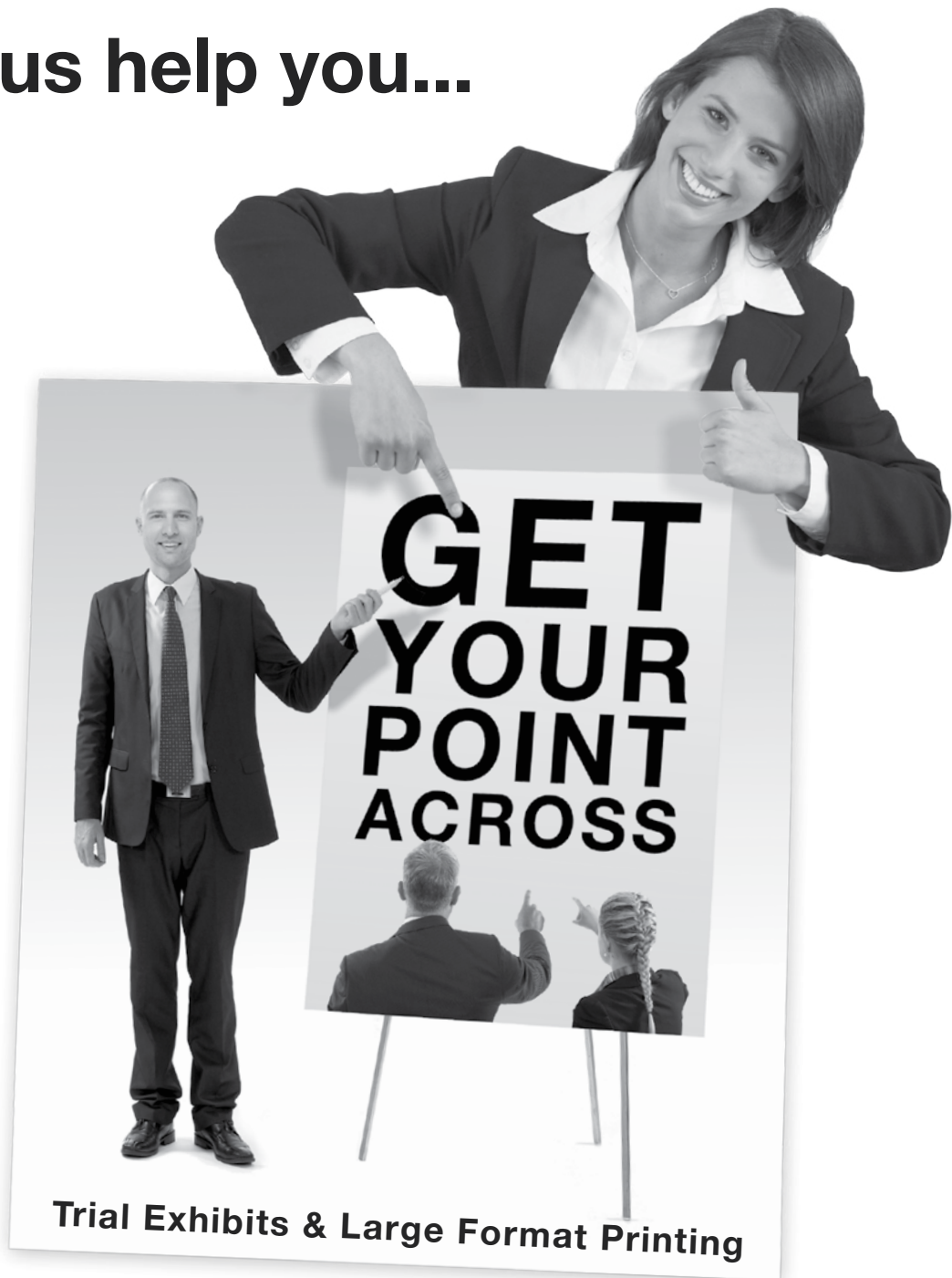
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# KRIEGER AWARD NOMINATIONS SOUGHT

by Judge John Vineyard

The Riverside County Bar Association has two awards that can be considered “Lifetime Achievement” awards. In 1974, the RCBA established a Meritorious Service Award to recognize those lawyers or judges who have, over their lifetimes, accumulated outstanding records of community service beyond the bar association and the legal profession. The E. Aurora Hughes Award was established in 2011 to recognize a lifetime of service to the RCBA and the legal profession.

The Meritorious Service Award was named for James H. Krieger after his death in 1975, and has been awarded to a select few RCBA members that have demonstrated a lifetime of service to the community beyond the RCBA. The award is not presented every year. Instead, it is given only when the extraordinary accomplishments of particularly deserving individuals come to the attention of the award committee.

The award is intended to honor the memory of Jim Krieger, and his exceptional record of service to his community. He was, of course, a respected lawyer and member of the Riverside bar. He was a nationally recognized water law expert. But, beyond

that, he was a giant in the Riverside community. He was known and respected in too many community circles to name (see the great article by Terry Bridges in the November 2014 issue of this magazine). The past recipients of this award are all known and respected by the community at large – Judge Victor Miceli, Jane Carney, Jack Clarke, Jr. and Virginia Blumenthal, for example.

The award committee is now soliciting nominations for the award. Those eligible to be considered for the award must be (1) lawyers, inactive lawyers, judicial officers, or former judicial officers, (2) who either are currently practicing or sitting in Riverside County, or have in the past practiced or sat in Riverside County, and (3) who, over their lifetime, have accumulated an outstanding record of community service or community achievement. That service may be limited to the legal community, but must not be limited to the RCBA.

Current members of the RCBA Board of Directors are not eligible, nor are the current members of the award committee.

If you would like to nominate a candidate for this most prestigious of RCBA awards, please submit a nomination to the RCBA office not later than May 11, 2018. The nomination should be in writing and should contain, at a minimum, the name of the nominee and a description of his or her record of community service and other accomplishments. The identities of both the nominees and their nominators shall remain strictly confidential.

*Judge John Vineyard is the chair of the Krieger Meritorious Service Award Committee and a past president of the RCBA.*



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# MARTIN LUTHER KING HIGH SCHOOL EDGES POLY HIGH FOR MOCK TRIAL CHAMPIONSHIP

by John Wahlin



1st Place - Martin Luther King Jr. High School

The championship round of the Riverside County Mock Trial Competition found two perennial powers, Martin Luther King High School and Poly High School, once again facing each other. While Poly had been County Champion in six of the last seven years, it had been eleven years since King's championship. This year it was King that emerged as the County Champion in a tightly contested competition.

The case, *People v. Davidson*, involved a charge of murder arising out of political rally with a 4th amendment issue being debated in the pre-trial motion. Superior Court Presiding Judge Becky Dugan presided over the trial before a distinguished panel of scoring attorneys, which included District Attorney Michael Hestrin, Public Defender Steven Harmon, RCBA President Alexandra Fong, and defense attorney Paul Grech.

The competition was conducted in the usual format with the first round held in three regional venues and the remaining rounds in the Riverside Hall of Justice. Twenty-six teams competed in the first four rounds. The top eight teams based on win/loss and points continued the competition in the "Elite 8" single elimination tournament. The pairing of the Elite 8 teams included, Poly vs. Arlington High School; Martin Luther King vs. John W. North High School; Murrieta Valley vs. Notre Dame High School; and Ramona vs. Valley View High School.

The competition then went to the semifinal round, in which Martin Luther King faced Murrieta Valley and Poly faced Ramona. Martin Luther King and Poly won

3rd Place - Murrieta Valley High School



2nd Place - Poly High School

that round, setting up the King-Poly championship round, which was won by King.

This year's Elite 8 included six teams from last year's Elite 8 and two newcomers, Ramona High School and John W. North High School, both from Riverside. For the first time in several years, six of the eight teams were from the Riverside Unified School District. Notre Dame is also located in Riverside.

Individual awards for outstanding performances were announced at the awards ceremony. First, second and third place awards were presented in attorney and witness categories. Internships with the District Attorney, Public Defender, and the Superior Court were awarded to the top trial and pre-trial. The Superior Court internship had been initiated last year under the direction of Judge Helios Hernandez. Judge Hernandez was also honored before the championship round for his service over the years to the mock trial program.

As always, it is the many volunteers from the legal community that drive the success of the program. Without coaches, judges and scoring attorneys, there would be no program. For more information concerning the volunteer opportunities, please contact the RCBA.

*John Wahlin, Chair of the RCBA Mock Trial Steering Committee, is a partner with the firm of Best Best & Krieger, LLP.*



3rd Place - Ramona High School



# WHY DO WE DO WHAT WE DO? A PERSPECTIVE FROM RIVERSIDE COUNTY MOCK TRIAL COACHES

by Breanne Wesche

When I was asked to write an opinion piece on why I coach high school Mock Trial in Riverside County, I found the list of reasons to be both never-ending and elusive. Flooding through my mind were memories of the impact my own law school Mock Trial coaches made on my life, the hopes I have of making the same kind of impact on the youth in Riverside, and the fact that the stiff competition of Riverside Mock Trial makes coaching just plain fun. I knew that the best place to seek inspiration was from the legal community that I am now proud to be a part of a family of Mock Trial coaches.

When talking to my fellow coaches about why they volunteer in Mock Trial, I immediately heard the same words and ideas come up again and again. Coaching Mock Trial and working with these students is “enriching,” “an honor,” and “a privilege.” But even more specifically, what are the experiences and rewards that keep us coming back month after month, year after year? Why do we do what we do?

We coach because we are eager to share our own life experiences and fortunes with enthusiastic young students. As John W. North coach, Yoginee Braslaw, told me, “I coach Mock Trial because I enjoy using my life experience, both as an attorney and as a mom, to teach the children about the legal process and to support their passions to learn. I’ve watched these kids grow into confident speakers and advocates. If any of the Mock Trial team actually goes on to become attorneys, I’m honored that I was a part of their path.” Indeed, there is a great sense of pride in seeing a student’s passion for the law blossom and hearing about how they are setting their sights on universities with the best pre-law and law programs.



North High School

Further, even if our students decide to choose a career outside of the law, we thrive on knowing that we are teaching these students the invaluable and transferable skills of civility, professionalism, and public speaking. Throughout the season, we certainly celebrate students learning legal skills such as arguing objections, crafting a cross examination, and presenting an opening statement. But even more rewarding is when we witness the “popular” student volunteering to help their shy classmate, the disorganized student showing up to practice with a perfectly tabbed binder, and the competitive student standing up after a tough round and heading straight to their competitor to smile and shake their hand. What a true honor to witness.

We coach because we are grateful to those who taught us and we want to pay forward the same good will. Carlos Monagas, Poly High School alumnus and Mock Trial coach, shared how his experience as a Mock Trial student inspired – and continues to inspire – his twenty years of coaching at his alma mater. “When I was a Mock Trial student, my coaches – Steve Harmon and Judge Helios Hernandez – helped me discover a passion for the law and for courtroom advocacy,” says Monagas. “I went to college knowing that ultimately I wanted to attend law school and become a trial lawyer. Later, upon passing the bar, I volunteered to coach Mock Trial at my alma mater hoping to give back to the program that has done so much for me; to pay it forward. Twenty years later, I continue to coach.”

The lifelong influence made by Public Defender Steve Harmon and Judge Helios Hernandez is exactly the type of impact that we coaches are hoping to have. Not only are we potentially impacting the future career paths of our students, but we are also demonstrating to our students the importance of being an active member of their communities. More specifically, we are showing them what a wonderful place Riverside is to practice law. We hope that they see how attorneys from all sectors come together for the common good of the community. From civil litigators to public defenders, new associates to senior partners, and trial attorneys to trial judges – we are all eager to come together for this program.

We coach because these kids are downright impressive and having the honor to witness their growth is incredible. Kevin Oakes, an Arlington High School coach, said, “It’s truly a privilege to be involved in such a program. Every





Notre Dame High School

year, I am astounded at how quickly Riverside County students develop their trial advocacy skills.” As explained by Virginia Blumenthal, one of the cofounders of Riverside’s Mock Trial program, “Riverside County is the high school Mock Trial mecca of the United States. Our county champions are always forces at the California State Competition and our State Champions are always feared at the National Competition. Arlington High School was a national champion and Poly High School was also undefeated at Nationals.”

Given the tradition of excellence in Riverside County’s Mock Trial program, it should come as no surprise that the program was incepted with the same passion that its coaches still hold to this day. When this program was founded in 1979 by Dr. Dale Holmes (former Superintendent of the Riverside County Office of Education) and Virginia Blumenthal, the goal was to create a program that taught students “analysis, organization, team coordination, acting, law, hard work, and healthy competition.” Within just two years of the program’s inception, the efforts of inaugural supporters such as Dr. Holmes and Blumenthal made Riverside Mock Trial what it is today: a source of great pride and community involvement. In looking back on her decades of coaching and supporting the Riverside Mock Trial program, Blumenthal shares, “I have seen many, many participating students become terrific attorneys but, just as importantly, I have also seen students start believing in themselves and their potential, and continue to advanced degrees in fields in which they never thought they could perform.”

Of course, even as much as all of us coaches love our teams, there may still be times throughout the season when we are weighed down by our own personal and professional obligations, and we too may ask ourselves, “Why do I do what I do?” Maybe we’re facing a tough deadline at work or we’re missing a family gathering for the students’ weekend scrimmage. But then, we remember that senior thanking us for allowing him to learn things about himself that he wouldn’t have otherwise learned. We remember the student who hadn’t quite found her way in high school until she thrived with her Mock Trial family and the relationships that we ourselves have built, with all of the diverse practicing attorneys who are on this journey with us.

As it turns out, we do what we do because these students and this program are truly enriching our own lives.

*A special thank you goes out to all of our fellow coaches, teachers, families of students, scoring attorneys, presiding judges, and the Riverside Office of Education. We could not do any of this without your continued support.*

*Breanne Wesche is an associate at Rizio Law Firm, Notre Dame alumna, and Notre Dame Mock Trial Coach.*



NOTE: The State Mock Trial competition was held March 16-18 in Orange County. Martin Luther King High School was 4-0 and finished third. Tamalpais (Marin County) defeated Shasta (Shasta County) for the championship. King beat iLead Academy (Los Angeles), Santa Cruz, University (Orange County) and last year’s champion Carmel (Monterey). Awards for King: Daniel Sosa for Best Attorney and Alex Pidgeon for Best Pre Trial Atty. Congratulations to King High School.



King High School



Arlington High School

# OPPOSING COUNSEL: JONATHAN E. SHARDLOW

by Stefanie G. Field

While one of Jonathan E. Shardlow's primary areas of practice is environmental law, he fell into this practice by happenstance, rather than design. He believed that he wanted to be a labor and employment attorney, but the Oregon Department of Justice, one of the best places for him to gain experience in law school, could only provide him an internship opportunity in their environmental division. He took it and from there, he continued to receive opportunities to practice environmental law. Fortunately, Jon found that he enjoyed the practice and even went as far as to obtain an L.L.M. in Environmental and Natural Resources Law. And so, an environmental lawyer was born.

Jon is a shareholder at Gresham Savage and is the chair of its land use practice group. In his client representation, Jon often deals with environmental law issues related to the development of real property with a focus on the California Environmental Quality Act (CEQA). If you ask Jon why he enjoys practicing in this area, he will tell you that environmental law is typically complex, involves several stakeholders, there is a lot of balancing of interests, and it is ever-changing. Environmental law also fits within his general philosophy that resolving issues without litigation is usually the best course of action, although Jon is routinely involved in high stakes environmental litigation cases at the trial court and appellate court level. On the development and entitlement side of his practice, Jon always tries to resolve disputes prior to resorting to litigation (of course, that does not always stop third parties from filing lawsuits under CEQA). Jon is a regular fixture in city offices, including the City of Riverside, and regularly appears before a city's planning commissions and city councils in the pursuit of securing land use entitlements on behalf of his clients.

If you look at Jon's bio, you might notice that he has some interesting and different admissions. Although a California native, he spent time practicing law in both Oregon and Hawaii. In fact, he spent over a year in Hawaii representing a ferry company in several lawsuits involving the Hawaii Environmental Policy Act. Island hopping became part of his lifestyle because he would regularly have court appearances on different islands. At that time, airfare and hotels were cheap due to the recession, so his



Jonathan E. Shardlow


girlfriend, Elizabeth, was able to regularly fly in from California to visit.

Although it was fun for a while, Jon wanted more time with Elizabeth as a regular couple. Jon had met Elizabeth shortly before he left California for the job in Hawaii. Despite the distance, Jon and Elizabeth continued their relationship. As a result, much of their time was spent in a long-distance relationship and when they did see each other, it was often like a mini vacation. In order to begin a more conventional relationship, Jon moved back

to California. It was a risk, but ultimately a very wise decision. The two have been happily married for eight years with two adorable children (a four-year-old boy and a one-year-old girl).

Jon's family is his core. As you can probably guess from some of his history, Jon used to enjoy travelling. However, now he prefers spending his free time with his family taking advantage of the local attractions and looks forward to when he can introduce his son and daughter to the adventures of travel.

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



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# JUDICIAL PROFILE: HONORABLE O.G. MAGNO

by Nicole Williams

On November 21, 2017, Honorable O.G. Magno was sworn in by Justice Richard T. Fields as a judge of the Riverside Superior Court. This was a few weeks shy of Judge Magno's 20 years working as an attorney, having been admitted to the State Bar of California in December 1997. What happened between 1997 and 2017 is a roadmap to his inevitable advancement from attorney to judge.

Judge Magno's legal career in Riverside County began as a deputy public defender in 1998, assigned to misdemeanor cases. He progressed to a felony caseload where he represented clients charged with any type of felony offense through research and writing motions to conducting evidentiary hearings and jury trials. From 2008-2013, Judge Magno maintained an exclusive capital punishment caseload. As a capital defense attorney, he was lead counsel in approximately 13 of 20 potential capital cases; conducted 7 death penalty trials, which included 5 death penalty trials through verdict and sentencing. As an experienced death penalty attorney, it was only fitting that he became supervising deputy public defender in 2014, managing the Death Penalty Unit. At the request of Public Defender Steven Harmon, Judge Magno was tasked with crafting a proposal to create specialized units to represent clients charged with the most serious non-capital offenses in a model similar to the existing Death Penalty Unit. As a result of this request, the Complex Litigation Unit ("CLU") was formed. Judge Magno's last assignment at the Law Offices of the Public Defender was as supervising deputy public defender over CLU, which encompassed the Death Penalty Unit and the new specialty units that represented clients charged in non-capital murder cases, sexual offense cases, and criminal street gang crimes in Western Riverside. In this capacity, he was responsible for supervising the attorney's, investigators, paralegals, and support staff assigned to CLU; implementation of training; and case assignment.

Prior to applying to the bench, Judge Magno engaged in a comprehensive self-inventory asking himself, as he frequently did throughout his legal career, could he do a good job and could he be helpful to others. It was evident to anyone who knew Judge Magno as an attorney or who was present at either the swearing in or the



Honorable O.G. Magno

formal enrobement on December 8, 2017, that the answers to those questions are an unequivocal "yes." He has been described as charismatic, an effective advocate, trustworthy, and a credible leader. The concern he possessed for his clients' and knowledge that his decision would have an impact on their lives would occasionally lead to sleepless nights. Make no mistake, Judge Magno is not hesitant to make decisions, but rather appropriately cautious to ensure that the decisions he makes are the correct ones. His legal training and experience has taught

him "...the importance of being able to make hard decisions when it is necessary."

The decision to apply to the bench did not solely rest with Judge Magno as it would inevitably have an effect on his family. The opinions of his wife of 18 years, Karyn, and their two daughters, Sydney and Kaylee, on any subject that impacts the family unit are important. Their input on this decision was therefore vital. After discussion, they enthusiastically agreed with him taking the next logical step in his career. In addition to his wife and children, Judge Magno has seven brothers and sisters of which he is the youngest. He credits his parents' example of working hard and doing ones job well as the foundation for his own work-ethic.

In the few months he has been on the bench, Judge Magno has presided over five jury trials and more than 20 preliminary hearings; handled the calendar in both felony and misdemeanor departments; served as duty judge and the "on-call" magistrate. I asked him if being a judge is everything he thought it would be. He responded simply with a small smile and said, "It's all of it." He expanded by saying, "I am now living it, enjoying it, and appreciating the awesomeness of the responsibility" of being a judge. Judge Magno is aware of the privilege that has been bestowed upon him through being appointed to the bench. He accepts this role humbly as ego has no place in his courtroom.

The comfort of all of the parties in the courtroom is important to Judge Magno because he is simply a considerate individual and more importantly, he believes it creates an environment for people to perform at their best. To achieve this he may inject an appropriate amount of levity during voir dire that in turn encourages the



prospective jurors to relax and be more forthcoming. He believes in the importance of the comfort of the attorneys, so they are not hindered by nerves or fear during the presentation of their case.

Judge Magno has seamlessly transitioned from an attorney to a passionate and neutral representative of justice by approaching his job with integrity, impartiality, thoughtfulness, and intelligence. If these first few months are an indicator, the lawyers who practice before him and the citizens of Riverside County are in good hands with Judge O.G. Magno and his view from the bench.

*Nicole Williams is a deputy public defender at the Law Offices of the Riverside County Public Defender and is a past president of the Richard T. Fields Bar Association.*



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**Charles A. Hoffman** – Office of the City Attorney, Riverside

**Adonia Tan** – Solo Practitioner, Garden Grove



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