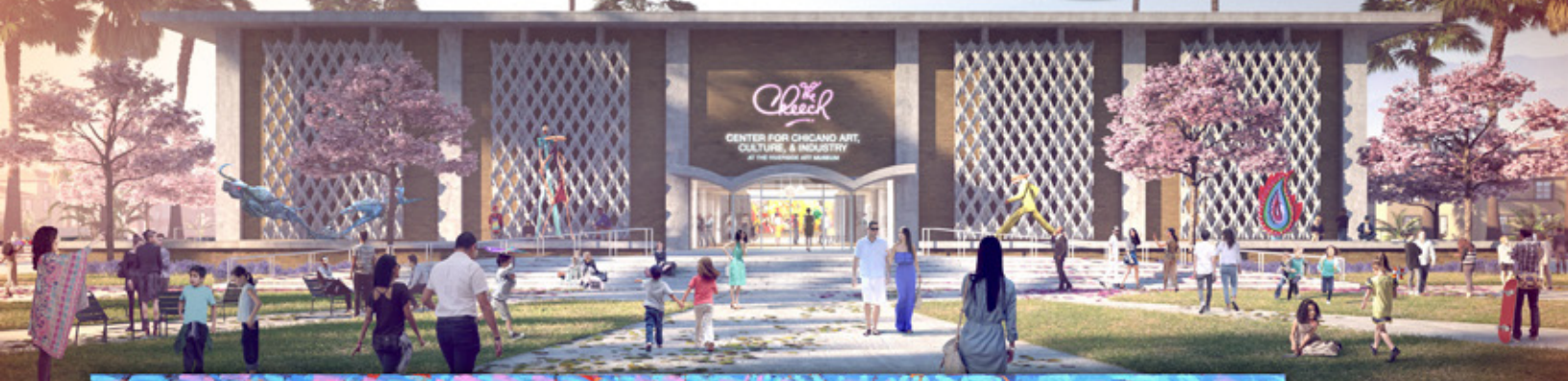
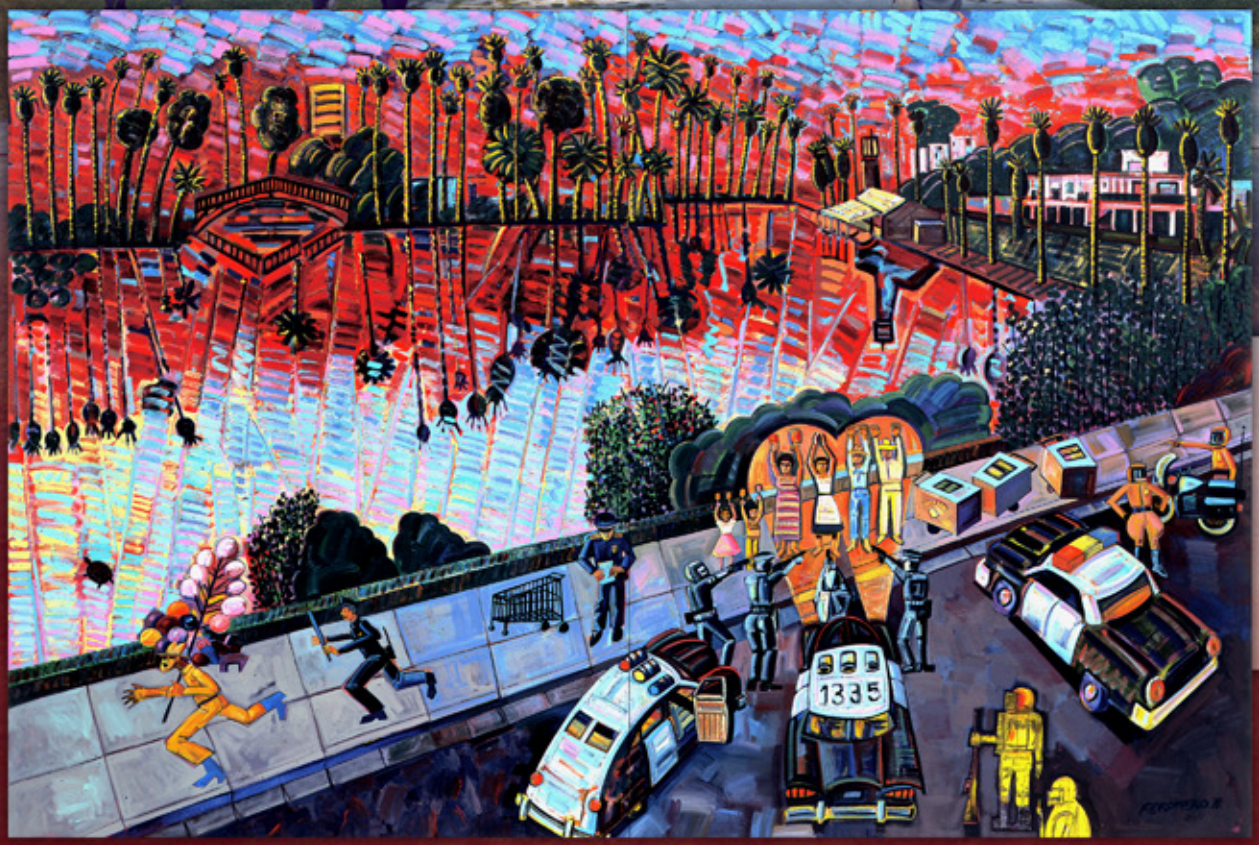
# RIVERSIDE LAWYER

March 2020 • Volume 70 Number 3 MAGAZINE




The Cheech
RAM
RIVERSIDE ART MUSEUM

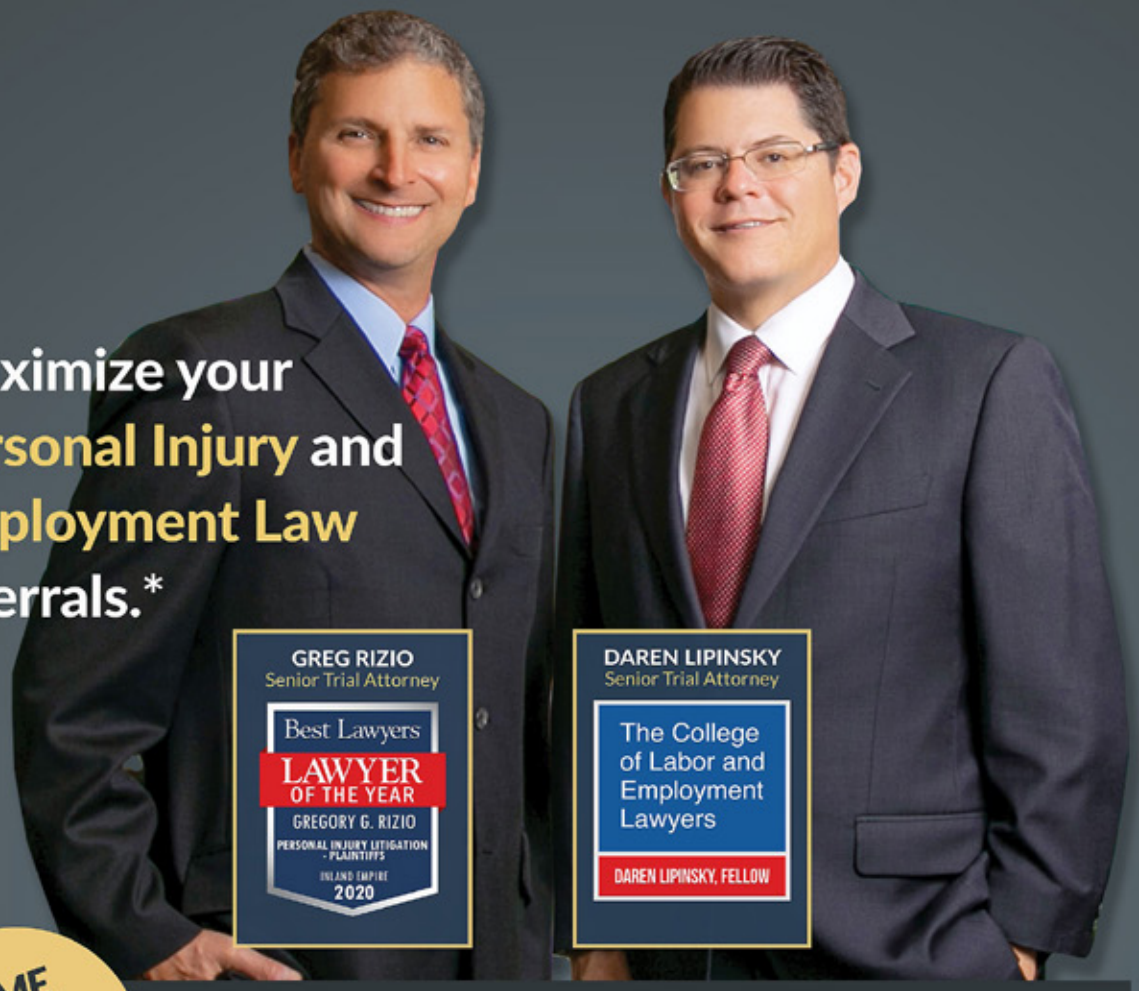
## In This Issue



RIVERSIDE COUNTY RCBA EST. 1894 BAR ASSOCIATION

The Official Publication of the Riverside County Bar Association

# RIZIO LIPINSKY
PERSONAL INJURY & EMPLOYMENT LAWYERS



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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

## March

**10** **Civil Litigation Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speakers: Bill Shapiro
Topic: "The Art of Jury Selection"
MCLE – 1 hour General

**11** **Criminal Law Section Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Darryl Exum
Topic: "Closing Arguments"
MCLE – 1 hour General

**13** **General Membership Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speakers: Hon. Irma Asberry, Sue Ryan, Don Cripe and Diana Martinez
Topic: "Celebrating 10 Years of Family Law Voluntary Settlement Conferences"
MCLE - .5 General

**17** **Family Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Don Lowery
MCLE – 1 hour General

**18** **Estate Planning, Probate & Elder Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Chrisann S. Coustenis, Agent, New York Life Insurance Company
Topic: "Social Security for Estate Planners – A Foundation for Retirement Income"
MCLE – 1 hour General

**19** **Solo/Small Firm Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Jacob Campbell
Topic: "Will You Retire on Time?" Retirement Planning for Small Business Owners
MCLE – 1 hour General

**25** **Appellate Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Carmela Simoncini & Susan Beck
Topic: "Rules of the Road (and Suggestions) for Brief Writing"
MCLE – 1 hour General

## April

**4** **Riverside Superior Court Temporary Judges Training**
Facilitated by Judge Dale Wells
12:30 – 4:30
RCBA Gabbert Gallery

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

# President's Message

*by Jack Clarke, Jr.*

## March – A Time for Spring Renewal and a Little Renovation

Spring begins just after the middle of this month and spring cleaning is a tradition for some of us. In accord with that tradition, the Board of Directors of the RCBA made progress towards a modest renovation of our Bar building in downtown Riverside. The Board considered two companies and after significant consideration, decided upon a company that we believe will be able to improve several aspects of the building for our staff, our members, and our tenants. Here is a portion of our designer's vision for the building:

> *The vision of our design is to create a timeless and classic looking building built on the historic values of the Downtown Riverside community, while capturing the building's rich history. A street view of the building will yield two new contemporary glass doors separated by an existing column to create an increased open traffic flow. This new entry will create a welcoming and inviting access area, as well as provide additional natural light to the lobby.*
>
> *The facade of the building (street-facing wall only) will be refreshed with a modern taupe designer paint color, which will also compliment the other three existing building walls.*
>
> *The interior design enhancements will include an extension of the exterior color palette and presented throughout all four floors and their common areas. A focus and priority will be given to the main floor lobby, the Dispute Resolution Service lobby, main board room and Gabbert Gallery on the third floor.*

It is our hope and plan that the renovation will take three to four months. If you have any thoughts, or see any subjects of concern, please let the Bar administration or a Board member know. While we can't design and improve by committee, we do want input and feedback.

Finally, this month's *Riverside Lawyer* focuses on the important and difficult issue of immigration law and policy. The subject of immigration has become, unfortunately, a divisive issue in many of our communities. I certainly cannot offer thoughts which can solve such a complex and important problem in a column. But I do think that the observations of the historian Jon Meacham, from his recent book, *The Soul of America, The Battle for Our Better Angels* are worthy of consideration. He wrote:

> *In just the past century, during World War I and after the Bolshevik Revolution of 1917, a new Ku Klux Klan, boosted in part by the movie* The Birth of a Nation*, took advantage of American anxiety to target blacks, immigrants, Roman Catholics, and Jews. The fear that the huddled masses of Emma Lazaurs's poem* The New Colossus *would destroy the America that whites had come to know helped lead to the founding of the twentieth-century Klan, a nationwide organization that staged massive marches down Pennsylvania Avenue in Washington in 1925 and 1926. Isolationists and Nazi sympathizers took their stand in the 1930s; their influence evaporated only with the Japanese bombing of Pearl Harbor on Sunday, December 7, 1941, and Adolf Hitler's subsequent declaration of war on the United States. Then there was the anti-Communist hysteria of the early Cold War period and the white Southern defense of segregation in the civil rights era.*

Our greatest leaders have pointed toward the future-not at this group or that sect.

In my view, all people should be treated with dignity and respect. Unless of course, by their own individual choices and actions, they establish otherwise. I would hope that any immigration policy would reflect our core constitutional values and what we have aspired to become as a country. Be well.

*Jack Clarke, Jr. is a partner with the law firm of Best, Best & Krieger LLP.*

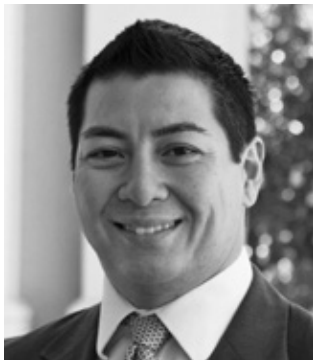
**ON THE COVER:** Frank Romero, Arrest of the Paleteros, 1996, oil on canvas, Gift of Cheech Marin, Collection of the Cheech Marin Center for Chicano Art, Culture and Industry of the Riverside Art Museum.

Frank Romero was also part of the group Los Four, leading him to embrace his Chicano identity. His brightly colored paintings celebrate the Los Angeles culture of lowriders and rascuache, the art of making something beautiful out of the ordinary.

The Cheech, as the center is affectionately nicknamed, will be the official home to Marin's collection, considered to be the finest private collection of Chicano art in the United States. A new art space in a mid-century setting, it will be, as Cheech says, the "center of Chicano art, not only painting, but sculpture, photography, and video arts." Opening in 2021, The Cheech explores Chicano culture from the barrio to the Bay, cholos to Cesar Chavez, pre-Columbian to modern murals. The center will be housed next door to the historic Mission Inn in a 61,420-square-foot facility, which was originally opened to the public as the Riverside Public Library in 1964. The Cheech is a perfect adaptive reuse of this mid-century building and the historic and vintage aspects will be preserved in its transformation from a library to a museum and cultural center. The Cheech is a public-private partnership with the Riverside Art Museum (RAM), Cheech Marin, and the City of Riverside. For more information visit, wwe.thecheechcenter.org.

# Barristers President's Message

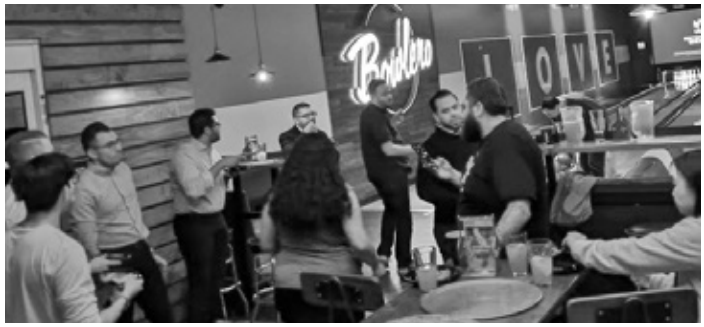
*by Paul Leonidas Lin*



## Dinosaurs didn't bowl and now they are extinct. Coincidence?

Unlike the dinosaurs, the Barristers are here to stay. Thank you one and all for attending our 5th annual "Motion to Strike Bowling Night." It's hard to imagine that an idea thrown out in jest five years ago has grown to an annual event that so many look forward to attending. In the spirit of creating new traditions (and after consuming a few spirits), I thought it would be a good idea to put my title as "President of the Barristers" up for grabs. After a fast pace and tight match, I managed to pull ahead for the win after my Motion to Strike was granted on the last frame. (Better luck next year, Lauren and Ankit.)

Also, it was great to see everyone at our monthly happy hour, which immediately follows the New Attorney Academy. We hope to see everyone for a drink after the class on March 13!


Finally, I am excited to announce that we have finalized the details for the long awaited Trivia Night. It is going to happen at Retro Taco on Wednesday, April 1. Yes, it is happening on April Fool's Day and no this is not a prank. (Or is it?) Space will be limited to the first 30 people who reserve a seat, after that we will be putting you on a waitlist. There will prizes, but really…we know you are there for the glory. We will be putting up information on how to RSVP soon. (Or will we?)

## Upcoming Events:

- **Friday, March 13** – "Tips and Tricks for Young Lawyers" in the RCBA Gabbert Gallery at 8:00 a.m.
- **Friday, March 13** – Happy Hour at Heroes starting at 5:00 p.m.
- **Friday, March 20** – "Little Known Facts About Altered Documents" MCLE in the RCBA Gabbert Gallery at 12:00 p.m.
- **Wednesday, April 1** – Trivia Night at Retro Taco at 5:00 p.m.
- **Wednesday, May 6** – Judicial Reception at Grier Pavilion, which will begin at 5:15 p.m.
- **TBA** – Escape Room.

## Follow Us!

Stay up to date with our upcoming events!

**Website:** RiversideBarristers.org
**Facebook:** Facebook.com/RCBABarristers/
**Instagram:** @RCBABarristers

*Paul Leonidas Lin is an attorney at The Lin Law Office Inc. located in downtown Riverside where he practices exclusively in the area of criminal defense and is the immediate past president of the Asian Pacific American Lawyers of the Inland Empire (APALIE). Paul can be reached at PLL@TheLinLawOffice.com or (951) 888-1398.*

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**for his verdict in the case of D.S. v. Graber**

D.S. was a UPS employee and promising amateur boxer who would ride his bike daily from home to work as part of his physical conditioning. In 2015, he was riding south toward an intersection. The light had turned red and he came to a stop immediately to the right of the defendant. When the light turned green for their direction of travel, D.S. began to pedal forward, when unexpectedly the defendant made a right-hand turn immediately in front of him, causing D.S. to strike the right rear quarter panel of the defendant's vehicle and fall to the ground. The defendant denied he made a right turn at the scene and all the way through trial.

No ambulance was called, but D.S.'s father drove him to San Antonio Regional Hospital where x-rays were taken but were negative, so he was released that day. He later followed up with his primary doctor who diagnosed him with a strained wrist and bruised hip. He was prescribed pain medication and several rounds of physical therapy. Consequently, D.S. was off work for approximately 10 months for a wage loss of $35,000. MRIs were taken that showed a suspected labral tear in his hip, but were later disproved.

The defendant had a 100k insurance policy through Ameriprise. A policy limits demand was made three times prior to filing the complaint. The carrier denied liability from the beginning and described D.S.'s injuries as "soft-tissue" in nature, and the lawsuit was filed in January 2017. The case was assigned to a SB County Superior Court judge.

Partner Cory Weck of McCune Wright Arevalo, LLP, introduced into evidence that D.S. had sustained nerve damage to his right wrist, which would ultimately require surgery to correct. The trial took five days and was tried against Brown, Bonn & Friedman from Santa Ana. The defense asked for a complete defense verdict after all the evidence was introduced.

The jury returned a verdict for $436,000. Post-trial motions resulted in an additional $27,000 in costs and $49,000 in interest, despite the carrier's threat to appeal the verdict. The defendant's carrier paid the excess judgment.

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# California's Commitment to Diversity in the Legal Profession

*by Erica M. Alfaro*

On September 21, 2018, Governor Jerry Brown approved Assembly Bill No. 3249. The bill introduced, by the Assembly Judiciary chaired by Mark Stone, requires the State Bar to develop and implement a plan to meet goals relating to access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law. In addition, the bill required the State Bar to prepare and submit a report on the plan and its implementation to the Legislature by March 15, 2019, and every 2 years thereafter. As a result of this legislation, Business and Professions Code section 6001.3 was enacted.

Business and Professions Code section 6001.3(a) states, "It is the intent of the Legislature that the State Bar maintain its commitment to and support of effective policies and activities to enhance access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law." It emphasized that diversity and inclusion are "an integral part of the State Bar's public protection mission to build, retain, and maintain a diverse legal profession to provide quality and culturally sensitive services to an ever-increasing diverse population."

In accordance with Business and Professions Code section 6001.3, the State Bar developed a plan to demonstrate its ongoing "commitment to and support of effective policies and activities to enhance access, fairness, and diversity in the legal profession and the elimination of bias in the practice of law." The plan outlines four strategic objectives.[1]

The first objective is **State Leadership**, which includes the collection of data beginning in 2019. The purpose is to understand trends in career retention and advancement, tracking diversity in the legal profession. In addition, this includes improving elimination-of-bias training.

The second objective is **Pipeline to the Profession**. The plan is to partner with law schools to improve data collection that will help better track and understand law school attrition rates and identify promising programs to increase matriculation and bar passage for individuals with diverse backgrounds.

The third goal is **Entry to the Profession.** California Bar Exam questions and grading will be reviewed from a diversity and inclusion perspective to help eliminate unintended disparate impacts. Also, the State Bar will work with law schools to expand programs that help all students prepare for the bar exam.

The last objective is **Retention and Career Advancement in the Legal Profession**. Again, this relates to the collection of data to understand themes and trends impacting retention and develop approaches for high-impact retention and advancement strategies.

Starting in 2019, the State Bar made a statutory change to its mission and now emphasizes advancing diversity and inclusion in the legal profession. Also in January 2019, the State Bar collected data from 125,000 attorneys. The data was collected to measure the goal of achieving a state population that reflects the demographics of the state, but also identifies barriers to diverse attorneys' retention and advancement in the profession.[2] The results demonstrated that although the diversity of California's attorneys has slowly increased, it does not match the state's demographic diversity.

California's legal profession remains approximately two-thirds white, while the state's population is nearly 60 percent people of color. Latinos in particular are underrepresented among attorneys. Women are a slight majority in California's adult population, but they make up about 42 percent of California attorneys. More than one in five Californians has some form of disability in the form of mobility issues, cognitive impairments, vision and hearing impairments, and other disabilities that limit activities and self-care. Few attorney respondents reported having a disability. The attorney LGBTQ population was roughly at parity with the state estimate, however, about a third of attorney survey respondents declined to answer the survey question about sexual orientation. It's also interesting to note along with the statistical data, the State Bar noted the importance of collecting data to create evidence for addressing diversity and measuring progress for increased diversity and inclusion.

Further changes include the pending implementation of Assembly Bill 242, which requires attorneys and other court employees to complete training regarding unconscious bias. This includes exploring and modifying the elimination-of-bias continuing education requirement through additional hours and/or developing online modules to help support retention, advancement, and creating a more inclusive, cul-

1 Fact Sheet: Advancing Diversity and Inclusion in the Legal Profession http://www.calbar.ca.gov/Portals/0/documents/Advancing-Diversity-and-Inclusion-in-the-Legal-Profession.pdf (July 18, 2019).

2 Bar Brief: Discovery and Inclusion in the Legal Profession, http://www.calbar.ca.gov/Portals/0/documents/BarBrief/Bar-Brief-1.pdf (July 17, 2019).

turally sensitive environment.[3] These changes are expected to take effect in 2021.

In developing the State Bar's plan to increase diversity and inclusion in the legal profession, the State Bar is uniquely positioned to make institutional changes that will profoundly change our profession for the better.

---

*Erica Alfaro is an attorney at State Compensation Insurance Fund (SCIF) where she defends state agencies in workers' compensation matters. Most recently she was appointed as a member to the SCIF Diversity Council. She is the vice president and founding member of the Hispanic Bar Association of the Inland Empire, is a director-at-Large for RCBA, is a member of the Leo A. Deegan Inn of Court, and is vice chair of the board of directors of the Inland Counties Legal Services.*

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3 "State Bar Gets 2 Years to Develop Anti-Bias Training for Lawyers," https://www.law.com/therecorder/2019/10/02/state-bar-gets-2-years-to-develop-anti-bias-training-for-lawyers/?slreturn=20200027151409 (October 2, 2019).

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# A Fight for Dreamers

*by Rep. Mark Takano*

Gabriela came to the United States with her family when she was just 4 years old. Her family intended to return to Mexico, but after her brother was born with Down Syndrome, they decided to stay in the United States to ensure that her little brother had access to the best resources and to quality healthcare. Gabriela grew up in the U.S. without being aware of her immigration status. It wasn't until high school, when she started looking for jobs, filling out the Free Application for Federal Student Aid (FAFSA), and applying to colleges, that she learned that she was undocumented. Luckily, Gabriela was able to apply for Deferred Action for Childhood Arrivals (DACA) in 2017, just before President Trump abruptly ended the program. Now, nearly 800,000 Dreamers like Gabriela are living in limbo, unsure of what the future will hold for them in the country they call home.

DACA provides undocumented immigrants who came to the United States as children, often referred to as Dreamers, legal protections from deportation. Contrary to the false anti-immigrant narrative being perpetuated by members of the Trump Administration, to qualify for DACA, Dreamers have to clear high hurdles: they must first be enrolled in school; pay significant filing fees; undergo an extensive application process; and must have a clean criminal record. By qualifying for this program, Dreamers receive a temporary Social Security number and a two-year work permit – two crucial documents that are often necessary to gain a reasonable foothold in the United States.

Since 2012, DACA has given 800,000 Dreamers the ability to attend school, work hard, and give back to their communities without fear of deportation. And some Dreamers have gone on to serve in our military – fighting for a country they may one day be forced to leave.

The argument in favor of giving Dreamers protections from deportation and a pathway to citizenship is not only a moral one, but also a question of economic impact. DACA has helped us strengthen our economy. A study by the Center for American Progress found that DACA beneficiaries will have contributed $460.3 billion to the U.S. gross domestic product over the course of a decade. In fact, forcing Dreamers back into the shadows – and the shadow economy – could cost California over $11 billion every year alone.

The cost of ending this program is too immense and points to the inherent flaws underpinning the Trump Administration's arguments against DACA. The termination of the DACA program was not based on a decision-making process that prioritized the well-being of our communities and of our economy, instead, ending this program appears to have stemmed from the President's need to appease his anti-immigrant base. In fact, the reasoning behind President Trump's decision to end the DACA program is at the heart of a case being heard by the Supreme Court this term, *Department of Homeland Security, et. al. v. Regents of the University of California, et. al.*

The Supreme Court will soon decide the fate of Dreamers by ruling on whether or not the president's decision to end the DACA program was legal. But the fate of Dreamers is not sealed, Congress can right this wrong by providing these Americans a pathway to citizenship. The House of Representatives passed the American Dream and Promise Act (H.R. 6) in June of 2019 to protect Dreamers. It is imperative for the Senate to take up this piece of legislation – and the President to sign it into law.

Two out of every three Americans support giving Dreamers legal status. We must prove that we have the political courage and common decency to stand up for the communities who need our support the most. To allow President Trump to decide the fate of Dreamers – our friends, coworkers, classmates, neighbors – who have proudly built a life in this country, and have made it a better, more prosperous place, would be a moral tragedy.

---

*Mark Takano represents the people of Riverside, Moreno Valley, Jurupa Valley, and Perris in the United States House of Representatives. He serves as Chairman of the House Committee on Veterans' Affairs and as a member of the House Education and Workforce Committee.*


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"Study at, or graduation from, this law school may not qualify a student to take the bar examination or to satisfy the requirements for admission to practice in jurisdictions other than California. A student intending to seek admission to practice law in a jurisdiction other than California should contact the admitting authority in that jurisdiction for information regarding the legal education requirements in that jurisdiction for admission to the practice of law."

# Fundamentals of Business/Employment-Based Immigration

*by Marie E. Wood*

*If it makes sense, it's not immigration law.*
- Anonymous

In Fiscal Year 2019, U.S. Citizenship & Immigration Services (USCIS) approved more than 500,000 petitions for non-immigrant workers, including specialty occupation, temporary agricultural and non-agricultural, and other workers.[1] These types of visas are commonly referred to as "business-based" or "employment-based" visas and, as the name implies, are available to those individuals seeking employment or business opportunities in the United States.

Under existing United States immigration law, those individuals who have certain skills and talents needed in the U.S. may be admitted to the U.S. on either a temporary or permanent basis to work for a U.S. employer or invest in a business. The petitioner is the business or employer who needs the services, and the beneficiary is the individual who is interested in coming to the U.S. to offer such services on a temporary or permanent basis. Two types of business/employment-based visas that are much publicized are the temporary H-1B visa and the permanent Employment-Based or EB-5 visa, but there is an "alphabet soup" of these types of visas, some of which will be discussed in this article. Please keep in mind, however, that the information provided in this article is intended only to provide a basic understanding of business/employment-based visas and it is by no means an exhaustive list or intended as legal advice.

Preliminarily, the purpose of immigration has been to promote family reunification, to benefit the U.S. economy, and to protect refugees. The main sources of immigration law are found in the Immigration and Nationality Act (INA), case law (Board of Immigration Appeals, Ninth Circuit), Local Field Office and Service Center Rules and Regulations, numerous other memoranda and manuals, and secondary sources such as Kurzban's Immigration Law Sourcebook. The law applicable to each case depends on whether the worker, or intending immigrant, is coming to this country on a temporary basis as a non-immigrant or on a permanent basis as an immigrant.

## I. What is "Non-Immigrant" Status?

Non-immigrant status is reserved for those individuals who are coming to the U.S. on a temporary basis to visit family or go to Disneyland, such as the B visa or under the Visa Waiver Program, or to work for an employer on a temporary basis or as a seasonal employee, such as the H-1B or H-2B visas, or as an intra-company transferee, such as the L-1 visas, or to invest in property and start a business, such as the E-1 and E-2 visas.

## II. Non-Immigrant Visas

E visas allow treaty traders (E-1)[2] to carry on substantial trade in goods, including services and technology, principally between the U.S. and the foreign country of which they are citizens or nationals. The items that may be traded include goods, services, international banking, insurance, transportation, tourism, technology and its transfer, and some news-gathering activities. Additionally, although there is no minimum requirement regarding the monetary value or volume of each transaction, great value is placed on "substantial trade" taking place, such as via the continuous flow of sizable international trade items which involves numerous transactions over time. Principal trade between the U.S. and the treaty country exists when over 50% of the total volume of international trade is between the U.S. and the trader's treaty country. Some countries with which the U.S. maintains a treaty of commerce include Argentina, Australia, Belgium, Colombia, Finland, Germany, Honduras, Mexico, and Poland, to name a few. The period of stay permitted under this type of visa is 2 years, with the possibility of extensions of stay granted in increments of 2 years each. Dependent spouses and minor children under 21 years of age may accompany the E-1 principal.

The E-2 visa[3] is reserved for treaty investors who direct the operations of a U.S. enterprise in which they have invested, or are actively investing, a substantial amount of money. The investment for an E-2 visa is the placing of capital, including funds and/or other assets, at risk in the commercial sense (meaning, the funds may be subject to partial or total loss if the investment fails) with the objective of generating a profit, and the investor must show the funds were not obtained from criminal activity. The E-2 visa allows for the same period of stay and possibility of extensions as with the E-1 visa, and it allows for dependent

1 USCIS final fiscal year FY 2019 agency statistics, January 16, 2020, uscis@public.govdelivery.com.

2 INA §101(a)(15)(E); 8 CFR §214.2(e).

3 *Id.*

spouses and minor children to accompany the E-2 principal to this country.

The H-1B visa[4] allows foreign nationals to accept professional assignments with U.S. employers after the employer has obtained an approved labor condition application from the U.S. Department of Labor (DOL). There is an annual numerical limitation or visa availability of 65,000 for H-1B visas, with an additional 20,000 H-1B visas for those holding U.S. advanced degrees (i.e., master's degree). In fiscal year 2019, USCIS received 190,085 H-1B visa petitions for only 65,000 available visas.[5] Once approval is granted, H-1B status is available for 3 years, which may be renewed for an additional 3 years (and does not count against the visa number cap, and dependent spouses and children hold H-4 status).

H-2B visas[6] allow foreign nationals who are citizens of certain countries to accept temporary non-agricultural employment in the U.S. after the employer has obtained temporary labor certification by establishing that there are no willing, able, and qualified U.S. workers available during the period of recruitment. The petitioning employer must need the worker for a one-time occurrence or seasonal, "peakload," or intermittent need. There is an annual numerical limitation of 66,000 for H-2B visas, half for agricultural workers and the other half for other seasonal workers such as hotel employees. Approval in this status is for 1 year, but the status may be extended for up to 3 years in very limited circumstances. Dependent spouses and children may also join the H-2B holder in the United States in H-4 status.

L-1 visas[7] allows for an intra-company transfer of employees of foreign entities to U.S. parent, affiliate, and subsidiary companies. The idea behind this type of visa is that key employees may contribute executive, managerial, or specialized knowledge skills to the U.S. business, and companies may ensure that their international operations are aligned in objectives and processes. There are two types of L-1 visas: L-1A, which is for managerial or executive employees, and L-1B, which is reserved for employees who hold specialized knowledge of the product or services offered by the employer. L-1A approval is for 3 years, but may extend up to 7 years, and L-1B approval is also for 3 years, but may only be extended up to 5 years. Dependent spouses and children may also join the employee in the United States.

O-1 visas[8] allow foreign nationals who have demonstrated extraordinary ability in sciences, education, business, athletics, the arts, or in the motion picture or television industries to visit the U.S. temporarily to work in the field. The O-2 classification is available to support staff accompanying the O-1 principal to assist with artistic or athletic events or performances. An O petition may be approved for up to 3 years, and extensions may be granted indefinitely for long-term projects or assignments or for a group of related performances or activities. Currently, there is no cap or visa limit for O visas. Spouses and dependent children of O-1 and O-2 principals are eligible for O-3 status in the U.S. but are not eligible to apply for work authorization.

P-1 visas[9] allow foreign nationals who have earned international recognition to visit the U.S. temporarily to compete in an athletic event, either individually or as part of a team. P-1 status is also available for entertainment groups who will perform in this country. P-3 status is available for essential personnel supporting the P-1 principal. Approval is up to 5 years, but the athlete is eligible for another extension of 5 years for a maximum of 10 years. Spouses and dependent children are eligible for P-4 status, but are not eligible for employment. And, just like the O visa, there is currently no cap or annual limit on P visas.

Lastly, the TN classification[10] is for Canadian and Mexican citizens who will perform professional assignments in the U.S. The North American Free Trade Agreement (NAFTA) Treaty specifies the list of occupations, as well as the corresponding educational and/or licensure requirement; for instance, accountants, graphic designers, land surveyors, management consultants, nutritionists, college teachers, and lawyers. TN status may be valid for up to 3 years, and dependent spouses and children hold TD status.

## III. What is "Immigrant" Status?

Immigrant status, on the other hand, is intended to seek a visa for the employee to permanently reside in the United States. INA Section 101(a)(20) defines permanent residence as the status of being lawfully accorded the privilege of permanently residing in the U.S. as an immigrant. Permanent residence status may be obtained via family, employment, diversity, refugee, and asylee status if certain requirements specific to each category are first met. The privilege of being an immigrant of this country does not mean the individual is a citizen (although he/she may eventually become a citizen), does not permit the immigrant to vote in an election, and may be taken away if, for instance, the individual is convicted of certain crimes. This status comes with some of the same rights and obligations of U.S. citizens, such as the right to purchase real property and the duty to pay taxes.

Employment-based (EB) visas leading to permanent residence are available in certain categories, and the number of visas available each fiscal year is pre-set by Congress.

4 101 INA §101(a)(15)(H)(i)(b); 8 CFR §214.2(h).
5 https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2019.
6 INA §101(a)(15)(H)(ii)(B); 8 CFR §§214.2(h)(1)(ii)(C) and (D).
7 8 CFR §214.2(l)(1)(ii)(G)-(L).
8 INA §101(a)(15)(O)(i); 8 CFR §214.2(o).
9 INA §101(a)(15)(P)(i); 8 CFR §214.2(p).
10 8 CFR §214.6.

The first category (EB-1) is available to certain priority workers with extraordinary abilities in sciences, arts, education, business or athletics. For instance, the EB-1 category may be available to a pediatric researcher or an acrobat. The second category (EB-2) is reserved for members of a profession holding an advanced degree or the equivalent (above a B.A.) such as a mechanical engineer or physician/neurologist. The third category (EB-3) is for skilled workers, professionals, and other workers holding a B.A. degree. The fourth category (EB-4) pertains to certain special immigrants such as religious workers and special immigrant juveniles, and, the fifth category (EB-5) is for those individuals who invest at least $500,000 in a commercial enterprise and create jobs. Generally, before a visa is approved, the petitioning employer is required to first test the labor market by working with the U.S. Department of Labor to confirm there are no qualified, willing, and able U.S. employees for the position, and to file a labor certification application. The requirements of the labor certification process are beyond the scope of this article and will not be discussed, but keep in mind that those requirements are very detailed and extensive. If all of the conditions are met, USCIS will approve the immigrant visa application and, if all other conditions are met, the individual becomes a permanent resident of this country.

## IV. Conclusion

As indicated above, one of the goals of business/employment-based immigration is to benefit the United States economy. In reaching this goal, Congress (via the U.S. Department of Homeland Security, USCIS), has implemented and made available numerous immigrant and non-immigrant visas, each with a unique and complex set of requirements, which also demands a thorough understanding of business, contracts and real estate law. As noted in the opening quote, "[i]f it makes sense, it's not immigration law." Similarly, because of the complexity of requirements, the petitioning employer and/or intending immigrants would be wise in seeking the advice of an experienced immigration attorney before filing any type of application or petition with USCIS.

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# The Cheech Marin Center for Chicano Art, Culture & Industry of the Riverside Art Museum

*by Drew Oberjuerge*

The Cheech Marin Center for Chicano Art, Culture & Industry of the Riverside Art Museum, affectionately known as The Cheech, will be a nationally-recognized center for Chicano art with vibrant arts programming for all ages. Cheech, who has been recognized as a preeminent Chicano art advocate, has stated, it will be a "center of Chicano art, not only painting, but sculpture, photography, and video arts."The center will be the permanent home of Cheech Marin's finest private collection of Chicano art in the United States; parts of the collection formed the core of his blockbuster exhibition, Chicano Visions: American Painters on the Verge, which broke attendance records during its groundbreaking 12-city tour during 2001–2007, to major art museums across the U.S. The Cheech will explore Chicano culture from the barrio to the bay, cholos to Cesar Chavez, pre-Columbian to modern murals.

The center will be housed next door to the historic Mission Inn in a 61,420-square-foot facility, which was originally opened to the public as the Riverside Public Library in 1964. The Cheech is a perfect adaptive reuse of this mid-century building and the historic and vintage aspects will be preserved in its transformation from a library to a museum and cultural center.

The Cheech is a public-private partnership between the Riverside Art Museum (RAM), Cheech Marin, and the City of Riverside. RAM brings 50-plus-years of knowledge of how to govern, administer, and program a dynamic, financially-healthy art center and museum. Additional project partners include: Cal State San Bernardino, University of California, Riverside, Smithsonian Latino Center, and the Los Angeles County Museum of Art.

Key aspects of programming at The Cheech will include:

- An Academic Resource: This will provide opportunities for scholars, graduate students, and researchers to engage with The Cheech, its collection, and programs to further deepen scholarship around Chicano art.
- Artist-in-Residency Program: By creating opportunities for creativity, community partners, and civic groups, this program is a catalyst for net¬working, professional development, and exposure to a broader diverse audience via exhibitions and more.
- Arts Engagement: For visitors of all ages, Spanish and English docent tours will be available throughout the week. The museum also provides activity centers on site to encourage people to engage with art and talk to each other. Visitors can also check out ARTVenture Packs, a fun activity for families to do together.
- Art-to-Go: Thanks to funding from Macy's and Edison International, Art-to-Go brings art lessons linked to California standards to pre-kindergarten to sixth grade classes in the Riverside Unified School District and beyond. The collection will be the focus of these lessons, creating a deeper understanding and connection for elementary-age students to the themes and content of the artwork.
- Film Program: Inspired by Cheech's knowledge and experience throughout his successful career in arts and entertainment, a film program will be developed for The Cheech to help students break into the film industry.
- Equitable Access: Children under 12 will always be admitted for free. RAM also offers free admission to military personnel and their families. And, as part of our participation in the Museums for All Program, people holding EBT cards receive discounted admission ($1 per person) for up to 4 people.
- Walk and Wonder Program: We bring students into the museum and combines a tour with a related art project. With the opening of The Cheech, we anticipate tripling the Walk and Wonder program. Other on-site programs include, all-day summer camps, afternoon classes, programs for home schools, and classes for pre-school students. Scholarships are given to students to expand access to these programs.

Major funders to the project include the following: the State of California, Bank of America, Altura Credit Union, Wingate Foundation and individual contributors. A grassroots organization called UNIDOS raised $250,000 for The Cheech. UNIDOS members include - California Hispanic Chambers of Commerce, Casa Blanca Community Action Group, Greater Riverside Hispanic Chamber of Commerce, Las Comadres, Latino Network, LULAC of Riverside Council #3190, Concilio Child Development Centers, Spanish Town Heritage Foundation, UC Riverside Chicano Latino Alumni, UC Riverside Chicano Student Programs, and VFW Villegas Chapter.

"It was The Cheech that brought us together. Its significance resonated with each one of us, a historical moment in time. This speaks to the importance of The Cheech, as more than just an art center and museum but what it means to a people who are a significant part of the creation of America, of history, culture, art, but have not been included or accepted," says Ninfa Delgado, UNIDOS Chairperson and COO, of the Riverside Community Health Foundation.

The project (being managed by the City of Riverside) will go out to bid in the summer of 2020 with an expected opening date in the fall of 2021.

For more information visit www.thecheechcenter.org.

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*Drew Oberjuerge is the executive director of the Riverside Art Museum.*

# Cruz Reynoso and California Rural Legal Assistance: Achieving Justice

*by Albert J. Maldonado*

President Franklin Delano Roosevelt said, "freedom cannot be bestowed it must be achieved." In 2000, President Clinton stated those words in reference to all of the recipients of the Presidential Medal of Freedom, one of which was Cruz Reynoso. Cruz helped create California Rural Legal Assistance (CRLA) in 1966, became CRLA's first president of the board of trustees from 1966-1967, and was director of CRLA from 1969-1972. His work throughout this period, fundamentally influenced by the constitutional principles of liberty and equality, helped secure for millions of California rural poor their constitutional rights. These rights include a right to receive Medi-Cal benefits, work in safe conditions, access welfare benefits, vote, and not be discriminated against in public schools on the basis of not speaking English.

## Developing his "Justice Bone"

Cruz Reynoso grew up a poor Latino farmworker in La Habra, California during the Great Depression in the 1930's. His family was poor and he and his siblings had to start working in the citrus groves in Orange County, California from a very early age. Cruz witnessed and experienced many injustices, both legal and illegal, from an early age which developed what he terms his "justice bone."[1] Whenever he would see an injustice, Cruz's "justice bone" would hurt and that pain would compel him to act to try and correct the injustice being done.[2] One early injustice Cruz witnessed was when his father was improperly arrested and the police officer kicked his father in the butt as the officer put him into the police car.[3] A second injustice Cruz experienced was attending the segregated school for Mexicans in La Habra called Lincoln Grammar School.[4]

## The Call of the Constitution

Cruz Reynoso's work with California Rural Legal Assistance was an effort to achieve the promise of the Constitution for millions of rural poor Californians. Cruz reads the United States Constitution to revolve around fundamental concepts of liberty and equality. The most relevant provisions of the Constitution for his work and his constitutional interpretation come from Section 1 of the Fourteenth Amendment, which reads: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[5] He reads the constitutional principles of liberty and equality as extending to all "persons" living in the United States, not just English-speaking American citizens.[6] "What unites us as a family and as a nation is the shared faith that our country, consonant with the ideals of the Constitution, treats all Americans, including members of ethnic and linguistic groups with fairness, equality, and respect."[7]

Before he became an attorney he had both experienced racial, ethnic, and class discrimination, as well as experienced times when the law was fulfilling its promise to protect everyone such as when *Brown v. Board of Education*[8] was decided. Cruz helping to create CRLA and later being its director was an effort to empower rural poor Californians to have their rights respected and enforced. This effort is consistent with Cruz's view of the United States Constitution being a reflection not of American reality at any given time period but of the American utopia that each generation has the obligation to strive towards.

## CRLA: Achieving the Constitution's Promise for Rural Poor Californians

California Rural Legal Assistance (CRLA) was started in 1966 as part of President Lyndon Johnson's War on Poverty.[9] The idea behind CRLA was to empower rural poor to have their rights enforced as an extension of how legal aid was being given to urban poor.[10] Cruz Reynoso described one role of CRLA lawyers as to "challenge illegal laws and to challenge illegal administrative decisions that adversely affect the poor; to try to bring about some change for the poor people that

1 Keith Roberts, "An Interview with Justice Cruz Reynoso," 51.3 *Judges Journal* 4 (Summer 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_pbp_reynoso_interview_jj_2012_su.authcheckdam.pdf.

2 *Id.*

3 At Age 80, "Trailblazer Keeps Fighting For Justice," *National Public Radio* (Sept. 28, 2011), *available at* http://www.npr.org/2011/09/28/140876184/at-age-80-trailblazer-keeps-fighting-for-justice.

4 Cruz Reynoso, "Democracy and Diversity," Ernesto Galarza Commemorative Lecture delivered at the Stanford Center for Chicano Research, Stanford University (1987), *available at* http://chs.stanford.edu/pdfs/Second_Annual_Lecture_1987.pdf.

5 U.S. Const. amend. XIV, § 1.

6 Cruz Reynoso, "Ethnic Diversity: Its Historical and Constitutional Roots," 37 *Vill. L. Rev.* 821, 825 (1992), *available at* http://digitalcommons.law.villanova.edu/vlr/vol37/iss4/6.

7 Cruz Reynoso, "Introduction," 17 *Chicano-Latino L. Rev.* ix, xi (1995), *available at* http://heinonline.org/HOL/Page?handle=hein.journals/chiclat17&div=3&g_sent=1&collection=journals#11.

8 347 U.S. 483 (1954).

9 Cruz Reynoso: *Sowing the Seeds of Justice*, a film by Abby Ginzberg (2010), available for purchase at https://vimeo.com/ondemand/28832?utm_source=email&utm_medium=vod-vod_receipt-201408&utm_campaign=10311&email_id=dm9kX3JlY2VpcHR8NjMxMWEwZjNjZTg5NTFmZTJmYTNiYzRhNGRmZDk4NTQ1NjN8MzgxMDAyMzZ8MTQyNTY2MDA3NHwxMDMxMQ%3D%3D (also on file with author).

10 *Id.*

really means something."[11] CRLA received from the Office of Economic Opportunity (OEO) an initial grant of $1,276,138 on May 24, 1966.[12] By June 1966, service offices were opened in Madera, Santa Rosa, El Centro, Salinas, Santa Maria, McFarland, Modesto, Gilroy, and Marysville.[13]

## Cruz as CRLA's President of the Board of Trustees

During Cruz's tenure as president of CRLA's Board of Trustees, CRLA brought two significant lawsuits that put CRLA in the public eye both in California and nationally. The first case was a suit against California Governor Ronald Reagan in order to prevent him from making cutbacks in the California Medi-Cal program.[14]

A second case that brought CRLA national attention was when CRLA sued the U.S. Department of Labor to stop importing "braceros," or temporary laborers from Mexico. [15]Congress ended the program in 1964, but apparently the Department of Labor was continuing to give small numbers of contracts to Mexican men to come work in the United States. CRLA was able to obtain an order temporarily restraining the Department of Labor from importing braceros. CRLA then negotiated with the Department of Labor to limit bracero importation in 1967 and completely stop importing braceros afterwards.[16]

The end of the Bracero program was fundamental to California farmworkers who were trying to organize themselves into a union, led by Cesar Chavez and Dolores Huerta. The challenge the Bracero program presented to the farmworkers' movement was an economic one. California farmworkers who lived permanently in the United States wanted to form a union in order to build collective bargaining power to demand increased wages and better working conditions. Temporary "bracero" labor from Mexico undercut those efforts because the "braceros" were willing to work for less pay than the California farmworkers. Moreover, when California farmworkers would go on strike, "braceros" would be brought into the fields to work, thereby eliminating the power of the strike to demand higher wages and better working conditions. Thus, the end of the Bracero program was the beginning of the California farmworkers being able to have meaningful strikes and exert pressure on growers to give them higher wages and better working conditions.

CRLA also brought a case under Cruz's tenure as president of the Board of Trustees which secured for California welfare claimants the right to sue in federal court for welfare benefits without first seeking a state remedy.[17]

11 *Id.*
12 Bennett & Reynoso, "California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice," 1 *Chicana/o-Latina/o L. Rev.* at 2 & no. 2.
13 Bennett & Reynoso, California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice, 1 *Chicana/o-Latina/o L. Rev.* at no. 2.
14 *Morris v. Williams* 67 Cal.2d 733 (1967).
15 *Ortiz v. Wirtz*, No. 47803 (N.D. Cal. 1967) filed September 8, 1967.
16 Bennett & Reynoso, "California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice," 1 *Chicana/o-Latina/o L. Rev.* at 7.
17 *Damico v. California* 389 U.S. 416 (1967).

## Cruz as Director of CRLA

After leaving CRLA in late 1967 and becoming assistant general counsel of the federal Equal Employment Opportunity Commission (EEOC), Cruz Reynoso returned to CRLA as the director in 1969. He was director from 1969 to 1972, and incorporated lessons from his earlier days as a community organizer into his leadership style. When Cruz was a young attorney, he was a member of a community organizing civic group called the Community Service Organization (CSO).[18]

While Cruz was director, he reviewed all of the cases before they were filed,[19] two of which were incredibly important for farmworker's health and for Spanish-speakers' right to vote. The *Hardin* case compelled the federal Secretary of Agriculture to respond to court within thirty days of his determination on the question of the suspension of the pesticide dichloro-diphenyl-trichloroethane (DDT).[20] Given the extensive evidence of negative effects DDT has on human, plant, and animal life, the five environmental organizations as petitioners requested that the Secretary of the Department of Agriculture issue notices of cancellation for all pesticides containing DDT and the interim suspension of DDT pending the conclusion of the proceedings.[21] The Secretary suspended some uses of DDT, retained others, and did not act upon the request for interim suspension.[22] The petitioners sought to compel the Secretary to respond to their request for interim suspension.[23] The court held that the Secretary was compelled to respond to petitioners request within thirty days.[24] The court reasoned that given the urgent character of petitioners' claim and the possibility for irreparable injury to health, the inaction of the Secretary was equal to an order denying suspension.[25] Thus, the Secretary needed to respond in order to avoid irreparable health-related injuries to petitioners.

This case was significant for farmworkers because it led to the suspension of DDT in California and later in the whole country.[26] Farmworkers traditionally already have lower life expectancies than the average worker because of the grueling physical nature of the work, living to an average of forty-nine years instead of the national average of seventy-five years in 1998.[27] However, if DDT were still allowed to be used, farmworkers would have an even lower life expectancy.

18 *Organize! The Lessons of the Community Service Organizatio*n, a film produced by University of California Television (2010), *available at* https://www.youtube.com/watch?v=hzMaR0fspdk
19 Telephone Interview with Cruz Reynoso, Professor, UC Davis Law School (Mar. 18, 2015).
20 *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).
21 *Id.* at 1096.
22 *Id.*
23 *Id.*
24 *Id.* at 1100.
25 *Id.* at 1098-1099.
26 Bennett & Reynoso, "California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice," 1 *Chicana/o-Latina/o L. Rev.* at 18.
27 Alicia Bugarin & Elias S. Lopez, "Farmworkers in California," California Research Bureau 1, 28 (July 1998), available at https://www.library.ca.gov/crb/98/07/98007a.pdf.

Another important CRLA case secured for Spanish-speaking citizens their right to vote.[28] The Spanish-speaking petitioners in Castro challenged Article II, Section 1 of the California State Constitution, which provided that "no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State."[29] The two petitioners were residents of Los Angeles County and were denied their right to vote exclusively on the basis of their inability to read English.[30] The California Supreme Court used a strict scrutiny test to decide the issue.[31] The Court ruled that the English literacy state constitutional requirement was unconstitutional under the Fourteenth Amendment Equal Protection Clause of the United States Constitution.[32] The petitioners were able to show, and the Court agreed, that they were politically informed because they had access to seventeen Spanish language newspapers and eleven Spanish language magazines, which provided them with information about political candidates, events, and issues.[33] The Court further held that any qualified prospective voter, not limited to Los Angeles County, who could make a comparable demonstration of access to political information in languages other than English could not be denied the right to vote.[34] This case was fundamentally important for all Spanish-speaking qualified voters as well as qualified voters of other linguistic groups different than English for securing their basic democratic right to vote.

The *Castro* case is one of Cruz's favorite cases.[35] If not for CRLA winning this case, some of my own family members would have been precluded from exercising their right to vote simply for being Spanish-speaking and not being literate in English.

Cruz was also in charge of negotiation before filing cases. Cruz told me in a telephone interview about the most important case to him during his tenure at CRLA.[36] The *Diana* case was about culturally biased testing. Spanish-speaking dominant children were being placed in classes for mentally retarded students because they were scoring poorly on the IQ test administered in English. Cruz negotiated with the State Board of Education in order to test the children's IQ in Spanish in order to better place the students in classes. The case was settled out of court and the Board of Education allowed the IQ testing to be conducted in Spanish. Again, it is understandable why Cruz would care so much about this case given his own past experience of discrimination by being sent to the "Mexican" elementary school under the presumption that he did not know how to speak English.

28 *Castro v. State of California,* 2 Cal.3d 223 (1970).
29 *Id.* at 225.
30 *Id.* at 226.
31 *Id.* at 236-237.
32 *Castro,* 2 Cal.3d at 242.
33 *Id.* at 238-239.
34 *Castro,* 2 Cal.3d at 242.
35 Reynoso, "Ethnic Diversity: Its Historical and Constitutional Roots," 37 *Vill. L. Rev.* at 832.
36 *Diana v. State Board of Education*, C-70-37 RFP (N.D. Cal. 1970), filed January 7, 1970.

In 1972, an important lawsuit began that had an immensely positive impact upon farmworkers by banning the use of the short-handled hoe as an unsafe working tool. [37]Starting in 1972, California farmworkers tried to get the short-handled hoe, also called "el cortito," banned by testifying before the Industrial Safety Board, which was replaced by California's Occupational Safety and Health Administration (OSHA) board in 1973. The board determined that the short-handled hoe was not an unsafe working tool. The farmworkers filed for judicial review, which was granted. The California Supreme Court held unanimously that the board erred in its decision because it must not only consider defects in the tool itself, but also must consider if the way a tool is used causes injury to employees.[38] The public hearings held before California's OSHA board showed with medical evidence that using the short-handled hoe caused severe back injuries for most farmworkers who use it for an appreciable length of time and that it causes extreme pain and considerable disability.[39] The Court remanded the decision to the California OSHA board to reconsider its determination under the new standard of taking into account injuries that may arise from how the tool is used. The board ultimately banned the short-handled hoe as an unsafe working tool.

In addition to the positive health effects resulting from the banning of the short-handled hoe upon California farmworkers, the *Carmona* case was a case about human dignity. Dolores Huerta described using the short-handled hoe as making one feel inferior and humiliated because it literally kept your head down and close to the ground.[40] The banning of the short-handled hoe further protected the civil rights of California rural poor farmworkers and allowed them to feel dignity in their work because they didn't have their noses close to the ground all day long.

## Conclusion

Through his work with CRLA, Cruz did achieve justice for millions of California's rural poor. In recognition of his great work with CRLA, Governor Jerry Brown appointed him to be an Associate Justice on California's Third District Court of Appeal in 1976 and in 1982 appointed him to be an Associate Justice on the California Supreme Court. Cruz was the first Latino to be appointed to the California Supreme Court.

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37 *Carmona v. Division of Industrial Safety*, 13 Cal.3d 303 (1975).
38 *Id.* at 306.
39 *Id.* at 307.
40 *Cruz Reynoso: Sowing the Seeds of Justice*, a film by Abby Ginzberg (2010).

# FAQs: Penal Code 1016.3: Immigration Consequences and Duties of Counsel

*by Andrea J. Garcia*

**(1) How does defense counsel meet its duty to provide accurate and affirmative advice about the immigration consequences of a proposed disposition?**[1]

*I am, as I've said, merely competent. But in an age of incompetence, that makes me extraordinary.*
- Billy Joel

The test of a defense counsel's performance is not whether a particular defendant would have been deported anyway, but whether defendant would have negotiated an alternative plea bargain or rationally rejected the offered plea bargain and proceeded to trial.[2] Pursuant to Penal Code section 1016.3, subdivision (a), defense counsel must rely on our law school training of issue-spotting, identifying the rule, applying the law to the facts and reaching a conclusion.[3] Defense counsel identifies if the duty exists by asking "where were you born" or a similar question. Then, if it involves a foreign born client, defense counsel must review both immigration and criminal history with the client, trusted family members or close associates of the client as deemed appropriate. Defense counsel shall review family, employment, and community ties in the United States as well.[4]

Next, consulting the pertinent statutory text, case law, and secondary sources is required to investigate the impact on the client's immigration goal of any proposed or likely disposition.[5] Then, defense counsel examines reasonable alternative dispositions, derived from pertinent resources and experts, that could be presented in lieu of the automatic deportation offense as a strategy to avoid the adverse consequences.[6]

Importantly, if defense counsel does not have sufficient knowledge and skill to properly determine whether the removal consequence is truly clear, then counsel should professionally consult with a "crimmigration" expert.[7]

There are some limited circumstances where a defendant, not the attorney, chooses to forgo immigration focused negotiations for strategic reasons, but there is no exception to the attorney's duty to advise.[8]

In California, the prevailing norm to adequately research the immigration consequences was in effect decades prior to *Padilla v. Kentucky*.[9] In one case, ineffective assistance of counsel was established when defense counsel testified that the plea agreement was the most advantageous criminal disposition available, but failed to consider the most advantageous immigration disposition.[10]

Engaging in routine trainings and developing a rudimentary knowledge of crimmigration is critical for court appointed counsel who have clients tempted by "get out today only" offers from the prosecution, which can inhibit defendant's cooperation with counsel. Likewise, lack of trust in their appointed representative, leads to issues of communication with counsel.[11] These factors do not relieve

1 Pen. Code § 1016.3, subd. (a) provides, "Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences."

2 Horwitz, "Actually Padilla Does Apply to Undocumented Immigrants" (2016) 19 Harv. Latino L., Rev. 1, 15-16; *Lee v. U.S.* (2017) 137 S.Ct. 1958, 1967 (it would not be irrational for a defendant to reject a plea offer, even if he risked a lengthier sentence, in favor of trial based on some chance of avoiding deportation.)

3 Commonly referred to as "IRAC", for more see https://www.lawschoolsurvival.org/content/irac-method.

4 *People v. Martinez* (2013) 57 Cal.4th 555, 560 (a deported noncitizen who cannot return "loses his job, his friends, his home, and maybe even his children" and such a defendant may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges); *Lee v. U.S.*, (2017) 137 S.Ct. 1958, 1969 (on an ineffective assistance of counsel claim, courts should not upset a plea solely because of post hoc assertions from defendant [...] but judges should look back to contemporaneous evidence to substantiate a defendant's expressed preferences).

5 *People v. Barocio* (1989) 216 Cal.App.3d 99, 109 (where counsel's failure to advise was not a strategic choice made after investigation of the law and sentencing alternatives, his assistance of the defendant was deemed ineffective).

6 *Padilla v. Kentucky* (2010) 559 U.S. 356, 368 ("Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute [...]".)

7 California Rules of Professional Conduct Rule, Chapter 1. Lawyer-Client Relationship 1.1(c) Competence; *People v. Bautista* (2004) 115 Cal. App. 4th 229 (If the attorney had researched the matter or "made a 5 minute phone call to an immigration attorney or a criminal attorney experienced in the immigration consequences of criminal convictions," he would have known that a final conviction of the charge would make (his client) admissible for reentry to the United States and permanently ineligible to return).

8 Roberts, "Effective Plea Bargaining Counsel" (2013) 122 *Yale L.J.* 2650, 2667.

9 *People v. Soriano* (1987) 194 Cal. App. 3d 1470, 1480-1482.

10 *Ibid.*

11 Tooby & Brady, "Cal. Criminal Defense of Immigrants" (Cont. Ed.

defense counsel of the duty to investigate and advise, nor does it relieve counsel of their duty to mitigate when consistent with client's goal and prevailing professional norms. As a general rule of practice, defense counsel must memorialize the steps taken in furtherance of this statute in their case notes.[12]

**(2) How does defense counsel defend against such consequences?**

*The worst thing that can happen to a good cause is, not to be skillfully attacked, but to be ineptly defended.* - Frédéric Bastiat

The right to effective plea bargaining is not based on a defense attorney's ability to secure an actual offer, since the prosecution can refuse or decline to negotiate at all, but by defense counsel's success or failure in following prevailing professional norms relating to plea negotiations.[13] The prevailing norm is to defend against adverse immigration consequences in plea discussions with prosecutors.[14]

Moreover, where a criminal event provides the basis for multiple charges, even "counsel who possess the most rudimentary understanding of immigration consequences may be able to plea bargain creatively with the prosecutor" to craft a conviction and sentence to avoid the automatic deportation consequence.[15]

In particular, the strategy is to offer to plead to a different, but related offense that avoids the adverse consequence; or if the case warrants otherwise, to "plead up" to an immigration neutral offense even if the criminal penalty will be stiffer.[16] An example of the latter would be to plead to a more serious offense in the criminal justice system context, but avoids automatic deportation.

A pro forma caution, on the plea form or separately, about a possible deportation by defense counsel is neither competent advice or an adequate defense against removal consequences.[17]

**(3) What is the prosecutor's role? What does interest of justice mean in terms of negotiating for immigration consequences and informed consideration?**

*I was gratified to be able to answer promptly, and I did. I said I didn't know.* – Mark Twain

There is no definitive answer. However, the statute states, more or less, that the prosecutor's single role in plea negotiations for avoidance of immigration consequences is to consider dismissing the offense that triggers the automatic deportation consequence, in exchange for obtaining a conviction for a like or similar offense with the same or similar terms and conditions.[18]

Traditional jurisprudence answers some questions as to what PC 1016.3(b) imposes on the prosecutor. First, the prosecution enjoys a nearly absolute right to make the decision on what charges shall be brought and what charges can be dismissed in the interest of justice. Yet, a prosecutor has the responsibility of a minister of justice and not simply that of an advocate.[19] Justice in any particular situation is fact specific, and furtherance of it requires consideration of both the interests of society represented by the People and the constitutional rights of the defendant, in determining whether there should be a dismissal.[20] In particular, the right of a noncitizen defendant to direct his defense counsel to engage in robust plea bargaining is embedded in the constitutional right to competent counsel in plea negotiations under the Sixth Amendment.

Next, the statutory mandate "in furtherance of the findings and declarations of Section 1016.2" sheds light on the legislative meaning behind "informed consideration." In particular, subsection (g) of PC 1016.2, which provides:

*The immigration consequences of criminal convictions have a particularly strong impact in California. One out of every four persons living in the state is foreign-born. One out of every two children lives in a household headed by at least one foreign-born person. The majority of these*

Bar 2018 §3.2, p. 57).

12 *People v. Espinoza* (2018) 27 Cal.App.5th 908, 915 (counsel could not recall what advisements he discussed with defendant, and his notes did not refer to any discussion of immigration consequences).

13 Roberts, "Effective Plea Bargaining Counsel," *supra*, 122 *Yale L.J.* at p. 2667.

14 *Ibid.*; Batra, Lafler and Frye; "A New Constitutional Standard for Negotiation" (2013) 14 Cardozo J. Conflict Resol. 309, 319-322; citing *Missouri v. Frye*, (2012) 132 S.Ct. 1399, 1408.

15 *Padilla v. Kentucky, supra*, 559 US at 373.

16 *People v. Bautista, supra*, 115 Cal. App. 4th at 870; *U.S. v. Rodriguez-Vega* (2015) 797 F.3d 781, 788-789 (a noncitizen may demonstrate there existed a reasonable probability of negotiating a better plea by identifying cases indicating a willingness by the government to permit defendants charged with the same or similar crimes to plead guilty to the non-removable offense).

17 *People v. Soriano* (1987) 194 Cal.App.3d at 1482 (defendant received only a pro forma caution from his attorney about the deportation consequences of his guilty plea, which was found to be inadequate advice about the immigration consequences of his plea); *People v. Barocio* (1989) 216 Cal.App.3d at 105 (the "formulaic" warning from counsel that the plea might have immigration consequences was inadequate]; *People v. Patterson*, (2017) 2 Cal.5th 885 (although defense counsel signed the *Tahl* form, it, standing alone, is akin to the "generic advisement" required of the court under Penal Code section 1016.5, and it is not designed, nor does it operate, as a substitute for the advice of defense counsel regarding the applicable immigration consequences).

18 The prosecution, in the interests of justice, and in furtherance of the findings and declarations of PC 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.

19 Rule Prof. Conduct 5-110 Special Responsibilities of a Prosecutor, Discussion Note 1.

20 *People v. Beasley, supra*, 5 Cal. App.3d 617, 636; (1963); *Gideon v. Wainwright* (1963) 372 US 335, 344, the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

*children are United States citizens. It is estimated that 50,000 parents of California United States citizen children were deported in a little over two years. Once a person is deported, especially after a criminal conviction, it is extremely unlikely that he or she ever is permitted to return.*

Informed consideration involves the prosecutor considering the impact on our communities when a person is subject to mandatory deportation and permanent family separation.

Moreover, subsection (f) also illuminates "informed consideration" and "interest of justice" as well, stating:

*Once in removal proceedings, a noncitizen may be transferred to any of over 200 immigration detention facilities across the country. Many criminal offenses trigger mandatory detention, so that the person may not request bond. In immigration proceedings, there is no court-appointed right to counsel and as a result, the majority of detained immigrants go unrepresented. Immigration judges often lack the power to consider whether the person should remain in the United States in light of equitable factors such as serious hardship to United States citizen family members, length of time living in the United States, or rehabilitation.*

Here, the Legislature describes actual collateral consequences as a result of an adverse immigration plea, including, but not limited to, being held without a statutory right to bond for any reason by immigration authorities as a result of a particular plea being entered at the local level.[21] The Legislature points to "equitable factors" pertinent to that particular defendant's situation that "shall" be considered as part of the process of informed consideration when the prosecutor is engaging in plea bargaining.

Informed consideration recognizes that the threat of deportation may provide defendant with a strong incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does while still satisfying the debt owed to the criminal justice system.[22]

**(4) What if the prosecutor declines to engage in informed consideration citing "equal protection" or because he would not agree to the same offer if it was a citizen?**

*It is better to offer no excuse than a bad one.*
- George Washington

Briefly, the concept of equal protection requires that the government may not deny equal protection of the laws to persons who are similarly situated, it does not require absolute equality, and accordingly a state may provide for differences as long as the result does not amount to invidious discrimination.[23] Citizens, unlike noncitizens, are not subject to our federal immigration laws. In fact, a citizen is not at risk upon pleading guilty to certain charges of facing automatic deportation, mandatory detention, and permanent exile. The two classes: citizen and noncitizen, are therefore not similarly situated when plea bargaining.

Of note is that neither the majority decision in *Padilla v. Kentucky* nor the dissenting opinion expressed any concern about equal protection when discussing plea bargaining for avoidance of adverse immigration consequences.[24] In the late Justice Scalia's dissent, he did not object to a criminal defendant's right to be advised of collateral immigration consequences."[25] Scalia opined "statutory provisions can remedy the concerns addressed in the majority opinion in a more targeted fashion" that could specify which categories of misadvise about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to defendant's attention, and what warnings must be given.[26] Penal Code section 1016.3 is a solid example of such legislation at the state level.

**(5) Can the prosecutor seek deportation as an intended consequence in plea negotiations?**

*I'm not prejudiced in any way that I can think of. That's just not the guy I am.* - Willie Nelson

No. The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation, so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.[27] Regardless, the prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race or national origin nor use considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion.[28]

Some ways to avoid this behavior is for the prosecuting agency to be proactive in efforts to detect, investigate, and eliminate improper biases and regularly assess the potential for biased or unfair disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified. The largest prosecutor's organizations are also the most frequent users of written guidelines and internal review mechanisms.[29] One such organization is the Santa Clara

21 INA § 236(c).
22 *Padilla v. Kentucky, supra*, 559 US at 373.
23 *People v. Cruz,* (2012) 207 Cal.App.4th 664, 675-677.
24 *Padilla v. Kentucky, supra*, 559 US at 388 (dis opn. of Scalia).
25 *Id.*, at 392.
26 *Ibid.*
27 *Bordenkircher v. Hayes* (1977) 434 U.S. 357, 364.
28 The ABA Criminal Justice Standards for the Prosecution Function: Standard 3-1.6 Improper Bias Prohibited.
29 Wright, "Padilla and the Delivery of Integrated Criminal Defense"

County Office of the District Attorney, which has a written collateral consequence policy.[30] Santa Clara prosecutor Josue Fuentes, remarked "we have the collateral consequence policy that gives us the discretion and entrusts every attorney to handle each case in accordance with the policy set down by District Attorney Jeff Rosen. Every case that is resolved is reviewed by a supervisor as a form of quality control, if there is someone coming down heavy handed or giving away the farm we have a way to re-calibrate the inconsistencies across the board." He adds, when it comes to the issue of fairness in the criminal penalty being applied to citizens and noncitizens alike, "we may reach an alternate charge, but we may need to find other ways to come up with an equitable outcome."

Another example is the policy of the Contra Costa County District Attorney that recognizes informed consideration by the prosecution as mandatory, while providing a streamlined approach, which allows discretion by line prosecutors and supervisors on a case by case basis.[31]

Importantly, recognition of "collateral consequences," such as immigration consequences, imposed on a defendant are not a new concept for prosecuting agencies to take into consideration.[32]

**(6) Does obtaining an immigration neutral plea mean our criminal justice system has allowed a noncitizen to abscond from immigration authorities and wander freely in our community with impunity?**

*Facts do not cease to exist because they are ignored.* - Aldous Huxley

No, evading immigration enforcement is not an objective envisioned in *Padilla v. Kentucky* (see FAQs 1 & 2 above). Avoiding mandatory deportation or statutorily ineligibility for discretionary relief compose the goals for negotiation.

Moreover, any such objective is not practical, especially in light of ever changing policy guidelines from the executive branch when it comes to discretion.[33] Former Department of Homeland Security ("DHS") prosecutor of 18 years, Patricia Corrales states "simply because you negotiate an immigration neutral plea, if the [noncitizen] is going to be arrested by ICE, [he] will be." She further adds, an "immigration neutral plea" allows the DHS prosecutor and the immigration court "to take into account the totality of criminal history, and [immigration authorities] can still say no."[34] Whereas a plea that triggers automatic deportation takes that discretion away from immigration authorities.

Lastly, if the noncitizen defendant applies for any immigration benefit, he will have to disclose any arrest, as well as arrest and court records, even if not convicted, regardless of the passage of time.[35]

**(7) Does the court have a role in 1016.3?**

*I'm very much into making lists and breaking things apart into categories.* - David Byrne

No. The advisals given by the court are dictated by Penal Code section1016.5. The State Legislature enacted the requirement with the verb "may" result in deportation, so as long as that is on the plea form and/or in the transcript, the court is protected from any withdrawal of a plea based on any alleged court failure. Yet, defense counsel has a separate obligation to provide competent counsel as discussed above in FAQs 1 & 2.

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(2011) 58 *UCLA L. Rev.* 1515, 1522.

30 "Section 5.02(b)(x)(6), Collateral Consequences, stating in part "in those cases where the collateral consequences are significantly greater than the punishment for the crime itself, it is incumbent upon the prosecutor to consider and, if appropriate, take reasonable steps to mitigate those collateral consequences [...]"

31 *Ibid.*

32 Johnson, "A Prosecutor's Expanded Responsibilities Under *Padilla*" (2011) 31 *St. Louis U. Pub. L. Rev.* 129, 134 (the recognition of collateral consequences led to the adoption of the Uniform Collateral Consequences Act, addressing a number of issues regarding the imposition of collateral consequences).

33 Executive Order 13768, January 25, 2017, Enhancing Public Safety in the Interior of the United States; Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, November 20, 2014.

34 Patricia Corrales began her career as a Legacy Immigration Naturalization Service ("Legacy INS") attorney. The INS was abolished in 2003 and the Department of Homeland Security was established in its place.

35 Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens.

# Penal Code 1473.7, subsection (a)(1): Post-Conviction Relief for Non-Citizen Defendants

*by Attorney Kusum Joseph*

Assembly Bill Number 2867 (AB 2867), approved in September 2018, amended California Penal Code section 1473.7 (P.C. § 1473.7), effective January 1, 2019, with the aim of ensuring "uniformity" and "efficiency" in its implementation.[1] This article discusses some select issues relevant to subsection (a)(1) of P.C. § 1473.7, which permits "a person who is no longer in criminal custody" to bring a motion to vacate a conviction or sentence that is "legally invalid" due to a "prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere."[2]

## Grounds for P.C. § 1473.7(a)(1) motion.

Amended P.C. § 1473.7(a)(1) clarifies the following, "A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." As such, defendant's error, standing alone, is sufficient to seek relief. However, it is advisable to additionally claim ineffective assistance of counsel (IAC) where a defense counsel mis-advised or failed to advise the defendant about immigration consequences of his plea as required under California's legal framework.[3] "[T]imely advance notice" must be provided to previous defense counsel where IAC is claimed.[4]

1 https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.7.&lawCode=PEN.
P.C. §1473.7, originally effective since January 1, 2017 was codified to provide a statutory vehicle in the form of a 'motion to vacate a conviction or sentence" to overcome jurisdictional problems in filing of a writ of habeas corpus for older convictions. See, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB813.

2 P.C. §1473.7(a)(1) [Italics added].

3 P.C. §§1016.2 and 1016.3, enacted in 2015, codifies *Padilla v. Kentucky* (2010) 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 *(Padilla)* where the United States Supreme Court held that failure to provide advice regarding risk of deportation amounts to ineffective assistance of counsel.
Long before *Padilla*, California courts have held defense counsels to additional duties while representing non-citizen defendants: *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1482, 240 Cal.Rptr. 328 ("pro forma caution [by a counsel] on deportation consequences...[w]ithout adequate investigation of federal immigration law" does not amount to adequate advice on immigration consequences); *People v. Boracio* (1989) 216 Cal.App.3d 99, 264 Cal.Rptr. 573 (failure to advise respondent of his right to request recommendation against deportation (RAD), which would have helped respondent avoid deportation, constituted ineffective assistance counsel at sentencing stage).

4 P.C. §1473.7(g).

## Due diligence.

The plain language of the amended P.C. § 1473.7(b)(2) makes it sufficiently clear that the due diligence clock starts only "*after the later of*"[5] the circumstances noted therein. In *People v. Rodriguez*, the Court of Appeal reversing a denial of P.C. § 1473.7 motion, noted that defendant's 7 month delay in filing the motion did not make it untimely even though defendant had been on notice of immigration consequences since 2005.[6] Regardless, once the grounds for bringing such motion become apparent, it is advisable to bring the motion immediately.

## The error must have been prejudicial.

In order to obtain relief under subsection (a)(1) of P.C. § 1473.7, a defendant needs to prove that the error was prejudicial. In *Lee v. United States (Lee)*,[7] the Supreme Court noted that the standard of prejudice set in *Hill v. Lockhart (Hill)*,[8] as opposed to standard of prejudice in *Strickland v. Washington*,[9] is applicable for such motions. Thus, "defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"[10] Lack of "viable defense" has limited significance, if any, under *Hill* standard because though a defendant will normally accept a plea when chances of acquittal are slim, a *non-citizen* defendant – for whom immigration consequences are usually of utmost importance – will reject a plea with adverse immigration consequences "in favor of throwing a 'Hail Mary' at trial."[11] Consistent with *Lee*, in *People v. Camacho (Camacho)*[12] and *People v. Mejia*,[13] California Courts of Appeal have applied *Hill* standard for prejudice.

5 Emphasis added.

6 *People v. Rodriguez* (2019) 38 Cal. App. 5th 971, 979-980, 251 Cal.Rptr.3d 538, 544. Defendant filed his motion in July 2017, 7 months after P.C. 1473.7 originally became effective in January 2017, though he had been ordered removed in 2005 due to his conviction.

7 *Lee v. United States* (2017) 582 U.S. __(2017), 137 S.Ct. 1958, 198 L.Ed.2d 476.

8 *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L.Ed.2d 203.

9 *Strickland v. Washington* (1984) 466 U.S. 668, 694. *Strickland* standard for prejudice requires the defendant to show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

10 *Lee, supra,* 582 U.S. __(2017), 137 S.Ct. at 1961 (Citing *Hill*). [Italics added].

11 *Lee, supra*, 582 U.S. __(2017), 137 S.Ct. at pp. 1966-1967.

12 *People v. Camacho* (2019) 32 Cal.App.5th 998,1009-1010; 244 Cal. Rptr.3d. 398, 407-409.

13 *People v. Mejia* (2019) 36 Cal.App.5th 859, 870; 248 Cal.Rptr.3d 819, 827.

Of course, the bare assertion by defendant – that he would not have entered a plea with adverse immigration consequences had he been aware of those consequences – is not sufficient to show prejudice. Courts will consider "contemporaneous evidence" supporting defendant's assertion of prejudice.[14] Defendant's socio-economic ties to the U.S. (for example, length of residence, existence of close family members, employment or business interests), form an important part of "contemporaneous evidence" of prejudice.[15]

Circumstances at the time of entry of plea form another important aspect of "contemporaneous evidence."[16] In *People v. Vivar*,[17] despite defendant's strong socio-economic ties and a finding that defense counsel erred, the Court of Appeal held that the defendant did not establish prejudice because he rejected an immigration neutral plea in favor of a plea offering drug treatment program. As such, success of a P.C. § 1473.7(a)(1) motion will largely depend on effective inquiry into circumstances at the time of plea. Some of the relevant questions would include: Whether any immigration concerns were raised by defendant before entering his plea? If not, then why? What statements, if any, induced the defendant to enter his plea? Whether he was informed about the need to consult an immigration attorney, or possibility of an immigration-neutral plea? How much time was he given to consider the plea? Was he informed of his right to request additional time as allowed under Penal Code section 1016.5(b)?

## Effect of Penal Code section 1016.5 advisement.

Pursuant to Penal Code section 1016.5 (a), prior to entry of plea, a defendant must be advised that his plea "may have" adverse immigration consequences.[18] Firstly, where adverse immigration consequences of a plea are mandatory and certain, the words "may have" are misleading. Secondly, Penal Code section 1016.5 advisement is not a substitute for a defense counsel's duties noted above.[19] Lastly, despite Penal Code section 1016.5 advisement, a defendant can, through "contemporaneous evidence," prove that an error occurred in understanding immigration consequences of a plea.[20]

## Conclusion.

There is a "strong societal interest in finality"[21] of plea deals where substantial number of cases are resolved through pleas. Having said that, on many occasions adverse immigration consequences come to haunt unsuspecting defendants who have entered their pleas without "meaningfully" understanding, "knowingly" accepting or defending against these adverse consequences. While P.C. § 1473.7(a)(1) provides an avenue for relief to such defendants, it comes with its own set of challenges which the defendants must be prepared to meet.

14 *Lee, supra,* 582 U.S. __(2017), 137 S.Ct. at 1967; *Mejia, supra,* 36 Cal.App.5th at p. 872, 248 Cal. Rptr.3d at p. 829.

15 *Lee, supra,* 582 U.S. __(2017), 137 S.Ct. at 1968; *Mejia, supra,* 36 Cal.App.5th at pp. 872-873, 248 Cal.Rptr.3d at pp. 829-830; *Camacho, supra,* 32 Cal.App.5th at p. 1011, 244 Cal.Rptr.3d. at p. 409.

16 *Lee, supra,* 582 U.S. __(2017), 137 S.Ct. at pp. 1967-1968: Lee's repeated inquiry with his counsel about immigration consequences and his hesitation during plea colloquy amounted to sufficient manifestation that he gave utmost importance to "avoiding deportation".

17 *People v. Vivar* (2019) 43 Cal.App.5th 216, 229-230, 256 Cal.Rptr.3d 443, 453-455.

18 P.C. § 1016.5(a), in relevant part, provides that defendant be administered following advisement: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

19 See n. 3.

20 In *Camacho*, defendant erred in believing that by avoiding jail time he would avoid deportation despite prosecutor's advisement to the defendant that his conviction "will result" in adverse immigration consequences. *Camacho, supra*, 32 Cal. App.5th at p. 1002, 244 Cal.Rptr.3d. at p. 401, n.2 and n.8
In *People v. DeJesus* (2019) 37 Cal.App.5th 1124, 1129, 250 Cal.Rptr.3d 840, 845, the Court of Appeal affirmed Trial Court's denial of P.C. §1473.7(a)(1) motion due to jurisdictional and other reasons. In reference to P.C. §1016.5 advisement, the Trial Court 'acknowledged that advisement of immigration consequences "may not be totally determinative of the issue"' of prejudice under P.C. §1473.7(a)(1).

21 *Lee, supra*, 582 U.S. __(2017), 137 S.Ct. at 1967.

# Anxious to Be a Citizen: The Added Anxiety of Filing an N-400

*by S. Alfonso Smith*

Correlation does not prove causation, at least not yet. With a thick cloud resting over immigration advocates, some of their worst fears began coming to fruition as the United States closes out one decade, and began a new one. I am speaking of the anxiety some green card holders have, as it relates to their "temporary" permanent status.

"I have my Green Card," "I'm a permanent resident," or "*mi tarjeta verde*" once considered the impenetrable safeguard from deportation; now, in the age of President Donald Trump, it has become another status that can be stripped away.[1] Typically, if you have a green card you are eligible to apply for citizenship if certain criteria are met within your first 5 years (2.5 years if you are married to a citizen), if you do not meet this criteria, you generally have to renew your Green Card every 10 years.

As a second-year law student in 2014, I began volunteering with the Public Law Center (PLC) and Orange County Communities Organized for Responsible Development (OCCORD) for their Citizenship Fairs. These Fairs occurred four times a year, and adopted a *speed datingesque* format, but for N-400 applicants. I began to notice a shift in 2018, the Fairs were bigger, they had more diverse applicants, and most of the applicants had an underlying theme – a fear of losing their status.

One woman named Maria[2] lamented that she has been a permanent resident for over 30 years, when she went to visit her family in Mexico and was given a hard time upon re-entry, having to wait almost two days before being allowed to re-enter the U.S. Another man, named Guillermo, said in the past he did not want to become a citizen even though he could apply since his wife of 13 years was a U.S. citizen; he explained that his mind was changed as he did not want to even think about the possibility of losing his Green Card and being separated from his family.

Is this new a feeling? Maybe. Is it an over reaction? Possibly. Is the anxiety real? Absolutely. The anti-immigration rhetoric by this administration cannot be denied, especially for immigrants of color.

While the N-400 was just another bureaucratic process before the current administration, it has now become the means to alleviate the anxiety that stems from being labeled the "other." This feeling of being from so-called "sh*t hole countries" or country that only sends "rapist" and "murders." This new label of being the "other" exponentially grows as the thought of an expansion of this policy by a continuation of the current administration's policies becomes a possibility. So does correlation prove causation? No. But, does the current administration lead to increased anxiety, even to those with LPR status? A resounding YES (See *DHS v. New York* (2020) 589 U.S. 1).

1 Please note as the article was written the U.S. Supreme Court decided to allow "the Trump administration to begin implementing new 'wealth test' rules making it easier to deny immigrants residency or admission to the United States because they have used or might use public-assistance programs." (*See DHS vs. New York* (2020) 589 U.S. 1).

2 Please note names have been changed to protect clients' privacy.

*S. Alfonso Smith is a labor and employment attorney with a passion for pro bono work. He is a current member of RCBA, the Hispanic Bar Association of the Inland Empire, and serves on the board for Inland Empire Latino Lawyers Association (IELLA).*

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# HBAIE President's Message: Our Goals for This Year

*by Mario H. Alfaro*

When my parents came to this country, they had no money, did not speak the language, and were in constant fear of deportation. In fact, there are times when they tell their story that I think the only thing they had was hope, hope for their future and a belief that, in America, education was the key to that future. Sitting here today, with the "wisdom" that hindsight affords, there is no question that while education is important to success, it is simply not enough. In order to find true success in this country, you also have to be able to successfully navigate through a system that, as the child of immigrants, you may not always realize is there. And that is one of the reasons why the Hispanic Bar Association of the Inland Empire exists, to help the next generation learn about this "system.

To be clear, the "system" I am referring to is an amorphous concept. It ranges from knowing the difference between an occasion where you wear a suit and one where a shirt and slacks is acceptable, to understanding the importance of the LSAT and why a preparatory course might be a worthwhile investment. But the fact that something is difficult to define does not mean that it does not exist. Notably, there are times when the significance of this institutional knowledge is so tangible that it becomes the difference between navigating successfully through an interview and disappointment. It is a wall that separates success and failure.

An important element of our mission at the Hispanic Bar Association of the Inland Empire is to help the next generation find success in the law. We believe that this includes helping the next generation learn to navigate through the "system" by sharing with them the wisdom we gained when we were the ones stumbling along. But our goals go beyond merely imparting information. To be truly successful, we need to be able to connect to the next generation by showing them that we stand next to them, not over them. We need to reach out to them and help them understand that we are walking a path that is available to them, to people who look and sound like them, and people who come from the same backgrounds that they do. We need to be mentors, leaders, and, most importantly, friends.

*Mario H. Alfaro practices business litigation as a shareholder and the CTO of Stream Kim Hicks Wrage and Alfaro, APC, in Riverside. He is the founding president of the Hispanic Bar Association of the Inland Empire and the president of the Federal Bar Association, Inland Empire Chapter.*

# Opposing Counsel: H. Samuel Hernandez

*by Betty Fraciso*

When looking for an attorney to profile for this issue on immigration, the criteria was fairly straightforward: a Riverside County attorney who was an immigrant, who practiced in the area of immigration, and who had significant experience in that area of practice. H. Samuel Hernandez satisfied the criteria, but most importantly, he was recommended by several members of the Riverside County Bar and the Hispanic Bar Associations. It was my pleasure to interview him for this profile.

*H. Samuel Hernandez*

Sam Hernandez was born in Cuba in December 1960, and anyone who knows their history knows this was a critical time in Cuba. Sam's father, Humberto Hernandez, who ran a private school, had been a vocal critic of Castro. His father's school was closed, and in January 1962, the family left Cuba and immigrated to the United States settling in Puerto Rico, where his two sisters, Dinah and Ruth, were born. This was Sam's first exposure to the U.S. immigration process. After a few years living in Puerto Rico as legal permanent residents, the family became proud United States citizens. Sam's dad, who had a doctorate in Education, worked at various Seventh Day Adventist schools and universities in Puerto Rico and South America, which explains why Sam lived in Venezuela and graduated from high school in Colombia. Sam's mother, Gladys Martin, was a school teacher.

College brought Sam to the United States where he attended Andrews University in Michigan. This is where he met his wife, Patricia, who had come to the school from Brazil. His interest was in public health, so he graduated with a degree in health science. His grandfather, was now in New Jersey, and his dad wanted to be closer to his family, so he had settled on the east coast of the United States. Sam went there after graduation, but after a time he realized there was only so far he could go with his bachelor's degree.

So, Sam made what would be a life altering change. In 1984, he came to Loma Linda University and earned a Master in Public Health. He went to work for the San Bernardino County Department of Public Health, but during this time he started thinking about doing something on his own. He thought about a program at Cal State San Bernardino. Then he earned his Spanish interpreter's certificate and began working as a court interpreter and for various agencies interpreting at depositions, worker's compensation hearings, and medical evaluations. In 1990, he decided to take the plunge and attend Western State University College of Law in Fullerton in the part-time program. This ended up taking 5 years, because his studies were interrupted by events that forced him to take time off school, namely the birth of his first daughter and the death of his father.

Sam became a member of the State Bar in 1996. He started working for a small immigration law firm in Alhambra, where most of the clients were Chinese. After two years of bringing in more clients, he decided to start his own office in Riverside, at the location where he remains today. The RCBA Lawyer Referral Service was a source of clients in the early days, but today his cases come from word of mouth and referrals. He has worked on almost every type of immigration matter. In the last few years, about 80% of his cases have been representation of individuals in removal proceedings before the Immigration Court, primarily in Los Angeles, Adelanto, and San Diego, but additionally in Nevada, Arizona, Texas, and several other states. Many of these involve clients who are claiming the need for asylum, which is difficult to prove. The remainder of his cases are family-based petitions, waivers of inadmissibility, naturalization cases, and appeals with the Board of Immigration Appeals.

Additionally, Sam does a certain amount of speaking on immigration issues. He frequently speaks at Spanish-speaking churches and congregations on immigration rights and particularly on the importance of becoming a U.S. citizen as soon as a person is qualified. He sees people who have earned their green cards and have lived with them their whole lives, instead of taking the extra steps required to become a citizen. For a number of reasons, a person can lose his green card (certain criminal convictions, for example), and at that point be subject to deportation. Sam stressed that the United States encourages its legal permanent residents to become citizens and as such, the requirements are relatively easy. One can apply for citizenship after having a green card for five years, showing good moral character, and a demonstrated a basic knowledge of English and civics.

Sam Hernandez has spent the past 24 years as an immigration law attorney in Riverside, and for that he is well respected. He has a close family, including his wife, who wisely majored in computer science and recently retired from San Bernardino County as a systems analyst with Information Services Department. His two daughters, also attorneys, worked in his office during high school and college, pursued non-immigration areas of the law: Paula Hernandez, a Pepperdine Law alum, is with Gresham

Savage, while Daniella Hernandez, a Berkeley Law alum, is with Best Best & Krieger, and both are involved in the Hispanic Bar Association of the Inland Empire. He is an understandably proud father.

When asked what he would most like to change about the current state of immigration in this country, Sam had two priorities. First, he would like to bring back adjustment of status under INA section 245I(i), which will allow some aliens, who are eligible for permanent residence based on a family relationship or job offer to become lawful permanent residents without leaving the United States. Now they are forced to leave the country and apply for a visa, which could take up to 10 years. Secondly, he would like relief for individuals with unlawful presence in the United States after being brought to the country as children. He would like them to have an opportunity to legalize their status permanently and eventually be eligible for citizenship. We need something permanent for those who came to this country at a young age and are now being required to leave the country. These are the thoughts of a seasoned attorney who has been in the trenches and has seen the harm that can be done by an unjust, sometimes politically motivated system.

*Betty Fracisco is an attorney at Garrett & Jensen in Riverside and a member of the RCBA Bar Publications Committee.*

# Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective March 30, 2020.

**Karrie W. Brusselback –** Office of the District Attorney, Riverside
**Melanie A. Deutsch –** Office of the District Attorney, Riverside
**Veronica Foster** (A) – Trust Properties USA, Riverside
**Veronica J. Garcia** – Inland Empire Latino Lawyers Association, Riverside
**Mischa Jackson-Kennedy** – Inland Counties Legal Services, Riverside
**Brian Kowalski** – Kowalski Employment Law Corporation, Corona
**Vanessa R. Nordstrom** – Holstrom Block & Parke, Corona
**Jenna Pontious** (A) – Riverside County Law Library, Riverside
**Pablo Ramirez** – Inland Counties Legal Services, San Bernardino
**Ernie Reguly** – Riverside Legal Aid, Riverside
**Alan D. Tate** – Office of the District Attorney, Riverside
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