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MAGAZINE

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The Official Publication of the Riverside County Bar Association

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MAY 20-21 | SEMINAR

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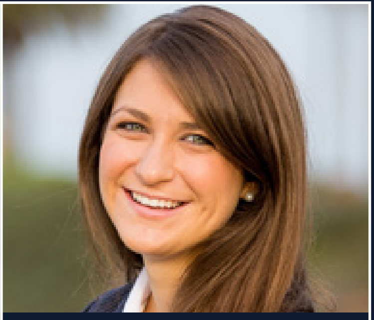
JUDGE BRIAN MCCARVILLE
SAN BERNARDINO
TRIAL JUDGE OF THE YEAR (SAN BERNARDINO)

DAREN LIPINSKY
WILLIAM M. SHERNOFF
TRIAL LAWYER OF THE YEAR



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MAGAZINE

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ERRATA

In the February 2022 issue of this magazine, the profile of Jane Carney mistakenly named a particular partner of Reid, Babbage & Coil as not wanting to hire Ms. Carney. The article should have read that "a senior partner" of the firm did not want to hire her. This error was corrected in the on-line version of the magazine.

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 $30.00 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

1 Juvenile Law Section
12:15
Zoom
Joint Meeting with the Public Defender's Office
Speaker: Christopher Wu &
Judge Leonard Edwards
Topic: "Introduction to Dependency Law"
MCLE

8 Civil Litigation Roundtable with Hon. Craig Riemer
Noon
Zoom
MCLE

16 Estate Planning, Probate & Elder Law Section
Noon
Zoom
Speaker: Karl Hicks, The Leonard Financial Group, LLC
Topic: "How Smart Professionals Vet Financial Advisors to Recommend"
MCLE

18 General Membership Meeting
Noon
Zoom
Speakers: Michael Hestrin, Lara Gressley, Judge Burke Strunsky
Topic: District Attorney Candidate Forum
MCLE

30 Juvenile Law Section
12:15
Zoom
Joint Meeting with the Public Defender's Office
Speaker: Carmela Simoncini
Topic: "Juvenile Dependency: Petition, Case Plan, Discovery,
Subpoenas, and Pretrial Motions"
MCLE

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

President's Message

by Neil Okazaki

March is already upon us. And there is something for everyone. Women's History Month. March Madness. St. Patrick's Day. Pi Day. Spring Equinox. Daylight Savings Time. There is even "Day of the Dude" inspired by the protagonist of the film, *The Big Lebowski*.

But there are also three things in this legal community that are worth celebrating this month.

Mock Trial

This month is also the California State Mock Trial competition. Representing Riverside County will be our 2022 champion, Notre Dame High School. Best of luck to them as they compete for a place in the national championship. On February 26, Notre Dame High School was crowned county champions after another extraordinary year of competitive rounds. This program is a source of pride to the RCBA because it provides an opportunity for our local high school students to learn about the law and the legal system from practicing attorneys, who share their expertise about the law and their legal skills. The students were outstanding once again this year. The talent of these high schoolers always amazes me.

This annual competition could not be accomplished without the hard-working organizers, coaches, and scoring volunteers. I would particularly like to acknowledge the members of the Mock Trial Steering Committee. The Mock Trial Steering Committee Co-Chairs John Wahlin and Melissa Moore put countless hours into making this year a success once again. They were joined by an outstanding group of individuals from the courts, the Riverside County Office of Education, the RCBA, and the legal community who teamed up to get the job done: Liz Alvarado, Desiree Cruz, Scott Ditfurth, Judge Chad Firetag, Marcus Garrett, Kevin Goodley, Dan Hantman, Theo Leonard, Renae McCain, Christopher Moffitt, Charlene Nelson, Robert Rancourt, Andrew Saghian, and Holland Stewart. Let me thank all of them for what they have done not only for the RCBA, but for the whole community at large. They have made a difference in the lives of so many students.

Mediation Month

March is Mediation Month, and that is the theme of this month's *Riverside Lawyer* magazine. There are many great articles in the pages ahead that are definitely worth a read. Someone told me recently that they are busy and sometimes never get farther than the President's column. I recommended that they start reading from the end of the magazine and work their way backwards so they don't miss the good stuff. This is a lot of valuable insight on dispute resolution that is worth a read.

As many of you know, the RCBA Dispute Resolution Service ("DRS") provides alternative dispute resolution services to the community. The mediator panel is comprised of experienced RCBA members who have practiced law for 10 years or more and have met other experience requirements established by the DRS Board of Directors. When you are looking to settle a case or enter into private arbitration, look at their website (rcbadrs.org) and see if it works for you and your clients. There are highly skilled mediators who will efficiently take your assignment locally for a competitive rate. DRS is only successful because of a dedicated DRS Board of Directors who do the hard work to make it successful. So I wish to thank the DRS Board led by President Chris Jensen. His dedication to DRS and the RCBA is truly unsurpassed. This year, Chris was awarded the tenth E. Aurora Hughes Award to recognize his distinguished service to the RCBA and to the legal community. Chris is joined on the DRS Board by an extraordinary group of local attorneys: Lisa Todd, Michael Kerbs, Jim Heiting, Elliott Luchs, Luis Lopez, and Jack Clarke.

District Attorney Candidate Forum

District attorneys seek justice, work to prevent crime, and serve as a leader in the county they serve. On June 7, 2022, the following three candidates will appear on the ballot seeking to serve a four-year term as Riverside County District Attorney: District Attorney Mike Hestrin, appellate attorney Lara Gressley, and Riverside County Superior Court Judge Burke Strunsky. On March 18, these three candidates have agreed to appear at our general membership meeting to discuss their candidacies and the issues facing our communities. I hope you will join us to learn more about this important local race that impacts our county and legal community. Please watch your emails to sign up to be in attendance. Special thanks to Criminal Law Section Chairs Paul Grech and Lori Myers for taking the initiative to put this program together.

I continue to be amazed at all the remarkable ways the RCBA serves the legal community and the greater community at large. Everywhere you look, people are making a difference. As we transition from winter, I am optimistic about what the future holds for all of us. I hope you are all able to take part in some of our activities this spring and share in some of that optimistic spirit we all really need to spread to one another these days.

Neil Okazaki is an assistant city attorney for the City of Riverside.

Barristers President's Message

by Michael Ortiz

I was first introduced to the concept of mediation as a fourth grader. My teacher asked me to volunteer as a conflict mediator, which entailed serving once a month during the first-through-third grade recess and mediating any disputes between the younger students. I would also have to take a series of conflict resolution trainings, which took place during normal class hours. I saw it as an excuse to get out of class, so I jumped at the opportunity

The first thing we learned in training was to calm the situation—no conflict can be mediated unless all parties are calm. The first goal is to show each party that their feelings are important and let them explain their side fully without interruption. We learned active listening as a tool to ensure each party felt understood.

When volunteering, I noticed that once each party fully expressed their perspective, the conflict would often resolve itself. After calming down and talking about their feelings, the parties no longer felt angry. Or, after discussion it became clear that each party wanted different things and they both could get what they wanted. Of course, there were conflicts that did not resolve themselves. Those situations were "above our pay grade" and we got a teacher involved.

Later, at age 16, I got a job as a customer service representative at Domino's Pizza. I answered phones, took orders, made pizzas, and handled customer complaints. Whether it was a delivery that took too long, incorrect items on a pizza, or a complaint about the price, I spent countless hours over the years resolving customer complaints.

"The customer is always right" in a food-service business, so of course I had my fair share of customers that demanded – and received – arguably unjustified free meals or refunds. What was surprising, however, were the number of customers who simply wanted to be listened to and understood. Many customers just wanted a sincere apology and promise not to make the mistake again.

In law school, I naturally gravitated toward mediation as an alternative form of dispute resolution. During my first year, I won an opportunity to shadow an attorney during one of his mediations. This attorney had a great reputation in the local legal community as both a trial attorney and a mediator. I was elated at the opportunity.

On the day of the mediation, I showed up at the law firm expecting an exciting day of mediation. I spoke with the mediator briefly before the first of the three parties showed up. "We make sure all parties are in separate rooms and do not directly interact with each other during the mediation," he said. After all parties arrived and were placed into their respective rooms, we entered each room one at a time. Introductions were made. Pleasantries were exchanged. And then we went straight into it.

I immediately recognized the mediator did most of the things I learned as a fourth-grade conflict mediator. He asked each party and their attorney(s) to explain the case from their perspectives. He actively listened to each side, trying to really understand their legal arguments, statute, and case law were referenced extensively early in the day.

However, as time passed discussions became less about law and more about the parties—namely, what each party actually wanted. The mediation went on without settlement all day, until finally the parties settled at the very last minute of a full-day mediation. Without disclosing details, suffice it to say the mediator found what each party cared about most – and least – and facilitated a global settlement.

From this eye-opening experience I learned that, although being a lawyer is not entirely the same as being a fourth-grade conflict mediator, there are more similarities than one might think. People want to be heard and understood, and when you listen and understand you might realize the parties aren't too far apart after all.

I try and bring this knowledge into discussions I have with my clients, as well. I listen and try my best to understand what they really want. Doing this, I think, allows us attorneys to both effectively advocate for our clients and effectively serve our roles as representatives of our profession.

The Barristers have some exciting in-person events lined up over the next few months, and we hope to see you all there!

Upcoming Barristers Events:

March 13 @ 10 am – Barristers Disneyland Day
March 17 @ 5:15 pm – Happy Hour location TBD
April 20 @ 5:15 pm – Happy Hour location TBD

Follow Us!

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

Michael Ortiz practices estate planning and administration at Ortiz Law. email: Mike@MikeOrtizLaw.com

Mediation Confidentiality Impact on Claims Between Lawyer/Client

by David Cantrell

As the case law suggests, "confidentiality is essential to effective mediation because it promotes a candid and informal exchange regarding events in the past…This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."[1] To foster this frank exchange, the legislature has made evidence of anything said or admissions made in the course of mediation inadmissible and not subject to discovery, absent some very narrow exceptions. (Evid. Code § 1119.)

But what happens when a client believes she received bad advice in connection with mediation and wishes to bring a claim against her lawyer? This question was answered in *Cassel v. Superior Court* (2011) 51 Cal.4th 113. In that case, the plaintiff sued his lawyers after he settled a case at mediation. Plaintiff asserted that his lawyers coerced him to settle at the mediation for an amount the lawyers previously said was too low. Prior to trial, the court granted the lawyer's motion in limine to exclude testimony related to the mediation, which eliminated most of the evidence to be presented by the client. The Court of Appeal reversed. After granting review, the California Supreme Court conducted a thorough analysis of the mediation confidentiality statutes and held that the testimony regarding mediation was inadmissible:

> [T]he plain language of the mediation confidentiality statutes controls our result. Section 1119, subdivision (a) clearly provides that '[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation ... is admissible or subject to discovery....'… 'Section 1119, subdivision (a), extends to oral communications made *for the purpose of* or *pursuant to* a mediation, not just to oral communications made in the course of the mediation.' [¶] The obvious purpose… is to ensure that the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. All oral or written communications are covered if they are made "for the purpose of" or 'pursuant to' a mediation. It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants.[2]

> As one practice guide summarized, "the mediation confidentiality statutes may effectively preclude the client from proving legal malpractice (breach of an attorney's duty) arising in the course of mediation."[3]

A few years after the *Cassel* decision, the legislature enacted Evidence Code section 1129. This section requires lawyers "before the client agrees to participate in mediation" to provide a written disclosure and explain the confidentiality restrictions. Notably, Section 1129 requires counsel to inform the client that statements are inadmissible "even if you later decide to sue your attorney for malpractice because of something that happens during the mediation." In my view, it is unfortunate that the legislature required lawyers to "plant the seed" for a client that it may sue the lawyer later; however, this is probably the easiest way to ensure the client understands the ground rules before committing to mediation. Side note: the entire disclosure that needs to be given to the client is contained in the statute and can easily be turned into a form disclosure.

How do lawyers ensure mediation confidentially does not bar them from presenting a defense if the client sues after mediation? In my view, it is the best practice for counsel to provide the client a written analysis of the case in advance of (and unrelated to) the mediation. This correspondence is a good opportunity for the lawyer to address the client's likelihood of success, potential verdict, likely costs to pursue the matter, settlement ranges and exposure to the other party's legal fees/costs. This way, the client has the benefit of the lawyer's analysis when mediation comes up later. The lawyer will also have a benefit: because the analysis is given in a setting that is unrelated to mediation, the writing is likely admissible in the lawyer's defense if the lawyer and client have a dispute down the road.

David Cantrell is a partner with the firm Lester, Cantrell & Kraus, LLP. His practice focuses on legal malpractice and professional responsibility issues. David is certified by the California State Bar's Board of Legal Specialization as a specialist in legal malpractice law.

1 *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415-416.

2 *Cassel* at 128, internal citations omitted.

3 Rutter Group, Professional Liability Ch. 6-D; citing *Cassel*.

OBJECTIVE COVERAGE OF LEGAL MATTERS IN SAN BERNARDINO AND RIVERSIDE COUNTIES

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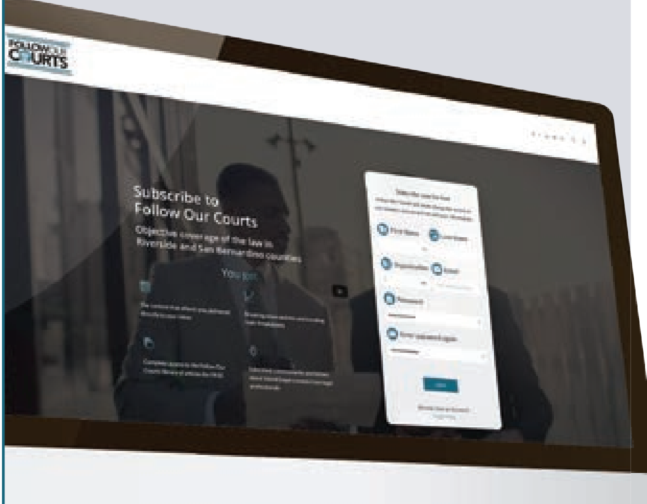

What is Follow Our Courts?

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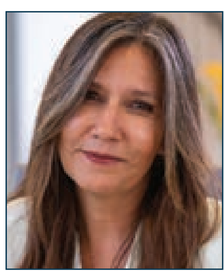

National DFM Journalist of the Year **Toni Momberger** leads the Follow Our Courts team with her 30 years of journalism experience. She has worked on many news publications, including the Boulder Daily Camera, the Press-Enterprise and the Redlands Daily Facts, where she was the editor. She served on the Redlands City Council and on multiple regional boards, including the San Bernardino County Transportation Authority and the Southern California Association of Governments.

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What's New with Court-Ordered Mediation?

by Sarah Hodgson

In March, a mediation appreciation event usually takes place during the RCBA's general membership meeting. Of course, nothing is "usual" right now, and the pandemic has put these appreciation events on hiatus. However, I do not want to let another March pass without thanking all the people who participate in and make the court-connected alternative dispute resolution (ADR) programs such a success. So, while this article doesn't involve a catered lunch, please know that I appreciate all of the time, effort, and skill so many members of our community give to support our ADR programs.

I also want to take this opportunity to share some exciting updates about the court-ordered mediation program. I hope this information will encourage every reader to appreciate this program the way I do, and to make every effort to use this resource to its fullest extent.

For those who may not be familiar with this program, I will briefly explain. General civil cases with an amount in controversy of $50,000 or less are statutorily eligible to participate and are typically ordered into the program around the time of the first case management conference. (Cal. Code Civ. Proc. section 1775.5.) Cases ordered into the program receive up to three hours of mediation with a trained mediator from the court's Civil Mediation Panel at no cost to the parties.

This description makes it clear that court-ordered mediation would not exist without a panel of dedicated mediators. Although the panel mediators' payment from the court is nominal, the mediators work on the cases in this program as though they were making their regular hourly rate. I consistently see our mediators diligently gathering all necessary information to best prepare themselves for a productive mediation.

As mediators began retiring from the panel several years ago, the court knew it was critical to continue to build its Civil Mediation Panel to keep this program thriving. With this goal in mind, the court's ADR Committee considered how the field of mediation has evolved, how the needs of our community have changed, and the qualifications that would enable new, highly qualified mediators to join the Court's Civil Mediation Panel. This evaluation resulted in the new "Pilot Mediation Panel Expansion Alternative Qualifications."

One of the most significant differences between the original and the alternate qualifications is the removal of the requirement that mediators be active members of the California State Bar. Removing this requirement allows persons who have retired from practice to serve as a mediator on the panel while also recognizing that there are people whose education and background have led them to become professional mediators without becoming an active member of any state bar. In creating alternative qualifications, the ADR Committee also sought to create qualifications that consider each applicant's unique training and experience that may make them an excellent fit for the Civil Mediation Panel. The panel is still much smaller than it once was, and the court continues to accept applications for new panel mediators. If you are interested in joining the Riverside County Superior Court's Civil Mediation Panel, I encourage you to look at the Civil Mediation Panel Qualifications and Requirements Information Sheet on the court's website for more information.

Another exciting change to the program is the ongoing availability of remote mediation. Before the pandemic, court-ordered mediations needed to be conducted in person. When the pandemic began, many Civil Mediation Panelists quickly pivoted to conducting mediations through online platforms to continue serving litigants and the court while also complying with social distancing requirements. After nearly two years, it is clear that remote mediations are effective, and in a county as large as Riverside, they are also time and cost-effective for all participants. In light of this, the court's ADR Committee recently voted to allow remote mediations to continue, even after the pandemic has ended.

The final recent update to court-ordered mediation uses California Rule of Court, Rule 3.891(a)(2) to expand the program to serve additional litigants. Specifically, as of January 1, 2022, the court amended Local Rule 3220 to allow cases with an amount in controversy between $50,001 to $75,000 to be ordered to court-ordered mediation with the parties' stipulation. I recommend considering this possibility to participate in court-ordered mediation, particularly if you believe your case would benefit from this program.

It is important to the court, and to me, that this program continues to be a useful resource for litigants. To that end, if your case is ordered to court-ordered mediation, it is helpful to timely respond to your assigned mediator, to schedule your mediation session well before the completion date (if possible), and to be certain you have completed the preliminary discovery needed to have a fruitful mediation session. Even if your case does not settle at the court-ordered mediation session, mediation often starts a conversation that ultimately leads to resolution of your case.

I hope these updates encourage you to make good use of our court-ordered mediation program, and perhaps even consider joining the Civil Mediation Panel. If you have questions about this, or any other court affiliated alternative dispute resolution programs in Riverside County, please email ADRDirector@riverside.courts.ca.gov.

Sarah Hodgson is an administrative attorney and ADR Director for the Riverside Superior Court.

A Celebration Of The Law And Lawyers

by Presiding Justice Manuel A. Ramirez

As Presiding Justice of the 4th District Court of Appeal, Division 2, in Riverside, I come into contact with the men and women of our legal community — judges, prosecutors, public defenders, civil law and government lawyers, and lawyers who work for public agencies — who work daily to enforce the laws and constitutions of our state and federal governments.

These dedicated and hard-working men and women work tirelessly to improve and promote our administration of justice system. I congratulate the men and women of our profession for their continued commitment and vigilance in protecting and promoting our system of laws throughout the United States.

We take for granted the principle that we should be governed by law rather than by rulers. Even the highest elected officials in our country are themselves limited by state and federal constitutions, which express our most precious and deeply held beliefs about representational democracy limited so as not to infringe on individual rights and liberty.

Implementation of government by law requires not only an informed and responsible citizenry, but also people who have the skills needed to create, administer, and enforce the law. These individuals include many professions, ranging from law enforcement officers to legislators, but more prominently, lawyers. From elected and appointed executives to judges and governmental attorneys and private practitioners, it is the lawyers who carry the greatest responsibility for making the rule of law work. The blessings of liberty and order this nation enjoy are the result, in large part, to the administration of the rule of law by the great majority of this country's lawyers, who honestly, diligently, intelligently, and compassionately practice their profession.

At the Court of Appeal, we have a number of very special lawyers who volunteer one hundred percent of their time and services as mediators in our court's settlement conference program. More importantly, not only do they donate their time and services to our court, but ultimately, to the taxpayers of this state as well.

In the Inland Empire and beyond, we are fortunate to have volunteer attorney mediators dedicated to the ideal of the law and who duly work to, as I so often like to quote the words of Abraham Lincoln, "persuade neighbors to compromise," where there are no losers, only winners. For the past 30 years, 1991 to the present, our volunteer attorney mediators have served as "peacemakers," on behalf of the Court of Appeal and the citizens of this state. For that, I am sincerely grateful, and I applaud them for their efforts, participation, and dedication.

In closing, with great respect and admiration, I acknowledge the following volunteer attorney mediators (both past and present). Sadly, many will be recognized posthumously: Ward Albert; Marlene Allen-Murray; Robert Andersen; Richard Anderson; Donna Bader; Roland Bainer; Cari Baum; Steven Becker; Michael Bell; John Belton; Hon. Marvin Ross Bigelow; Hon. Andre Birotte; Caywood Borror; David Bowker; John Boyd, Terry Bridges, Harry Brown; Don Brown; Raymond Brown; George Bruggeman, Jr.; William Brunick; Christian Buckley; Warren Camp; Leigh Chandler; Robert Chandler; Timothy Coates; Hon. Carol Codrington; Hon. Stephen Cunnison; Mary Ellen Daniels; Darryl Darden; Robert Deller; William DeWolfe; James Dilworth; Ben Eilenberg; Hon. Douglas Elwell; Lloyd Felver; Edward Fernandez; Hon. Richard T. Fields; Thomas Flaherty; Joyce Fleming; Michael Fortino; Victor Gables; Hon. Frank Gafkowski, Jr.; Raymond Gail; Florentino Garza; Lawrence Gassner; Hon Barton Gaut; Alfred Gerisch, Jr.; Debra Gervais; Kevin Gillespie, Elizabeth Shafrock Glasser; Howard Golds; Michael Goldware; Richard Granowitz; Donald Grant; Jordan Gray; Hollis Hartley; Donald Haslam; James O. Heiting; Ralph Hekman; Denah Hoard; Walter Hogan, Hon. Dallas Scott Holmes, J.E. Holmes III; Brian Holohan; Simon Housman; Hon. Thomas Hudspeth; Charles Hunt, Jr.; Thomas Jacobson; Muriel Johnson; Albert Johnson, Jr.; James Johnston; Carl Jordon; Barry Kaye; Hon. Jeffrey King; Hon. Kira Klatchko; Karl Knudson; Lara Krieger; Kary Kump; Rick Lantz; Cyrus Lemmon; Hon. Jean Leonard; Randolph Levin; Richard Lister; Christopher Lockwood; Elliott Luchs; Thomas Ludlow, Jr.; Hon. Cynthia Ludvigsen; Bruce MacLachlan; Donald Magdziasz; Larry Maloney; John Marshall; Ralph Martinez; Justin McCarthy; Robert McCarty, Sr.; Thomas McGrath; Dan McKinney; Thomas McPeters; Greg Middlebrook; Hon. Douglas Miller; Thomas Miller; Barbara Milliken; Christine Mirabel; Stephen Monson; David Moore; Bruce Morgan; Peter Mort; John Nolan; Vincent Nolan; Daniel Olson; Stanley Orrock; Andrew Patterson; Brian Pearcy; Ann Pelikan; Douglas Phillips; Donald Powell; Jude Powers; Padgett Price; Daniel Reed; D. Brian Reider; Hon. Duke Rouse; Hon. Stephan Saleson; Walter Scarborough; Charles Schoemaker, Jr.; Charles Schultz; Kurt Seidler; William Shapiro; Patricia Short; Hon. Elisabeth Sichel; Neal Singer; Ronald Skipper; Warren Small, Jr.; Ellen Stern; Robert Swortwood; Leighton Tegland; George Theios; James Tierney, III; Bruce Todd; William Ungerman; Brian Unitt; Lucien VanHulle; Scott Van Soye; C. L. Vineyard; Alexandra Ward; Hon. James Ward; Hon. Christopher Warner; Samuel Wasserson; Hon. Sharon Waters; Thomas Watts, III; Andrew Westover; Harvey Wimer; Lawrence Winking; Victor Wolf; and Ray Womack.

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Judge Chapman is available to travel outside of the Coachella Valley.
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Understanding the Two Dimensions of Mediation Can Help Avoid Impasse

by Susan Nauss Exon

I'd rather go to Hell than take a penny from that Bastard today. I want a court judgment. This was a party comment made four hours into a mediation when the parties had negotiated from a difference of $300,000 down to $15,000. The parties were now so close in their negotiating demands and offers yet plaintiff was ignoring what she had stated at the outset of the mediation: that she really needed to settle her case that day because she needed the money and was tired of the lawsuit hanging over her head. The party allowed her emotional biases to control the outcome of the mediation. This scenario portrays the two dimensions of mediation: they include an emotional dimension and a cognitive dimension. By realizing these two dimensions of mediation, the mediator and her attorney can work together to bring the party back in check with her original goal.

It is incumbent on the mediator to start the mediation off on the right foot, taking time to develop rapport with the participants and gain their trust before the mediation session begins. A mediator should contact the attorneys prior to the day of the mediation. This is a great time to discuss process matters and relationship issues. Some mediators will have a joint telephone session with all attorneys. I prefer to have a private, confidential discussion with each attorney so that I can discuss intimate issues. I ask personal questions concerning the professional relationship between the attorneys, relationship issues involving all parties, the impact of the dispute on the client, client expectations, strengths and weaknesses of the case, issues regarding the client that will help me manage the process and frame my questions, client control, the need for a reality check, whether the attorney has enough information to form a settlement position for purposes of mediation, and more.

Then when the mediator has a good understanding of the emotional landscape of the conflict, including relationship issues, he can decide how to begin the mediation. Many attorneys prefer to go right into private caucuses. That method, however, may not be conducive to settlement. Attorney advocates should allow the mediator to control the mediation process and decide how to begin.

The mediator will seek to engender trust because once parties and counsel trust their mediator, they will open up with information sharing; this information enables the mediator to help parties creatively settle their dispute. It may seem like a waste of time; however, starting with small talk helps put parties at ease.

The mediator can then gently ease into a discussion of the conflict. I like to ask a party to articulate what she wants to accomplish in the mediation. This is not the time for her attorney to take over. Let the client respond. A psychological impact exists when a party personally voices her goal, hears herself state that goal, and realizes that others have heard what she said. Allowing a party to articulate goals will provide a powerful tool for the mediator to use later in the session.

After parties articulate what they want out of the mediation, it is important to allow them to tell their story while engaging in active listening so that each party feels heard. The mediator can reframe negative comments into positive observations and summarize and neutralize when necessary. When the parties feel heard, really heard, their emotional dimension is being addressed. A party's right to speak in an open, free-flowing fashion can also be cathartic.

Once the mediator manages the emotions, it is time to address the cognitive dimension of the dispute. Understanding one's emotional landscape enables objective negotiation of legal terms so that the mediator can help all parties focus on creative solutions or simply focus on distributive bargaining.

The bottom line is that attorney advocates too often want to rush to the numbers. Rely on your mediator's experience to decide the right time to start the real negotiation. Rather than rushing to a number, allow the mediator time to first address the emotional elephant in the room.

Let's return to the scenario discussed at the beginning of this article. *I'd rather go to Hell than take a penny from that Bastard today. I want a court judgment.* Although it looks like the mediation is about to crumble, the mediator has a valuable tool—to calmly remind the party of her stated goal voiced early in the mediation and ask whether her current comment is helping to move toward her goal.

The mediator can also remind the party of the economic consequences of not settling including mounting

attorney fees, discuss the weaknesses of her case, emphasize how much work had already been accomplished since the parties had negotiated a $300,000 difference down to a $15,000 difference, and remind the party that certainty exists with settlement rather than waiting months to gamble at trial. There are also many facts specific to a case that can be used to persuade a party to continue with settlement discussions. For example, in the present scenario why is it so important to get money now? What do you need it for?

This also might be a good time to take a break or change the dynamics. When a person gets angry or upset, taking a break, standing up and stretching, or having a snack can help change a party's mood. These small changes in a party's environment will help her calm down and regain an ability to engage objectively in cognitive decision-making.

Attorneys, rather than sit back quietly, be proactive by reaffirming the mediator's statements. When a client gets off track with her stated goal, mediators and attorneys can work together to overcome a party's emotional biases.

The negotiation, whether involving creative components or simply focusing on distributive bargaining, will progress smoothly and objectively if you allow the mediator to control the process. Allow the mediator to address the emotional dimension before engaging in the cognitive dimension of the mediation. Allowing a mediator to maneuver both dimensions of mediation should help avoid impasse.

Susan Nauss Exon is an arbitrator and MC3-certified mediator with California Arbitration & Mediation Services (CAMS), the American Arbitration Association (AAA), and the Dispute Resolution Service Corporation of RCBA. She also mediates for the Riverside County Superior Court. Susan is Professor of Law Emerita at the University of La Verne College of Law, where she retired in June 2020. Email: snexon@camsmediation.com; Website: susanexon.com.

Empathy Reminder for Mediators

by Peter Robinson

Mediators who want influence tend to rely on two approaches. They might emphasize their credentials and experience in hopes that clients will defer to their expertise. The other approach is to seek to empathize with the client in hopes that the client will feel understood and supported. The idea is that clients who feel understood and supported will be less defensive or insistent about their perspectives. They might even be more open to suggestions from a mediator who they feel "gets them" and is "on their side."

So how do some mediators try to link up with parties. They suspend critical analysis for a season and accept the client's view as his/her truth. They offer no resistance to the client's story, even when they are skeptical, because they know that the client is not ready to have their perspective challenged. Like most of us, many clients want to feel heard and hopefully understood before having someone point out the way they may have oversimplified the story. The saying is trite because it is memorable and often true: "People don't care about what you know, until they know that you care." The early season of the mediation is a time for mediators to demonstrate that they care for both sides by being empathetic with both sides. Depending on the mediator's style there may come a time to serve as the "agent of reality" later, maybe towards the end of the mediation.

So, remember that most people in crisis aren't ready for advice or for someone to fix the problem. The first thing they want is to be heard and understood. Mediators operating under extreme time constraints, like a thirty-minute small claims court case, can't take lots of time to let each party's story unfold and breath. But they can let each party know that they understand their perspective and are viewing them as a decent person searching for a reasonable solution to this conflict.

One of the hallmarks of mediation that is often included in the mediator's opening statement describing the process is that we are not the judge and not the decision maker for this dispute. While we are not the judge deciding the matter, I wonder how often parties feel the mediator was judgmental of their story. Leading with empathy will help parties to perceive that the mediator cared about them and refrained from judgement during the process as well as regarding the outcome.

Peter Robinson is a Professor Emeritus at the Pepperdine Caruso School of Law.

Settlement Conference Program at Fourth District, Division Two, Court of Appeal Continues Amid the Covid-19 Pandemic

by Presiding Justice Manuel A. Ramirez & Jacqueline J. Hoar

It is difficult to comprehend that two years ago this month, our country (and the entire world) essentially shut down because of the COVID-19 pandemic. How could any of us have imagined that two years later we would still be dealing with the results and ramifications of the virus? But we have dealt with it and adjusted our lives, our homes, and our workplaces to meet the ever-changing scenarios that continue to confront us. And so, it is with our settlement conference program at the Fourth District, Division Two, Court of Appeal.

When the pandemic first began, there was no immediate urgency to alter or change the procedures of the court's settlement conference program. However, in May 2020, it became increasingly apparent to both of us that if the program was to survive, adjustments needed to be made. It was at that time that the decision was made to begin holding the settlement conferences remotely via the internet. In June 2020, the court began utilizing the Blue Jeans platform to hold oral argument remotely; and shortly thereafter, in July 2020, the settlement conference program commenced conducting the settlement conferences remotely as well. However, that platform proved to be somewhat problematic in a mediation setting, so the decision was made to switch to Zoom; and since March 2021, this platform has been used; and fortunately, is working very well.

When looking at statistics for our program, it is interesting to note that holding the settlement conferences remotely for the past 20 months has not significantly affected our program's settlement rate. Fortunately, we continue to see a settlement rate of 40 to 45 percent, as was the case pre-pandemic. There are two very important reasons for this.

The first and foremost reason is the volunteer attorney mediators who are recognized in the companion article in this issue entitled, "A Celebration of the Law and Lawyers." Their immediate willingness to "switch gears" mid-stream to facilitate the mediations remotely is a testament to both their commitment and dedication to our settlement conference program.

Secondly, the court continues to utilize the efficient process for selecting cases for the program and matching them with our very experienced and dedicated volunteer attorney mediators, a process which was developed more than 30 years ago when the program began in September 1991.

One hundred percent of civil appeals are eligible for the settlement program. The referral decision process begins when the settlement administrator receives a copy of the civil case information statement (CCIS) with attached copy of the judgment or order appealed. The CCIS is a form used by the California Courts of Appeal to screen civil appeals for jurisdictional defects. The settlement administrator reviews the CCIS for each case according to policies set by me as the presiding justice. Sixty percent of appeals pass this screening and the settlement administrator obtains settlement conference information forms (SCIF's) from the parties.

SCIF's elicit information about the character of the action, the issues on appeal, previous settlement negotiations, and preliminary settlement offers the parties are willing to make. SCIF's are confidential and not served on, or shared with, opposing counsel. Once a group of SCIF's have been received, it is a collaborative decision as to what cases are accepted for the settlement conference program. To date, more than 7,500 cases have been reviewed and considered. The goal is to complete selection of cases for the program before the appellate record is filed (on average about 100 days after the filing of the notice of appeal) to avoid delay in cases not selected for settlement. On average, approximately one quarter of the 60% of all civil appeals in which SCIF's are received is selected for the program. Thus, of the 100% of all civil appeals, 15% are selected for the settlement program, and 85% of all civil appeals go through the usual decisional process of briefing, the tentative opinion, oral argument, and decision.

As soon as a case is selected for the settlement program, the parties' participation in the settlement conference program becomes mandatory. Briefing is stayed, but preparation of the record continues. The settlement

conference administrator selects the mediator according to area of expertise, availability, and the appropriateness of the mediator for the particular appeal. Once selected, the mediator is screened for conflicts with the parties and counsel. The settlement conference administrator sets the settlement conference on a date convenient to the mediator and notifies the parties in writing, generally giving at least 30 days advance notice. The parties are required to file settlement conference statements at least 15 days before the settlement conference. Prior to the settlement conference, copies of the SCIF's and settlement conference statements are sent to the mediator. Typically, by the time of the settlement conference, the record on appeal has been filed. Should the case not settle, the stay is lifted, and the matter is set for briefing. As stated, between 40-45 percent of the cases going through the settlement program settle, which is about 7% of all civil appeals. The efficiency and timeliness of this process contribute to the overall cost-effectiveness of the program.

Returning to the mediators, they are the engine which makes the settlement program run. What makes this court's mediation program even more impressive is that it has been operating for more than 30 years. Given that length of time, many of our volunteer attorney mediators have either retired, or sadly, passed away. One of the biggest challenges our program faces today is maintaining our active mediator list, especially during this pandemic, which is an excellent segue to asking for more volunteer attorney mediators. If you are interested in serving as a volunteer mediator, please contact Jackie Hoar at (951) 782-2495. As Settlement Conference Administrator, I would enjoy speaking with you and will answer any questions you might have.

In closing, it with great honor and humility that we write this article for the *Riverside Lawyer*, and we very much appreciate having the opportunity to share information about our program and to once again recognize our volunteer attorney mediators. Without them and their selfless dedication, we are confident to say there would be no settlement conference program at the Fourth District, Division Two, Court of Appeal; and for that selfless dedication, we thank them and will be forever grateful.

Presiding Justice Manuel A. Ramirez has served as the Presiding Justice of the Fourth District, Division Two, Court of Appeal, Riverside, since 1990. Jacqueline J. Hoar is the Settlement Conference Program Administrator for the Fourth District, Division Two, Court of Appeal.

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Riverside, the Old West – The Second Deputy Sheriff Killed in the Line of Duty

by Chris Jensen

On December 24, 1907, Constable Preston Van Buren Swanguen was hosting a Christmas Eve dinner at his home in Temecula. The constable was the peace officer within the township, a position gained typically through an election by the citizens within the township. For jurisdictional reasons, constables were also appointed as "special deputies" to the county sheriff to assist the sheriff outside the township boundary as needed.

Constable Swanguen received word of difficulties at the local pool hall. Horace Magee, "a half-breed," was in a drunken rage, uncontrollable, and hurling insults in Spanish at the proprietor and others. The proprietor had enough and sent for the constable.

Preston apologized to his guests and rapidly proceeded the short distance to the pool hall.

The town of Temecula was a small village within the Murrieta Township. It was a remnant of the Mexican Rancho Temecula. The township, defined in real property parlance as a one square mile area, had a population of roughly 760 people with no growth anticipated. Just a couple years prior, Walter L. Vail, a Nova Scotia immigrant, purchased over 38,000 acres of part of the old Ranchos, Temecula, Pauba and Little Temecula. When it was part of San Diego County the area was called the Temecula Township. Five years into the new County of Riverside, in 1898, the Temecula Township ceased to exist as a township. The Riverside County Board of Supervisors annexed Temecula into the Murrieta Township; Murrieta having been the center for the township for many years.

Swanguen had proven himself as a more than capable special deputy to the sheriff. In 1897, Riverside County Sheriff Johnson called up Swanguen in his special deputy status, with a few others, in pursuit of the notorious outlaws, Sepulvada and Morales. Sepulvada had murdered Los Angeles County Deputy Sheriff Wilson; and Morales, an ex-con, was a known horse thief. The two had been jointly terrorizing the area in the hills and mountains around Temecula. In a two-month pursuit through the rugged mountains from Temecula to and across the Mexican border, Sheriff Johnson and his posse were able to eventually bring the criminals to justice.

By 1906, Swanguen was up for re-election. But someone "neglected" to place his name on the ballot presented to the few voting citizens of the township. Swanguen hired the law firm of Collier & Carnahan (Collier, RCBA president in 1914 and the thirtieth California lieutenant governor in 1928). A writ was sought to correct the error and Judge Densmore quickly granted the motion. Murrieta Township destroyed the improper ballots as ordered. New ballots were printed with Swanguen's name thereon and after the election was held, Swanguen was declared the winner.

Constable Preston Van Buren Swanguen

Swanguen was not always the "winner." Born in 1863 in Caplinger Mills, Missouri, Preston's parents, Thomas and Nancy, moved their family west to the Temecula area in the 1870's. Eventually, Preston would meet his future wife, Blanche Hewit, in Temecula. When Blanche and Preston met, she was married to Henry Johnson, a farmer. Blanche was 18 years old when she married Henry, 28 years her senior. Blanche was about 29 when she met Preston, a youthful, square jawed, 23-year-old man. Blanche had four young children, but that didn't matter to Preston.

Blanche obtained her divorce from Henry in 1886 and she and Preston were married later that year. But the marriage was not destined to last. On October 11, 1893, Blanche filed an affidavit in the new Riverside County Court consenting to the marriage of her 16-year-old daughter, Cassie. The oddity of the request was that ten days prior, Blanche was granted a Judgment of Divorce, by default, from Preston. Cassie's intended husband? Preston. Cassie gave birth to her

first child over one year earlier on July 18, 1892. The child's father was eventually deemed to be Preston.

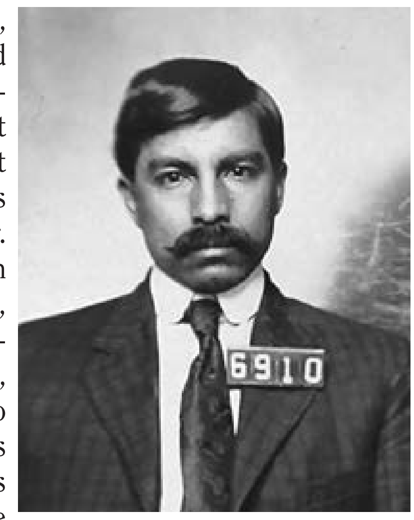
Horace Magee was born December 19, 1876. His mother was known as Custoria, a full Native American. His father was John Magee, the first to open a store in the Temecula Valley which was also a post office as well as a stop on the Butterfield Stage Route. John Magee was known for serving good quality food to the stage passengers; reported as far away as New York. Legend has it that John's store was the place whereat President Zachary Taylor's Indian Treaty negotiation delegation met with the area chiefs and entered into the Treaty of Temecula.[1]

As a young man, Horace was employed by the Garner Ranch eventually becoming a quality vaquero. As was related years later by Robert Garner, he, as a young lad, was very ill and needed the urgent assistance of a doctor. Being the black of night and hence a dangerous ride to the village to find the doctor, no one was willing to undertake the task except young Horace. Horace grabbed one of the "wild" range mounts owned by the ranch and made his way into the village. Horace located the doctor and returned to the ranch with him. Robert Garner later attributed his recovery to the heroism of Horace.

One of Horace's brothers, Dan, was "the famous football player of Sherman Institute," the team which beat USC in 1906.

On that fateful Christmas Eve of 1907, witnesses related a good-sized group of local men, perhaps 12 in all, were passing their Christmas Eve playing billiards at Albert Degonmos' pool hall. Magee entered the establishment with Albert Golch. It was the opinion of many that Magee and Golch had been drinking heavily. Moreover, both Magee and Golch were conversing in Spanish which apparently didn't sit too well with the other patrons. Spanish or otherwise, Magee told off Degonmos, casting a vile insult to him. Degonmos tried to ignore him. Magee, not satisfied, turned on Louie Escallier, the owner of the Ramona Hotel who happened to be in attendance. Further derogatory insults were thrown by Magee. Obscenities were cast as if he was baiting the room for a fight. The entertaining evening of billiards among the crowd was rapidly lost. Magee and his angry outbursts were too much to bear. Degonmos had enough and sent for the Constable.

Swanguen, perhaps in a foul mood having had excused himself from his guests, entered the pool hall. He passed Magee and Magee's extended open hand, summing up the room. Apparently realizing the problem was the man he just passed, Swanguen turned and took Magee's still extended hand and shook it firmly. However, in that brief instant, Magee's ego was bruised too far. As soon as Swanguen released Magee's hand, Magee drew his revolver and unloaded three, perhaps four, shots into Swanguen from inches away. Swanguen was struck through the heart and dropped dead instantly.



Horace Magee

Escallier was the only person in the room to initially attempt to stop Magee. Magee eluded Escallier's grasp and bolted for the door. In the process, Magee turned and emptied his revolver on Escallier. He too dropped dead.

John Jackson, a Santa Fe Railroad brakeman, lunged after Magee who was still pulling the trigger on his revolver. With the "click, click" of the gun continuing, Jackson unleashed a barrage of strokes with the cue stick in his hand. Jackson did not miss his mark, knocking Magee unconscious. Jackson continued his blows to such an extent that after Jackson was stopped, it was believed Magee would not survive the night from the damage to his head.

The only other officer in the area that night was Riverside Deputy Sheriff Hugh McConville. He had been attending a Christmas performance at the schoolhouse when he was gathered. McConville rushed to the scene in time to gain custody of the bloody and beaten Magee. McConville took Magee to the livery stable where he hovered over Magee for the rest of the night with a drawn revolver, not for fear of Magee, but the crowd who wanted to string up Magee right then. At first light, McConville took Magee to the county jail in Riverside.

Was Horace predestined to violence?

Speculation was rampant as to the cause of the violence. It was reported Magee purchased the revolver from Frank Furneld 15 minutes prior to the murders. What was anyone doing selling a weapon to someone that intoxicated? Joe Winkles served the alcohol to Magee. Winkles ran what was called a "blind-pig," which was a home "still" operation for profit. Within four months of the murders, Winkles was fined $300 for his operation and effectively run out of the Inland Empire. Magee's mother was a "squaw." His father was Irish. His brother, the football star, was recalled having had a prior run in with the law because of his "free use" of firearms.

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1 "The Treaty of Temecula is but one of 18 unratified treaties with California tribes that were submitted to the U.S. Senate on June 1, 1852, by President Millard Fillmore. Unbeknownst to the tribal signatories, the Senate rejected the treaties and ordered them to be held in secrecy for over fifty years." https://americanindian.si.edu/sites/1/files/pdf/press_releases/Nation-to-Nation-Treaty-K-press-release.pdf

Justice was demanded; Swanguen was leaving a wife and five children and Escallier, a wife and two children.

Assemblyman Miguel Estudillo (future RCBA president) was hired to represent Magee. On December 28, a preliminary hearing took place. Magee, through Estudillo, entered a not guilty plea. Trial was promised without unnecessary delay, set for January 28, 1908.

On January 28, Estudillo along with co-counsel, Will Curtis, for the defense, and District Attorney Lyman Evans (and future RCBA president) commenced the selection of a jury. Many questioned how this Indian could afford such a legal team. The answer was by the benevolence of San Bernardino City Councilman R. F. Garner. Garner was that child saved by the horsemanship skills of Horace years prior. Apparently, he felt an indebtedness or some moral connection to be the benefactor.

Estudillo and Curtis struggled to pick a jury. Out of the first 90 persons summoned for jury duty, only 10 were selected. During the second day, a full jury was finally impaneled, and testimony commenced. Over 40 witnesses were subpoenaed, not all testified. Throughout the damning testimony, Magee was regularly reported as "that Indian," one who would sit stolidly, a characteristic of his race, emotionless to the brutality of the crime.

Testimony was completed by Friday, January 31. Two long days of testimony was presented to the jury. Estudillo and Curtis defended the case based on Magee did not have the requisite intent, the alcohol plied by others being the cause. The final arguments were set for Monday, February 3.

Once the arguments were over, it did not take long for the jury to be handed the case and the verdict reached. The jury announced, "Guilty, murder in the first degree." The jury also recommended life imprisonment in the State Penitentiary at San Quentin. Sentencing was set for February 21. Rumor had it the jury was split on punishment, six for life, six for death.

The defense moved for a new trial which was denied. Judge Densmore thereupon sentenced Magee to prison for life.

Life doesn't always mean life. In February 1920, Magee was granted parole. "Friends" of Magee's had been working hard to gain his release. The argument given to justify the parole was the same as the trial defense; perhaps Magee was not so much to blame but others were or should be. The others who should be responsible, it was agreed, being those who fed him the home-made liquor rendering him not responsible for his actions.

On January 5, 1931, eleven years after Magee was paroled, Governor Clement Calhoun Young commuted the sentence of Horace Magee to the term actually served. January 5 was the day before the end of the governor's term. The lieutenant governor at the time was Herschel L. Carnahan, formerly of Collier & Carnahan, the firm which represented Swanguen in getting his name on the ballot in 1906 to run for re-election as constable.

What ever happened to Horace Magee? After his release, he returned to the Garner Ranch where he worked as a hand, became a foreman, and eventually retired. Horace never moved away from the ranch, being given a small cabin to live out his life, which ended quietly on March 26, 1963, in the tranquil environment of the mountains.

Chris Jensen, Of Counsel in the firm of Reid and Hellyer, is president of RCBA Dispute Resolution Service, Inc. Board of Directors and chair of the RCBA History Committee.

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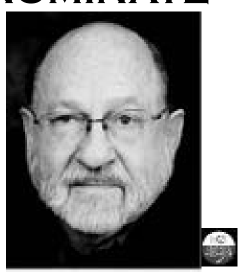

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Small Businesses & Divorce Mediation

by Cheryl Kang Prout

Running a small business with one's spouse while ensuring a happy married life can be challenging. Both require considerable time, effort, and energy from the couple. It gets even more difficult when the marriage fails, as the ownership and management of the family-owned business can further complicate the separation.

Many divorcing couples who own a small business decide to mediate their divorce in order to:

- Save Money: An average divorce in California costs around $17,500. A mediated divorce usually costs between $3,000-$8,000.
- Save Time: The family court's already high caseload has exploded during the COVID-19 pandemic. In 2021, the Orange County Family Court processed 10,000 Request For Orders (not including Domestic Violence requests), which is an increase by 15% since 2020. There was also a 41% increase in renewals of Domestic Violence restraining orders since 2020. A litigated divorce involving a small business often takes years before it is finalized because it is subject to the court's busy schedule. In mediation, parties need only coordinate with their mediator. Even with valuation experts and accountants involved, a settlement can be reached much faster than waiting on a judge's order.
- Keep It Private: A study by the Small Business Administration found that every year 36-53% of small businesses deal with a lawsuit. Many times, the first-place business litigators go to find out financial details regarding a business (and its owner) is the public divorce records of the business owners. By mediating their divorce, small business owners can keep details of their business finances and practices private.

When mediating a divorce involving a small business, a mediator will consider the following factors to help the divorcing couples reach an agreement regarding the division of the business.

1. Date of Creation of the Business: California Family Code provides that, with a few exceptions (namely, gifts made to one party and inheritance), community property is anything that one earns, creates, and acquires (unless acquired with separate funds) during the marriage. In the event of a divorce, any such community property assets earned, created, or acquired during the marriage is equally divided. The same is true with businesses. Without any existing agreement, businesses started during the marriage should be divided equally during a divorce in California. If one spouse owned the business before the marriage, the California Family Code provides that the increase in the business' worth during the course of the marriage is divided equally. That said, so long as the parties are in agreement, they do not need to follow the Family Code when dividing the business.
2. Valuation of the Business: In a litigated divorce, valuing a small business can turn into a battle of appraisers. The advantage of using mediation for a divorce involving a business is that the parties will have control over the valuation method. Parties will often use one of the three valuation methods. Each method takes into consideration either the asset, the market, or the business' income.
   - The asset approach is a straightforward method that adds all the assets and subtracts the liabilities from the sum. It may seem simple at first, but people tend to give different values to different assets. This method is usually used for small businesses because of its inherent complexities.
   - In the market approach, the valuation of the business is based on the price of similar businesses that have been sold recently. It's the least used approach of the three methods.
   - The income approach is the most commonly used among the three methods. It considers the past performance and revenue of the business to project its future income. Income refers to the gains generated by the business' products and services.
3. Division of the Business: Once the value of the business has been determined, the parties will decide how to divide the business.
   - Buy-Out: Most couples with a profitable business wish to keep the business in-tact, rather than sell it. Keeping a profitable business open is better for both spouses as it is a source of income for the supporting the spouse who will be awarded the business, and possibly a spouse receiving spousal and/or child support. One spouse, usually the one who carried the day-to-day business operations will buy-out the other spouse by paying that spouse half of the value of the business.
   - Equalization: Many divorcing couples do not have enough liquid funds for a true buy-out. In such cases, couples may agree to trade assets in-kind to prevent liquidation of valuable assets. For example, a business may be awarded to one spouse in exchange for the other spouse being awarded a house of similar value.
   - Liquidation: Usually as a last possible resort, a divorcing couple may consider liquidating a business if it is an unprofitable one by putting it out on the market. One may consider posting the business on certain business sale listings. Divorcing couples may also sell and liquidate a business because they cannot come to an agreement on the division of the business or because they have an urgent need for liquid funds.

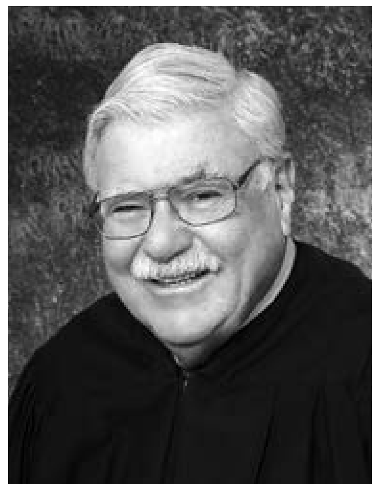
Whether in court or in mediation, the parties will need to reach an agreement or receive an order regarding the value for the small business and a method of division. It would behoove the parties to reach an agreement on these matters in mediation to save time and money.

Cheryl Kang Prout is the managing partner of Cordial Family Lawyers, LLP. She specializes in divorce mediation and pre-marital/post-martial agreements.

In Memoriam: Honorable Charles D. Field

by John E. Brown

Judge Charles D. Field passed away on October 29, 2021. He practiced law with Best Best & Krieger LLP for 27 years having joined the law firm in 1963, after graduating from UCLA School of Law in 1962. Known by family, colleagues, and a wide circle of friends as Charlie, he specialized in school law as a labor and employment lawyer. Beginning in the late 1960's, he founded and led Best Best & Krieger's statewide school law practice. In 1990, Charlie was appointed a judge to the Riverside County Superior Court where he served in the juvenile and civil divisions. In the civil division, he managed complex litigation and served two years as supervising judge. His fellow judges remember him not only as a fellow jurist and colleague, but as a good friend to one and all.



Judge Charles Field

In addition to his quick wit, wry smile and cheerful disposition, Charlie had California native son written all over him. On August 2, 1936, he was born in San Francisco to parents who were both graduates of Stanford University, his father was a physician and later a professor at UCLA's School of Medicine. Charlie grew up on the Stanford University Campus, in Washington, D.C., and in Los Angeles. He attended the University of California, Riverside (UCR) in the 1950's, where he graduated in 1958 as a member of UCR's first four-year class, and joined Best Best & Krieger, LLP in 1963. Charlie profoundly impacted the city of Riverside, many of that city's most important numerous civic institutions, and in particular UCR, for more than half a century. He was a lifelong supporter of both UCR and UCLA, a passionate supporter of athletics at both schools (Charlie himself being a multi-sport athlete at UCR), and never one to put his ursine passions as both a Highlander and a Bruin one above the other.

When Charlie joined the firm at its newly completed mid-century modern office building at 4200 Orange Street, designed by architect Clinton Marr, he joined Jim Krieger who had been practicing with Raymond & Eugene Best for nearly 15 years. The Bests in turn had practiced at the old Evans Building for nearly 70 years. He joined John Babbage, Gerald Brown, Enos Reid, Arthur Littleworth, Glen Stephens, John Barnard, and Bill DeWolfe as well as Gene Best. Charlie's associates soon included Horace Coil, Bart Gaut, Terry Bridges, and Chris Carpenter. Some of these colleagues from the 1950's and 1960's came and went, but most remained the espirit de corp of Best Best & Krieger for the next half century or more.

Charlie described his early years as a "utility" litigator as embracing everything that "came through the door" from civil litigation to family law, and even his appointment to defend a criminal defendant in a death penalty case. Many of his clients walked through the door at 4200 Orange Street as part of the firm's free legal clinic from 8:00 a.m. to noon every Friday. Encouraged by Charlie, I proudly represented the local rock band War as a first year lawyer for a too brief 72 hours after they drove up to the firm on a Friday morning in their limousine in the spring of 1976.

By the 1960's, Riverside and San Bernardino counties were growing rapidly in population as were the increasingly complex labor and employment legal matters confronting both private and public employers, particularly collective bargaining, as public employees were employed throughout the region to educate the growing student population. Although school districts had been traditionally represented by county counsels in school law matters, by the early 1970's, Charlie had developed a substantial school law practice. He was encouraged to develop that practice as a specialty by his partner, Arthur L. Littleworth, who served on the Riverside Unified School District's Board of Education from 1958 to 1972. Charlie was also a good friend of Ray Berry, who was superintendent of the Riverside Unified School District at the time. Always on the go, traveling from Riverside Unified School District to Hemet Unified School District, Palm Springs Unified School District and many, many more to represent them in collective bargaining negotiations.

In 1973, Charlie was asked to represent a number of grape growers in the Coachella Valley in a labor dispute that attracted international attention. Among the growers that Charlie represented included Palm Springs Unified School District Board of Education member, Corky Larson and her husband K.K. Larson. The three-year contract of the 60,000-member United Farmworkers Union (UFW), AFL-CIO, then headed up by Cesar Chavez, with 27 growers who owned and farmed 7100 acres of table grapes, had expired on April 15, 1973 and the growers elected in the meantime to sign up with the International Brotherhood

of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The UFW initiated a prolonged strike against both the growers and the Teamsters. Charlie recalled that the prolonged strike and negotiations as one of the most challenging legal matters he ever took on. He told many of us later how much he preferred sitting across the table from schoolteachers and their representatives.

Judge Field was warm, he was affable, and he was a down to earth communicator making him the ideal legal advisor for successfully carrying out labor negotiations. Joined by Bill Floyd, Ginny Phillips, Howard Golds, Dan McHugh, and Jack Clarke at Best Best & Krieger, he managed one of the larger school law practices in California before his departure in 1990 to become a judge.

Judge Field repeated one highlight of his judicial career again and again. He initially delayed signing what he referred to as a printed form, Return of Minor, seeking the return of a runaway juvenile from California to Pennsylvania. With the cooperation of his judicial counterpart in Pennsylvania, he placed the minor "temporarily" with a loving family in Banning and having reached the age of majority that minor eventually went to college and remained in California. A "random act of kindness" he called it but one of many that characterized Charlie's love and compassion for family, friends, casual acquaintances and many others throughout his life.

Charlie's passionate and tireless support of so many of Riverside's civic associations, particularly UCR, were legendary. He was a member of both the UC Regents, UCR's Alumni Association, founding chair of the UCR Foundation, president of UCR's Citizen University Committee as well as president of the Board of Directors of the Riverside Arts Foundation and the Mission Inn Foundation. Raymond Best, who considered himself a public speaker of no small repute, would undoubtedly have been pleased about the good judge's undisputed role as "master of ceremonies" for numerous civic events over the years. His good humor, sharp mind, and endearing comments left many of us attending those events to conclude it was as much about Charlie as master of ceremonies as it was about the event.

Charlie is survived by his beloved wife of nearly 38 years, Virginia Field, a retired UCR administrator; his sons, Robert and John Field; his stepchildren, Vicki Broach, Cristi Hendry, and Stephen Broach; and 15 grandchildren and six great-grandchildren. His first wife and Robert and John's mother, Judy Field Baker, an accomplished pen and ink artist, predeceased Charlie. Charlie's 'merged' family as he put it, enjoyed decades of camping, boating, roaming the Northwest, and other parts of the United States, and in particular fishing. Go Bears, whether UCR or UCLA, Charlie loved them all!

John E. Brown is Of Counsel to Best Best & Krieger LLP.

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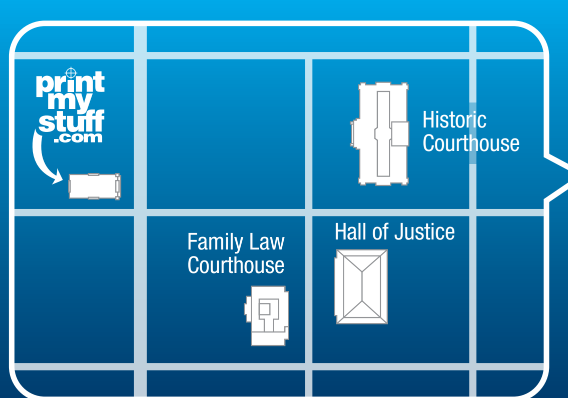

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Updated Guidelines From the EEOC Regarding COVID-19 as a Disability Under the ADA

by Jonathan E. Phillips and Emilie J. Zuccolotto

As we approach our third year dealing with the impact of COVID-19 in the workplace, employers continue to face unprecedented challenges developing and implementing policies to protect themselves, their employees, and their customers and clients. One question many employers have struggled to understand is whether employees suffering from COVID-19 symptoms—particularly "long covid" or "long-haul covid" symptoms—are entitled to accommodations under Title I of the American with Disability Act (ADA). In December, the U.S. Equal Employment Opportunity Commission (EEOC) issued updated guidance in the form of a series of questions and answers intended to clarify under what circumstances COVID-19 symptoms meet the definition of "actual" or "record of" a disability for purposes of the ADA.

The EEOC started by stating the obvious: COVID-19 symptoms must be analyzed under the ADA's definition of disability just as any other medical condition. Thus, a person with COVID-19 has an "actual" disability only when their symptoms constitute a "physical or mental" impairment that "substantially limits one or more major life activities." As the EEOC explained, this means that having COVID-19 is not an actual disability if an employee is either asymptomatic or only has cold or flu like symptoms that resolve in a matter of weeks. On the other hand, if an employee has more severe symptoms, then a careful, case-by-case analysis is needed to determine if those symptoms substantially limit a major life activity such that the employee has an actual disability potentially triggering the right to reasonable accommodations.

The EEOC went on to provide some examples of situations in which COVID-19 symptoms would constitute a disability. These primarily involve long covid symptoms, such as intermittent multiple-day headaches, dizziness, brain fog, difficulty remembering or concentrating, and various physical symptoms—such as shortness of breath, heart palpitations, chest pain, intestinal pain, nausea, or vomiting—that last, or are expected to last, for several months. Importantly, the EEOC stressed that these COVID-19 symptoms can be deemed to substantially limit a major life activity even if they only occur intermittently, as long as they are substantially limiting when active. Of course, all of this is subject to individualized assessment and would need to be attributed to COVID-19 by the employee's physician.

As with any disability, if an employee is suffering from a COVID-19 disability, the employer must engage in an interactive process with the employee to determine whether a reasonable accommodation can and should be provided. On this issue, the EEOC confirmed that an employee's right to reasonable accommodation remains unchanged by the fact that the disability is based on COVID-19 symptoms as opposed to other disabilities. That means that the employee is entitled to a reasonable accommodation only if it is required by their disability, the employee is qualified for the job with the accommodation, and the accommodation would not pose an undue hardship for the employer.

Of course, although the standard remains the same, the pandemic has changed the accommodation analysis in some circumstances. Perhaps most notably, as addressed by the EEOC in prior updates, the prevalence of remote work arrangements during the pandemic in industries where it was previously considered essential to work in-person has made it more difficult for employers to claim that a remote work accommodation would be unreasonable or pose an undue hardship. And, as with any analysis and implementation of reasonable accommodations, the employer must balance the inherent need for individualized assessment with the risk that treating employees differently may lead to a claim of discrimination.

Finally, the EEOC also addressed some COVID-19-specific issues that may arise in analyzing whether certain adverse employment actions would actually constitute discrimination under the ADA. For example, prohibiting an employee from being in the workplace could constitute an adverse employment action. But given the virus's highly-contagious nature, an employer could rely on the ADA's "direct threat" defense to justify such an action on the grounds that it is necessary to protect the health of others in the workplace during the period in which an employee is contagious. That said, it is critical that the employer follow CDC-recommended guidelines—and not "myths, fears, or stereotypes"—to determine if it is safe for an employee to remain in, or return to, the workplace.

In conclusion, while the EEOC's update was much needed and will undoubtedly provide both employers and employees important guidance when navigating the impacts of COVID-19. If we have learned anything over the past two years, it is that this pandemic—and the scientific understanding of it—is constantly evolving. Thus, it will remain critical that every situation be carefully analyzed taking into account the latest guidelines from the EEOC, the Centers for Disease Control and Prevention, and other federal, state, and local agencies.

Jonathan E. Phillips and Emilie J. Zuccolotto are partners at Larson LLP who practice complex civil litigation and white collar criminal defense, with a focus on employment disputes and counseling.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

NOTICE

TRANSITION TO ZOOM FOR REMOTE APPEARANCES

Effective March 7, 2022, the Riverside County Superior Court will transition from Webex to the Zoom platform for remote appearances in all case types countywide.

The court is transitioning to Zoom as the video and audio quality are significantly better, court customers are often more familiar with Zoom in their everyday lives, and Zoom is more cost effective for the court.

Zoom is a secure environment. Zoom can be accessed through a computer, tablet, telephone, cellphone, or other electronic or communications device. The new Zoom telephone numbers and meeting ID numbers for the Riverside County Superior Court departments will be listed on the court's website under the Remote Appearance page at www.riverside.courts.ca.gov/PublicNotices/remote-appearances.php.

TRANSITION TO ZOOM FOR REMOTE APPEARANCES IN PROBATE

The new Zoom telephone numbers and meeting ID numbers for the respective Probate Departments are set forth in the chart below.

Department	***Zoom Information for Probate Hearings on 3/7/22 and After***
Call	**1-833-568-8864 (toll free), 1-669-254-5252, 1-669-216-1590, 1-551-285-1373 or 1-656-828-7666**
8	Enter Meeting Number: **161-617-1847** Or join by URL: https://riverside-courts-ca-gov.zoomgov.com/j/1616171847
11	Enter Meeting Number: **161-443-2070** Or join by URL: https://riverside-courts-ca-gov.zoomgov.com/j/1614432070
T1	Enter Meeting Number: **160-976-1261** Or join by URL: https://riverside-courts-ca-gov.zoomgov.com/j/1609761261
PS3	Enter Meeting Number: **160-319-8473** Or join by URL: https://riverside-courts-ca-gov.zoomgov.com/j/1603198473

Please consult the court's website frequently for changes and updates. If you have any questions, or if there are any issues with connection to Zoom, please dial (951) 777-3147, during the hours of 7:30 a.m. to 4:00 p.m.

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Krieger Award Nominations Sought

by Honorable John Vineyard

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

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

The award honors the memory of Jim Krieger and his exceptional record of service to his community. He was, of course, a well-respected lawyer and member of the RCBA. He was also a nationally recognized water law expert. However, beyond that, he was a giant in the Riverside community at large (please see the great article by Terry Bridges in the November 2014 issue of the *Riverside Lawyer*). The past recipients of this award are Judge Victor Miceli, Jane Carney, Jack Clarke, Jr., Judge Virginia Phillips and Virginia Blumenthal, to name a few.

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

Current members of the RCBA board of directors are not eligible, nor are the current members of the award committee.

If you would like to nominate a candidate for the Krieger Award, please submit a nomination to the RCBA office no later than May 20, 2022. The nomination should contain, at a minimum, the name of the nominee and a description of his or her record of community service, and other accomplishments. The identities of both the nominees and their nominators shall remain strictly confidential.

The Honorable John Vineyard is a judge of the California Superior Court located in Riverside County, is the chair of the Krieger Meritorious Service Award Committee, and a past president of the RCBA.

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, 2022.

Alison E. Bergquist – Solo Practitioner, Brea

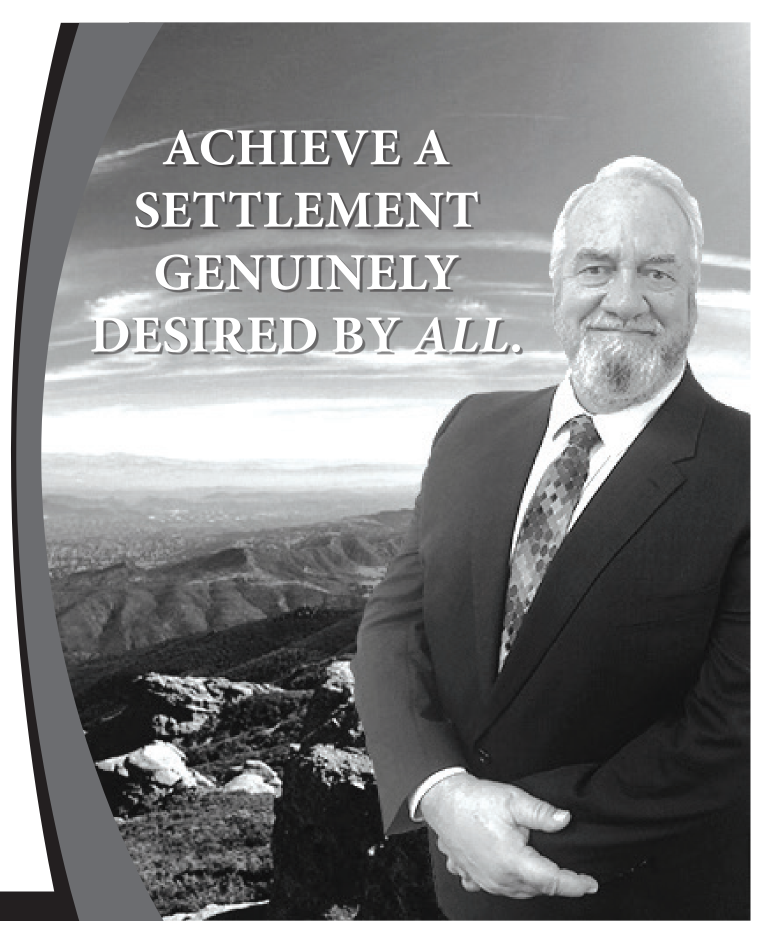
Robert S. Chichester – Office of the City Attorney, Riverside

Ginetta L. Giovinco – Richards Watson & Gershon, Los Angeles

Lilian Demonteverde Hoats – Law Office of Lilian Demonteverde Hoats, Corona

Craig A. Kroner – Law Offices of Craig A. Kroner, San Jose

Howard W. Schreiber – Hughes & Hughes, Palm Desert



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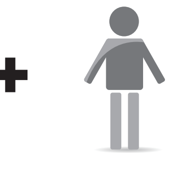
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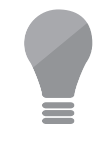
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Opposing Counsel: John Boyd (as told by his son)

by Jeffrey Boyd

A few years ago, John Boyd was in trial on a long cause probate case in front of Judge Michael Smith in Department 21 of the San Bernardino County Superior Court. I was next door trying a very short three day misdemeanor jury trial at the same time as a prosecutor. It will probably never happen again, but it was a very fun experience getting to peak in on each other during our breaks. John has watched myself and my brother Michael (a deputy district attorney in Riverside County) in trial on many occasions. My mom also enjoys this as she volunteered many years offering court tours for school classes. My mom always considered it a win when she could find a courtroom in trial (with nothing graphic or violent) or a judge who would be willing to talk to the kids (not that hard with the bench in Riverside County) so the students could witness the judicial system firsthand.

John Boyd

As I am now old enough to be practicing and have children, I cannot help but marvel at the number of teams my father coached for me, and my brothers (basketball, baseball, soccer, and mock trial). I still remember points my father taught me in mock trial when I am in court. My father was always heavily involved in our lives and always made time to see our games or whatever activity we were competing in at the time. When his three sons decided to take up ice hockey in their twenties, he was again there at the ice rink to watch them play. It is a level of involvement I hope to maintain with my children.

John was born in Corona, California. He went to San Diego State University (SDSU), after transferring there from Riverside Community College, where he met the love of his life. After that he went to Pepperdine Law School. He married his wife, Janice, after his first year of law school ("I proposed as soon as I realized I was not going to flunk out" he recounts to me every few years). He did more than "not flunk out" graduating cum laude and was an editor on the school's Law Review. Both my parents routinely tell the story of how my Dad would "learn community property" by dividing up the few belongings they had in their small apartment. My mom did not mind as she was a certified public accountant, all too familiar with the California Bar's favorite test subject.

After graduation, John began working at Thompson and Colegate in 1979 and continues to practice there today. John practices bankruptcy/creditor's rights, business/commercial law, and real estate/construction. He also mediates cases. John was second chair (next to Jim Ward) on the *Press-Enterprise* U.S. Supreme Court cases, which provided for an open public courtroom during preliminary hearings and jury selection. Those cases are still seminal cases on the right to a public, open courtroom at all stages of criminal proceedings. I recall him bringing my brother Steven and I airplane pencil sharpeners as a gift after one of his trips to Washington D.C. for those cases.

Some of the our memories are driving down to San Diego on a Friday or Saturday afternoon to watch a SDSU football game with the family. We collectively watched the birth and early career of future hall of fame running back, Marshall Faulk. John's sons all attended college at schools without football teams which has caused us to adopt my father's alma mater as our own when it comes to football.

As my father spent his entire career at the same firm, we regularly became acquainted with many of the other attorneys in the firm. The Boyds regularly watched Craig Marshall play basketball in Poly High School Gym and then at UC Riverside. We met and came to know the Marshall family, because Jack Marshall was a partner at the firm as well. It is fitting that Craig practices there now. My father is very blessed to have many close family friends at Thompson and Colegate (and throughout his practice generally). He regularly held a Saturday morning golf tee time with Don Grant, Robert Swortwood (both former partners at Thompson and Colegate), and Tom Burkhardt, who John met through his legal work.

I have not asked (but I have been told by many, many people who know him), that he is most proud of is his marriage, his three sons and three daughters-in-law, and his grandchildren. John has a son who is not an attorney. Ironically, in his first job out of college, that Steven worked for the company that maintained the Riverside County Superior Court's case management software. When he is not working, John spends time with his now seven grandchildren. He also serves as an elder at Magnolia Center Church of Christ, where they have attended since before I was born.

Jeffrey A. Boyd is one of John's three sons and a Deputy District Attorney with the Orange County District Attorney's Office.

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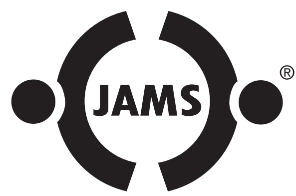

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Legal Malpractice
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Judgment Collections
California and Nevada. Referral Fees Paid. 760-479-1515, Joel@SelikLaw.com. And Nevada Pro Hac Vice & Referrals.

Corporate Transactional Attorney
Seeking experienced attorney with a minimum one year of business and transactional law practice experience to join our corporate/real estate transactional team in our downtown Riverside office. Practice areas include: mergers & acquisitions, commercial contracts, real estate development, general business and business formation. Full benefit package and competitive salary with performance bonuses. Please send resumes to vb@varnerbrandt.com.

Civil Litigation/Premises Liability Attorney
Seeking experienced attorney with minimum one year of civil litigation and/or premises liability matters/insurance defense experience to join our premises liability team in our downtown Riverside office. Trial experience a plus. Full benefit package and competitive salary with performance bonuses. Please send resumes to vb@varnerbrandt.com.

Labor & Employment Attorney
Seeking experienced attorney with minimum one year of labor & employment defense litigation experience to join our labor and employment team in our downtown Riverside office. Practice areas include: all forms of harassment and discrimination, wrongful termination, wage and hour, and class action / PAGA defense. Trial experience and class action/PAGA experience a plus. Full benefit package and competitive salary with performance bonuses. Please send resumes to vb@varnerbrandt.com.

Litigation Assistant/Paralegal
Opportunity available in our downtown Riverside office for a litigation legal/paralegal assistant with 3+ years litigation law experience. Excellent location in historic downtown Riverside with competitive salary and benefits package. Please send resumes to vb@varnerbrandt.com.

Estate Planning Attorney
Available opportunity in our Ontario office for an attorney to join our Estate Planning team. Potential candidates must possess a strong background in estate planning, trust administration and probate matters (at least 2+ years of relevant experience). Please send resumes to vb@varnerbrandt.com. The following are requirements for this position: Estate planning, trust administration and probate experience; Excellent written and oral communication skills; Excellent organizational and interpersonal skills; Acute attention to detail and ability to multi-task in a fast paced culture; Must have initiative, be able to act decisively, work independently and exercise excellent and ethical judgment.

Probate Paralegal
Opportunity in our Ontario office for an experienced full-time probate paralegal to join our Estate Planning team. Potential candidates must possess a background in estate planning, trust administration and probate matters (2+ years). The following are requirements for this position: Estate planning, trust administration and probate experience; Excellent written and oral communication skills; Excellent organization and interpersonal skills; Acute attention to detail and the ability to multi-task in a fast paced culture; Competitive salary commensurate with experience along with bonuses. Great benefit package including health, dental, vision, life insurance, 401K, and a great working environment. Please send resumes to vb@varnerbrandt.com.

Transactional-Corporate Legal Assistant/Paralegal
Opportunity available in our downtown Riverside office for a legal assistant/paralegal with 2+ years' experience with comprehensive transactional and corporate knowledge and top-notch technical, communication and administrative skills. Job duties include working with our transactional attorneys, document preparation, maintaining and processing client information, and managing the progression of matters. Familiarity with complex business transactions and associated documentation is required. Excellent location in historic downtown Riverside with competitive salary and benefits package. Please send resumes to vb@varnerbrandt.com.

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

Office Space – RCBA Building
4129 Main Street, Riverside. Next to Family Law Court, across the street from Hall of Justice and Historic Courthouse. Office suites available. Contact Charlene Nelson at the RCBA, (951) 682-1015 or rcba@riversidecountybar.com.

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