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MAGAZINE

RIVERSIDE COUNTY BAR ASSOCIATION
RCBA
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The official publication of the Riverside County Bar Association

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RIVERSIDE LAWYER
MAGAZINE

CONTENTS

Columns:

COVER STORY:

Features:

Departments:

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 its members, and indirectly their clients, by implementing programs that will enhance the professional capabilities and satisfaction of each of its members.

Serve its community by implementing programs that will provide opportunities for its members to contribute their unique talents to enhance the quality of life in the community.

Serve the legal system by implementing programs that will improve access to legal services and the judicial system, and will promote the fair and efficient administration of justice.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Tel-Law, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of Riverside Lawyer published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries 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.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in Riverside Lawyer.

The material printed in 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

FEBRUARY

18 **RCBA/RCLA General Membership Meeting**
"Hot Topics in Federal Practice"
Speaker: Professor Laurie Levenson, Loyola University School of Law
RCBA Bldg 3rd Floor – Noon
MCLE

21 **HOLIDAY**

22 **RCBA Board**
RCBA – 5:00 p.m.

23 **EPPTL Section**
"Useful Tips When Dealing With Title Insurance"
Speaker: Dan Buchanan, Esq.
RCBA Bldg 3rd Floor – Noon
MCLE

Mock Trial (Regional) Round 3
HOJ – 6:00 p.m.

24 **CLE Brown Bag**
"CA Lemon Law – Plaintiff & Defense"
Speakers: Rob Schelling, Esq. and Don Lee, Esq
RCBA Bldg 3rd Floor – Noon
MCLE

26 **Mock Trial – Round 4**
HOJ – 9:00 a.m.

Mock Trial Awards Ceremony
Riverside Municipal Auditorium – 1:00 p.m.

MARCH

1 **RCBA/SBCBA Environmental Law Section**
"Crimes in Riv. Co. from the Perspective of the DA's Office"
Speaker: Stephanie Weissman, Esq.
RCBA Bldg., 3rd Fl. – Noon
MCLE

2 **Bar Publications Committee**
RCBA – Noon

Mock Trial - Elite 8
HOJ – 6:00 p.m.

5 **Mock Trial – Final 4**
Historic Court House – 9:00 a.m.

Mock Trial – Championship Round
Historic Courthouse – 1:00 p.m.

Mock Trial – Finals Awards Ceremony
Historic Courthouse, Dept. 1 – 4:00 p.m.

8 **PSLC Board**
RCBA – Noon

9 **Barristers**
Cask 'n Cleaver – 6:00 p.m.
1333 University Ave., Riverside
MCLE

15 **Family Law Section**
RCBA Bldg 3rd Floor – Noon
MCLE

President's Message

by Michelle Ouellette

When I heard that the theme of this month's *Riverside Lawyer* is Lawyers and Love, I was stumped. What could the two words lawyers and love possibly have in common? "Love." "Romance." "Passion." For many, these words evoke images of candlelight dinners, walks on the beach, marriage ceremonies, and tender moments shared between two people deeply attached to one another. I doubt very much, however, that many would list "attorney" among the images conjured by these words, as we are not generally a warm and fuzzy bunch. The unfortunate stereotype of the stoic lawyer, emotionless in a black suit, is often presented as reality. But history, and indeed our own experiences, reflect the inaccuracies of this image and vindicate our profession, demonstrating that the practice of law is one steeped in passion, emotion, and even love.

The founders of our nation were men and a few women whose pens ignited the page with reason and brilliant legal arguments, appropriate because many of the founders were also attorneys. The founders' passions were not reserved only for political persuasion or oral advocacy; rather, their heated emotions carried over into all parts of their lives, including their romances. It is no secret that Benjamin Franklin, one of the driving forces behind our bicameral legislature, enjoyed a lengthy series of romances – some of which bordered on the scandalous. Even John Adams, a man known for his reserved nature and even temper, wrote innumerable love letters to his wife, Abigail, declaring that even in her absence, her memory and image haunted him like a welcomed ghost.

By the turn of the Twentieth Century, one of American's most famous advocates, Clarence Darrow, had expressed his own views on love. Biographer Irving Stone describes how Darrow's marriage, a heartbreaking tale full of suspicion and restriction, drove Darrow to disavow marriage forever. Darrow chose instead to conduct his romantic affairs outside the bonds of marriage, and thus avoided the loss of liberty which Darrow believed accompanied the rite.

In 1949, Katherine Hepburn and Spencer Tracy were lighting up the big screen in one of the motion pictures' earliest depictions of lawyers in love, *Adam's Rib*. Hollywood, it seemed, had finally grasped that the art of advocacy and the passions that accompany it are not unlike the persuasion and emotions involved in any good romance.

Although history certainly provides sufficient evidence to show that "being an attorney" and "being in love" are not mutually exclusive concepts, I have seen firsthand many additional examples of the way that lawyers express their emotions and convictions. Love is not always of the romantic variety, and the bonds of filial love, platonic love, and philanthropic love can be equally intense. One has only to watch an attorney fearlessly defend the innocent, struggle to protect a client's interests against insurmountable odds, work evenings at a legal aid clinic, or reach into his or her own pockets to help the needy to realize that attorneys are, above all else, people. And as people, attorneys experience the same range of emotions, beliefs, and convictions as any other person in love.

As the most "romantic" of all holidays approaches this February, do not be hesitant to express your feelings, whether of the romantic sort or not, to those who matter most to you. Also remember that, as an attorney, the love of justice and of the law should remain at the top of your list of professional passions.

Michelle Ouellette, president of the Riverside County Bar Association, is a partner at Best Best & Krieger, LLP in Riverside.

An Ordinary Man Whose Life Was Marked by Extraordinary Things

by Andrew Heglund

Abraham Lincoln was truly a remarkable man, an ordinary man whose life was marked by extraordinary things. His résumé would not read like a résumé of today's leader – you wouldn't find an Ivy League education, a Rhodes Scholarship, or legal experience in a prestigious international law firm. Rather, you would find a humble upbringing with no ancestral "coattails" to ride into political office. His mother died when he was only ten years old, two years after his father had moved the family to Indiana.

He admitted that he "did not know much" when he was growing up. But perhaps the greatest lesson he learned was the lesson of diligence and hard work. Not relying on his difficult childhood as an excuse, Abraham Lincoln worked, both physically and mentally, to better himself, whether splitting rails for a fence or working in a store in Illinois.

It is unlikely that during his early years, he ever imagined that he would serve as President of the United States, that he would be forced to take steps to keep his great nation together, or that he would one day sacrifice his life for the cause in which he believed. No, young Abraham Lincoln simply applied himself to his work and to his studies.

Those who aspired to become attorneys in Lincoln's time ordinarily apprenticed with a member of the bar or clerked in law offices. However, Abraham Lincoln did not have these opportunities available to him. Instead, he borrowed law books from the man who would one day be his law partner. He taught himself the law from these books, with no law school, no Socratic method, no Bar prep class, and no study groups.

After being certified to practice law in Illinois in 1836, Abraham Lincoln practiced law from 1837 to 1861, the year that he assumed the Presidency of the United States. While he did serve in the Illinois legislature and in the United States Congress, his primary passion was practicing law. Throughout his law practice, he practiced both litigation and transactional law and argued before the Illinois courts, including his state's Supreme Court, as well as the federal bench.

By 1861, the nation was divided on an issue that would threaten its very existence. For nearly one hundred years, the United States had survived as a great example for the world of a new variant of government that required the good character of its people, a representative democracy. However, this fledgling nation was facing permanent destruction. It was at this time that Abraham Lincoln became President of the United States.

During the tumultuous events that molded his presidency, including the secession of the Southern states from the Union, President Lincoln, with divine wisdom, navigated through the complex issues that this nation faced to insure that it would remain as that great example. While brother fought against brother and thousands of young men lay bleeding to death in battlefield after battlefield, President Lincoln was able to extend to the nation hope that one day it would recover from this tragedy. This was demonstrated in no greater way then through his comments at Gettysburg:

> *"It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they here gave the last full measure of devotion – that we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall not perish from the earth."*

Even after this address at Gettysburg, his work was not done. Before his great life was extinguished, he effectively ended slavery with the Emancipation Proclamation and placed the early stitches in the mending of this great nation.

Today, we live in a country that enjoys the benefits of his work and sacrifice, which earned him little more than a bullet at the hand of a maniacal extremist. The headlines the following day read, "OUR GREAT LOSS – Death of President Lincoln." While the loss was great, Abraham Lincoln's legacy continues to inspire us and our nation to greatness.

We as attorneys can learn from and be inspired by President Lincoln's example that one does not need position, prestige, or money to be great. Greatness is born in diligence, humility, and a willingness to affect people in every setting in which we find ourselves.

While an Ivy League law degree may make a job search somewhat easier, and being a partner in an inter-

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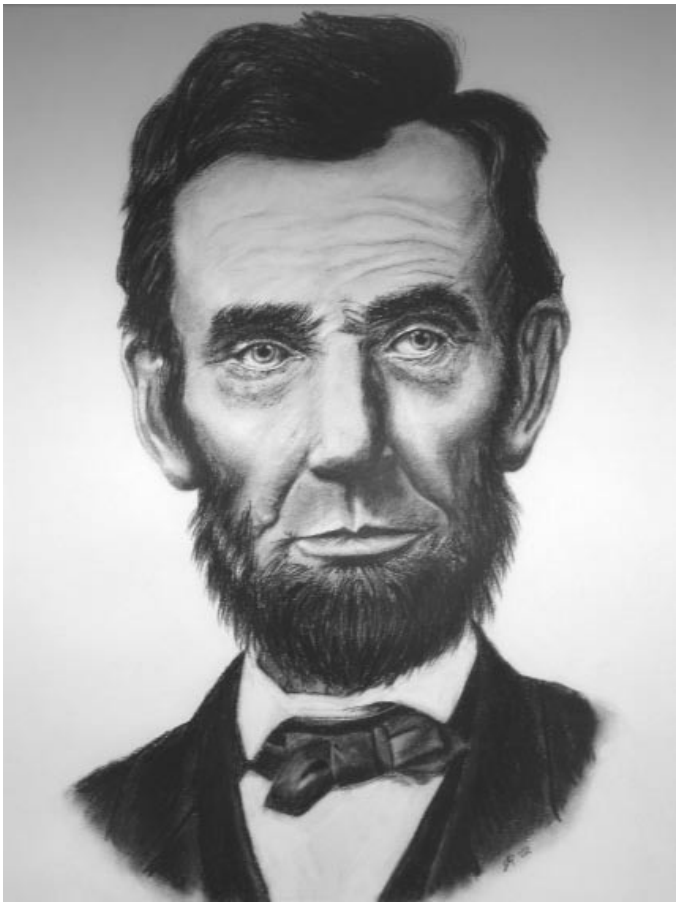
An Ordinary Man . . . *(continued from page 5)*



Portrait of Abraham Lincoln was drawn by Jennifer Robbe

national law firm may allow more opportunities for recognition, they do not guarantee greatness. Each of us can impact our world. As attorneys, we have tremendous opportunities every day to make a difference in those lives with which we come in contact. Being great and doing extraordinary things in our world simply require the characteristics often held by those who are simple, ordinary people, just like Abraham Lincoln.

Andrew Heglund is an attorney with the Los Angeles law firm of Bonne, Bridges, Mueller, O'Keefe & Nichols.

HUMOR

by Richard Brent Reed

LEX SEX

On January 4, 2005, the Riverside County Bar Association presented a CLE class on "Harassment in the Workplace." The useful CLE credits aside, the session was very instructive as to the pitfalls of sexual harassment in the 21st Century. Here are some highlights of what to do and what not to do:

1. Don't hang a picture of your employee having sex on the wall of your art gallery, even if she is eighty-three years old. (*Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142.)

2. If one employee harasses another, don't just transfer one of them, promote the harassee. Then, let the harassed employee take care of her persecutor. (**Chapman v. Enos** (2004) 116 Cal.App.4th 920.)

3. If you're a patient in a veterans' hospital, don't chase your nurse around in your motorized wheelchair. (*Star v. West* (9th Cir. 2001) 237 F.3d 1036.)

4. If you're a female supervisor and you want to hit on a female employee, don't hit on her where it will hurt. (*Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153.)

5. Don't be a cheapskate. Offer to dry clean your date's dress before the dress is offered in evidence. (*Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158; see also *Kenneth Starr v. Clinton.*)

Following these helpful hints should keep you and your employees out of trouble.

Richard Brent Reed, a member of the Bar Publications Committee, is a sole practitioner in Riverside.

Mock Trial 2005

by Judge Joe Hernandez

It is Mock Trial season again. And again, Riverside County is working on continuing a highly successful youth-oriented program. Last year, Riverside Poly won the County Championship. They were one of three undefeated teams at the State Competition, but did not make the final round. State is a bit different from Riverside County, in that there are no quarterfinals or semifinals – just four rounds, and then the top two face off for the championship.

As mentioned above, this is a youth- and community-oriented program. Mock Trial teaches our youth about the judicial system and about being the best that they can be. Civics classes are good, but nothing compares to the education that you get in Mock Trial. Where else can you meet and work with judges and attorneys without being in trouble with the law?

Many past Mock Trial students have gone on to successful careers, many in the law. Some are right here in Riverside; for example, Public Defender Samra Roth, North 1991, and Conflict Panel attorney Chad Firetag, Arlington 1994. They are both on the Steering Committee. There are more: D.A. Carlos Monagas, Poly H.S. (and current coach for Poly); attorney Megan Starr of Best Best & Krieger, Poly H.S.; D.A. Jack Lucky, Apple Valley H.S. (San Bernardino County); D.A. Raquel Marquez, Bishop Manogue H.S. (Sacramento County); defense attorney Christopher Oliver, Arizona. And all of them have given back by coaching, scoring, or otherwise helping out with Mock Trial. These are just the tip of the iceberg; there are many, many others.

Mock Trial is a collaborative effort of the bench, the bar, and the County Department of Education. The Steering Committee consists of representatives of each of these groups. John Wahlin of Best Best & Krieger is the Chair. Tom Willman is the Coordinator from County Schools. Judge Joe Hernandez is the representative from the bench. Charlotte Butt, RCBA Executive Director, is the bar association representative. Judge Michele Levine is the recruiter for judicial officers. Many other dedicated volunteers are on the Committee. The Committee works with the Constitutional Rights Foundation, which is based in Los Angeles and is the sponsor of the program statewide and nationwide.

Riverside has been exceptionally successful in the past, winning the State Championship four times (Poly in 1992, 1996, and 2003 and Arlington in 1994). Arlington won the National Championship in 1994, the only California school ever to do so. Norte Vista H.S. and Corona H.S. finished second in the State in the years that they won the County Championship.

This year's championship round will be presided over by Tom Hollenhorst, Associate Justice, Fourth District Court of Appeals.

Attorneys, contact the RCBA or Tom Willman at the Riverside County Office of Education, (951) 826-6570, to volunteer to be a scoring attorney. Judicial officers, contact Riverside Superior Court Judge Michele Levine.

The schedule:

Round 1	Regional Tuesday, February 15, 6 p.m.
Round 2	Regional Thursday, February 17, 6 p.m.
Round 3	Regional Wednesday, February 23, 6 p.m.
Round 4	Hall of Justice Saturday, February 26, 9 a.m.

Individual Awards Ceremony follows Round 4
at Riverside Municipal Auditorium.

Elite 8	Hall of Justice Wednesday, March 2, 6 p.m.
Final 4	Historic Courthouse Saturday, March 5, 9 a.m.
Championship	Historic Courthouse Saturday, March 5, 1 p.m.

P.S.: The State Competition will be in Riverside, March 18-20, 2005. They need volunteers, too. Contact the RCBA.

Law Library

by Gayle Webb

Got Westlaw? YES!!

Westlaw, a leading online legal research service from West, a Thomson business, has arrived at both the Riverside and Indio law libraries, and it's not just cases and codes! Because of a very special program offered by Thomson to California county law libraries, we are now able to help make your research faster, easier and more thorough than ever.

This tailor-made package of Westlaw databases includes not only their vast collection of annotated (or "value-added," as they like to call it) federal and state case law, statutes and administrative law (All Primary Library), but also an All Forms Library, an All Analytical Library (A.L.R., Am.Jur., Restatements, etc.), all of the Rutter Group treatises, and numerous subject libraries of treatises on California civil litigation, family law, workers' compensation, real estate, bankruptcy, business transactions, insurance, municipal law and social security.

Adding Westlaw to our libraries enables us to provide you with a deeper and more current collection. For example, according to West, when the Supreme Court issues an opinion, the full text of the opinion, along with the full text of any concurrences or dissents, is available on Westlaw within a half-hour. Many treatises not previously owned will now be available through the various subject libraries; hours of print digest research for key numbers and topics will be eliminated with online keyword searches; and more than one person can be using the same treatise or volume at the same time.

Come in and ask the reference staff to show off Westlaw; you can access it at three public computer stations in Riverside and two in Indio. As this is a special program just for county law libraries, you may not access these databases from your office or through our website – you must use them in the libraries. West also has placed restrictions on downloading or emailing to your office, but you may print or paste material into a Word document on-site.

We're really excited about this fantastic new service and we think you will be too – especially because we are offering it to you and to the public for free!

The Law Libraries will be closed to observe the following holidays:

Monday, May 30	**Memorial Day**
Sat., July 2 & Mon., July 4	**Independence Day**

Gayle Webb is the Riverside County Law Library Director.

RCBA Elves Program 2004

by Brian C. Pearcy

The third year of RCBA's Elves program was a year of change and growth. Due to a shift in personnel and new management goals after the last article was written, we changed agencies to help us identify needy families. Now we are working with the Child Abuse Prevention Center, and their staff has been very helpful and supportive of our program.

Another change was the retail store used by our Shopping Elves. Our move to use Big Kmart in Orangecrest on Alessandro Boulevard in Riverside was a beneficial one. Not only did we have a staff that was supportive of our project, but they were helpful in so many other ways. The store manager not only had staff assigned and dedicated to bagging and tagging our purchases, but they also helped carry the product out and load it in the cars for transport. (No small thing when you have over 25 shopping carts full of gifts!) Big Kmart also helped our dollars go further by giving us a 10% discount on all items purchased. They did this for us on two different days! We definitely will use them next year.

This year we assisted 15 families. While this is the same number as last year, it should be noted that the average size of the family we helped this year was much larger than last year. (This year we assisted 64 individuals versus 50.) We touched the following communities in the county: Corona, Hemet, Riverside, and San Jacinto. The feedback from the Delivery Elves and the families served was overwhelmingly positive. (See copies of "thank you" letters at the end of this article.)

Participation this year jumped nearly 50%, as we had 76 Elves participate this year, compared to 55 last year, and in several instances some members wore two

and three Elf hats! The Money Elves were fewer this year, and our donations fell to $3,200. Fortunately, we had a bit of a cushion from last-minute donations last year that carried over into this year. So between our carry-over cushion and the discount from Big Kmart, our purchasing power increased this year as compared to last. However, as with the state budget, we can't count on that money being there next year, so please plan your charitable giving for next Christmas accordingly!

The success of this program is due to the great support and generosity we have received from the members of this bar association and their families, who helped them participate. This year we had 30 new participants give of their time, in addition to the 22 repeat participants. Well done, folks!

It is also wonderful to see the growing participation from the bench, not only in terms of money, but time. Special thanks to all who participated.

Finally, a big "Thank you" to the Elves themselves. Your wonderful spirit and camaraderie (which you can see in the photos accompanying this article) were evident throughout all the events.

(continued next page)

Elves Program 2004 *(continued)*

Thank you for all the gifts like the hot pink scooter because it goes really fast. I would guess that it goes about twenty miles per hour. That's all I have to say for now. When I see you again, I will thank you in person. Thank you for my bratz doll (Cloe). My new shoes are a size bigger than I really wear. That means I can wear them for a long time.

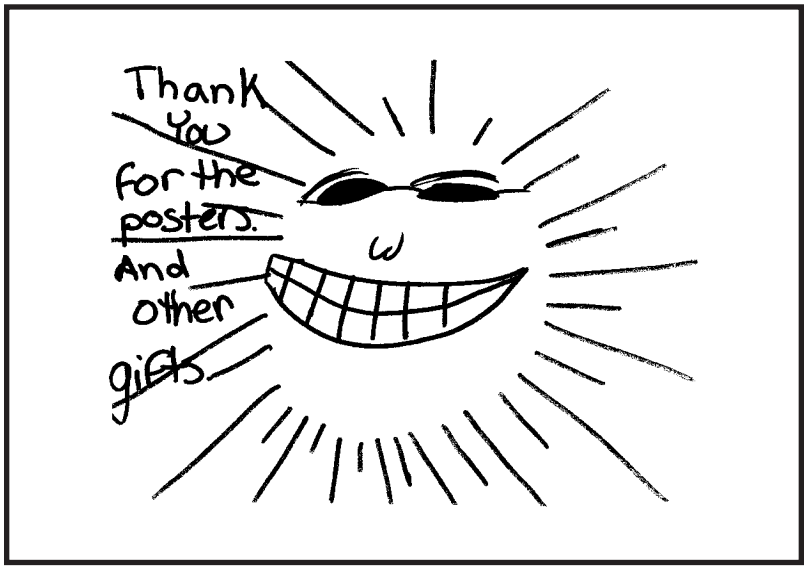
How can I Say Thankyou for The Wonder Things you have gave to my girls for Christmas. They were So very happy To recive Those gifts. I belived That God Sent you To cheer up my family. We had a very hard year. Bless The other people who has helped us. this Christmas.

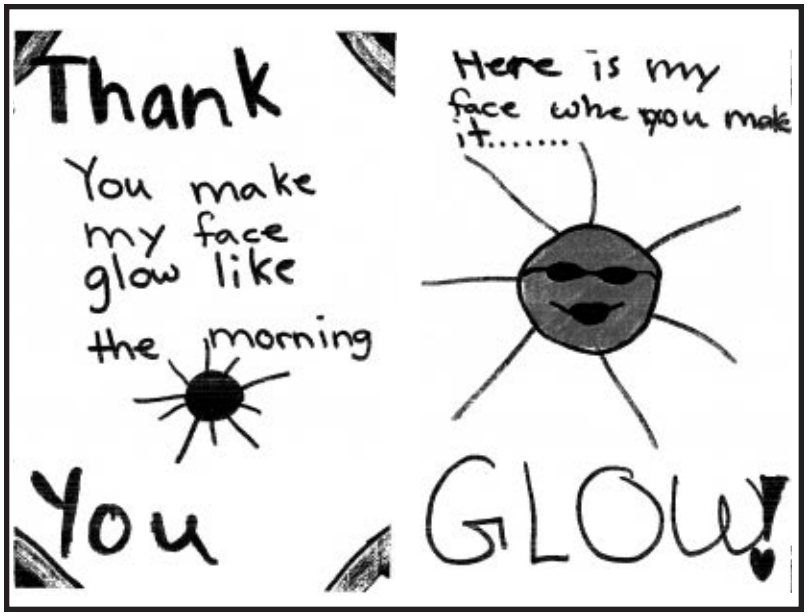
May God Bless you in your life and what you do for people who you don't even know.

Dec 20, 2004

Riverside County Bar Association,

I would like to Thank everyone who contributed to my family's Christmas. Thank you for your time and generosity. We very much appreciate having your special gifts to open on Christmas otherwise it may seem like Santa was a little stingy this year. Thank you so much for making our Christmas more exciting.





Shopping Elves:

Kristen Gingerella, Andrew Graumann, Katie Greene, Tera Harden, Deanna Jack, Judi Murakami, Amanda Owen, Jeb Owen, Brian Pearcy, Judy Poohar, Krys Skelton, Nycci Skelton.

Wrapping Elves:

Harmoni Brown, Rina Gonzales, Katie Greene, Tera Harden, Roberta Harting, Megan Hey, Judge Dallas Holmes and Pat Holmes, Antoinette Jauregui, Melodee Kantor, Commissioner Bob Lind, Lucas Lind, Pam Thatcher-Lind, Tiffany Myers, Bella Na, Queenie Ng, Brian Pearcy, Judith Runyon, Joyce Schechter, Charity Schiller, Jeff Smith, Catherine Thong, Mary Violasse.

Delivery Elves:

Erik Bradford, Alex Bratton, Pam Bratton, Vicki Broach, Kristen Gingerella, Tera Harden, Kristopher Hiraoka, Deanna Jack, Kevin Kump, Lisa Macias, Michelle McDonnell, Sheryl McDonnell, Brian Pearcy, Dean Silliman, Frank Tetley, Mark Thompson, Barry Walker, Karen Wesche.

Money Elves:

Phil and M.J. Abraham, Commissioner Paulette Barkley, Beck & Sirna, Blumenthal Law Offices, Vicki Broach, Judge Thomas Cahraman and Christine Cahraman, Bill Densmore and Laura Pearson-Densmore, Bernard Donahue, Judge Becky Dugan, Marsha Gilman, Daniel Greenberg, Tera Harden, Donna Hecht, Harry Histen, Judge Dallas Holmes and Pat Holmes, Eileen Hunt, Maureen Kane, Judge Roger Luebs, Judge Victor Miceli, Michelle Ouellette, Amanda Owen and Jeb Owen, Brian Pearcy, Jean Pedneau, Greg and Michele Priamos.

Special Thanks:

My assistant Rosetta Runnels, whose tireless efforts and positive attitude in the face of last-minute changes kept this project organized and moving forward smoothly. It should also be known that it was her keen bargaining skills that were used to strike a better deal with the shopkeepers of Riverside. Charlotte Butt, the Riverside County Bar Association staff, Shanna Diep, the social workers from the Child Abuse Prevention Center, and the Big Kmart at Orangecrest in Riverside, California.

Brian C. Pearcy, a sole practitioner in Riverside, is Chair of the Elves Program and a past president of the RCBA.

FOR YOUR HEALTH

by G. Spencer Mynko

In my last article, I touched on the cause of health problems that are the result of diet and lack of exercise. I now want to explore in greater detail these problems, and why they have such devastating implications for our well-being. Without question, regular exercise and a healthful diet will help you avoid the deadly consequences of high blood pressure, diabetes, heart disease, stroke, kidney disease and metabolic syndrome.

METABOLIC WHAT?

Haven't heard of metabolic syndrome yet? Well, get used to the term, because it may revolutionize how we look at and manage our health. First of all, let me tell you what it is. Metabolic syndrome is essentially widespread dysfunction of the intricate biological processes that regulate our metabolism, and it results in devastating effects on the body. Central to its pathology is insulin resistance (as in adult-onset, non-insulin-dependent diabetes). Metabolic syndrome is characterized by a group of metabolic risk factors in one person:

1) Insulin resistance or glucose intolerance (evidenced by elevated blood sugar);

2) Visceral obesity (a/k/a central or abdominal obesity) which results from excessive fat tissue in and around the abdomen;

3) 80-90% of the afflicted go on to develop diabetes (indeed, metabolic syndrome is often referred to as "pre-diabetes");

4) Atherogenic dyslipidemia (high LDL or "bad" cholesterol, high triglycerides, and low HDL or "good" cholesterol);

5) High blood pressure (note – a staggering 80% of hypertension is associated with insulin resistance);

6) Prothrombotic state (a fancy way of saying your blood is prone to abnormal clotting, such as happens in strokes and heart attacks); and

7) Oxidative stress or "proinflammatory state" (which needs to be combated with *anti*-oxidants – more about this later).

To underscore how serious the development of metabolic syndrome is, consider this: recent studies reveal that a person with metabolic syndrome has the same risk of having a heart attack as a person who has already had a heart attack!

The problems that result from metabolic syndrome include high blood pressure, diabetes, clotting abnormalities, and lipid abnormalities, all of which put one at increased risk for heart disease, stroke, fatty liver, liver cancer, vascular disease, and kidney disease, just to name a few. And what most puts us at increased risk for developing metabolic syndrome? *Obesity* – plain and simple. And why do we get overweight? Lack of exercise and poor nutrition. By the way, having a so-called "slow metabolism" has little, if anything, to do with this (with the exception of having a truly underactive thyroid gland).

For those of you who come from "metabolically challenged" families, it does not seem that genetics cause metabolic syndrome – it is considered to be an *acquired* disease. We get there by eating too much of the wrong food. Consider this frightening statistic: in 1965, the average American male weighed 160 pounds, but in 2000, the average American male weighed *over 190 pounds!* Was this due to some widespread genetic mutation? I think not. Increased average height? Nope – average height only increased in men from 5'8" to 5'9" in that period. The obesity epidemic is due to our poor nutrition and sedentary lifestyles. In other words, can you say "Super Size" on your way to the couch? I bet you can, and if you're like me, more than you're willing to admit.

The bad news – you can't blame Mom and Dad. The good news – you can do something about it. According to James Creek, M.D., a specialist in treating metabolic syndrome, 65% of cases can be reversed with exercise, good nutrition and weight loss, and *without* having to take medication (for example, drugs to lower your blood pressure, cholesterol and/or blood sugar). Dr. Creek reports that the typical person with metabolic syndrome is taking three to seven different medications for the treatment of elevated cholesterol, high blood pressure, diabetes, vascular or heart disease, and other abnormalities. The point is that the detrimental manifestations of metabolic syndrome can be treated and reversed *non-pharmacologically*. Given the choice, we are obviously better served if we can avoid medication. Non-drug therapy will reduce potential risk and harm and cost less, as well. Finally, drugs should be considered a *temporary* treatment for the manifestations of metabolic syndrome whenever possible.

Metabolic syndrome is an epidemic of enormous proportions that is getting worse. According to Dr. Creek, approximately 45

million people in the United States have metabolic syndrome or "pre-diabetes" – that's 30-40% of people over 45 years old. What's more shocking and more sad is that 1 of 3 children born in 2000 will go on to develop metabolic syndrome, and eventually diabetes, unless there is a dramatic change in current trends.

Without question, obesity puts us at tremendous risk for developing metabolic syndrome. But regular exercise along with good nutrition will help combat obesity, which will, in turn, dramatically reduce the risk of developing metabolic syndrome. And to reiterate, this can prevent the development of metabolic syndrome and type II (adult-onset) diabetes and its disastrous complications. This is why it is crucial to keep weight under control and exercise.

But there's even more good news: according to Dr. Creek, even a small amount of weight loss, like five pounds, can make a tremendous difference! This is especially true if one is exercising and eating healthfully. Exercise actually "sensitizes" the body to insulin and can break the vicious cycle of ever-increasing insulin resistance. Good nutrition helps fight the oxidative stress caused by insulin resistance, which I'll address further in a subsequent article.

NOW, FOR THE MOMENT OF TRUTH . . .

Obesity is defined as having a Body Mass Index (BMI) over 30. Morbid obesity is a BMI over 40. A person with a BMI between 25-30 is considered overweight. Also, BMI correlates with body fat, so a BMI over 25 puts a person at increased risk for cardiovascular disease, high blood pressure, osteoarthritis, some cancer, diabetes and premature death. To calculate your BMI, take your weight in kilograms and divide it by your height in meters *squared*. I know, doing metric calculations stinks, so here is the English formula: BMI = (weight in pounds / height in inches x height in inches) x 703. Now do your own math.

Alternatively, consider this: men with waistlines over 40 inches and women with waistlines over 35 inches correlate almost perfectly with persons who develop metabolic syndrome. Disappointed? Shocked? Scared? Feeling really guilty about that Bacon Double Cheeseburger with fries you just ordered?

If the answer is "no," great. But if it's "yes," check out my next article, where I'll talk about what can be done about this serious problem.

G. Spencer Mynko, M.D., is an associate with Heiting & Irwin and a licensed physician.

Fishing Off the Company

by Kevin Dale and Queenie K. Ng

Inter-office romances and flirting between co-workers are a fact of life. But is it a good idea for co-workers to date each other or engage in flirting? What about a supervisor dating a subordinate? To what extent can an employer control dating between employees? These questions are not that easy to answer.

While there may be some successful inter-office relationships, and cases where flirting is harmless, there are also cases where such activities have resulted in unfortunate circumstances. Take for example the facts in *Jacobus v. Krambo Corp.* (2000) 78 Cal.App.4th 1096. Jacobus was a supervisor and had a friendly relationship with a secretary (whom he did not supervise). Their relationship included frequent sexual bantering and they talked to each other about their personal lives, including their sexual encounters. After the secretary was the subject of a complaint by another employee, Jacobus forwarded the complaint to the vice-president. Jacobus and the vice-president then met with the secretary to discuss the complaint. The secretary became upset and, later in the day, met privately with the vice-president. For the first time, the secretary claimed that Jacobus had been sexually harassing her, and she showed him some sexual materials that Jacobus had given her.

As demonstrated by *Jacobus,* welcome relationships have the potential to become unwelcome relationships and can lead to claims of sexual harassment. But what exactly is "sexual harassment" and what laws are applicable? Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act prohibit various types of discrimination/harassment, including sexual harassment. Generally speaking, to establish "sexual harassment," a plaintiff must show that: 1) he/she was subjected to verbal or physical conduct of a sexual nature; 2) the conduct was unwelcome; and 3) the conduct was sufficiently severe or pervasive to alter the conditions of the victim's working environment. (*Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872.)

However, the laws mentioned above and the elements of sexual harassment do not dictate what control an employer has with regard to dating between employees. There is conduct which inherently should not be allowed in the workplace. For example, what if two employees who are dating each other decide to "make out" in the employee lunch room while on their break, or engage in conduct which even further demonstrates their affection for each other in plain view of other employees? It goes without saying that some employees may not appreciate having to view an inter-office display of affection, and that such conduct could take a toll on employee morale and the professionalism of the workplace.

The predominant motivating factor for employer regulation of employee personal relationships is the fear of sexual harassment liability and disruption in the workplace, which can arise when inter-office relationships turn sour. In California, employers are held strictly liable for supervisory sexual harassment. (See Gov. Code, § 12940; see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042.) The California Fair Employment and Housing Act also imposes an affirmative duty on employers to prevent sexual harassment. On one hand, an employer has a legitimate interest in controlling and preventing any adverse effects the relationship has on supervision, morale, and professionalism in the workplace. On the other hand, an employee has an expectation of privacy in the relationship and the right to freedom of association.

Generally, it is more difficult for an employer to show that it has a legitimate business interest in prohibiting relationships between employees of equal status than between supervisory/subordinate employees. While it is not a violation of the federal or state anti-discrimination laws or of public policy for a supervisor to engage in a consensual relationship with a subordinate, there are circumstances when employers may regulate personal relationships in order to avoid accusations of favoritism arising from romantic involvement between supervisory employees and their subordinates. In *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal.App.3d 1132 (disapproved on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 700, fn. 42), an employer had an unwritten rule proscribing inter-office relationships between management employees and subordinates. A management employee began dating a subordinate in violation of the rule and, at some point, they began living together. When the manager promoted the subordinate, another employee complained that the manager was showing favoritism. After a supervisor heard a rumor that the manager

Dock: Is It a Good Idea?

was dating the subordinate, the supervisor reminded the manager about the rule. When further questioned about the suspected relationship, the manager attempted to conceal the relationship by lying to his supervisor. Thereafter, the manager was terminated.

The manager filed suit for wrongful termination on the ground that his dismissal for violation of the rule did not constitute good cause. The court balanced the interests of the employer and manager. In upholding the manager's termination, the court found that the employer was legitimately concerned with appearances of favoritism, possible claims of sexual harassment and employee dissension created by romantic relationships between supervisors and subordinates. In light of *Crosier,* employers may be able to demonstrate legitimate business reasons for regulating inter-office relationships between supervisory employees and their subordinates.

Despite an employer's ability or inability to control dating between employees, employers should be taking steps to help prevent sexual harassment from occurring. There are plenty of cases where employers have been liable for not preventing sexual harassment and have faced large judgments. Every employer must take proactive steps to ensure that it is doing all it can to prevent sexual harassment from occurring in the workplace. The key to having success in this area is training, training, and more training. The importance of providing training, both in terms of preventing sexual harassment and having an affirmative defense available, cannot be overstated. Sexual harassment training should be provided to new employees during their orientation, and to existing employees on at least an annual basis.

In addition to training, another important aspect of an employer's efforts to prevent sexual harassment involves having a sexual harassment policy and a meaningful complaint procedure in place. Employers must provide a mechanism whereby employees are comfortable in bringing allegations of sexual harassment forward. For example, an employee who believes that he/she is being subjected to sexual harassment by his/her supervisor must have a person of authority that he/she can go to. Further, employees should be comfortable knowing that their allegations will only be shared with those people who need to know about the information.

Once a complaint is received, the employer should promptly initiate an investigation. A sexual harassment investigation should be conducted in a manner that is fair and thorough. A prompt, fair and thorough investigation can serve as an affirmative defense in the event litigation arises.

In sum, employers must weigh their interests as well as employees' interests when attempting to control personal relationships between employees. In any case, employers must be aware of the seriousness of workplace sexual harassment and must ensure that they have implemented proper policies and procedures in this regard.

Kevin Dale and Queenie K. Ng are attorneys with the law firm of Best Best & Krieger, LLP in Riverside.

Opposing Counsel: Cynthia M. Germano

by Kim Byrens and Howard Golds

Cynthia Germano, husband Dane and daughter Chessa

Since starting as an associate at Best Best & Krieger in 1990, Cynthia Germano has devoted most of her time to the firm and to the community. Having impressed the firm's partnership with her ability to solve problems and get results the clients wanted, she became a partner in 1998. Clients and opposing counsel have long respected her "iron fist in a velvet glove" approach to advocacy and her ever-present good cheer. They serve her well in her chosen field of practice – employment litigation. Cynthia represents clients in all aspects of litigation, but specializes in litigation for employers, including claims of wrongful termination, harassment and discrimination based on sex/gender, race, age and disability, for both public and private clients, in both state and federal court. She also regularly participates as a presenter in labor and employment law seminars and trains private and public employers on sexual harassment, employee discipline and the termination of employees.

Cynthia also is very active in the community. She has been a member of the Board of Directors of the Youth Service Center, a non-profit counseling agency for kids and families, since 1993, and was the President of the Board from 2000 to 2004. She was a member of Leadership Riverside in 2002, a volunteer hearing officer for the City of Riverside, a volunteer for the Inland Empire Latino Lawyers Legal Clinic, and a member of the Board of Directors of Riverside Hospice. Cynthia currently participates in the Chamber of Commerce as a member of the Governmental Affairs Committee, and specifically the Employee Relations Subcommittee.

Despite the demands of her employment litigation practice, Cynthia also devotes her time to her family. Cynthia is the best "Auntie" to five nieces and two nephews, lavishing them with her time, attention and love. Those around her knew that she would make a loving and caring mother, given her devotion to her family and community.

In 2004, Cynthia and her husband Dane became the adoptive parents of a beautiful daughter, Chessa Evelyne, and Cynthia took time off from the grind of advocacy to become a mother. The long and drawn-out adoption process was (and continues to be) stressful, to say the least. Because Cynthia met the birth mother early in her pregnancy and participated in each step along the way, the typical concerns experienced by expectant mothers nagged at Cynthia. As always, Cynthia approached the situation with grace and compassion and proved to be a worthy friend and advocate for the birth mother. Chessa was born on July 2, and Cynthia and Dane were able to take her home on the Fourth of July.

Since then, Cynthia has been showered (and re-showered) with gifts from a seemingly endless group of well wishers. Having ensured that Chessa is well stocked with every conceivable baby product, Cynthia returned to work in November and is undertaking the juggling act of a full time career and parenthood. She and Dane are happier than they've ever been. Their dogs are at least coping.

Kim Byrens and Howard Golds are attorneys with the law firm of Best Best & Krieger, LLP in Riverside.

ACTionable Information in the Deep Web*

by Allen C. Turner, Esq.

"Knowledge comes from actionable information," says Brightplanet.com. Actionable (reliable) information is found lying beneath the surface where it is not available to robotic search engines: "the deep web."

What Is the Deep Web?

The 1,000 billion documents that are not among the 10 billion indexed or cataloged by the Internet's major search engines (e.g., Google, Yahoo, etc.) comprise the "deep web." These documents are produced in response to your query and are not indexed by search engines. Some are private or fee-based but most are open and free.

(There is another class of internet-accessible materials that are not truly web documents – interactive pages that produce results based on your input, such as chatrooms, online games, e.g., Sodaplay.com, and calculators, e.g. Martindalecenter.com.)

Who Uses the Deep Web

Businesses, professionals, librarians, and governments provide findable content organized into databases for use by you and me, as well as by doctors, lawyers, Indian chiefs, butchers, bakers, and candlestick makers. You have used the deep web if you have used Mapquest.com for directions, ordered an airline ticket online from Expedia.com, or purchased a book from Amazon.com or some trinket from eBay.com.

Online banking and other commercial transactions increasingly use deep web database resources protected by secure connections.

Why Use the Deep Web?

On the surface web, anyone can publish anything – your granddaughter's diary, spoofery, and intentional misinformation are no exception. Unlike refereed journals, the Internet has no way to regulate the quality of what is presented. Therefore, much, if not most, of the surface web is trivial, incomplete, or not authoritative.

If you intend to locate more than superficial documents, require specific information, or are conducting research of any consequence, you should access deep web databases.

Where Is the Deep Web?

The surface web contains numerous websites with search interfaces. These provide access to topical databases for any subject – arts, business, computing, dogs, . . . Zoology. Medical information, items for sale, legal materials, airline schedules, library catalogs, death records, social security numbers, phone books, and other documents respond to your specific query.

For example: the State Bar of California, like many organizations, maintains records of its members' names, addresses, bar numbers, phone numbers, and disciplinary records at www.calsb.org/mm/sbmbrshp.htm.

Similarly, the Social Security Death Index, listing the deceased by county, social security number, date of birth, and date of death, is available through several commercial and free sources, including www.newenglandancestors.org.

Airline schedules and reservations are yielded by searching www.expedia.com.

The National Library of Medicine maintains searchable abstracts of journal articles and abundant health and medical information, www.nlm.nih.gov/databases.

The Library of Congress maintains a catalog of all U.S. copyright books at loc.gov. The U.S. Patent Office enables anyone to search patents at www.uspto.gov/patft.

How to Access the Deep Web

Don't despair. There are a couple of easy ways to find those deep documents.

Using ordinary search engines like Google, just enter the topic with the word "database," e.g., "social security database." This will yield a list of sites with access to the death records database. Note: some are free; others charge a fee.

The other way is to use the several excellent directory portals that give topical access points to online databases. See, e.g., Complete Planet at www.completeplanet.com.

For more on the deep web, see Michael K. Bergman's White Paper at brightplanet.com/technology/deepweb.asp.

* This document can be found online at actesq.com/search.

Allen C. Turner, a member of the Bar Publications Committee, is the webmaster for the RCBA's website, www.riversidecountybar.com.

Litigation Update

by Mark A. Mellor

This column represents our continuing effort to bring you the latest information concerning the practice of law in California. We hope that you find it both helpful and informative in your practice here in Riverside. Please favor us with your thoughts and suggestions by writing the editor concerning our new addition to the Riverside Lawyer.

Right to sexual privacy is before the California Supreme Court.

In August, the Second District Court of Appeal was presented with an action in which a wife sued her husband, alleging he had infected her with HIV. *John B. v. Superior Court* (Aug. 23, 2004) 121 Cal. App.4th 1000 [18 Cal.Rptr.3d 48, 2004 DJDAR 10515] [Second Dist., Div. Eight]. The court affirmed an order disclosing the husband's medical records and details of his sexual background in response to discovery demands. The California Supreme Court has granted review in the case (Case No. S128248). As a result, the case may no longer be cited.

The Supreme Court will decide whether a statute subjecting an employer to liability for sexual harassment by a third party will be applied retroactively.

In September, we reported that our appellate courts were split on the retroactive application of Gov. Code, § 12940(j)(1), which provides that an employer may be liable for sexual harassment by a non-employee. The Supreme Court has now granted review in *Carter v. California Dept. of Veterans Affairs* (Aug. 17, 2004) 121 Cal.App.4th 840 [17 Cal.Rptr.3d 674, 2004 DJDAR 10147] [Fourth Dist., Div. Two], which held that retroactive application would violate due process (Case No. S127921).

Senator Dunn to chair State Senate Judiciary Committee.

The State Bar's Office of Governmental Affairs reported that State Senator Joe Dunn will chair the Senate Judiciary Committee. Senator Dunn, a trial lawyer from Orange County, has shown himself to be a friend of the judiciary and sensitive to the interests of lawyers.

Lawyer's disqualification based on work done for defendant more than a decade earlier.

In an opinion filed last September, but ordered published by the Supreme Court on December 1, 2004, the Second District Court of Appeal reversed an order denying disqualification of a lawyer to act as expert witness on claims handling where the lawyer had worked for the insurance company defendant more than 10 years earlier. The decision was largely based on the fact that the lawyer had previously advised the defendant on claims handling practices. *Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (Sept. 1, 2004) 124 Cal.App.4th 594 [21 Cal.Rptr.3d 380, 2004 DJDAR 14315] [Second Dist., Div. Two]. The court noted, citing *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155 [172 Cal.Rptr. 478, 624 P.2d 1206], that "an attorney is forbidden [from using] against his [or her] former client knowledge or information acquired by virtue of the previous relationship." There is no time limit on this prohibition.

The Supreme Court will decide whether a nonprofit corporation may receive an attorney fee award.

In July, the First District Court of Appeal in *Frye v. Tenderloin Housing Clinic, Inc.* (July 27, 2004) 120 Cal.App.4th 1208 [16 Cal.Rptr.3d 583, 2004 DJDAR 9155] [First Dist., Div. Four] (as modified Aug. 18, 2004) held that a nonprofit corporation that provided legal assistance to its low-income clients may not recover attorney fees unless it is properly registered with the State Bar. The California Supreme Court has granted review (Case No. S127641). As a result, the case may no longer be cited.

Does the court or the arbitrator decide whether a dispute is arbitrable?

Which came first, the chicken or the egg? Where a contract contains an arbitration clause but parties dispute whether the particular claim being asserted is subject to the clause, does the arbitrator decide the issue? In *Dream Theater, Inc. v. Dream Theater* (Nov. 30, 2004) 124 Cal.App.4th 547 [21 Cal.Rptr.3d 322, 2004 DJDAR 14254] [Second Dist., Div. Four] (as modified Dec. 28, 2004), the Court of Appeal answered the question with an unequivocal maybe.

Dream involved a business sales agreement with a clause providing for arbitration of indemnity claims. The trial court had agreed with the seller that a suit for breach of contract was not subject to the arbitration clause. The buyer appealed, arguing that the decision concerning jurisdiction should have been made by the arbitrator. The Second District Court of Appeal agreed with the buyer. Whether the issue is for the court or for the arbitrator depends on the language of the arbitration clause. Here, the clause incorporated the AAA Commercial Arbitration Rules; these rules provide that the arbitrator has the power to determine his or her own jurisdiction. Thus, the trial court exceeded its jurisdiction by deciding an issue that should have been decided by the arbitrator.

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A Lawyer's Guide to Cross-Cultural Depositions

by Nina Ivanichvili

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The skillful interpretation of languages is both a craft and an art. In the 1964 Cold War drama, Fail-Safe, Henry Fonda plays a U.S. President who must avoid all-out nuclear war by convincing the Soviet Premier that U.S. bombers had been mistakenly sent to attack Moscow with nuclear weapons. By his side at the hotline is his Russian interpreter, a young Larry Hagman. As Fonda prepares to make the call, he briefs his interpreter:

Sometimes, there's more in a man's voice than in his words. There are words in one language that don't carry the same weight in another . . . . So, I want to know not only what he's saying, but what you think he's feeling – any inflection in his voice, any tone, any emotion that adds to his words – I want you to let me know.[1]

Attorneys sometimes trade gloomy stories of testimony by foreign-born witnesses. A common complaint is that following a long verbal exchange between the witness and the interpreter, the interpreter turns toward the attorney and solemnly declares, "The witness said, 'Yes.' "

Today, almost one in five Americans speaks a language other than English at home.[2] Therefore, it is no surprise that many non-English-speaking witnesses appear daily in depositions nationwide. At times, many attorneys may yearn for a high-caliber interpreter, like the one played by Larry Hagman in Fail-Safe, to help them navigate through the esoteric cross-cultural terrain.

This article addresses ways of overcoming some challenges of a cross-cultural deposition. For purposes of this article, a cross-cultural deposition is one in which the attorney is English-speaking (generally American-born), and the deponent is foreign-born and speaks limited or no English. In other words, a cross-cultural deposition is one in which the attorney and the deponent do not share the same cultural archetypes and common linguistic patterns.

Understand Court Interpreter's Role

There are two categories of language experts. Although the terms "translator" and "interpreter" often are used interchangeably in English, there is a clear distinction between them, as they refer to members of two different

professions. Translators deal with the translation of written materials. Interpreters translate orally from one language to another.

Interpretation and translation are complex processes that require in-depth knowledge of two languages and two cultures, as well as familiarity with specific vocabulary. Interpretation and translation are acquired skills of expressing and transferring ideas, formulated within the framework of a particular culture, in another language. These skills may be developed and honed over years of extensive training and practice.

There are relatively few formal guidelines governing interpreters. The Court Interpreters Act of 1978 and the subsequent 1988 amendments mandated that a national certification exam be developed for certifying interpreters qualified to interpret in federal courts.[3] Currently, federal certification programs exist in only three languages: Spanish, Navajo, and Haitian-Creole.[4] The Administrative Office of the U.S. Courts classifies three categories of interpreters: (1) "certified" interpreters, who have passed the Administrative Office certification examination (Spanish, Navajo, or Haitian-Creole only); (2) "professionally qualified" interpreters for languages other than Spanish, Haitian-Creole, and Navajo[5]; and (3) "language skilled" interpreters.[6]

The National Center for State Courts has established a consortium of states to develop court interpreter proficiency tests. Currently, thirty states are members of the consortium for state interpreters.[7]

A court interpreter's role is to "translate exactly what is said and at the same level of discourse the speaker uses."[8] An interpreter in a deposition should not summarize, paraphrase, explain, or verbalize his or her personal opinions. Instead, the interpreter is charged with the task of relating exactly how something is said by counsel and by the non-English-speaking deponent to properly convey the style and form of the message.

Avoid Interpretation by Interested Persons

Untrained, non-professional interpreters often misunderstand the fact that the interpreter is required to be neutral when interpreting in a legal setting. As a result, they may side with a deponent and translate what the interpreter believes to be favorable rather than what is accurate.[9] Interpreters who personally know the defendant or have some interest in the case may have a serious problem in accurately rendering a deponent's testimony, which defeats the purpose of the interpreter in a deposition.

There often are clear signs at the beginning of a deposition that an interpreter is incompetent or noncompliant with the Interpreter's Code of Professional Responsibility. Untrained interpreters commonly fail to use the same grammatical tense as the deponent for whom they are interpreting. For instance, if the deponent says, "I do not recall," the interpreter should repeat, "I do not recall," rather than, "He said he does not recall."

To ensure an accurate record, it is equally important for the deposing attorney to address the deponent directly. If appropriate, the attorney should maintain eye contact with the deponent, as if the interpreter were not present. For instance, counsel should ask the deponent through the interpreter, "Where were you born?" Counsel should not say to the interpreter, "Ask him where he was born."

In the author's experience, immigrants residing in close-knit ethnic communities may know most people in their community. This can make it difficult to find an interpreter who is not a friend or relative of the deponent. It is in the deposing attorney's interest to make sure the interpreter is screened for possible conflicts of interest.

When in doubt regarding the professionalism of an interpreter retained for a deposition by the opposing counsel, an attorney may consider hiring an impartial and qualified "check interpreter." To ensure an accurate record, the check interpreter will speak up only if the main interpreter fails to provide an accurate interpretation of a given statement.

Use Interpreter If English Is Limited

When deponents speak some English, but are not fluent, it is not advisable to have them testify in English. Some attorneys are tempted to have an interpreter present, but to let deponents with limited English testify in English when they understand the question and then use the interpreter only when the deponents do not understand what is being asked.

On the whole, it is better to have an interpreter deliver all questions to such deponents and to have deponents provide all answers in their native tongue. Deponents with limited knowledge of the language can become confused if they are not certain of the meaning of questions. The deponents might start guessing or mixing English words with foreign words during the testimony, which would make it difficult for the court reporter to produce an accurate record.

Plan Ahead for Specialty Area Interpreter

In addition to being linguists, some translators and interpreters are professionally qualified in various disciplines such as aerospace, biochemistry, computer science, electrical engineering, electronics, finance, law, mechanical engineering, medicine, pharmaceuticals, physics, and telecommunications. In a complex civil case involving technical specialty areas, the lawyer who will be taking the deposition may want to select an interpreter with expertise in the relevant discipline.

(continued next page)

Sometimes, translation companies may have such experts available locally. In other cases, an expert interpreter may have to be brought in from another state. Thus, if the case involves a specialty area, it is advisable to start looking for an interpreter well in advance of the deposition.

Scheduling is only one aspect of careful deposition planning. To allow the interpreter to prepare properly, counsel should provide him or her with a copy of the complaint and other key pleadings, documents, or exhibits. By way of example, in a patent case, counsel should provide the interpreter with copies of the patents in controversy. In a product liability case, if the product catalog will be an exhibit, counsel should give a copy to the interpreter.

Determine Deponent's Language and Dialect

Counsel should determine the language or dialect the deponent speaks. In selecting an interpreter, it may be necessary to take into account the deponent's national origin. For example, Arabic interpreters sometimes are automatically called to interpret for deponents from anywhere in the Arab world. However, if the deponent is from North Africa, he or she may be more comfortable with a French interpreter.

A professional interpreter may be fluent in a foreign language without knowing all of the dialectal differences within the language. For instance, it is not enough to request a "Chinese" interpreter. There are eight dialects in China, and one Chinese dialect may be practically unintelligible to someone who speaks another dialect. Mandarin is spoken in northern China (Beijing), Taiwan, and Singapore; Cantonese is used in Southern China and Hong Kong and is spoken by many Chinese immigrants to the United States. Knowing in advance the language or dialect in which the deponent is fluent before hiring an interpreter can prevent confusion and delays.

Understand Deponent's Background

Cultural archetypes, or the "deep-seated collective attitudes and values formed by a culture,"[10] are the "eyeglasses" through which people look at the world. People evaluate, assign priorities, judge, and behave based on how they see life through those lenses.[11] Culture influences the communication process in significant ways, such as the selection of language, thinking patterns, interpretation of verbal and non-verbal cues, the role of silence in face-to-face interaction, perception of time and personal space, and concepts of respect and politeness.

Before the deposition, the attorney might want to learn more about the deponent's culture to gain an understanding of the potential communication issues that may arise. Nonetheless, it is important to avoid stereotyping; beliefs about the deponent's background and expectations about the testimony may prove to be inaccurate. For example, a deponent could be influenced by such factors as: (1) how long the deponent has resided in the United States; (2) the deponent's familiarity and comfort level with the Western cultures; and (3) the level of the deponent's education and professional status.

On the other hand, even though the individual's background is not necessarily indicative of anything, it may provide a glimpse into his or her psychological mind-set. Consider the following hypothetical. An older Russian male is asked to recall the date of an automobile accident in which he was involved four years earlier. He states that he cannot recall that date. When the deposing attorney gives him the date on which the accident allegedly occurred, the Russian-speaking witness immediately agrees. When asked how he suddenly remembers what he could not recall a minute ago, he replies, "Because you have just told me that your paper says so." The deponent has resorted to a familiar behavioral pattern of unquestioningly submitting to authority – in this instance, represented by the American attorney.

To understand this behavior, the attorney needs to remember that Russia only recently emerged from a culture dominated by a totalitarian political system. In that environment, the predominant motivation for behavior was fear and avoidance of retribution by representatives of the totalitarian regime. This mind-set still might be deeply rooted in the psyche of the ex-Soviets of the older generation. In the above example, where the attorney provided the date of the accident, the witness potentially compromised his credibility by bowing to authority.

Be Aware of Culture-Specific Mannerisms

Attorneys should be mindful that cultural differences can affect nonverbal communication. Behavioral patterns of a deponent from a foreign country may appear suspect to a native-born American attorney if they do not fall within the common cultural experience of that attorney. In American culture, looking someone straight in the eye is a statement of open and honest communication. In some other cultures, looking a person in the eye is a sign of disrespect. In the author's view, that explains why some Asian deponents would rather stare at the table instead of looking at the deposing attorney, even when they have nothing to hide.

Gender also may play a role. The author has been advised that sometimes, when a witness from the Middle East is deposed by an American attorney of the opposite gender, he or she is likely to avoid eye contact with the deposing attorney. This is not because the deponent has something to hide; the action is based on an understanding of the cultural dynamics of male-female communication and is a sign of polite respect or modesty. That deponent is more likely to look a deposing attorney straight in the eye when the attorney is of the same gender as the deponent. As mentioned earlier, a number of variables, including the length of residence and level of

assimilation in the United States, may further influence such a deponent's conduct at the deposition.

People learn to express emotions based on their cultural archetypes and in ways that may be unfamiliar to outsiders. For example, some Asian cultures use a smile as a mask when dealing with unpleasant situations.[12] Thus, an Indonesian-speaking deponent from a rural area might smile when discussing sad or upsetting matters. In Indonesian culture, "smiles do not necessarily imply delight, amusement, friendliness." Indonesians "unconsciously and effortlessly smile as they meet people, speak with others, or encounter experiences that are neither funny, nor delightful."[13]

People from Mediterranean cultures and Eastern European Jews, on the other hand, often tend to be very facially expressive and use frequent gestures.[14] Before any attempt is made at interpreting deponents' body language, the deposing attorney may want to observe their personal style and "baseline" body language in a context of a non-stressful conversation.[15]

Respect the Deponent's Ethnic Identity

Attorneys sometimes are careless and confuse the country of origin, native language, or ethnic identity of the deponent. For instance, perestroika put an end to several decades of forceful "russification" of areas with predominantly non-Russian populations. Having become independent states, the former Soviet republics elevated their national languages to the status of official languages. Several former Soviet republics, such as the Republic of Moldova and the Republic of Uzbekistan, even rejected the Cyrillic alphabet and Latinized their writing. To avoid alienating deponents from countries such as Lithuania, Armenia, or Tajikistan, deposing attorneys should not refer to them as "Russians."

By the same token, all the Spanish-speaking countries today are independent states. Therefore, it likely will be puzzling – if not offensive – for a Spanish-speaking deponent from Costa Rica or Uruguay to be referred to as Mexican.

Set Clear Deposition Ground Rules

Even to an English-speaking person, a deposition can be a confusing experience with a language and rules of its own. Most non-English-speaking individuals who were raised in foreign countries have never been in contact with lawyers, lack knowledge of the American legal system, and have different perceptions of private property and dispute settlement procedures. For such deponents, a deposition can be intimidating.

Sometimes, non-English speakers try to use a deposition as a venue for making lengthy and evasive statements about their case, feeling triumphant that they finally have an opportunity to be heard. They may ramble, answer a question with a question, and easily forget or disregard instructions given to them by counsel.

(continued next page)

A Lawyer's Guide *(continued)*

Attorneys involved in a cross-cultural deposition would benefit by establishing clear ground rules from the start. Counsel might advise the non-English-speaking deponent regarding:

- – speed and simultaneity of conversation (no interruptions are allowed; only one person may speak at a time; the witness needs to pause from time to time to let the interpreter interpret)
- – not engaging in conversation with the interpreter
- – answering only the questions asked
- – providing intelligible verbal responses to each question asked rather than nodding or making "uh-huh" sounds.

If the witness starts providing long-winded responses to the questions, counsel can allow the interpreter to use a hand signal with a deponent to alert the deponent when he or she is talking too fast or too long. By raising a hand, the interpreter will ask the deponent to pause and let the interpreter convey the uttered statement.

Establish Rapport Using Self-Disclosure and Feedback

Some attorneys rarely give verbal feedback during depositions. They stay busy with their notes, flip through documents, and rarely look at the deponent. Such behavior can stimulate mistrust and defensiveness in a deponent, particularly where there are cultural differences between the deponent and counsel.[16] For example, the author has been advised that many American attorneys are unaware of the importance of building respect when deposing male deponents from Turkey or Iran. The deposing attorney's stern or business-like manner, seemingly sarcastically lifted eyebrow, or raised voice often are perceived by such deponents as criticism of them and, therefore, as an insult to their pride. When this happens, the attorney has lost the opportunity to obtain open, candid responses from the deponents.

Trial lawyers often use self-disclosure effectively to develop rapport with jurors during the jury selection process. Although openness is not required, they know they can make that process more meaningful if they "disclose something of themselves during the questioning."[17] This tactic may be equally effective in establishing rapport with a non-English-speaking deponent in a cross-cultural deposition based on the simple principle, "if you want a clear view of another person, you must offer a glimpse of yourself."[18] Before going on the record, the opposing attorney might offer the witness a drink of water and indulge in a little small talk with the deponent to put him or her at ease.

The author is cognizant of the important role that positive feedback plays during the course of the deposition in encouraging the non-English-speaking deponent's responses. When positive feedback is given, using simple phrases such as, "I see," "Thank you," and "I appreciate it,"[19] people speak more readily and state

their answers more freely. When the deposing attorney does not make value judgments about the testimony and is neutral or positive, the non-English-speaking witness is likely to "feel more accepted and be more comfortable."[20] As a result, there is an increased likelihood that he or she will be forthcoming when providing testimony.

Strive to Be More Culturally Relative

Lawyers involved in cross-cultural depositions are likely to create communication misunderstandings if they view or treat people from different cultures as being "generally more similar to themselves than dissimilar."[21] This behavior is termed "assumed similarity."[22] Assumptions about the meaning of similarities may cause a deposing attorney to stereotype and misjudge a deponent. Consider the following hypothetical.

An American attorney is deposing a well-dressed, middle-aged, non-English-speaking woman in a civil lawsuit. The woman is originally from a small, male-dominated village. She states that she has held several jobs since moving to the United States. However, she does not know what her articles of clothing cost because her husband makes all the purchasing decisions in the family. Because the deponent is employed, the attorney may assume some similarities between the deponent and her American counterparts. Nonetheless, her working status does not make her independent – financially or otherwise – from her husband, who continues to make all of the important decisions.

While deposing a non-English speaking witness, lawyers likely will benefit from being more "culturally relative,"[23] which is the opposite of ethnocentric. Instead of viewing the whole world through the prism of the American cultural archetypes, it helps to remember that more than one meaning may exist for verbal messages communicated between people from different cultures. Thus, in the above-mentioned example, in the deponent's cultural worldview, it is common for a woman to have a job and still let her husband make all of the financial decisions for her. In the American deposing attorney's cultural worldview, however, this is not a consideration.

Acknowledge Cultural Taboos – But Ask the Question

"The potential for misunderstandings, confusion, and hostility increases in the intercultural exchange."[24] During cross-cultural depositions, it is easy to inadvertently delve into areas of cultural taboos, which represent beliefs that make discussion of certain topics forbidden or discouraged. For example, most American attorneys might not anticipate that questions related to loss of consortium in a personal injury case are likely to arouse animosity in Russian-speaking deponents of either gender. Only a decade ago, in Russia, discussing one's sex life in public was a cultural taboo.

Deponents from many cultures would find questions embarrassing if they pertain to intimacy, certain medical conditions, human anatomy, and bodily functions. Attorneys should be aware of this possibility and prepare the deponent prior to verbalizing a sensitive question by saying, for instance, "I know that it may be uncomfortable for you to answer questions like the one I am going to ask, but I need to ask it."

Ask Simple Questions

An examining attorney should use simple sentences and basic vocabulary during a cross-cultural deposition. Counsel should avoid legal terms when possible; they frequently are unfamiliar and confusing, even when expressed in the witness's native language. If the need arises to ask questions containing legal terms, the examining attorney will benefit by asking the interpreter's advice on ways to phrase the question. An effective interpreter may anticipate problems with some questions based on differences in attitude or culture that could hinder the deponent's understanding of the question. In such situations, the interpreter may ask the attorney to rephrase the question.

Counsel also should be aware that many English words, including legal terms, have no semantic parallel – and sometimes no conceptual equivalent – in other languages. For example, it takes at least four Russian words to convey the concept of a "deposition" and at least five Russian words to say "deponent." Therefore, the interpreter often may need to use some descriptive terms, which would take longer than the counsel's familiar way of speaking.

A basic understanding of the idiosyncrasies of the deponent's native language also will help counsel improve his or her communication with the witness during a cross-cultural deposition. For example, Laotians and Thais often reply to yes/no questions by repeating the verb from the question. Therefore, when asking a simple question requiring a yes/no answer, such as, "Are you married?," the deposing attorney might hear "Married" instead of "Yes"; when asking, "Do you have other relatives in the U.S.?," the answer might be "Have no other relatives" instead of "No." Knowledge of this fact will allow counsel to avoid the frustration of insisting that the witness reply to his or her question with a clearly stated yes or no, or blaming the witness for being evasive.

Be Tolerant of Nonresponsiveness

Many non-English-speaking deponents are embarrassed to admit that they do not understand a question, even when the question is spoken in their own language. If the deponent appears nonresponsive or evasive, the deposing attorney might want to clarify whether the question might have been misconstrued. The deponent's nonresponsiveness may be "nothing more than a bump in the conversational road";[25] with a few additional questions, the attorney may be able to easily get the required information.

On the other hand, attorneys need to recognize that many people from other cultures find it "insensitive and rude" when someone insists on discussing an issue that "they have plainly tried to avoid."[26] Instead of alienating the deponent by pursuing fur-

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ther questions in the area that the deponent appears reluctant to discuss, it may help to try another approach later.[27]

Finally, many Americans are uncomfortable with silence. In some cultures, it is common to remain silent before answering a question. Silence allows time to process information and, as such, may be viewed as part of a person's cognitive process. It will be to the attorney's benefit to allow for silence without assuming it is due to the deponent's discomfort or evasiveness.

Allow for Short Recesses

Interpretation is a complex process involving a high degree of concentration as the interpreter attempts to first hear, then understand, analyze, and, finally, express ideas coherently in another language. Compound questions by an examining attorney and long-winded responses by a deponent during a deposition require great focus on the part of the interpreter. Non-stop interpretation for several hours at a time can lead to the interpreter's fatigue, which impairs attention.[28] Short recesses are recommended to combat the interpreter's fatigue factor and to ensure an accurate record.

Conclusion

Admittedly, no civil or criminal case is likely to rise to the level of dire emergency that the U.S. President faced in the movie *Fail-Safe*. Nonetheless, attorneys can maximize their chances of having a relatively smooth and, perhaps more revealing, deposition. By understanding some of the intricacies of cross-cultural depositions, counsel can adjust their preparation, actions, and style to prevent inexplicable surprises in the deposition process.

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California attorneys can receive one Elimination of Bias credit by taking the online course *Cross-Cultural Depositions: A Guide for Lawyers,* available at http://www.digilearnonline.com.

NOTES

1. *Fail-Safe* (1964).
2. Frey, "Multilingual America," 24 *American Demographics* 20 (July/Aug. 2002).
3. 18 U.S.C. §§ 1827-28.
4. See http://www.uscourts.gov/interpretprog/infosheet.html.

5. To be "professionally qualified," the interpreter must: (1) have previous employment as a conference or seminar interpreter with a U.S. agency, the United Nations, or a similar entity if a condition of employment includes successfully passing an interpreter examination; or (2) be a member in good standing in a professional interpreter association that requires a minimum of fifty hours of conference interpreting experience in the language of expertise, and sponsorship of three qualified members of the same association. For a full description of the requirements, see Federal Court Interpreter Information Sheet, available at http://www.us courts.gov/interpret-prog/infosheet.html.
6. "Language skilled" interpreters must be able to "demonstrate to the satisfaction of the court their ability to effectively interpret from the foreign language into English and vice versa in court proceedings." Federal Court Interpreter Information Sheet, *supra,* note 5.
7. *See* http://www.ncsconline.org/wc/publications/Res_CtInte_ConsortMemberStatesPub.pdf.
8. Rainof, "How to Best Use an Interpreter in Court," *55 Cal.St.B.J.* 196, 198 (1980).
9. Committee on the Legal Needs of the Poor, "Equal Justice and the Non-English Speaking Litigant: A Call for Adequate Interpretation Services in the New York State Courts," *reprinted in 49 Record of the Assoc. of the Bar of the City of New York 306,* 312 (April 1994).

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MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective February 28, 2005.

Mario Alvarado –
Thompson & Colegate, Riverside

Daniel A. Ballin –
Best Best & Krieger, Riverside

Michael E. Bender –
Law Offices of Martin R. Bender, Temecula

Matthew M. Benov –
Best Best & Krieger, Riverside

Anne C. Bittner –
Court of Appeal, Riverside

Susan Knock Brennecke –
Thompson & Colegate, Riverside

Patrick R. Egger –
Egger & Talmadge, Riverside

Marie Moreno Myers –
Swanson & Myers, Riverside

Jeremy J. Ofseyer –
Sole Practitioner, Palm Desert

Catherine Sempepos –
Sole Practitioner, Palm Springs

Carson O. Smith –
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Jennifer D. Smith –
Gresham Savage Nolan & Tilden, San Bernardino

Nam Anh Tran –
Hanna Brophy MacLean McAleer & Jensen, Riverside

Lakesha Wilson –
Law Student, Moreno Valley

Margerie E. Youdath –
Law Offices of Catherine R. Lombardo, Claremont

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R.E. Commercial Leasing Lawyer. 2 years experience, Palm Desert. Fax resume to (760) 564-6783, Attn: Nancy King.

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Riverside office of growing firm seeks attorneys with 1-7 years' real estate, construction or business/commercial litigation experience. Strong writing skills and academic credentials. Competitive salary, bonus program and benefits. Fax resume listing experience and salary history to: Michael Smith (951) 275-9712.

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2 to 7 year associates needed for small but growing litigation practice. Competitive salary and benefits. Ground floor opportunity. Fax resume to (951) 509-1378.

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Conference rooms, small offices and the third floor meeting room at the RCBA building are available for rent on a half-day or full-day basis. Please call for pricing information, and reserve rooms in advance by contacting Charlotte at the RCBA, (951) 682-1015 or charlotte@riversidecountybar.com.

Office Space Available

The RCBA building has office space available for rent. Contact Sue Burns, (951) 682-1015 or sue@riversidecountybar.com.

A Lawyer's Guide *(continued)*

10. Rapaille, *7 Secrets of Marketing in a Multi-Cultural World* (Provo, UT: Executive Excellence Pub., 2001) at 20.
11. *Id.*
12. Mogil, *"I Know What You're Really Thinking": Reading Body Language Like a Trial Lawyer* (Bloomington, IN: 1stBooks, 2003) at 63.
13. Heryanto, "Politically incorrect smiles: Bali incident," *Jakarta Post* (Nov. 25, 2002); database: Business Source Premier.
14. Mogil, *supra,* note 12 at 8.
15. *Id.* at 9.
16. Morris, "Effective Communication with Deposition Witnesses," 36 *Trial* 70, 78 (2000).
17. Dimitrius and Mazzarella, *Reading People: How to Understand People and Predict Their Behavior – Anytime, Anyplace* (New York, NY: Random House, Inc., 1998) at 10.
18. *Id.*
19. Morris, *supra,* note 16 at 77.
20. *Id.*
21. Haskins, "Pitfalls in Intercultural Communication for Lawyers," 16 *Trial Diplomacy J.* 71, 74 (1993).
22. *Id.* at 73.
23. *Id.* at 75.
24. Kessler, "The Lawyer's Intercultural Communication Problems With Clients From Diverse Cultures," 22 *Beverly Hills B.J.* 251, 257 (1988).
25. Dimitrius and Mazzarella, *supra,* note 17 at 147.
26. *Id.* at 148.
27. *Id.*
28. Vidal, "New Study on Fatigue Confirms Need for Working in Teams," VI(1) *Proteus* (1997), available at http://www.geocities.com/paschmcc/TeamingFatigue.pdf.