

RIVERSIDE LAWYER

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MAGAZINE



The Day The Mountain Drained

The official publication of the Riverside County Bar Association

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RIVERSIDE LAWYER

MAGAZINE

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MISSION STATEMENT

Established in 1894

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

RCBA Mission Statement

The mission of the Riverside County Bar Association is to:

Serve 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

MARCH

- 15 Family Law Section**
RCBA Bldg 3rd Floor – Noon
MCLE
- 18 General Membership Meeting**
“The State of the County Court System”
Speakers: Judge Sharon Waters & Inga McElyea
RCBA Bldg., 3rd Fl. – Noon
MCLE
- State Mock Trial Competition**
Rounds 1 & 2
Hall of Justice – 1:00 p.m.
- 19 State Mock Trial Competition**
Rounds 3 & 4
Hall of Justice – 9:30 a.m.
- 23 EPPTL Section**
RCBA Bldg., 3rd Fl. – Noon
MCLE
- 24 CLE Brown Bag**
“Where Did My Money Go? – Practical Tips for Retirement Savings”
Speaker: Prof. Peter van Zante, Chapman University SOL
RCBA Bldg., 3rd Fl. – Noon
MCLE

APRIL

- 4 CLE Committee**
RCBA – Noon
- 5 RCBA/SBCBA Landlord/Tenant Section**
Mona's Restaurant – 6:00 p.m.-8:30 p.m.
San Bernardino
MCLE
- 6 Bar Publications Committee**
RCBA – Noon
- 7 CLE Brown Bag**
“Computer Evidence for the Litigators”
Speaker: Richard L. Albee, DataChasers, Inc.
RCBA Bldg., 3rd Fl. – Noon
MCLE
- 12 PSLC Board**
RCBA – Noon
- 13 Barristers**
Cask 'n Cleaver – 6:00 p.m.
1333 University Ave., Riverside
MCLE
- 14 CLE Brown Bag**
“False Advertising”
Speaker: Michael Geller, Esq.
RCBA Bldg., 3rd Fl. – Noon
MCLE





President's Message

by Michelle Ouellette

The theme of this month's *Riverside Lawyer* is the environment and environmental law, a subject near and dear to my heart. I went to law school specifically to be able to practice environmental law. I thought at that time that I could protect the environment and save the world with my law degree. Turns out all of those enormous school loans from USC Law School propelled me in a different direction. Now I represent public agencies and developers in endangered species and other environmental areas, hopefully making a positive contribution, even if I am not saving the world.

The concept of environmental law began with the "tragedy of the commons." The commons consists of a resource shared by a group, such as water, fuel, grazing land or wildlife. Each individual in the group has the right to use resources from, and ultimately dump waste into, the commons. The tragedy of the commons occurs when equal and unrestricted access to these resources leads to depletion of the resources and ultimate harm to the group. Gradually the concept of environmental regulations came into being to protect us from overuse of these resources. Individuals like John Muir and Theodore Roosevelt recognized the value of saving our natural resources such as Yosemite for future generations.

Now environmental law has become a huge industry in California. Although there are many federal laws to which we are subject, California often has its own more stringent environmental laws, such as the California Environmental Quality Act and the California Endangered Species Act. Our water quality laws are some of the strictest in the nation. Of course, these are very polarizing issues. The development community believes that California's strict

environmental laws often have significant adverse impacts on development and the overall economic climate in the state. My developer clients from out of state cannot believe the hoops they have to jump through to get projects approved and constructed. In most parts of the country, for example, they do not have to address potential impacts to the Delhi Sands flower-loving fly, a large endangered fly that lives in the Colton/Rialto area. On the other hand, the environmental community fears for the future of our limited resources and believes that even though adequate laws may be in place, they are often ignored or selectively applied. State and local government is often in the middle, attempting to both spur economic development as well as provide for a good quality of life for its citizens.

In the Inland Empire, we are clearly at development "ground zero." Housing starts are at an all-time high, and large increased populations are expected as other Southern California counties are built out. Given the large amount of open space that we have in the Inland Empire, we still have many of the resources that no longer exist in other parts of the state, such as endangered species. Thus, as development increases throughout our region, conflicts have already occurred and are certain to increase. Riverside County has attempted to proactively address these issues through the Riverside County Integrated Project, consisting of a revised County General Plan, planned transportation infrastructure improvements and the Multiple Species Habitat Conservation Plan, which will ultimately assemble a reserve system of over 500,000 acres. A similar habitat conservation plan is also underway in the Coachella Valley. All of these mechanisms will assure that as development occurs, open space will not be completely lost.

Michelle Ouellette, President of the Riverside County Bar Association, is a Partner and currently chair of the Natural Resources Practice Group of Best Best & Krieger LLP. Ms. Ouellette represents municipal, district and private clients in environmental issues arising under the California Environmental Quality Act ("CEQA"), the National Environmental Policy Act ("NEPA"), the state and federal Endangered Species Acts, and wetlands regulations.



Barristers

by Robyn A. Beilin

The New Year has been good to Barristers so far! In January, Barristers members were privileged to be joined by Mike Donner of Donner, Fernandez & Lauby for a discussion on "Taking an Effective Deposition." Mike's comments and tips were invaluable, not only for our newest members of the Bar but for our more seasoned veterans as well. On behalf of Barristers, I would like to take this opportunity to thank him again for his time in joining us for our January meeting.



Left to right: Jonathan Lewis, Harlan Kistler, Luis Lopez

More recently, Barristers was joined by Harlan Kistler of the Law Offices of Harlan B. Kistler, Luis Lopez of Lopez & Morris and Jonathan Lewis of J. Lewis and Associates for a panel discussion on "Marketing Your Practice." Harlan and Luis, both owners of smaller firms here in Riverside, explained the keys to their success. In particular, both attorneys encouraged Barristers to volunteer in the community, be active in the Bar Association, and find their own niches in which to market their practices. They also explained that good marketing now can lead to a successful practice down the road and emphasized the importance of networking with other attorneys who may practice other areas of law than one's own. As a newer member of the Bar Association, Jon Lewis attested to the veracity of Harlan and Luis's advice. Jon began his own Riverside practice immediately after being admitted to the Bar. He explained that he has tried to emulate the marketing strategy of both attorneys: "While it may sound like an infomercial testimonial, I can honestly say that

it works." A special thanks to Harlan, Luis and Jon for their entertaining and informative discussion on a topic that is so important to all of us.

I would encourage all RCBA members to join us; you do not have to be a member of Barristers or eligible to be a member to attend. And, of course, those of you with questions can contact me at (951) 686-8848 or at beilinro@yahoo.com.

Hope to see you at our next meeting!

Robyn Beilin, Vice President of Barristers and a member of the Bar Publications Committee, is with the Law Offices of Harlan B. Kistler.



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 addition to the Riverside Lawyer.

Discovery statutes will be renumbered.

The Legislature has renumbered all the sections in the Code of Civil Procedure dealing with discovery. (Code Civ. Proc., §§ 2016-2036.) The new numbering system will go into effect July 1, 2005. Because of the mid-year change, the 2005 standard codes will continue to contain the old sections, with the notation at each section that it is repealed as of July 1, 2005. The new sections, also contained in the new codes and noted as becoming effective that same date, are numbered §§ 2016.010 through 2036.050.

The basic scheme was to make the discovery statutes more readable by dividing each old section into a number of smaller ones. The new statutes only renumber the sections and *do not make any substantive changes*. The new numbering scheme has remained consistent with the old one, in that the first four digits of each new section number correspond to that present section number but each subdivision of the present statute has been placed in a separately numbered section; e.g., present section 2016(a) will be section 2016.010, section 2016(b) will be section 2016.020, etc. There are a few exceptions to this numbering scheme; for example, present sections 2031.1 and 2031.2 (pertaining to elder abuse) will now be found in sections 2017.310 and 2017.320.

So start reworking those boilerplate points and authorities!

New and amended statutes affect litigators.

Many new statutes and amendments to existing ones effective January 1, 2005, affect our members' practices. Space does not permit us to give a comprehensive overview of these many changes. In our January publication, we reported on the new time requirements for motions and opposition papers. Here are some other changes, as reported by the Los Angeles Daily Journal:

- AB 1836 revises the procedures for the resolution of disputes between homeowners' associations and their members. (Former Code Civ. Proc., § 383; see now Civ. Code, §§ 1354, 1357.120, 1363.810 et seq., 1368.3 et seq., 1369.510 et seq.)
- AB 2161 revises the procedures for structured settlements. (Ins. Code, §§ 10136 et seq.)
- AB 2347 increases attorney fees awardable in contract actions based on book accounts. (Civ. Code, § 1717.5.)
- SB 1436 prohibits installation of "spyware." (Bus. & Prof. Code, §§ 22947 et seq.)
- SB 1457 allows recipients of unsolicited commercial email to recover damages. (Bus. & Prof. Code, § 17529.5.)

Right to jury trial in actions for fraudulent conveyance based on historical analysis.

The trial court erred when it characterized a cause of action for fraudulent conveyance as "equitable" and thus denied plaintiff's demand for a trial by jury. In *Wisden v. Superior Court* (Dec. 3, 2004) 124 Cal.App.4th 750 [2004 DJDAR 14397] [Second Dist. Div. Eight], the court determined that, at least as far back as 1791, a right to jury trial existed in such actions. Under the provisions of California Constitution, Article I, section 6, if a right to jury trial existed when California's Constitution was adopted in 1850, it exists now. If any member of the Litigation Section worked on the 1791 case, be sure to let us know.

If you want the opposing party's computer data, be prepared to pay for it.

Under Code of Civil Procedure section 2031(g)(1), the demanding party must pay the reasonable expenses incurred in translating computer data into a usable form to permit the other side to respond to a demand for production. This can be expensive! In *Toshiba America Electronic Components, Inc. v. Superior Court* (Dec. 3, 2004) 124 Cal. App.4th 762 [2004 DJDAR 14401] [Sixth Dist.], the cost was estimated as between \$1.5 and \$1.9 million.

No duty to supplement answers to interrogatories with later-discovered evidence.

Thoren v. Johnston & Washer (1972) 29 Cal. App.3d 270 [105 Cal.Rptr. 276] held that where a party willfully failed to disclose the existence of a witness in answers to interrogatories, the trial court properly precluded that witness from testifying at the time of trial. (This resulted in a nonsuit.) But the Court of Appeal has now ruled that this applies only where the failure to disclose was willful, and that plaintiff did not have a duty to supplement his interrogatory responses after the witness was discovered, even though the response to the interrogatory had stated that plaintiff reserved the right to serve supplemental responses. The opinion also implies that, if there is time to cure the defect before trial, a party should be given an opportunity to do so. The court therefore reversed a summary judgment that was based on the exclusion of a declaration by a witness who had not been disclosed in answers to interrogatories. *Biles v. Exxon Mobil Corp.* (Dec. 14, 2004) 124 Cal.App.4th 1315 [2004 DJDAR 14850] [First Dist., Div. Two].

CAVEAT: The *Biles* court did not overrule *Thoren*. Therefore, if you intend to call a witness at trial who has not been disclosed, consider whether you should voluntarily serve a supplemental response or, at least, advise opposing counsel by letter of the existence of the witness and your intention to call him or her.

CAVEAT 2: Because of the holding in *Biles*, it behooves counsel to serve follow-up interrogatories as close to trial as permitted.

Lawyer's letter to client's auditor may retain work-product protection.

A lawyer, by sending a letter to the client's auditor concerning matters pertaining to pending litigation, does not waive the work-product privilege. (*Laguna Beach Co. Water Dist. v. Superior Court* (Dec. 15, 2004) 124 Cal. App.4th 1453 [2004 DJDAR 14932] [Fourth Dist., Div. Three].)

Third party liability of engineers raises difficult issues.

For a detailed discussion of the factors to be considered by the courts in determining

(continued next page)

Litigation Update *(continued)*

whether an engineer may be liable to a third party for negligently performed design work that results in injury, see *Weseloh Family v. K.L. Wessel Construction Co., Inc.* (Dec. 21, 2004) ___ Cal.App.4th ___ [2004 DJDAR 15150, 2004 Cal.App.LEXIS 2195] [Fourth Dist., Div. Three]. The Court of Appeal held that an engineer who designed a retaining wall, under contract with a subcontractor, did not owe a duty towards, and thus was not liable to, the owners of the property when the design proved to be inadequate, causing the wall to fail with resulting damage to the property.

Orders made after facts which establish disqualification are known to judge are void.

A judge realized, after denying a motion for summary adjudication, that he was disqualified because of prior contacts with an ADR provider. The newly assigned judge refused to vacate the order. *Held*: Reversed. Code of Civil Procedure section 170.3(b)(4) provides that where grounds for disqualification are first learned or arise after a judge makes a ruling, the ruling shall not be set aside, absent good cause. But here, the judge knew the facts before ruling on the motion; his failure to disqualify himself was inadvertent. Therefore, section 170.3(b)(4) did not apply. (*Hartford Casualty Insurance Co. v. Superior Court* (Dec. 22, 2004) ___ Cal.App.4th ___ [2004 DJDAR 15199, 2004 Cal.App.LEXIS 2215] [Second Dist., Div. Five].

When you file an interpleader you must deposit the disputed funds with the court or lose your claim to attorney fees.

A bank filed an interpleader complaint against two competing claimants to a \$90,000 account, but failed to deposit the funds with the court. In accordance with the interpleader statutes (Code Civ. Proc., § 386 et seq.), the trial court granted the bank's motion for a discharge of its liability and awarded the bank \$43,000 in attorney fees and costs. The Court of Appeal reversed the award of fees and costs, holding the bank was not entitled to fees and costs because of its failure to deposit the disputed funds with the court. *Wells Fargo Bank, N.A. v. Zinnel* (Dec. 28, 2004) ___ Cal.App.4th ___ [2004 DJDAR 15307, 2004 Cal.App.LEXIS 2229] [Third Dist.].

Mark A. Mellor, Esq., is a partner of The Mellor Law Firm specializing in Real Estate and Business Litigation in the Inland Empire.

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A FULL HOUSE IN CABAZON

by Brian Hickey

These days it's getting harder to tell the difference between Cabazon, California, and Las Vegas, Nevada, especially if your vantage point is from the newly renovated Morongo Casino, Resort & Spa (owned and operated by the Morongo Band of Mission Indians). Morongo now comes complete with 310 rooms, 8 restaurants and a gaming area of approximately 148,000 square feet. In the midst of such extravagance, it is hard to imagine that the story of Morongo's success, seemingly automatic, can be traced in part through the long evolution of legal developments which have affected tribal gaming in California.

The U.S. Supreme Court has long recognized the sovereignty of Native American tribes as "domestic dependent nations" while at the same time upholding the government's constitutional right to place limits on such "sovereignty" [see *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)]. In effect, the federal government acts as a "trustee" with respect to Native American tribes, a relationship that is administered through the Bureau of Indian Affairs ("BIA"). In the 1980's, Morongo, along with the Cabazon Band of Mission Indians (located in Indio, California) operated bingo parlors on their respective reservations. Although such operations were regulated under the jurisdiction of the BIA, the State of California attempted to enforce its own laws against gambling on the Morongo and Cabazon reservations. In 1987, the U.S. Supreme Court affirmed a lower court ruling which held: (1) in the event California law prohibits a specific form of gambling, that prohibition can be enforced against the tribes; but (2) once California permits a specific form of gambling (even if regulated by the State), Native American tribes have the right to engage in that same form of gambling without interference from the State [*California v. Cabazon Band of Mission Indians*, 420 U.S. 202 (1987)].

In response to the Supreme Court's holding in the *Cabazon* case, Congress passed the Indian Gambling Regulatory Act (IGRA) in 1988. IGRA divides Native American gaming into 3 categories:

Class I - traditional gaming in conjunction with tribal ceremonies;

Class II – games that are not per se prohibited by state law (examples in California are bingo, lotteries and "non-banked" card games - meaning that players are playing for a common pot of money and not against the house itself); and

Class III – games that are prohibited by applicable state laws (in California, these are games such as roulette, slot machines, craps, and "banked" card games such as baccarat and blackjack where players play against the house).

The effect of IGRA is (i) to protect Class I traditional gaming by leaving its regulation solely to individual tribes, (ii) to codify the Cabazon test at the federal level with respect to Class II gaming (i.e. if a state does not prohibit a specified form of gambling, tribes shall be permitted to offer such games free of state regulation) and (iii) to develop a system for Class III gaming whereby each state is permitted to negotiate compacts with the individual tribes located within their boundaries.

Perhaps the most important advancement for Native American gaming in California is Proposition 1A (approved by California voters on March 7, 2000), which opened the door for a compact between California and its tribes permitting "banked" card games such as blackjack as well as a specified number of slot machines (far and away the 2 most popular games in Nevada). In return, the State receives a portion of slot machine revenues. Not-coincidentally, Native American gaming has flourished in California since the passage of Proposition 1A, and the trend shows no signs of receding. Although Propositions 68 and 70 (competing versions of a revenue-sharing plan between California and its tribes which would have further expanded Native American gaming options) both failed on the November 2004 ballot, they are examples of the continued negotiations between the State and its tribes, each with a significant financial interest in the outcome - some estimates put last year's Native American gaming revenues in California at over \$3 billion. Given the stakes, it seems likely that Native American tribes will continue to gain increased "sovereignty", but not without a price.

Brian Hickey is an Associate in the Corporate Transactions and Finance Practice Group of the Riverside Office of Best Best & Krieger LLP, where he provides general business and corporate representation to clients in a variety of industries.



ANOTHER HARPOONED SEAL

by Richard Brent Reed, Esq.

“Congress shall make no law respecting an establishment of religion...” Amendment One of the United States Constitution.

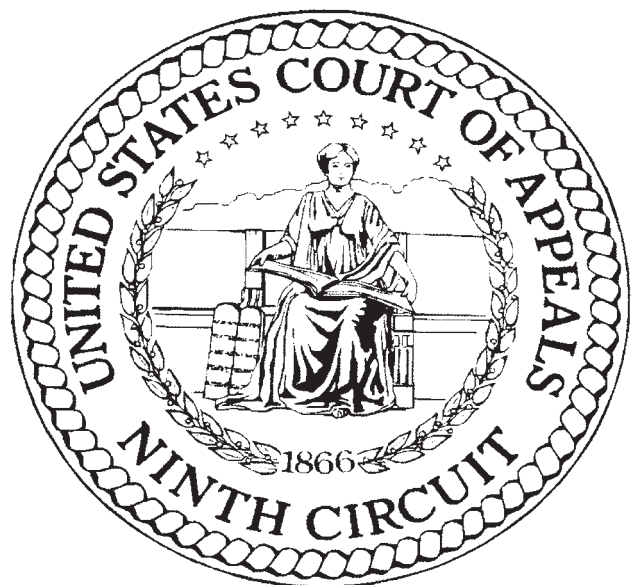
The City of Redlands removed a cross from its seal due to threats of legal action by the ACLU. Similar intimidation caused Los Angeles County to consider turning a Spanish mission on its seal into a Taco Bell. Then the big stick was used to bully Riverside County into putting a fig leaf over a quote by Teddy Roosevelt in one of its historic courtrooms. And it was the Ninth Circuit Court of Appeals that decreed that “God” should be redacted from the Pledge of Allegiance, finding that reference to be an unconstitutional amalgamation of church and state. All of these events occurred within the jurisdiction of the Ninth Circuit last year. This year, yet another governmental seal takes its place among the constitutionally challenged: The seal of the Ninth Circuit Court of Appeals.

That seal consists of the words “UNITED STATES COURT OF APPEALS NINTH CIRCUIT” encircling a laurel wreath sprouting out of “1866,” which supports an arc of nine stars over the head of a woman in a tunic, seated on a throne, reading a huge book. Behind her is a mountain. Under her right hand, propped against the throne, is a pair of stone tablets. Though the writing on the tablets is illegible, their contours are suspiciously Mosaic. Since the tablets feature ten squiggles, one might infer that they are the Decalogue, a/k/a the Ten Words of the Law, a/k/a the Ten Commandments. Evidently the woman, a/k/a the Majesty of Justice, has just finished consulting the tablets and has turned to a heftier tome. (Perhaps she has decided to read the rest of Exodus.) The seal has been around for about a century, but finally offended someone when Ryan Donlon was admitted to practice before the Ninth Circuit last June and discovered the seal on his certificate. Thus was spawned the case *Donlon v. United States*, 05-0536.

Donlon explains why he has made a federal case out of the seal: “It’s to enforce my civil rights and

what I believe is the clear meaning of the First Amendment, which is that no law should be made respecting the establishment of religion.” Donlon’s periphrastic conversion of the language of the First Amendment, far from being a clear interpretation, broadens its scope. Donlon’s interpretation of the Constitution is impaired either by his thinking or by his grammar.

Donlon no doubt figures that the Constitution can’t survive another century with biblical references lurking on government seals. Perhaps Donlon and the Court could go to mediation and reach some sort of settlement. The Ninth Circuit could consider replacing the tablets with a less controversial publication, like Black’s Dictionary or a Rutter Guide. Or the Court could maintain that the historical significance of the Ten Commandments is undeniable. Or the Court could suggest that the tablets represent the Code of Hammurabi. Those laws supposedly came down from the Babylonian god Shamash. That particular deity hasn’t had a follower in several millennia and, since dead religions are less intimidating than more recent ones, a seal referring to the Code of Hammurabi would, therefore, be less disturbing to those with a delicate Constitution.



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



TAX TIPS FOR ATTORNEYS: CALIFORNIA OFFERS AMNESTY FOR INCOME AND SALES TAXES

by Dennis M. Sandoval, J.D., LL.M. (Tax), CELA

The California Legislature has approved a tax amnesty program, which will begin February 1, 2005 and run through March 31, 2005. An applicant for amnesty can be relieved of all civil and criminal penalties for income, franchise, sales and use taxes for periods prior to January 1, 2003. The amnesty program does not apply to payroll or employment taxes, property taxes and other miscellaneous taxes.

Amnesty is available to individuals, businesses, fiduciaries, estates and trusts that either: (1) did not file pre-2003 California tax returns; (2) underreported taxes for one or more periods prior to 2003; or (3) did not pay pre-2003 income, franchise, sales or use taxes on time. Taxpayers that are not eligible for amnesty include: (1) those involved in a criminal court proceeding; (2) those under criminal investigation or prosecution for tax-related matters; and (3) those involved in certain abusive tax shelter transactions. Taxpayers that are in active bankruptcy need approval from the bankruptcy court to participate in the amnesty program.

To participate in the Franchise Tax Board ("FTB") and Board of Equalization ("BOE") programs, a taxpayer must complete and return a signed amnesty application before April 1, 2005. Amnesty applicants must also file any required tax returns, including amended returns, and pay any taxes or interest on or before May 31, 2005. In the alternative, applicants can enter into an amnesty installment agreement which would require the entire liability to be paid by June 30, 2006.

Tax amnesty will provide relief from penalties and fees, but the FTB and the BOE are prohibited from refunding or crediting any penalties and fees the taxpayer paid before applying for amnesty. Accordingly, a taxpayer that has an existing balance due that includes penalties and/or fees should apply any payments made prior to applying for amnesty to taxes and interest only.

A taxpayer under audit, or with an existing protest, appeal, amended return, etc., that has penalties associated with it may want to apply for amnesty to get penalty and fee relief.

New Penalties to be Applied. Beginning April 1, 2005, the FTB and BOE can impose substantial new penalties on taxpayers who were qualified to apply for amnesty and chose not to participate. The agencies will impose these penalties on all amnesty-eligible years and reporting periods, including those closed by the statute

of limitations. The new penalties include: (1) a 40% (instead of 20%) accuracy-related penalty; (2) for amounts that are "due and payable" on March 31, 2005, a penalty of 50% of interest due; and (3) for amounts that "become due and payable" after March 31, 2005, a penalty equal to 50% of the interest computed from the original due date of the return up to March 31, 2005. The BOE will also impose double the amount of existing penalties when issuing a deficiency determination for tax due from periods before 2003.

Many taxpayers don't realize they owe money to California on old returns or returns they may have forgotten to file. The state has records going back many years. The author personally knows of a case in which the FTB is investigated unpaid taxes going back to 1977. While you and your clients may believe you have always filed your tax returns, the author suggests that it may be wise to check with the FTB (for income and franchise taxes) and the BOE (for sales and use taxes) to see if these agencies believe you or your clients have unpaid taxes or if they are missing a tax return. If these agencies show that you or your clients owe money or have unfiled tax returns, advice on amnesty should be sought from a tax professional.

If you or your clients are undergoing a federal or state audit, there are extremely important decisions that must be made right now. Contact a tax professional to discuss your options.

Dennis M. Sandoval is one of only two Certified Taxation Law Specialists practicing in Riverside County. He is the only attorney who is certified as a Certified Taxation Law Specialist and a Certified Estate Planning, Trust & Probate Law Specialist by the California Bar Board of Legal Specialization and as a Certified Elder Law Attorney by the National Elder Law Foundation. His tax controversy, estate planning and elder law practice is located in Riverside. He can be reached at (951) 787-7711.



by Richard Brent Reed, Esq.

TEST TUBE MAYBE

Wrongful death of an embryo: the issue is as old as Moses. Under Levitical law, causing a woman to miscarry subjected the terminator to a hefty penalty. In the play *The Crucible*, written by the late Arthur Miller, the hanging of one “witch” was postponed because the court did not have jurisdiction to endanger the life of the innocent child in her womb. If parents have rights in the embryo — or if the embryo has rights in itself — are those rights personal rights, or property rights?

An Illinois couple decided to have their baby in a test tube. The embryo died while in the care of the clinic. The couple is suing the clinic in Cook County for wrongful death. The judge declined to dismiss the action, deciding that a test-tube embryo is a human being. In order for there to be a wrongful death, the victim must have been alive — or, more precisely, a life. In the case of a test-tube embryo, when did that life begin? Certainly before the birth, since there was no birth. Did it begin at conception? If life is defined as beginning upon viability outside the womb, this embryo, from its conception, was “living” outside the womb.

Then there is the issue of standing. If the parents can sue the clinic for wrongful death of an embryo, could one parent sue the other for causing a termination of the pregnancy? In the case of the unborn, both the parents and the embryo may have rights. Property rights merge with personal rights, for, as Alexander Solzhenitsyn observed, the first thing that a person owns is themselves. The question is: When do those rights vest? If they vest in vitro, the test tube may become a Pandora’s box.

DEVILS

Sheik Omar Abdel Rahman was the blind Islamic cleric involved in first terrorist attack on the World Trade Center. His attorney was Lynne Stewart. She took it upon herself to phone a reporter in Cairo, Egypt, telling him that her client had withdrawn his support for the cease-fire holding that was restraining his followers. She also distracted the jailers while the sheik’s cronies passed messages to him. She claims that her actions were no more than zealous representation. The federal court jury convicted her of aiding terrorists. The fear among some attorneys is that her conviction will have a chilling effect: that lawyers will be less willing to represent such clients. It seems that the feds busted her by eavesdropping on her conversations with her client. The evidence was not excluded. Evidently, the attorney-client privilege does not extend to aiding and abetting.

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



THE DAY THE MOUNTAIN DRAINED: THE CALIF

by Arthur L. Littleworth

When the engineers for the Metropolitan Water District were designing the Colorado River Aqueduct system, they had no idea that drilling a tunnel through the San Jacinto mountains would be like pulling the plug on a mountain full of water.

Metropolitan began construction of its aqueduct in 1933, in a monumental effort to bring water from the Colorado River to supply all of Southern California. The aqueduct route included a 13-mile, 16-foot-diameter tunnel through Mount San Jacinto at an elevation of about 1500 feet. Ground surface over the tunnel rose to about 4000 feet, and the cracks and fissures within the mountain were filled with water under great pressure.

In the early hours of July 1, 1934, a third-shift crew of about 45 men was at work in the tunnel. Suddenly, without warning, thousands of gallons of water burst into the tunnel. The flow was estimated at 8000 gallons per minute. The crew scrambled to safety as the tunnel filled, and water actually rose nearly 700 feet in a vertical construction shaft that had been drilled down to the level of the tunnel.



Arthur L. Littleworth

to try to control the water. At first, the water was pumped out of the vertical construction shafts and simply ran down the side of the mountain. Later, the water was discharged into the San Jacinto River. More than 100,000 acre-feet finally flowed down the river into Lake Elsinore.¹

While the tunnel proved to be a great boon to Lake Elsinore, it dealt a tragic blow to the Soboba Band of Luiseño Indians. Their reservation lies along the southerly foothill slopes of Mount San Jacinto. Two creeks, Poppet and Indian, fed by springs on the side of the mountain, flowed down through the reservation and into the San Jacinto River near Hemet. The tunnel dried up the springs, and hence the creeks. While Metropolitan settled the water rights claims of a number of other owners who were also impacted by the tunnel, it did not do so with the Soboba Band. The situation was ripe for an action against Metropolitan, but the Band chose a different course.

In 1950, the Band filed a petition against the United States under the Indian Claims Commission Act of 1946 (60 Stat. 1046), alleging a breach of its fiduciary duty to protect the Band's water rights. At trial in 1976, the Band prevailed. The Commission found that the United States was well aware of the settlements made by Metropolitan with other affected parties, and "should have taken the initiative in obtaining equitable damages for the [Band's] losses" (p. 384). The United States had argued that the Band was not dependent on the government "and could have sued on its own behalf," but the Commission characterized this argument as "absurd" (p. 363). Describing the Band in a way that would hardly be applicable today, the Commission said the Band was a "small, relatively unsophisticated, and impoverished group of Indians, greatly dependent upon the Government for protection of its resources, and principally reliant upon the Government as its



This was only the beginning. During the several years of construction, flows were never less than 540 gallons per minute, and sometimes were as high as 30,000 gallons per minute. The first contractor went broke. Ultimately, 12 enormous pumps were installed

CALIFORNIA RIVER AQUEDUCT LEGAL CONTROVERSY



legal protector throughout the period of its greatest water losses” (p. 364). Ultimately, in 1991, the United States stipulated to damages in the amount of \$12 million.

This judgment, however was not the end of the Soboba Band’s interest in the waters of the San Jacinto River system. In 1995, the Band filed a claim against the Eastern Municipal Water District and the Lake Hemet Municipal Water District for alleged interference with its water rights. Both Districts, as well as the Band, pump from groundwater basins recharged by the San Jacinto River. The Band claimed damages of \$70 million on the theory that the two Districts had been taking “their” water without payment. The Districts responded that under both federal and California law, the Band did not “own” the water that it was not using; that water was available to others without compensation.

The Band’s 1995 claim was certainly not an “unsophisticated” effort. The Band was represented by its own out-of-state legal team experienced in Indian water rights law, by its own engineers and hydrologists, and by economists from the State of Washington. Moreover, the Band had strong support from lawyers from the United States Justice Department, the Department of the Interior, and the Bureau of Indian Affairs, as well from a team of experts even larger than those assembled by the Band. Clearly, the Government was not going to be accused again of failing to perform its fiduciary duties.

Indian water rights are basically governed by the case of *Winters v. United States* (1908) 207 U.S. 564. *Winters* involved the water rights of the Fort Belknap Indian Reservation in Montana to the adjacent Milk River. The Supreme Court held that whenever the United States established an Indian reservation, it impliedly reserved a sufficient amount of unappropriated water to meet the reservation’s current and future needs. Neither prescription, nor laches, nor estoppel can abrogate those rights. Later cases measured the Indian right in terms of the amount of water required for the practicably irrigable acreage (PIA) in the reservation. *Arizona v. California* (1963) 373 U.S. 546. Whether agricultural need should still be the measure of Indian water rights is open to question. Likewise, it is not settled whether the *Winters* doctrine applies to groundwater, as opposed to surface flows, and how the doctrine fits into California law, in which not all water rights are based upon the doctrine of prior appropriation.

These issues, along with many others, were raised by the Soboba claim, but all parties wanted to reach a negotiated settlement if possible. Initially, the settlement negotiations were among the Band, the United States, Eastern and Lake Hemet, and dealt only with the Band’s groundwater rights. However, in 2000, the Band resurrected the tunnel issues by suing Metropolitan, as well as Eastern and Lake Hemet, in the federal district court in Los Angeles. As to the tunnel damage, the defendants argued that the Band had already been paid by the United States. That intriguing issue, however, was never decided since an overall settlement was finally reached.

The settlement agreement, made in 2004, determined and limited the prior water rights of the Band, and settled all claims for damages. Congressional approval, however, is required before an Indian settlement can be effective. Legislation is expected this year. Strange as it may seem, the ten years involved in settling the Soboba claims is considered fast compared to most Indian water rights cases.

Meanwhile, the San Jacinto tunnel continues to leak about 5000 acre feet a year. But the drainage now goes into Metropolitan’s system, and happily is now part of this area’s water supply.

¹ This is enough water to supply several hundred thousand people for a year. There was a lawsuit between the City of Elsinore and the Temescal Water Co. over the rights to these flows. *City of Elsinore v. Temescal Water Co.* (1939) 36 Cal.App.2d 116.

Arthur L. Littleworth is one of the preeminent water law attorneys in the United States and Senior Partner in the Environmental Law and Natural Resources Practice Group at the law firm of Best Best & Krieger LLP. In his forty years of legal practice, he has participated in all aspects of water law, including transactional and litigation matters. In 2003 he was named as one of the “Top 100” lawyers in California. Mr. Littleworth was President of the Riverside County Bar Association in 1971.



OPPOSING COUNSEL: IRENA LEIGH NORTON

by Theresa Han Savage

Akin Gump Strauss Hauer & Feld Closes Riverside Office – Litigator Makes Her Move

With the closure of the Riverside office of Washington, D.C.-based Akin Gump Strauss Hauer & Feld, LLP, attorney Irena Leigh Norton moves to Shulman Hodges & Bastian, LLP, as a partner, anchoring the firm's Riverside office.

Irena grew up in Riverside, graduating from Notre Dame High School, before attending the University of California, Irvine. She is a 1993 graduate of Georgetown University Law Center and began her Riverside legal career as a civil litigator with what was then Thomas, Luebs & Mort. During her tenure, the firm changed names several times, eventually merging with Burke Williams & Sorensen, LLP, in 1998.

In 1999, Irena joined several colleagues to form the Riverside office of Akin Gump. "It was a tremendous opportunity for me to practice with Akin Gump," Irena stated recently. "The cliché of big firm practice is true, in that you get the most sophisticated cases and enjoy the support of knowledgeable lawyers nation – and even worldwide. The downside is that it became increasingly difficult to service local clients because of the pressure of higher fees and overhead. I am thrilled to have joined forces with a firm that performs at the same level of sophistication in its legal work, but with a business model that is far more suitable for clients in the Inland Empire."

Regarding Irena's move to Shulman Hodges & Bastian, Len Shulman, managing partner at the firm, stated: "We are very excited to have Irena as part of our firm. It is rare to be able to land such a well-credentialed, experienced, and talented lawyer. Irena contributes to our depth and leadership and will greatly enhance our service to the Inland Empire business community."

Founded in Orange County in 1992, Shulman Hodges & Bastian has evolved to meet the needs of its clients and the California business community. With roots as a bankruptcy boutique, the firm has expanded its focus to address just about any legal issue facing a business of any size and its principals. Irena joins the firm's litigation department, continuing her emphasis on complex business disputes and healthcare-related litigation.

Irena has been an active member of the RCBA since beginning her practice in 1993. She is active in the community, having served as Board Member and President of the Corona Historic Preservation Society and as Scholarship Chair on the St. Edward's School Board. She is currently involved in a number of functions with her children's AYSO soccer teams.

Irena balances her work obligations and community involvement with a busy family. She is married to Mitchell L. Norton, a lawyer



Irena Leigh Norton

with San Bernardino County Counsel. They have three children – Samuel (9), Christina (6), and Benjamin (4). The family resides in Corona.

Theresa Han Savage, President-Elect of the Riverside County Bar Association, is a research attorney at the California Court of Appeal, Fourth District, Division Two in Riverside.



OPPOSING COUNSEL: LUIS E. LOPEZ

by Michael L. Bazzo



Luis E. Lopez

Coming to America from a farm near Jalisco, Mexico and learning English at the age of 14 was no easy task for Luis Lopez. With his parents' charge that the United States is the land of opportunity, a place where he could be anything he wanted to be, Luis set out to make his fortune and eventually became the well-liked and respected Riverside attorney he is today. The path to "lawyerhood," however, would take Luis on a few interesting twists and turns.

Being a lawyer wasn't a child hood dream for Luis. When he was young, he wanted to be a pilot. His family, on the other hand, wanted him to be a veterinarian. After attending night school to learn English, Luis planned for college. He majored in political science at California State University, Fullerton. He was actually working in computers as a programmer at the time and thought that he had discovered his "path." Little did he know that a controversial event and the enthusiasm of a young woman would change that path forever.

While Lopez was in college, Tom Metzger, a leading member and former Grand Dragon of the Ku Klux Klan, was using communication equipment at CSUF to tape and syndicate a television program called Race and Reason. Students were outraged. The media became involved. A group was formed that organized rallies, protests, and eventually a sit-in to further the cause of getting Metzger off campus. It was at that time that Luis met the young woman who displayed such enthusiasm for the cause . . . our very own Jackie Carey-Wilson! Luis got involved and was asked to research the constitutionality of Metzger's use of the state school's equipment. Metzger was forced to leave campus and Luis was on the path to law school. Jackie and Luis lost touch over the years, but became reacquainted a few years back here in Riverside, after they had both become attorneys. Luis jokes that he was working in computers as a programmer and one day woke up to a new career.

Luis graduated from McGeorge School of Law in 1990 and thought law school was just plain fun. He was involved in all sorts of activities, including becoming president of the California Law Students Association. In fact, on one occasion he was sent by the dean of the school to Albuquerque as part of the National Spanish Lawyers Association and had the opportunity to meet Supreme Court Justice Anthony Kennedy.

After law school, Luis decided that he didn't want to practice in San Francisco or Los Angeles, but wanted to be part of a small-town atmosphere. A large Riverside firm flew him down from San Francisco for an interview and he immediately decided that this was the place for him. He worked at Dye, Thomas, Leubs & Mort for two years doing some litigation, transactional business law, and appeals. He credits Don Dye

with being a true mentor in his life. Don taught me so much," beamed Luis. "I'll never forget him."

Luis then got involved with Hispanic issues and joined the Hispanic Chamber of Commerce. He worked at Fullerton, Lemon, Schaffer & Dominick for four years doing business litigation, transactional law, and nonprofit work. Luis was also very involved with the Catholic Diocese. He started with the Latino Lawyers as a volunteer and now has a free legal clinic in San Bernardino where he sees clients every Thursday. The Catholic Diocese then asked him to do a clinic once a week; in three years, he has seen over 2,500 people. The clinic runs from 5 p.m. to 8 p.m. and sees about 15-20 people per week, who come from as far away as Pomona, Indio, Las Vegas, and Arizona. Luis is committed to giving quality legal advice to those who come to the clinic and comments, "We don't leave until we help them."

In 1996, Luis left to start his own firm. After joining forces with Gilbert Kelly for a short time, he left to open Lopez & Morris. Now he practices mainly in family law, real estate, and business litigation. His partner does personal injury, employment, and civil litigation. Luis' practice is growing so much that he now has an office in Irvine and is adding more associates.

In his spare time, Luis likes to travel. Though his time is now consumed with little league and soccer practice (he coaches both), he has been to India, Mexico, and all over the U.S. He is now planning a trip to Europe.

If you've never met Luis, take the time to stop and say hello. You'll know him when you see him. He's the guy with the big smile. The guy who knows where he's going.

Michael Bazzo, co-editor of the Riverside Lawyer magazine, is an attorney with Bonne Bridges Mueller O'Keefe & Nichols in Riverside.



A TALE OF TWO TRIBES

by Rick Lantz

MORONGO

I drove from Palm Springs on Highway 10 west-bound on my way for an interview with Maurice B. Lyons, Chairman of the Morongo Band of Mission Indians. Three miles from the tribe's headquarters stands a blue-tinged, neon-flashing, 27-story piece of concrete consisting of a hotel and casino that can be seen for at least five miles in any direction. According to a recent tribal publication release, the "\$250,000,000 project has 310 hotel rooms, 140,000 square feet of casino space, a night club, a blue oasis with a sand beach, private casitas, 15 eating venues, and a multi-level parking garage."

A few miles later, I found myself off the highway and on a narrow, cracked asphalt road passing through low-riding hills and patches of unattended grassland sprinkled with a few dilapidated houses and cars. The Morongo Band's headquarters was a one-story block building.

At 10:00 sharp, a secretary escorted me into Mr. Lyons' spacious office, where I was met by a relatively short, powerfully built man in his mid-50's, sporting a salt-and-pepper crew cut sans facial hair. If I was expecting an Indian out of central casting, I was mistaken. Chairman Lyons looked somewhat Hispanic and came across as an intense, peppy, down-to-earth gentleman very much into the success of his people. He was elected Tribal Chairman in July 2001 and re-elected in 2003.

L: Let me just ask certain basic questions. You are the Morongo Band of Mission Indians. What are the Mission Indians?

Lyons: We got the name from when the Franciscan people were here. They called us Mission Indians, so that's what stuck.

L: And what is meant by the Morongo Band?

Lyons: It's a group of people that make up the Morongo Tribe. It's just the name. It's all it is.

L: Is there a Mission Indian or Morongo Band language?

Lyons: We have different dialects of languages spoken on the Morongo Reservation; the major ones are Cahuilla and Serrano.

L: This reservation, how large is it?

Lyons: 32,000 acres. It's one of the largest in California.

L: How long has the reservation itself been in existence?

Lyons: We've been here since 1868, created by executive order, with 825 members.

L: Does each member get X amount of dollars per month or per week from your various enterprises?

Lyons: We have a per capita distribution plan from the casino and each member of 18 years and older gets per capita.

L: Now, from the reading I've been doing in preparation, life changed after gambling started up. Could you tell me how life was on the reservation before gaming?

Lyons: We were very poor. There was nothing here, really, for us, the kids or anybody. But we were safe. Nobody bothered to come out here except if they were going to visit. Not many people lived out here; maybe we had 80 people at that time. Basically, it was a welfare state.

Writer's note: Lyons stated in his bio, "Life on the Reservation prior to gaming was a hard life. We didn't have electricity so until I was seven or eight, we used kerosene lamps. We would stuff the cracks of our windows with paper to keep out the wind. Having that kind of a life to start with made me appreciate the importance of Tribal self-sufficiency."

L: Then all of a sudden gaming popped up?

Lyons: Yeah, all of a sudden gaming popped up.

L: How did that come about? What was the concept?

Lyons: It all started in 1979. We had high-stakes bingo at Cabazon, and so when they tried to shut us down, we took it to court. It went as far as the United States Supreme Court – we were entitled to gaming. Whatever the state let other people do in the state, we were able to do, too. So they had high stakes – the churches and stuff, the bingo – we could do it.

L: Who was trying to shut down your high stakes?

Lyons: The state itself.

L: Why?

Lyons: They said it was illegal because we had prizes over \$500. And we proved it was regulatory, not prohibitive, and won that decision.

L: And what happened after that?

Lyons: The United States Congress stopped it all because they created IGRA to control gambling. So they put limits on gaming.

L: What is IGRA?

Lyons: Indian Gaming Regulatory Act.

L: So Congress – from what you gathered – passed an act to try to regulate gambling on reservations?

Lyons: Yeah, because of the states – and that was the reason for IGRA, really.

L: So now what did IGRA allow you to do?

Lyons: They made us have compacts with the states.

L: Compact meaning an agreement with the state?

Lyons: An agreement with the state. And that was somewhere in the 1980's.

L: What did the compact with the state allow the Morongo Band of Mission Indians to do?

Lyons: Very little. Very little. It allowed us 2,000 machines – slot machines. We have packed tables every night.

L: The United States Congress tried to regulate you, and force you to make compacts with the states, which you gather was to keep you down rather than up; you fooled them, didn't you?

Lyons: Well, we played the political game and we learned how to play it. We play it very well now.

L: Whose idea was it to come up with the casino? That's an expensive proposition, I would think.

Lyons: It was just a progressive thing that came and it eventually got to be what we have now. We started out with the high-stakes bingo and we went on from there. Built up and up. We had people that came in, investors that came in, and it didn't work right away. We lost the money.

L: What didn't work, hiring people to run it for you?

Lyons: Outside people to run it, yeah. They had their methods of running things, and we wanted it to be done our way, and that's what we have now.

L: You have a magnificent building now. How long was that in the works before it was put together?

Lyons: You would not believe this, but I think four years. And it was built in 18 months. The planning process took a little longer than the construction of the building itself.

L: So now with the additional money that has filtered in in the 1980's and obviously in the 90's, what did you do with the money?

Lyons: We were able to keep it all. We have all of our programs on the reservation and we have a good-size bankroll, a nest egg. We have all kinds of things. We have the fire department over here, we have maybe four trucks. We have a hook and ladder truck – over a million-dollar

truck. The clinic is up here. We have our Head Start. We just got rid of the federal side of the Head Start. We're financing it ourselves now.

L: What does Head Start do?

Lyons: It's for the little kids – three, four and five years old – to get them ready for school. We have our Elders Program. We bought them one of those great big buses to travel all over the country and see things. We have an ambulance coming. Our own.

L: You have your own waste management? Is that correct?

Lyons: We have complete waste management. We have the big trash trucks that come in to pick up all of our members' trash and then they take it out to the dump area. We have a waste water treatment plant that handles the casino and all of the entities right in there that belong to us.

L: Let's talk a little about education. Do you have any schools on the reservation?

Lyons: We have one Christian school on the reservation. That's not tribal, but one of our churches has a school. Our kids mainly go to Banning and Cabazon – that's county schools – but they are eligible to go to any college they want. The tribe will pay for it – pay for the whole thing for them to go wherever they want to go.

L: If someone can get into Harvard, you'll finance it?

Lyons: If they can get into Harvard, we'll pay for it.

L: Are there any requirements that after they graduate, they have to come back and perform services?

Lyons: No. I would advise that they would, because this is home and they want to be part of what we're doing.

L: Recreational facilities?

Lyons: We have a community center – that was our bingo hall. The front is for parties and things like that. The back is a gymnasium. Upstairs is the weight room. We have people come in and teach classes on health down there. We have our baseball fields over here. There are three of them – two of them and rodeo grounds.

L: Rodeo grounds?

Lyons: Oh, yeah. Our boys like to ride, so we have Indian rodeos here.

L: Do you have your own police department?

Lyons: We have security out on the reservation. We have 10 or 15 men around the clock. We also have an agreement with the county sheriff to come out; we have two men out here all night long. We pay monthly for that.

L: Why do you think it's necessary to have two sheriffs out here?

Lyons: We were having problems with drugs and people coming and dumping things. It was mostly at nighttime. We're also closing our entrances. We're going to be a closed community here. That will help solve that problem.

L: Speaking about drugs, is there a drug problem?

Lyons: There has been; it's starting to get better. My first meeting of the morning was with our health clinic, and we're looking at doing a new facility that will entail all of the things for the drugs, everything.

(continued next page)

A Tale of Two Tribes *(continued)*

L: You have basically a city-state here, don't you?

Lyons: Yes, absolutely. We've got all of our own, and we employ about 2,500 people in gaming and non-gaming tribal operations.

Writer's note: According to Native Americans Magazine, Morongo opened up one of the largest Shell gasoline stations in the country, owns an A&W drive-in restaurant, opened the first Coco's restaurant ever owned by an American Indian tribe, acquired Hadley Fruit Orchards' three retail stores, including the company's mail-order and franchise rights, and in 2003 opened a \$26,000,000 Arrowhead Mountain Spring Water bottling plant.

L: Did you have a master plan?

Lyons: Not really, we piecemealed it, and we didn't – it just didn't work that way. This is a true democracy. We have monthly meetings. All of our people come and they tell us what they want us to do. So we have our Master Plan, we have our Land Use Plan, we have it all, but when they want to do something, we've got to do it.

L: You mention you have the health clinic. Do you have doctors on the reservation?

Lyons: There are doctors there all the time, just like a regular clinic. We have dentistry, too, and it's not just for the tribal members here. Any Native American can come.

L: Are there tribes in California that are still modest by way of income?

Lyons: Modest? They're still third-world countries. There's Santa Rosa up here in the mountains; they just got electricity not long ago. Just got telephones. It's bad. But through what we're doing, they get money every year. It comes through the state distribution plan.

L: Is this all surprising to you? All that has occurred?

Lyons: Yeah, in some ways it is. We moved quite a ways. But it's always a fight to keep what we have – when you get something, you've got to fight to keep it.

L: But you're playing the game the right way.

Lyons: We learned. And we learned good.

L: Do you have to beat the governors over the head?

Lyons: It was a fight. It was a fight with all of them. There's not been one that is really pro-Indian. It's a battle.

L: Why, do you think?

Lyons: I have no idea what's in their minds, you know. Gray Davis you could work with. I could call him any time and talk to him. This one I've never talked to at all.

L: You've tried, I gather.

Lyons: Oh, yes, we've tried. We've just tried everything. There's nothing . . . he won't talk to us.

L: Do you know why?

Lyons: He wanted 25 percent of our take. He's not gonna get it. We'll help the state out; we're not denying that we'll

help the state. But they got into a problem and now they want us to bail them out.

L: As a matter of fact, what I've been reading, you pay quite a bit of taxes – federal and state.

Writer's note: According to Native Americans Magazine, Native Americans paid \$4,000,000,000 in personal and federal income taxes nationwide in 2003. In California, Indian gaming generated an estimated \$280,000,000 in federal payroll and income tax, as well as over \$120,000,000 in state and local taxes in 2003.

Lyons: Yes, but his perception is that we don't. We sat down to negotiate with his negotiators; we offered them a billion dollars. If he signed the deal we want, ten percent of all the new machines go to the state. We give him a billion dollars the next day. Five tribes were gonna do that. He won't take it. We got 15 years left on our other compact. We don't have to do anything. We're negotiating because of little tribes like Santa Rosa. They need help. We have a huge budget to worry about. These other ones don't. They've never had a tribal government to worry about. What fits them, don't fit us. It's not a cookie-cutter process.

L: Basically, then, along with the wealth comes additional responsibility.

Lyons: Absolutely. Absolutely.

L: I was reading where you are quite active in providing money to charities.

Lyons: Oh yes, yes. We have a charity budget of \$2,000,000 a year.

L: When did you get involved with tribal politics?

Lyons: I just got into politics not long ago. Maybe five years ago. I came to a few meetings and I'd see things that we weren't keeping up the pace with the rest of the tribes.

L: Could you give me an example?

Lyons: All the new casinos that went in. All of the programs that the other tribes had. We had very little. Adding additions onto our casino, that's not what I wanted. I want it, like I told the council . . . you walk in the front doors of our new casino, you're thinking you walked into Las Vegas. That's what I want. I don't want none of the cultural stuff that all the other casinos have in it. They have all of their culture within their casino. That's not the right place to do that cultural business. That goes in a museum, or on your reservation being taught to your people. Not in a casino.

L: I read that it cost \$250,000,000 to put that new casino up. Where did you get that money?

Lyons: People were in line to give it to us because of the cash flow that was coming through our casino. It was a relatively easy process to get it done.

L: Would you say that with the influx of income came an influx of pride in being a member of this tribe?

Lyons: Absolutely, absolutely. Me, I was always a Morongo Indian. Didn't make no difference to me. I see it more with other people. They love being a Morongo Indian now, and I anticipate more people living on our reservation.

L: What do you consider your greatest achievement?

Lyons: Becoming chairman of the tribe. That's a great achievement, but I haven't achieved the greatest yet.

L: Which is?

Lyons: You'll know when I do it. It'll be soon.

L: Last question. Where does your respect come from?

Lyons: It comes from the dollars. Dollars bring political power that brings respect.

AGUA CALIENTE

Tahquitz Canyon Boulevard, running from the heart of downtown Palm Springs to Palm Springs International Airport, is one of the major, established thoroughfares in Palm Springs and home to a number of law firms. The headquarters for the Agua Caliente Band of Cahuilla Indians is located on Tahquitz, and like the street, the tribe is rock-solid and anchored in the Coachella Valley. No Johnny-come-lately, it has been going steady and stable since the 1930's. Chairman Richard Malinovich is the epitome of that stability, secure in his position, one that has lasted for 21 straight years, encompassing 11 straight elections as the tribe's chairman. Chairman Malinovich calmly answered my questions.

L: First off, I'm curious about something. Correct me if I'm wrong, but the name Malinovich is not an Indian name. It sounds Eastern European. How does that compute?

M: Malinovich is Eastern European – Yugoslavian. When I was considering running for chairman, I was concerned about how tribal people would think of me, "Malinovich the Indian." Then someone said it doesn't matter what your last name is, what matters is what's in your heart.

L: Agua Caliente Band of Cahuilla Indians. Are there various bands?



Richard Malinovich

(continued next page)

A Tale of Two Tribes *(continued)*

M: There are seven bands which make up the Cahuilla Nation. We're just but one band of the Cahuilla Nation, which was recognized by the federal government. We were established as a reservation in 1876. That's when Congress authorized the Mission Indian Act.

L: Do you have your own constitution?

M: Yes.

L: How many members in the nation?

M: 420.

L: Is there an actual physical reservation?

M: Yes, it incorporates Palm Springs, Cathedral City and a portion of Rancho Mirage in Riverside County.

L: How large is the reservation?

M: 32,000 acres, that was our original reservation boundary, but in the 1930's and 1940's each member of the tribe received 47 acres as they were born: a 40-acre parcel of non-irrigable land, a five-acre parcel of irrigable land, and a two-acre parcel for a residence.

L: How about the additional Indians who were born, let's say, in the 1980's and 90's?

M: There was no land available to give out to them.

L: Timing is everything, isn't it? So, basically, then, the overwhelming majority is allocated out. How many acres were left for development?

M: All we had was eight acres. The Spa Hotel opened in 1962. It was the first long-term lease in Indian Country, 99 years.

L: To whom was it leased?

M: It was leased to a couple of developers from Chicago.

L: Who owns it now?

M: The tribe does.

L: You bought it back?

M: We didn't buy it back until 1993.

L: It strikes me that there was a distinction before and after gaming. Before gaming, it was tough to get by, and after gaming, the money came in. Would that be correct insofar as the Agua Caliente Band is concerned?

M: No. We developed our income through land use, long-term leases.

L: Well, this is completely different than the setup with the Morongo Indians. I spoke with Chairman Lyons and he was telling me that until gaming came about, it was poor out there.

M: It was. Everyone around the valley, all the tribes, called us the rich Indians.

L: Has the Spa Casino changed the tribe's political power any? Has it increased?

M: The political power – not the casino itself, but the land jurisdiction, because prior to 1977, the state con-

trolled land use of the reservation. In other words, they could apply our land in any way they saw fit.

L: Even though you were a nation.

M: Even though we were a nation.

L: That must have pissed you off!

M: That's saying it lightly. It wasn't until 1977, when the Santa Rosa Tribe near San Francisco was sued by the state. The state lost, and the Ninth Circuit upheld the lower court's decision saying the tribes had the right to jurisdiction and had the right to zone. The Supreme Court refused to hear the case. The developed land in Palm Springs and Cathedral City, probably 65 to 70 percent, is owned by the tribe.

L: This is a completely different setup than that of the Morongo Tribe.

M: Definitely. Definitely.

L: It strikes me that you have, in the long run, succeeded; they have now, through gambling, been doing well.

M: They're doing well, in the sense that their immediate revenue is quite extreme, but we still have our programs available to pay for our health insurance for child members, educational benefits for child members, and housing assistance for tribal members. In regard to housing, we have first-time buyers – a \$30,000 grant down payment, and the condition is that they live in the house for five years. On another note, in 1973, we did a social survey. The majority of our members lived at or below the poverty level. We had multiple families living in substandard dwellings. That's what caused us to begin the process of searching for a gaming partner. Prior to 1993, we didn't want to go to gaming. We stayed away from it.

L: Why is that?

M: The people in charge were being taken advantage of by the management companies, by tribal leaders who were taking advantage of their members. We began the process. That's when we got Caesar's World as a financial partner. That lasted about 18 months, and then we decided to break from Caesar's and do it on our own. That's when we opened the Spa Resort and Casino.

L: Any regrets?

M: None. None. We used probably seven-eighths of our resources when we opened the Spa Resort and Casino. There was a possibility that we may have been shut down the first day, losing everything, or we may open and it would still be a bust.

L: How do you distribute the money?

M: We have developed a per capita whereby each month we give each and every member, including minors, a certain dollar amount from the proceeds from the remaining revenue, just like most casinos do to their members. Some tribes don't give to minors, they just give to adults. We include the minors and make them set up in a "rabbi trust," a financial authority.

L: What does that mean?

M: It means that you have control over it; you can dictate how it is used or how it's to be invested. When they turn 18, we have a process where they get a certain percentage, certain amount, and then it is distributed over a ten-year period.

L: Does the tribe own any businesses other than the casino and the spa?

M: We own this office building, the office building down the street across from the Wyndham Hotel; there's a brand new golf course that was reconfigured, Canyon South Golf Course, we own that leasehold interest, 500 and some-odd homes at the Canyon Country Club. Since we built the casino, we have purchased land amounting to about 6,000 acres.

L: I'm gathering that your philosophy, the tribe's philosophy, is slow but steady. Nothing extravagant. You're buying up land. You are carefully analyzing how to best use it.

M: My mother served on the council, on the first all-woman tribal council, my aunt served on the all-woman tribal council, so they never did it extravagantly, they just plodded ahead, slowly but surely and methodically.

L: Did you put together a projection as to what you want to do and how you are going to spend your money?

M: The Spa Hotel has to come down and a new hotel will go in its place. It was opened in 1962, so the infrastructure is pretty shot. It's a \$250,000,000 to \$300,000,000 project.

L: You have a different philosophy on how to deal socially and economically from the Morongo Tribe.

M: And Cabazon. And the Soboba. I think that there is a basis for that, because we have dealt with the outside world to a big extent, from the 30's. But we lost our cultural ties a lot quicker than those tribes that were more isolated. To the extent as to how it was before, never, because so much has been lost in the meantime. Tradition is an acceptance of other ideas somewhat akin. We're laying a new traditional groundwork for who we are. We're learning, and we try to take what we hear and put it into another bowl, mix it up, until this is who we are.

L: What is your educational background?

M: I finally graduated college in 1996. I went back to the University of Redlands. It took me two years, but I got it done, and I have a Bachelor's in Business, but my ultimate is to go to law school.

(continued next page)

A Tale of Two Tribes *(continued)*

L: Now, you see, I thought you were a smart man.

M.: It's just a real personal satisfaction. I guess I'm a patient person. I'm not concerned about "hurry up and get it done." I think that I work toward specific goals.

L: I gather you have a policy to maintain good relations with the community.

M: Yes. One of the ways that we do that is with our charitable contributions. We give away close to one and a half million dollars a year; we also purchased fire engines, police vehicles, things like that. We need good relations, because there are people in Palm Springs that are opposed to whatever we do.

L: Why?

M: Because of animosity, envy; they don't like the fact that we do have – who we are.

L: So we're talking about prejudice, are we not?

M: Thank you. It's not all of a sudden. It's been there since the non-Indians have been coming to Palm Springs, it's there. They bring it with them. I remember growing up as a young man here in Palm Springs and I'd go home sometimes after school, or I'd go to a movie and come home at night, and my mom would just be crying away because of the way she had been treated that day. She used to work as a maid, housekeeper ... Just the way

she was treated. Her stepfather was so frustrated because he couldn't get a job, so he took it out on his family, and Dad was pretty miserable.

L: How do Indians take it?

M: Interestingly enough, Indian people as a whole don't really take it to heart, other than we know it's there. We feel it, but don't give it back, because of who Indian people are and how we are able to adjust, because we're doing better now. One of the things that the revenue that we've been able to put back within our community has given our own members is a sense of accomplishment. They no longer live in hovels. They're no longer clothed in holey or dirty or greasy clothes that were brought over from Goodwill or from the Salvation Army bins. They are proud of who they are.

L: Have you seen public opinion change?

M: Oh, yes.

L: Do you have internally within the tribe any type of council or committee that oversees disputes among tribal members?

M: No. Not within the tribe. At this time, we have approximately 4,400 team members,

employees. There was a time when if someone was terminated, there was no true process for redress. We did not know what to do. So we established a separate body, outside of the tribal government, made up of retired attorneys and retired judges who would hear appeals. So it's an independent body which was set up and they hear and their decisions are mandatory on us.

L: Thank you so much.

M: We were talking pretty freely. Thank you very much. You're easy to talk to. You allowed me to get some of the stuff out in the air.

Rick Lantz, a member of the Bar Publications Committee, is an attorney in La Quinta.



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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, 2005.

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Bradford & McGuire, Riverside

Risa S. Christensen –
Wagner & Pelayes, Riverside

Michael E. de Coster –
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Burke Williams & Sorensen LLP, Riverside

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