

RIVERSIDE LAWYER

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MAGAZINE



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RIVERSIDE LAWYER

MAGAZINE

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MISSION STATEMENT

Established in 1894

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

RCBA Mission Statement

The mission of the Riverside County Bar Association is:
To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, RCBA - Riverside Superior Court New Attorney Academy.

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

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

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

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

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

The material printed in the Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

CALENDAR

October

- 12 Criminal Law Section**
12:00 – 1:30 p.m.
RCBA Gabbert Gallery
Speaker: Darryl Exum
Topic: “Closing Argument”
MCLE
- 18 Family Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Art Grater
Topic: “Support and Tax Crossover Issues”
MCLE
- 20 General Membership Meeting**
Noon – 1:15
RCBA Gabbert Gallery
Program - TBA
- 21 Minor’s Counseling Training – Day 1**
8:00 a.m. – 5:00 p.m.
RCBA Gabbert Gallery
For information contact
Carol Adams – 760.342.8450
- 25 Appellate Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Dennis Haserot
Topic: “E-Briefs & Appendices”
MCLE
- 26 CLE Presentation**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Susan Exon
Topic: “Ethics in Mediation”
MCLE
- 28 Minor’s Counsel Training – Day 2**
8:00 a.m. – 1:00 p.m.
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For information contact
Carol Adams – 760.342.8450





President's Message

by Jean-Simon Serrano

In preparing to write this month's "President's Message," I reviewed what I wrote exactly six years ago when I was the President of the Riverside County Barristers. At that time, the Barristers were excited to announce that we had once again begun working with the Associated Students at UC Riverside to restart a non-profit legal clinic, providing legal assistance/advice to UCR students. The UCR Legal Clinic was originally started in the 1960s and continued to operate until sometime in the mid to late 90s. The clinic became dormant after concerns regarding availability of malpractice insurance were raised. In 2010, my vice president at the time, Scott Talkov, took the laboring oar and worked with the University to ensure that there would be malpractice coverage for our volunteer attorneys. It was an exciting time for the Barristers as we got the legal clinic running again. In my years on the Barristers Board prior to this, the Barristers had been essentially just a social club for young attorneys. There was a sense of pride among the Barristers as we returned to our civic-minded roots.

Today, the ASUCR Legal Clinic is thriving with seven attorneys helping UCR students with issues related to, among other things: criminal law, personal injury, landlord/tenant, family law, debt collection, and administrative hearings. Unlike the legal clinic of the past, the current clinic does most of its work via email and telephone calls. This allows the volunteer attorneys to respond immediately to students and allows us to forgo a physical location for the clinic. I'm very happy with the success of the legal clinic and was fortunate to have been at, as well as a part of, its re-opening. I continue to donate time to the

Clinic, providing assistance and advice to students with personal injury matters/questions.

Recently, the Riverside County Bar Association has formed the Riverside County Bar Foundation. This is a non-profit public benefit corporation whose purpose is to serve the communities in which the RCBA members work. Already-existing RCBA charity programs are now a part of the Foundation. These include: The Elves, which provides holiday gifts and meals for families in need; Project Graduate, which works in collaboration with the Riverside Superior Court and Riverside County's Department of Public Social Services to assist foster youth to graduate high school, to continue their education beyond high school, and to plan for a successful future; Citizenship Awards to acknowledge the achievements of local high school students; and Adopt-a-High School which educates students about the legal system. With an eye toward the future and expansion, the Foundation also provides for the creation of other community service projects. In addition to allowing us to house all of our charitable programs under one roof to further coordinate fundraising efforts, because the Foundation is a 501(c)(3) corporation, donations made to these programs through the Bar Foundation are now tax deductible.

Through the ASUCR Legal Clinic, the Barristers have been providing a great service to the community. For decades, the Riverside County Bar has been providing important services to its members as well as providing assistance to the public. Programs such as the Elves, Project Graduate, and Adopt-a-High School, have made available a fantastic level of service to the community. The formation of the Bar Foundation will make it easier for the Bar to continue our efforts and I look forward to the creation of exciting new programs that allow our members to get involved and help others within the greater Riverside community. As with the ASUCR Legal Clinic, I hope that, six years from now, we can look back at the formation of the Riverside County Bar Foundation as the beginning of something that will have a lasting impact on our community.

Jean-Simon Serrano is an associate attorney with the law firm of Heiting & Irwin.





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BARRISTERS PRESIDENT'S MESSAGE

by Erica M. Alfaro



Board Member Profile: Julianna Crawford

Julianna Crawford is the Barristers Board Vice President. A native of Albania, she relocated with her family to Michigan at age 17. A graduate of Hofstra University, she earned degrees in Political Science and Italian. Although Julianna misses being in close proximity to New York City, she does not miss the weather. She moved to California and went on to attend Southwestern Law School. While at Southwestern she served as a judicial clerk, an

advocate at the Immigration Clinic, and a law clerk at a boutique law firm.

Julianna currently practices workers' compensation law. She is Senior Litigation Counsel at Health-Link Management where she represents doctors and other medical providers, working with attorneys from insurance companies in an effort to collect the liens of clients.

A graduate of the RCBA New Attorney Academy like many of the new Barristers board members, she joined Barristers to become active in the legal community. Julianna is very proud to be part of the Board because it's comprised of a dedicated and hardworking group of leaders. Although only elected in June, the Board has already held various events including happy hours, bowling night, and most recently the Evidence MCLE facilitated by Judge Richard T. Fields on September 21, 2016. Most of all, she enjoys the friendships she has made in Barristers and having the opportunity to meet some of the Inland Empire's brightest new attorneys.

One of the best things Julianna enjoys about practicing in the Inland Empire is being in a close knit legal community. Although a relative newcomer to the area, she feels embraced by the legal community and the community at large. As a past participant of the New Attorney Academy, she learned valuable legal skills and highly recommends new attorneys apply for the program.

A kid at heart, Julianna is a Disneyland annual pass holder and loves spending time with Mickey Mouse when she can. A self-described foodie, she enjoys gourmet cooking, trying new foods, and visiting new restaurants. In the last few years, she has practiced ballroom dancing. Last, but not least, she enjoys spending time with friends and family. Julianna currently resides in Redlands with her husband Dave.



Julianna Crawford

Upcoming Barristers Events, Proposed Amendments

Please join Barristers for an MCLE Presentation on Wine Law on Thursday, October 27, 2016 at Canyon Crest Winery located at 5225 Canyon Crest Drive, Suite A., Riverside 92507 (next door to Rite Aid). Mixer starts

at 5:30 pm and presentation will begin at 6:00 p.m. Attorney Michael Newcomb of Temecula's Newcomb Law Group will be facilitating the presentation. Cost is \$15 for RCBA members, \$20 for non-members and includes a glass of red, white, or fruit wine, or a non-alcoholic beverage. Appetizers and charcuterie provided. Cash bar available. Limited seating is available. RSVP by October 24, 2016 to RCBA**barristers@gmail.com**.

Finally, we will also have an MCLE presentation on Client Trust Accounts during the second week of November. Lunch will be provided courtesy of City National Bank. More information is to follow. At this meeting Barristers will also be voting on proposed amendments to our bylaws. The proposed amendments include: the membership year commences in September, social events count toward the three meeting requirement for voting, changing Vice President Position to President-Elect, election votes may be cast via mail and email, officers elect assume positions at commencement of membership year, meetings will be held monthly, and the addition of standing and special committees including the appointment of a Law School Liaison.

Erica Alfaro is a graduate of UC Davis School of Law and practices Workers' Compensation at State Fund.



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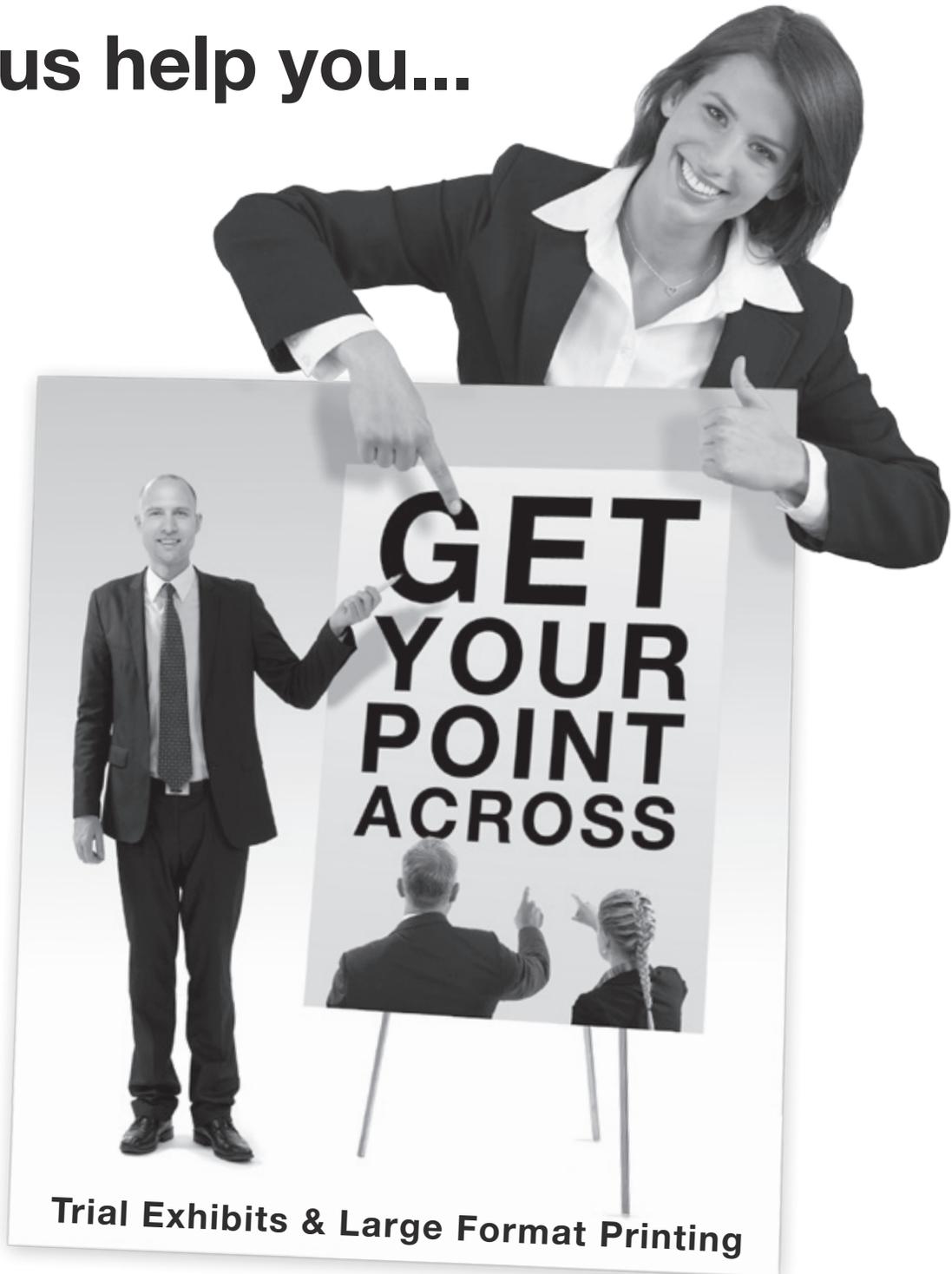
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HALLOWED HALLOWEEN

by Boyd Jensen

Monsters, ghouls, fiends and spirits are not near as terrifying as considering the potential actionable conduct at the venues, which cater to “horrific” Halloween, holiday activities. Consider the following real life situation and possible actions and defenses.

Factual Background

“The Haunted Trail,” is an outdoor haunted house where disguised, loathsome clad actors jump out of dark spaces, inches away from patrons, holding prop knives, axes, actual chainsaws (sans chains), or severed body parts. Our victim – let’s call him “Griffin” stated he was unexpectedly confronted by a final scare known as the “Carrie” effect.¹ A ghoulishly costumed actor wielding a gas powered chainsaw, startled, approached, frightened and chased Griffin, when upon falling, he was injured. “He was right into my space... He was literally coming at me... He selected me..., pointing it [chainsaw] right at me and it was live and active; you could literally smell the gas...hear the sound and everything...and the more I backed away, the more he followed me. I asked him to stop. He wouldn’t. I started running. He was literally running after me.”

The Haunted Trail had played an orientation audiotape: “Our creatures will not grab you, however, they may accidentally bump into you. Oh, you will be scared sh—less and try to run away, but in the end our creatures will chase you down like the chickens that you are!” A “Frequently Asked Question” on the Web site admitted, “Running is the main cause of minor injuries. Make sure to follow the rules and DON’T run and you should be fine!” Signs stated, “Due to natural surroundings of the park the ground may be uneven with some obstacles such as tree roots, rocks, etc. Be careful...This attraction contains high impact scares...is not suitable for people with heart conditions...prone to seizures...not recommended for children under age 10; and pregnant women and infants...” Yet, there was some relief, employees are instructed to “stay clear of people who are crying.”

Possible Actions

Actionable conduct would of course include varieties of negligence, chasing someone when you know the ground causes falls; what does “heart conditions” mean

¹ After the horror film *Carrie*, where the main character, Carrie, was misled that all was wonderful, only to be assaulted and humiliated, albeit not by a chainsaw wielding ghoul.

and how do the employees screen for that...how can anyone screen for anything at point of sale (*Hall v. Sea World Entertainment, Inc.* 2015 WL 965911 [though unsuccessful, this suit for fraud was filed because after paying for tickets, and actually witnessing the perceived harmful treatment of animals, the advertisements were felt to be deceptive and misleading].) When does “security” engage to protect the patrons; and what are the rights of the actors from unexpected defensive blows from startled patrons? Using discriminatory language about patrons – not just that they are “chickens” but other words which indicate they are weak or inadequate, i.e. “disabled” in whatever way. (*Sayed-Aly v. Tommy Gun, Inc.* — F.Supp.3d —; 2016 WL 1043672 [discrimination claim stated after the owner yelled discriminatory and derogatory remarks]; see also, *Mullen v. Helen Keller Services for the Blind* (2016) 135 A.D.3d 837.) Negligent training of actors and when to recognize they had gone far enough. (Discussed in *Avrett v. Festival Fun Parks, LLC* 2016 WL 193805 [case involved a go-kart incident].) And, finally what about criminal assault. (See *Scharff v. L.A. Fitness International, LLC* (2016) 139 A.D. 3d 929 [attacks by third parties].)

Possible Defenses

Defenses would primarily be assumption of the risk and there are plenty of amusing situations with which to compare. (*Kaminer v. Jericho Union Free School District* (2016) 139 A.D.3d 1013 [struck in the head by a baseball thrown by a coach]; *Safon v. Bellmore-Merrick Cent. High School Dist.* (2015) 134 A.D.3d 1008 [student injured at lacrosse practice, even though the goal was not covered by netting]; *Spiteri v. Bisson* (2015) 134 A.D.3d 799 [observer struck by lacrosse ball who entered a fenced athletic field during a scheduled lacrosse practice]; *Bryant v. Town of Brookhaven* (2016) 135 A.D.3d 801 [a golfer who slipped and fell on a wet golf course footpath].) But, in these and the dozens of others, horseback riders, motocross, metal ski pole, karate punches, water polo, break dancing, weight lifting, using a treadmill, fishing, football practice, skate boarding and basketball practice, the behavior of the actor was not intended to injure, unlike the conduct of the chainsaw wielding ghoul chasing Griffin, whose every act and attendant risks achieved an obvious, and frankly expected, harmful result. Releases and waivers are com-

mon defenses. (*Roberts v. T.H.E. Ins. Co.* 367 Wis. 2d 386 [case about the validity of releases and waivers for participating in a balloon ride attraction].)

In *Griffin v. Haunted Hotel Inc.* (2015) 242 Cal. App.4th 490 (*Griffin*), last year just in time,² our Fourth District protected Halloween’s modern, monstrous customs in considering the exact incident quoted above from San Diego, Balboa Park’s “Haunted Trail.” Although the case turned upon assumption of risk analysis, in affirming the successful Motion for Summary Judgment in favor of the defendant, the court’s opinion amassed 28 Westlaw keynote categories! Mainly on assumption of the risk, yet validating the potential for abundant causes of action. So why take the risk?

Far beyond the exigencies of *Knight v. Jewett* (1992) 3 Cal.4th 296 and “primary assumption of risk” there is a very significant reason for hallowing Halloween. Think back upon our amusement past. Parks and fairs in most of the country have always been considered seasonal. School starts in September and parks traditionally closed after Labor Day. October 31 was left to schools and neighborhoods to celebrate. Sunny

² October 23, 2015.

Southern California, however, being the exception, and with motivated, “neighborhood-bound” Knott’s Berry Farm (KBF), Halloween was about to change. Knott’s Berry Farm’s Halloween Haunt and Knott’s Scary Farm expanded its season through October 31 so successfully that venues copied it throughout the world, and as an example of Knott’s success in 2015, almost one-sixth of KBF’s yearly attendance was after the season end – during October – and it is a special pay event to boot.³

From San Diego, California to Ocean Park, Hong Kong, Halloween’s financial success will stimulate continued trepidation, panic and terror paid for by patrons... and with the treatment by courts such as our Fourth District in *Griffin*, ...why not?

Boyd Jensen of Garrett & Jensen has lived and raised his family in Riverside throughout his 35 year legal career and represented Knott’s Berry Farm for over 25 years before it was sold by the Knott Family to Ohio’s Cedar Fair LP.



³ See *Americans Are Expected to Spend 6.9 Billion on Halloween* by James Peltz, October 11, 2015.

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THIS HOUSE IS HAUNTED

by DW Duke

What is a haunted house? I am not referring to the haunted houses you see at an amusement park, but real haunted houses. The houses that have peculiar events that cannot be explained within normal human comprehension. Stories abound throughout the world about strange experiences in “haunted houses.” A common denominator in many of these haunted places is that there was an untimely death; the result of murder.

A friend of mine from the Midwest told me of the haunted house he grew up in. He is a fairly well-known attorney who wishes to remain anonymous for obvious reasons, though he adamantly insists that a haunting is the only possible explanation for what occurred in his family’s home. To most accurately reflect what he told me, I will provide his story in the first person, as if he were here telling the story himself. The following is what he told me:

“In the early 1960s my parents bought a beautiful 4500 square foot house in a small Midwestern town. The house had been built in 1928 only a decade after the First World War at a time when security was of utmost importance to most Americans. It had become apparent that a war could reach international proportions and even in the United States, no one felt safe. The bricks to build the house were imported from Africa and the roof was covered by slate shingles. Every exterior wall was, at a minimum, one-foot thick and made of brick and mortar. Perhaps the most amazing feature of the home were several secret passageways that ran from the six-room basement to the garage and another that ran to the neighbor’s house. In the basement there was a built-in brick barbecue in a large studio room with flood lights for theatric performances. The house had many stained glass windows that cast a colorful hue around the rooms as the sunlight came through. We loved the amazing house but from the day we moved in, something was wrong; something strange that we could not quite discern.

“We knew that the house had been built by the uncle of an Indiana Hall of Fame basketball player and university basketball coach and that the athlete had spent many years playing basketball in the basement, and in the driveway of the home. For hours, he would dribble the ball from one end of the studio room to the other, a distance of forty feet. He would stand in the middle of the street and shoot baskets from a half court distance toward the hoop on the garage, with a seventy percent accuracy.

“When the former owner, the uncle of the ballplayer showed us the house, he told a strange story of a night when he was alone and he dreamed that he was being beaten by his sons. His sons, of course, were not there and the bedroom door was locked when he went to bed and when he awakened in the morning. No one had come into the room. However, he was severely beaten and had bruises and cuts all over his body, so severe that he sought treatment at a local hospital. He said this occurred shortly after his wife died. My parents discussed this before buying the house but dismissed it as a bad dream and we bought the house notwithstanding the strange story.

“The first evidence of something amiss occurred shortly after we moved into the house when my entire family was sitting in the living room on a Sunday afternoon. As we talked we heard someone coming down the stairs. We couldn’t hear the footsteps but we could hear clothes swishing that sounded like a woman wearing a heavy evening gown. It came into the room where we were sitting and walked around the room going past each of us. Every one of us looked at each other but no one said a word. We were stunned. The hair on the back of my neck was standing up. After it walked out of the room my mother looked at my father and he nodded his head, indicating that he had heard it, but neither said anything to the children until many years later.

“We heard the sound again a short time later, and soon it became so frequent that we no longer considered it abnormal. We just accepted that it would happen on nearly a daily basis. In time, we began to hear other sounds that were equally as eerie. In bed at night I could hear what sounded like a cane tapping lightly on the floor. It sounded as if it was tapping on hardwood. When we first moved into the house, the floors were indeed hardwood oak but my parents had carpeted the floors to provide additional insulation from the bitter cold winters in Indiana. Thus, the sound was virtually impossible because there was no hardwood on which the cane could be tapping. Every night the tapping would start in the hallway, come into my room, walk up to the side of my bed and stop next to my head. It would then go to the other side of my bed and stop next to the headboard. Then it would turn and go out of the room. The first time I heard it I lay in the bed perfectly still and terrified. We always kept a nightlight in the hall and I slept with my door open. I looked to see if there was anyone there; of course there was not. This continued

all of the time we lived at the house and it occurred every night between 10 p.m. and midnight.

“Another event that was puzzling was a strange overwhelming sensation that someone was in the room. This was something that each of my family members would experience at various times on a routine basis. A person might be reading a book or standing in a room when suddenly she would get terrible cold chills and a terrifying sensation that someone was behind her in the room. Turning around there would never be anyone visible. On one occasion, when my mother had the sensation someone was in the room, she turned around and saw the cat staring at the corner of the room with its back arched and the hair standing up on its back. My mother ran out of the room but the cat ran out faster, ran down the steps and hid behind the couch.

“In time, the events became more frequent and vivid. Sometimes objects would fall on the floor for no apparent reason. Often when walking up the steps at night one would suddenly feel someone behind him causing him to run up the steps as fast as possible. One evening around 9 p.m., my mother and her four children were sitting in the kitchen when suddenly someone turned the doorknob to the basement door from the other side. The door was closed and locked with a skeleton key. The door then shook as if someone was shaking it trying to get in. My mother called the police who arrived and searched the basement from one end to the other and found all windows and doors locked from the inside. My parents had locked the secret passageways and sealed them with concrete so we knew no one had entered through the passageways. The police did notice however, dust on the basement steps in the size and shape of a woman’s bare feet. My sister and my mother both compared their feet to the footprints and they were both the wrong size. The boys even compared theirs and they were the wrong size as well. No guest had been in the house for weeks and the basement steps were always mopped once per week. I know, because that was my chore.

“After living in our house for many years, my father decided to ask our neighbor if he had ever heard of any haunting events at the house. The next door neighbor was in his eighties and had lived there since the house was built. The neighbor took him into a den and took out an old newspaper clipping. The clipping told the story of the death of the wife of the man who sold the house to us. According to the clipping she was painting outside and said she felt ill. She went inside, lay down in bed and died. There was an investigation of possible homicide in part because her husband was having an affair at the time. Due to inconclusive evidence no charges were ever filed. All five of their sons, however, were convinced that their father murdered their mother by poisoning her. The body

was kept in the parlor of the house for three days then was buried in a nearby cemetery. After she died, the husband continued to live there for about a year then married the woman with whom he was having the affair before his first wife died. The boys disowned their father. The clipping had a picture of the woman who had died, who was very beautiful. We had purchased the house within a year after she died. The neighbor gave my father the newspaper clipping to keep, but he never told the children about it.

“The most horrifying event for me was when I was in my room one night asleep at the age of 17. My bed sat at an angle to the corner of the room. There was a street light outside my window that cast a dim light into the room. For some unknown reason, I awakened at the middle of the night and looked up. Standing on the other side of the headboard looking directly down on me was a pale white woman. Her features were so vivid I could see long hair just inches from my face. I jumped out of bed, ran out the door and shouted to my father that there was someone in the room. We went back in the room. The bedsheets and blankets had been pulled completely off the bed. All of my musical equipment consisting of guitars and microphones were thrown on the floor. All of my drawers had been pulled out of the dressers and were lying on the floor. Yet, all of the windows were locked from the inside. I stayed up the rest of the night. The following morning, my father showed me the newspaper clipping and when I looked at the photo I immediately recognized the woman in the photo as the woman who stood above my bed looking down at me.

“The morning after the event with the “ghost” in my room, I called my sister who lived about ten minutes from us and asked if I could move in with her. She agreed. That was the last night I stayed in the house. A few years later my parents closed up the house and it sat empty for about forty years. Finally, the house was sold to a real estate investment company that rents it out. I have often thought about contacting the tenants to see if they have ever noticed anything strange, but ultimately decided to let the sleeping ghost lie. Perhaps someday, I will read of the haunted house in the Midwestern town in Indiana.”

I have often thought about this story over the years and have asked students when I teach real estate law, “If this occurred in California, would there be a duty of the family selling the house to disclose these events pursuant to California Civil Code 1102.3, if they had experienced these events?” What do you think? BOO!!!

DW Duke is the managing partner in the Inland Empire Office of Spile, Leff & Goor, LLP and the principal of The Duke Law Group. He is the author of five books and a frequent contributor to the Riverside Lawyer.



CONFESSIONS OF A GOTH GIRL TURNED LAWYER ON ALL HALLOWS' EVE

by Juanita Mantz

I love Halloween. Let me repeat that. I love Halloween. I love the pumpkins on doorsteps, the skeletons hanging from doorways, the witches with cauldrons, the costumes, the candy, and the scent of fall in the air which smells to me like cinnamon and leaves crushed together.

As a former goth/punk girl (at least my exterior does not show it, inside I remain the same), my adoration for Halloween might be called cliché, or at the very least expected. Mind you, I do not care if I am judged. This is my holiday and I relish it every year awaiting the sight of the first big orange banner tied across the rented storefronts proclaiming that Halloween has arrived. I have even been known to clap and yell aloud to my husband, "Yes, it's here! Halloween is here!"

Every Halloween, I decide on a costume theme and execute it to perfection. Last year, along with my husband and our best friends, we were The Munsters and The Addams Family. The year before, we dressed as characters from *The Rocky Horror Picture Show*. I proudly twirled in my gold top hat and sequined top with short shorts as Columbia (although I did not tap dance). My best friend was the mad maid

Magenta. The year before that, my husband and I were Danny and Rizzo from *Grease* (I am no Sandra Dee) and before that, we dressed as Alice in Wonderland characters. Before that, super heroes. I could go on, but will spare you.

I don't know if it is the process of reinvention that I adore, or whether it is the spookiness of this pagan All Hallows' Eve that I react to, but what I do know is that there is something magical about it all.

As lawyers, we are allowed to put on a costume every day in order to have the authority that our law degree along with the suit costume (for those of you for whom it is not a costume, I feel sorry because I would much rather be wearing jeans and a punk rock tee most days) entitles us to. We appear before a robed judge on a bench and make requests, arguments, even demands. But, there is a deference we must have. We must play by the rules. Decorum is everything. And, I believe in the formality of it all. It is like church. And, after all, these are people's lives we are dealing with.

Yet, sometimes, I want to scream and shout in the courtroom at the absurdity of it all. Laugh aloud like a mad hatter. And, other times, I want to cry over the sadness and misery of it all. But I do neither.

Instead, on Halloween I reinvent myself. And for one day a year, I get to play someone other than myself.

Juanita E. Mantz is a Deputy Public Defender in Riverside County and is currently assigned to Mental Health Court in Department 42 handling incompetency proceedings under PC 1368. You can read her blog at <http://www.wliffeofjemcom-jemmantz.blogspot.com>.



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TRICK OR TREAT: INTELLECTUAL PROPERTY AND HALLOWEEN COSTUMES

by Jeff Van Hoosear and Jonathan Hyman

What do an orangutan, the Mighty Morphin Power Rangers, and Albert Einstein all have in common? They each spawned Halloween costumes, intellectual property rights, and litigation. What do Pikachu and Adele have in common? They are the costumes my son and daughter will don this Halloween. This article will discuss why I am fairly confident that their costumes will not result in litigation, despite the intellectual property issues inherent in costumes depicting cultural icons, superheroes, and scary movie creatures.

The three primary areas of intellectual property that are triggered by costumes are copyright, trademarks, and rights of publicity. Federal copyright law is intended to provide exclusive protection to actual artistic expression, but not to an underlying idea or concept. Federal and state trademark laws provide a brand owner with certain exclusive rights and also protect consumers from confusion as to the source of products or services. The right of publicity is generally a state law which allows an individual to control the commercial use of his or her name, image, or likeness.

One of the leading cases to address the intersection of intellectual property and costumes is *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005). In *Chosun*, the Second Circuit held that an orangutan costume could be copyrightable if the design elements of the costume are separable from the overall functional nature of the costume as clothing. The alleged infringer argued that the costumes were the equivalent of clothing, which is considered a functional "useful article," and is not protected under the copyright laws. The court found, however, that elements of design which can be separated from the overall function of the clothing could be protected by copyright. For example, while a dress would be considered a "useful article" and not subject to copyright protection, the pattern on the fabric from which the dress is made may be protected.

In addition to the potential copyrights in a particular costume, the manufacturer must also be careful to avoid infringing the trademark rights of others. In *SCG Power Rangers, LLC v. Underdog Endeavors, Inc.*, CV11-08485 JHN (C.D. Cal. 2011), the Mighty Morphin Power Rangers were called into action. For those who may not be familiar with this 1990s' phenomenon, it was a popular television

show featuring a group of teenagers who could "morph" into "Power Rangers" and fight evil forces. These teenage superheroes wore head-to-toe uniforms in a single color - blue, pink, red, yellow or black. Their character names were based on the color of their uniform, e.g. "Red Ranger" or "Blue Ranger."

In 2011, SCG Power Rangers, the owner of the intellectual property rights in the Power Rangers, sued the owner of "MyPartyShirt.com," for selling t-shirts in the same colors as those worn by the Power Rangers and with a similar center diamond graphic. SCG alleged that the t-shirts constituted both copyright and trademark infringement, even though the words "Mighty Morphin Power Rangers" were not used on the shirts. There was no dispute that SCG owned the copyrights and trademarks in the names and representations of the characters. The issue was whether the protection extended to the colors of the uniforms and the simple diamond design. The diamond shape had no utilitarian function, and was merely ornamental, but is also a very common design element. The case was voluntarily dismissed, so unfortunately we don't know how the court would have ruled on the issue of whether the similarity in the color and graphics on the t-shirts would have constituted an infringement of the Power Rangers' copyright rights.

There is a similar case now pending before the U. S. Supreme Court, *Star Athletica, LLC vs. Varsity Brands, Inc.* This case involves two manufacturers of cheerleading uniforms and will require the Supreme Court to decide if the placement of simple and common elements such as chevrons, stripes, and zigzags are protected elements or not.

Trademark law enables trademark owners to take action against others who are using a mark which creates "likelihood of confusion" with the trademark owner's brand. The owners of the trademark rights in superheroes have a robust business based on licensing other companies the right to make superhero costumes. Trademark owners can be quite aggressive in stopping the unlicensed manufacture of costumes, since it cuts into the royalties they would otherwise receive from the sale of licensed costumes. Therefore, a consumer encountering a costume bearing the recognizable attributes of a superhero usually assumes the costume is authorized or licensed by the

owner of the rights in the superhero. My son's Pikachu costume, which I purchased online through a major e-commerce site, and was fulfilled by a manufacturer that specializes in Halloween costumes, is more likely than not an officially licensed costume.

If a costume is not officially licensed by the trademark owner, however, the trademark owner can, and often does, sue the costume manufacturer for trademark infringement. In the Power Rangers case, the website was using the name "Ranger" to sell its t-shirts. SCG would probably have done quite well on its trademark infringement claim; although it might be a stretch to think a consumer would believe the "Ranger" t-shirts were authorized by the official Power Rangers. Such confusion or mistake by consumers is essential for finding trademark infringement.

Albert Einstein was the central figure in a case involving the interplay between costumes and the right of publicity. In *Forum Novelties, Inc. v. Greenlight, LLC et al.*, 10 Civ. 9414 (S.D.N.Y. December 17, 2010). Forum Novelties, a costume wholesaler, created a "Heroes in History" costume kit comprised of a white curly-haired wig and a white mustache – instant Albert Einstein. When Albert Einstein died in New Jersey in 1955 at the age of 76, he left all his papers and literary rights to the Hebrew University of Jerusalem. The Hebrew University sued Forum, alleging that the costume violated Albert Einstein's right of publicity under New Jersey law. This suit highlighted many interesting

issues relating to the post-mortem right of publicity. One issue is that there is no federal right of publicity, only a patchwork of state statutes and common law. New Jersey's right of publicity is based solely in its common law. If Albert Einstein had died in New York there could be no claim, as New York does not recognize a post-mortem right of publicity. Another issue is that there is no consistent rule as to the length of a post-mortem right. No New Jersey court had yet ruled as to the length of the post-mortem right.

The Albert Einstein "Heroes in History" case was resolved out of court, but the current packaging suggests that a license was granted to the manufacturer.

Of more immediate interest to me and my family are the rights of Adele. While Adele is very much alive, she is also English. England does not recognize a "right of publicity." The other good news is that my daughter's costume is homemade and is essentially for her own entertainment. We are optimistic that it will not draw the attention of Adele (or her lawyers).

Dressing up for Halloween shouldn't scare you or your children. Costume manufacturers, on the other hand, should be wary of intellectual property landmines when outfitting trick-or-treaters.

Jeff Van Hoosear and Jonathan Hyman are partners in Knobbe Martens.



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FRANKENSTEIN TURNS TWO HUNDRED

by Abram S. Feuerstein

Although it would not be published officially for another two years, the story that would evolve into *Frankenstein; or, The Modern Prometheus* would start its life in the summer of 1816. Frankenstein's creator, Mary Wollstonecraft Shelley, the daughter of prominent parents Mary Wollstonecraft and William Godwin, had eloped to the Continent with a married man, Percy Shelley.¹ According to Mary Shelley, the couple "visited Switzerland, and became the neighbors of Lord Byron."² "It proved a wet, ungenial summer, and incessant rain often confined (them) to the house," she wrote.³ And, indeed, a volcano eruption in Indonesia the prior year had spewed vast quantities of ash into the atmosphere and changed typical European weather patterns.⁴

With Byron's infamous parties lasting for days, and trapped indoors, the group entertained themselves with ghost stories. Byron then suggested an idea for a contest of sorts: "We will each write a ghost story," he suggested.⁵ So in a "playful desire of imitation"⁶ of the German ghost stories they told each other while gathered around the fireplace, Mary Shelley "busied (herself) to think of a story – a story to rival those which had excited (the group) to (the) task."⁷

The 19-year-old Mary Shelley at first had writer's block. Then one night Lord Byron and Percy Shelley began to discuss the implications of a well-publicized scientific experiment involving a "piece of vermicelli in a glass case," dead worm tissue that, "by some extraordinary means . . . began to move with voluntary motion." Upon listening to this discussion, Mary Shelley thought: "Perhaps a corpse would be re-animated; galvanism had given token of such things: perhaps the component parts of a creature might

be manufactured, brought together, and endued with vital warmth."⁸ In the early morning hours, after the partying had eased up and she retired to bed, her imagination ran wild, and *Frankenstein* was conceived. "On the morrow I announced that I had thought of a story," she recounted, and in short order penned several pages.⁹ Later, Percy Shelley would persuade her to transform the tale into a longer work.¹⁰

Classics are the books frequently that everyone talks about but nobody reads.¹¹ To be sure knowledge of the Frankenstein monster seems universal; but one gets the sense that the knowledge is based upon movie or even theme park portrayals, or the popularity of the character during the Halloween season, rather than Mary Shelley's novel. "It's alive," exclaims Dr. Frankenstein in the famous 1931 movie while the body of the monster, played by Boris Karloff, is strapped to a laboratory table, lowered to the ground, and moves a few fingers of its hand.¹² Unsurprisingly, popular versions of the monster depart significantly from Mary Shelley's wretched creature. Although depicted as eight feet tall and thus guaranteed to stand out among a European population in general shorter than later "Wonder Bread" consuming generations, the monster of Mary Shelley's imagination definitely did not possess electric bolts on its neck; and instead of the square, relatively close-cropped haircut depicted in movies, it had long, uncontrolled hair.¹³ In collecting bones from charnel-houses and with "(t)he dissecting room and the slaughter-house furnish(ing) many of (his) materials," the Dr. Frankenstein of the novel had endeavored to select "beautiful" features and proportionate limbs for his creature.¹⁴ But after two years of work,

1 Mary Shelley, *Frankenstein: Complete, Authoritative Text with Biographical and Historical Contexts, Critical History, and Essays from Five Contemporary Critical Perspectives*, edited by Johanna M. Smith, pp. 4, 10 (Bedford Books 1992) (hereafter, "Frankenstein JMS ed.).

2 Frankenstein JMS ed., p. 20. The quotation is from the Introduction that Mary Shelley wrote to accompany the 1831 edition of *Frankenstein*.

3 *Id.*, at 21.

4 As a result of the powerful 1815 Eruption of Mount Tambora, the following summer of 1816 is sometimes known as the "Year Without a Summer." See generally, https://en.wikipedia.org/wiki/1815_eruption_of_Mount_Tambora.

5 Frankenstein JMS ed., p. 21.

6 Frankenstein JMS ed., p. 25. The full sentence in the text combines partial quotations from Shelley's Preface to the 1818 edition of *Frankenstein* and her Introduction to its 1831 republication.

7 Frankenstein JMS ed., pp. 21-22.

8 Frankenstein JMS ed., p. 22.

9 Frankenstein JMS ed., p. 23.

10 *Id.* One of the first vampire stories, "The Vampyre," published in 1819 and written by Lord Byron's personal physician, John William Polidori, also had its origins in the Byron 1816 ghost story contest. See https://en.wikipedia.org/wiki/John_William_Polidori; and https://en.wikipedia.org/wiki/The_Vampyre.

11 Mark Twain called a classic "a book which people praise and don't read." Twain, *Following the Equator*, Pudd'nhead Wilson's New Calendar (1897).

12 Mel Brooks' version, the 1974 *Young Frankenstein*, adds a little humor to the Frankenstein story, as Gene Wilder comments on the "big knockers" on the front door of the Frankenstein castle while standing next to his well-endowed lab assistant, Inga.

13 For some good trivia about Boris Karloff and the 1931 Frankenstein movie (including the fact that Karloff's shoes in the film weighed 13 pounds each), see <http://www.imdb.com/title/tt0021884/trivia>.

14 Frankenstein JMS ed., pp. 56, 58.



and no sooner than life was infused into the inanimate body, Dr. Frankenstein realized in “breathless horror” the hideousness of the “demonical corpse to which (he) had so miserably given life.”¹⁵

Themes in *Frankenstein*

The novel hits many themes. And some of them that might not have been recognizable to a teen reader become more evident as AARP membership age approaches or passes. Certainly, the mad scientist, whose personal ambition combines with twisted genius, is identifiable, as is the related concept concerning the tragic consequences of tampering with the natural order of things, *i.e.*, attempting to play God. The monster’s alienation from the world of men, resulting largely from their fearful reaction to his physical appearance, is central to the story and even causes a reader to sympathize with the wretch. The unfolding narrative also embraces issues relating to the responsibility of a parent towards its child – the relationship of a creator and the created – and the way in which those who enter the world acquire knowledge and lose their innocence. Ah, yes, the old nature or nurture debate.

But the novel additionally has been the subject of feminist, Freudian, and even Marxist interpretations and/or criticisms.¹⁶ The strengths or weaknesses of these analyses vary. Of the “isms” or ideologies, the most appropriate may be a view of the novel through a feminist lens. Mary Shelley’s mother, Mary Wollstonecraft, who died in childbirth, had written the early feminist *A Vindication of the Rights of Woman* in 1792, a work that influenced Shelley and which apparently she had been re-reading while writing *Frankenstein*.¹⁷ *Frankenstein* itself initially had been published anonymously possibly because a fear of negative criticism should it be known that the work had a female author;¹⁸ the women in the novel remain “voiceless” and are relegated to the “domestic” rather than the “public”

15 *Frankenstein* JMS ed., pp. 58, 59.

16 A healthy sampling of these are contained in the *Frankenstein* JMS ed., pp. 189-341.

17 *Frankenstein* JMS ed., pp. 6-7. Smith cites to Shelley’s journals for factual support.

18 *Frankenstein* JMS ed., p. 271.

sphere;¹⁹ and Dr. Frankenstein’s ill-fated, *patriarchal* decision, to keep his new bride, Elizabeth, in the dark about the monster’s threat to take revenge on their wedding night, leads to her demise.²⁰

Political constructs, however, cannot explain the enduring popularity of *Frankenstein*. Instead, the novel’s permanent place on the family bookshelf results from the same impulse that led to its creation – the age-old entertainment value in good storytelling, whether around a fire pit outdoors or indoors around Lord Byron’s fireplace. For two hundred years this gothic horror story has captured the imagination of its readers, and likely will do so for another two hundred. In writing *Frankenstein*, Mary Shelley had been animated by an image that haunted her “midnight pillow,” that of a “hideous phantasm of a man stretched out, and then, on the working of some powerful engine, show(ed) signs of life,” the awakening corpse instilling a “thrill of fear” in the author. With bizarre fascination, tourists in mid-to-late Nineteenth Century Paris gazed through large windows at bodies displayed publicly on marble slabs at the morgue.²¹ Zombie and “walking dead” movies and television shows today hold a similar fascination, instilling a “thrill of fear.” The living/dead divide always inspires the supernatural. The narrative of *Frankenstein* remains compelling – yes, because of the quality of the writing – but also because Mary Shelley’s protagonist assembled body parts from corpses, breathed life into the dead, and violated the sanctity and eternal silence of the grave.

Frankenstein and the Integrity of the Human Body

The real world of course imitates good fiction.²² And two hundred years later, *Frankenstein* – particularly on the subject of body parts – does worm its way into the public consciousness, and even intrudes into the legal world.

For example, a headline in the September 20, 2016, online *Daily Mail*, appearing above a story about the world’s first head transplant, stated that the doctor was “preparing for his ‘Frankenstein’ surgery by REANIMATING human corpses” (capitalization in the original).²³ “They will use electricity to stimulate the nerves in dead bodies after first cutting and then reconnecting the spinal cord as a test of their technique,” the story notes eerily in describing practice tests the surgical team plans to conduct.²⁴

19 *Frankenstein* JMS ed., p. 270.

20 *Frankenstein* JMS ed., p. 284.

21 See generally, <http://www.messynessychic.com/2014/05/13/that-time-when-parisians-used-to-hang-out-at-the-morgue-for-fun/>.

22 In *The Decay of Lying*, Oscar Wilde observed that “Life imitates art far more than art imitates life.”

23 See <http://www.dailymail.co.uk/sciencetech/article-3798056/Head-transplant-surgeon-plans-controversial-Frankenstein-experiments-reanimate-corpses.html?ITO=149>.

24 *Id.*

In commenting on videos purportedly depicting representatives of Planned Parenthood describing the use and/or sale of fetal body parts resulting from abortions performed at Planned Parenthood clinics, a pro-life group, Life Legal Defense Foundation, stated that it was “proud to have taken an active, essential role in exposing Planned Parenthood’s ‘Dr. Frankenstein’ wrongdoing.”²⁵ Similarly, a representative from the pro-life Family Research Council referred to Planned Parenthood’s “Frankenstein-like plot.”²⁶

In the mid-1980s, Michael Mastromarino, a dental surgeon who lost his license because of malpractice issues arising from his drug addiction, ran a criminal enterprise in which he plundered body parts from funeral homes and sold millions of dollars in bone fragments and human tissue to medical science customers.²⁷ He did not have the consent of surviving family members but that did not stop him. He simply forged their signatures. He also falsified information concerning the health condition of the “donor” sources in order to mask any chronic conditions that otherwise would have made the parts unmarketable. A story in *USA Today* described Mastromarino’s conduct as “so grotesque that it reads like a real-life sequel to *Frankenstein*.”²⁸

The needs of medical science in the early decades of 19th Century England, resulting from the expansion of medical and anatomical schools, frequently led to monstrous behavior. Traditionally, in places like Edinburgh, Scotland, executions of criminals supplied the needed cadavers.²⁹ When that proved insufficient, grave-robbers targeted the recently deceased. Walls and watchtowers were erected in graveyards to protect burial areas.³⁰ Medical schools asked few questions about the source of the bodies.

This atmosphere gave rise to the infamous duo of William Burke and William Hare, who operated between

1827 and 1828.³¹ Instead of waiting for bodies the old fashioned way and then robbing their graves, they murdered between 13-30 people by luring new City of Edinburgh arrivals to a boarding house operated by a woman with whom Hare cohabitated.³² They strangled their victims so that the bodies would not be ruined, and then sold the bodies to Robert Knox, a professor at the medical school at Edinburgh University. They committed their last murder on Halloween 1828.³³

Today most states, including California,³⁴ have laws that regulate organ donations and make illegal the sale or purchase of body parts. Federal law is similar.³⁵ Some states make it a crime to “abuse a corpse,” i.e., to treat a corpse in a way that a reasonable person knows would outrage ordinary family sensibilities.³⁶ Because the medical demand for cadaveric organs vastly exceeds the supply, the subject of creating an active marketplace for the purchase and sale of body parts certainly has been the subject of scholarly discussion.³⁷ But whether one believes that altruism alone can supply medical needs, or that a functioning market is necessary or preferable, the policies that we adopt and the laws that we enact undoubtedly will be influenced by the popular images of the doctor and his monster created by Mary Shelley.

Abram S. Feuerstein is employed by the United States Department of Justice as an Assistant United States Trustee in the Riverside Office of the United States Trustee Program (USTP). The mission of the USTP is to protect the integrity of the nation’s bankruptcy system and laws. The views expressed in the article belong solely to the author, and do not represent in any way the views of the United States Trustee, the USTP, or the United States Department of Justice. The photographs accompanying the essay were taken by the author on a September 6, 2016, drug store visit using a cell phone camera.



25 See <https://avemariaradio.net/planned-parenthoods-fetal-body-part-trafficking-a-resource-page/>.

26 See <http://dailysignal.com/2015/07/16/house-strips-funding-from-planned-parenthood-supporter-in-wake-of-scandal/>.

27 A. Feuer, “Dentist Pleads Guilty to Stealing and Selling Body Parts,” *New York Times*, March 19, 2008, at http://www.nytimes.com/2008/03/19/nyregion/thecity/19bones.html?_r=0. The highly publicized story is recounted more fully in a book entitled *Crooked Brooklyn: Taking Down Corrupt Judges, Dirty Politicians, Killers and Body Snatchers*, by Michael Vecchione and Jerry Schmetterer, 272 pages (Thomas Dunne Books 2015).

28 See “Scandal Rocks human tissue industry,” *USA Today*, June 12, 2006, located at http://usatoday30.usatoday.com/news/health/2006-06-11-tissue_x.htm.

29 See Scottish History Online, “William Burke & William Hare, ‘The Resurrectionists,’” at <http://scotshistoryonline.co.uk/burke.html> (hereafter, “SHO Burke & Hare”). Of note, growing up the young Mary Shelley lived near a prison and public hangings were well attended spectator events. See <https://www.brainpickings.org/2013/03/05/the-lady-and-her-monsters/>.

30 SHO Burke & Hare.

31 Ben Johnson, “Burke and Hare, infamous murderers and grave-robbers,” *Historic UK: The History and Heritage Accommodation Guide*, at <http://www.historic-uk.com/HistoryofScotland/Burke-Hare-infamous-murderers-graverobbers/>.

32 *Id.*

33 *Id.*

34 Cal. Pen. Code Sec. 367f. For a general list of state statutes, see <http://www.state.gov/documents/organization/135994.pdf>.

35 See 42 U.S.C. Sec. 274e (Prohibition of Organ Purchases making it “unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation” but excepting “human organ paired donation”).

36 See, e.g., Del. Code Ann. tit. 11, Sec. 1332.

37 See, e.g., Michele Goodwin, *Black Markets: The Supply and Demand of Body Parts*, 312 pp (Cambridge University Press 2006).

IDENTITY THEFT: THE FEAR OF THE MODERN AGE

by Souley Diallo

The zombies, goblins and vampires of our childhood nightmares serve as objects of celebration and revelry during Halloween. Unlike the phantom menaces of horror movies – one fear that does not abate with the maturity of adulthood or the changing of the holidays is the fear of crime. Although stories of violent crime dominate the evening news – the one crime outranks violence in terms of a tangible day-to-day concern for the average citizen in our technologically driven, interconnected world is identity theft. In fact, a recent study listed “identity theft” among the top ten fears of all Americans, along with terrorism and public speaking.¹

The term “identity theft” refers to the use of someone’s personal identifying information for an unlawful purpose.² Its practical applications are varied and far-reaching: from garden variety check and credit card fraud; to the hacking of financial institutions and our most private, sensitive medical information. Its victims range from multinational corporations, to shoppers at the local big box retail outlet. The perpetrators of the crime are equally varied: from foreign hackers connected to organized crime to the drug addict stealing checks from mailboxes.

The scope of the problem originates from our desire for convenience and interconnectedness. We have been spoiled by the expectation of 24/7 financial transactions; credit approvals upon a click of a mouse, and satisfaction of our shopping impulses upon the swipe of a smart phone. Our reticence to share our most sensitive information with faceless entities has fallen by the wayside; today we provide our driver’s licenses, social security numbers, and mother’s maiden names to the dot-com *du jour* without hesitation. We demand that technology keep pace with this desire. Accordingly, the digital replaced the analog; paper currency and written checks have been replaced by cards, chips and phone apps as the preferred method of payment.

Further our desire has intersected with our increasing expectations of mobility. We not only want it 24/7 – we want it everywhere; from the patio of our local coffee shop to our business class seat on the airplane. The architects of this convenience, the Silicon Valley tech giants and the social media barons, have demanded a price in exchange for its provision; an increasing demand for our information, and the Big Data that holds the promise of future revenue streams. We have obliged this demand, acquiescing to the waiver of privacy with the click of a radial button as a proforma requirement of life in the digital age.

However, our embrace of technology fueled openness; tempered by a fear that every aspect of our lives in the public domain and thus subject to misappropriation. The shallow promises of firewalls and hyper-encryption, bring us little comfort; in the age of openness, the internet café is a mine-field, and every patron with a laptop and a latte is a potential threat. Our fear, at times, borders on the conspiratorial- with every errant tweet or email resulting in claims of being “hacked,” or every unaccounted for minor transaction in a bank account summary resulting from identity theft rather than a failure of memory.

Notwithstanding the hysteria, identity theft is a real and growing threat. The Identity Fraud Study, released by Javelin Strategy & Research, found that there were 13.1 million victims of ID theft in 2016, with reported losses of \$15 billion. Data breaches have occurred among America’s largest corporations – Target, Citibank, Google and Sony Pictures to name a few. Even government agencies have not been immune, with data breaches occurring at the Internal Revenue Service, Office of Personnel Management, and Veteran’s Affairs.

Our attempts to address multi-faceted aspects of the problem has resulted in a complex web of civil, criminal, and regulatory laws. On both the federal and state level, there are scores of penal statutes criminalizing the broad variety of conduct falling under the umbrella of identity theft. Every year there are new regulations governing the handling of personal identifying information by corporations, government, and consumer reporting agencies. In response to increasing concern over civil liability, corporations have given top priority to cyber-security and the prevention of data breaches. Moreover, consistent with America’s entrepreneurial spirit, a new industry, “identity protection”, has arisen to capitalize on our concern over identity theft.

Despite these efforts to address the problem, the specters of identity theft, both real and exaggerated, continue to dominate our collective consciousness. The pervasiveness of the problem, in part has arisen due to our desire for interconnectedness, and our empowerment of technology to serve it. Accordingly, like *Frankenstein* or *The Terminator*, this embrace of technology has given birth to the monster; and our real fear comes from the inability to control it.

Souley Diallo is a deputy public defender for the County of Riverside, where he practices in the Complex Litigation Unit.



1 *America’s Top Fears 2015* Wilkinson College of Arts, Humanities and Social Sciences, Chapman University 2015.

2 Cal Penal Code § 530.5

4BR, 2BA, 1 GHOST: MUST HOME SELLERS DISCLOSE PARANORMAL ACTIVITY?

by Kimberly Phan

Real estate disclosure laws rest on the idea that a person has the right to make informed choices about known conditions. But what happens when the condition, by its very nature, cannot be known in an apparent way? Real estate property characterized as “stigmatized” is property that is not defective in any physical manner, but instead has “psychological” defects.¹ These sorts of defects can include properties that were the site of a murder, suicide, crime, death, serious illness, or even a haunting.² Stigmas such as these can either attract publicity thereby raising the market value of the property,³ or they can have a detrimental effect on value. Either way, the fact that a stigma can have any effect on property value creates a legal query: must the seller disclose the property’s paranormal history and if the seller fails to disclose, are there remedies available to the buyer once the property’s history is discovered?

A New York Case Study

In the 1991 infamous *Stambovsky v. Ackley* case, the “[p]laintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists, reportedly seen by defendant seller and members of her family on numerous occasions over the last nine years.”⁴ The defendant, Helen Ackley, drew media attention when she publicized her house as being inhabited by three benevolent spirits dressed in colonial-era clothing.⁵ Ackley publicly reported that the spirits often left strange items in the house and that one actually gave her approval for a new paint color in the house.⁶ The New York appellate court reasoned that because Ackley promoted her home as being haunted,

she could not later deny the existence of ghosts.⁷ The court held that the seller’s promotion efforts had created a reputation for the home that materially affected the value, among members of the public, to whom she had no legal duty; therefore she owed no less of a disclosure duty to the buyer.⁸ The court found that when a “non-local” buyer will likely not discover a material fact even when exercising due care, the seller owes the buyer a duty to disclose.⁹ Therefore, rescission was an appropriate remedy. Judge Rubin punned that he was “moved by the ‘spirit of equity’” to allow the buyer to rescind the contract and recover his down payment.¹⁰ The court ruled that “[...] as a matter of law, the house [was] haunted.”¹¹ As such, the seller owed a duty to the buyer to disclose a material fact that would have had an adverse effect on the market price of the property.¹²

The New York legislature responded in 1995 by enacting a “stigma statute.” It protects sellers and real estate brokers from liability for nondisclosure of the psychological conditions of a real estate property. New York Real Property Law Section 443-a, declares that it is not a material defect or fact if the prior occupants had HIV/AIDS or any other diseases, or if “property is, or is suspected to have been, the site of a homicide, suicide or other death by accidental or natural causes, or any crime punishable as a felony.”¹³ However, the New York statute does not encompass all psychological impacts that could affect the property such as haunting. New York instead codifies a procedure for buyers, regardless of whether a condition is a material fact or not, allowing them to make a written inquiry to the seller of conditions that may affect the value of a home.¹⁴ However, the seller may choose whether or not to respond to the inquiry.¹⁵

A California Case Study

In *Reed v. King*, buyer Dorris Reed brought an action against seller Robert King and his real estate agent seek-

1 Anne M. Payne, *Liability of Purchaser of Real Property for Failure to Disclose That Property is Haunted, or Was Scene of Murder, Suicide, or Other Notorious Death*, 149 AM. JUR. PROOF OF FACTS 3D §9 (2015).

2 *Id.*

3 Tony Guerra, *Does the Value of the House Change Due to a Tragic Death in the House*, SF GATE, <http://homeguides.sfgate.com/value-house-change-due-tragic-death-house-54941.html> (last visited Sep. 12, 2016) (describing the murder of fashion designer Gianni Versace, who was gunned down outside his Miami Mansion and three years later the mansion sold for a record \$19 million).

4 *Stambovsky v. Ackley*, 572 N.Y. S. 2d 672, 274 (App. Div.1991).

5 Xavier Ortega, *The Haunted House On The Hudson*, GHOST THEORY, (Sep. 3, 2015) <http://www.ghosttheory.com/2015/09/03/the-haunted-house-on-the-hudson>

6 *Id.*

7 *Ackley*, 562 N.Y.S. 2d at 674.

8 *Id.* at 677.

9 *Id.* at 674.

10 *Id.* at 675.

11 *Id.* at 674.

12 *Id.* at 677.

13 N.Y. Real. Prop. Law §443-a (West 2011).

14 *Id.*

15 *Id.*

ing rescission of the sale contract and damages when she learned from a neighbor that a woman and her four children were murdered in the house ten years earlier.¹⁶ The question which confronted the appellate court was whether the seller had a duty to disclose the property's history.¹⁷ The court ruled for the seller, finding that generally sellers only owe buyers a duty when they know of facts materially affecting the value or desirability of the property, and the material fact is known only to the seller and is unlikely to be discovered by the buyer.¹⁸ The appellate court reversed the trial court's decision and ruled that if Reed could prove that the multiple murders had a significant effect on the market value, either from the opinion of experts or other evidence, then she was entitled to relief.¹⁹

In 1987, the California legislature limited the Reed holding by passing a "stigma statute."²⁰ California Civil Code Section 1710.2 states that there is no liability against an owner or agent for the nondisclosure of an occupant's death or the "manner of death" when the death has occurred more than three years prior to the date of purchase or if the occupant of the property was afflicted with, or died from, HIV/AIDS.²¹ This statute is similar to the New York one in that does not specifically address the disclosure of paranormal phenomenon such as haunting. In addition, the statute limits its anti-seller-liability provisions by explicitly stating that owners and agents are not protected from "intentional misrepresentation[s] in response to a direct inquir[ies] from a transferee or a prospective transferee of real property, concerning deaths on the real property."²² To protect real estate brokers and agents from deceptive sellers, the California Association of Realtors® created the California Real Estate disclosure form (Seller Property Questionnaire), which requires disclosure from sellers of material facts or defects affecting the property not otherwise disclosed to the buyer.²³ To date, there have been no case studies in California that determine whether haunting is a material fact.²⁴ The California Association of Realtors® advises real estate agents and brokers to be prudent and that "when in doubt, disclose."²⁵

16 *Reed v. King*, 145 Cal. App. 3d 261, 264 (1983).

17 *Id.*

18 *Id.* at 265.

19 *Id.* at 267.

20 Cal. Civ. Code §1710.2 (a) (West 2016).

21 *Id.*

22 Cal. Civ. Code §1710.2 (a) (West 2016).

23 Seller Property Questionnaire, <http://www.car.org/media/pdf/legal/358056/>, (last visited Sep. 12, 2016).

24 *Disclosure of Death and AIDs*, Cal. Ass'n of Realtors®, (last visited Sep. 12, 2016).

25 *Id.*

Conclusion

In contrast to the New York and California statutes, some states, like Colorado, go even further in protecting sellers and their agents by offering general protection to sellers for nondisclosure of psychological stigmas, rather than leaving the question to a case-by-case determination of whether a condition is a material fact.²⁶ On the other side of the spectrum, states like Kentucky only protect nondisclosure of the HIV/AIDS status of an occupant.²⁷ More than half the states have enacted stigma statutes similar to the ones promulgated by New York, California and Colorado. Even the National Association of Realtors® has urged states to pass such uniform legislation and declare psychological stigmas as "not material facts."²⁸ The case studies mentioned above largely have been superseded by statutes and reflect a trend to provide clarity and consistency for matters like paranormal activities that are not easily quantifiable and known.

Kimberly Phan is a licensed real estate agent (BRE#01970662) and 2016 fall extern with the United States Department of Justice in the Riverside Office of the United States Trustee Program (USTP). She attends UCLA School of Law and is in her second year of study. The views expressed in the article belong solely to the author, and do not represent in any way the views of the United States Trustee, the USTP, or the United States Department of Justice.



26 Colo. Rev. Stat. §38-35.5-101 (2009).

27 Ky. Rev. Stat. Ann. §207.250 (LexisNexis 2007).

28 Ronald B. Brown, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose That Properties Are Psychologically Tainted*, 49 Okla. L. Rev. 625, 628 (1996).

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JUDGE IRMA POOLE ASBERRY TO RECEIVE USD SCHOOL OF LAW DISTINGUISHED ALUMNI AWARD

by Shari Baurle Green

The Honorable Irma Poole Asberry is receiving University of San Diego (USD) School of Law's 2016 Distinguished Alumni Award on Friday, November 18, at a luncheon at the Holiday Inn San Diego Bayside.

USD School of Law has approximately 500 alumni in the Inland Empire and Judge Asberry is the first alumna from Riverside County to receive the Distinguished Alumni Award—the school's highest honor bestowed upon alumni. The award is presented to law school alumni who have distinguished themselves in the legal field or other chosen profession at an exemplary level and who embody the high ethical standards and commitment to community service USD School of Law seeks to instill in its graduates.

"I am truly grateful to God for a wonderful life and legal career. I pray for many more years to share with my family and serve my community," said Judge Asberry.

Judge Asberry received her Juris Doctor degree from USD in 1979 and bachelor's degree from the University of California, Riverside in 1976. In 2007, Judge Asberry was appointed by Governor Arnold Schwarzenegger to the Superior Court and became the first African-American female judge to serve in Riverside County. Prior to her appointment, Judge Asberry practiced law for 26 years primarily in family law with occasional work in juvenile, adoptions, guardianships and bankruptcy. She worked for Butterwick, Bright, Pettis & Cunnison from 1980 until opening her own office in 1988.

Judge Asberry has a long history of active involvement in the legal community. In 1997, Judge Asberry became the first African-American president of the Riverside County Bar Association and has served on numerous committees and sections of the Bar Association. She is a former member of the Board of Directors of Inland Counties

Legal Services and the Public Service Law Corporation. In 2007, Judge Asberry was elected by her colleagues as a trustee of the Riverside County Law Library, a position she continues to hold. In 2008, Judge Asberry was appointed by Chief Justice Ronald M. George to the Elkins Family Law Task Force, where she remained until completion of its work in 2010. She continues on appointment by the Judicial Council in 2010, on the Workload Assessment Advisory Committee and, by appointment in 2015, on the AB1058 Funding Allocation Joint Subcommittee.



Irma Poole Asberry

Over the past nine years, she has regularly volunteered as a judge in the Riverside County Youth Court.

USD School of Law has more than 14,000 alumni and, since the Distinguished Alumni Awards inception in 1977, only 77 law school alumni have received the award.

Tickets for the luncheon and awards ceremony are \$55 per person and may be purchased online at law.sandiego.edu/daa or by phone at (619) 260-4692. Discount hotel accommodations are available online at bartellhotels.com/usd for one of Bartell Hotels' eight San Diego properties.

Shari Baurle Green is the Associate Director of Alumni Relations, University of San Diego School of Law.



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OPPOSING COUNSEL: BOYD JENSEN

by Betty Fracisco

Boyd F. Jensen II is uniquely a renaissance man: as a California, Utah and Wyoming trial lawyer, with well over 50 civil jury trials and hundreds of arbitrations; an appellate practice including multiple published opinions and multiple successful civil writs; and author of legislation passed into law in Utah,¹ Arizona² and California.³ A father of eight children all of whom having been raised in Riverside – La Sierra and Arlington High Schools – have Master’s or Doctor’s degrees or advanced certifications or are still working on advanced degrees – three in medicine, and one in education, communication, law and music;⁴ and almost 20 grandchildren scattered with their parents over five states. Boyd has bagged a dozen 3000 and three 4000 meter peaks (including California’s Mount Whitney), coached Little League for three years, coached YWCA/YMCA Basketball for two years, and served as an LDS Bishop⁵ here in Riverside. Like all lawyers, Boyd loves to read and has a large library on shelves and online. Were he not tied to his practice he would read, sail and dive. He says “three quarters of the planet is under water and so few put on a mask and go look around.”

Boyd is from the small town of Murray, Utah. As did his parents and all of his uncles and aunts, he graduated from the only high school “Murray High School.” For money, he threw newspapers, cleaned dental and veterinarian offices, helped on his grandfather’s farm – Boyd had his own horse and even road in the Murray patriotic parades. He operated a small merry-go-round, took children on pony rides, was a lifeguard and provided concierge services for Murray Park and Salt Lake dance hall, “The Terrace Ballroom.” Over New Year’s checking hats and coats sometimes earned tips of a quarter. He hated gardening but remembers his parent’s pride at



Boyd Jensen

many Sunday dinners because all the food came from the garden and family raised beef, turkey or lamb.

Boyd attended freshman year at the University of Utah on a leadership scholarship and playing basketball. Boyd is committed to his faith and left school to serve a two year LDS Mission in Germany. Upon returning, he completed his degree requirements in only two years, and preparing for a life in the law worked as an assistant librarian at the Utah Supreme Court and aide to Salt Lake’s Mayor (later Senator),

Jake Garn. Boyd had met ballet dance major Julie Hansen before leaving on his mission. A year and half after his return, Julie and he married, graduated with honors and headed to California to attend Pepperdine Law School, near Disneyland where Julie had danced with the “Electrical Parade.”

During law school, Boyd clerked with the Orange County firm of Garrett & Domino, who hired him upon graduating and passing the California Bar. Boyd became absorbed into the insurance defense world, litigating hundreds of cases, trying dozens of jury trials, and beginning his lifelong involvement with the amusement industry. On occasion, Boyd found himself sitting at the defense table with Russell Knott, Walter Knott’s son. After receiving a string of defense verdicts, Boyd made partner and a name for himself in the Orange County legal community. He presented seminars on litigation including Arbitration with JAMS⁶ founder Honorable Warren Knight; received his AV Martindale-Hubbell rating, which he has retained for over 25 years; and qualified for American Board of Trial Advocates (“ABOTA”) membership as an “Advocate.”

Boyd established himself as one of the premier amusement industry lawyers in the United States. He co-founded the *International Amusement and Leisure Defense Association* (“IALDA”); founded the first amusement park association in California, the *California Amusement Park Association*⁷ (“CAPA”); and the first car-

1 Sections of Utah Code, §78-27-61 (1998)

2 Arizona Laws, Amusement Ride Safety, §§ 44-1799.61 et.seq. (2009)

3 California Penal Code, §490.6; California Labor Code, §§ 7916-7919 & amending 7912, 7914 & 7915; and City of Concord, California Ordinance, §§ 74-61 to 63 (1997).

4 One of the eight passed within a year following her birth.

5 An LDS Bishop is an ecclesiastical leader in the Church of Jesus Christ of Latter-day Saints who serves approximately 500 church members without compensation for normally at least five years.

6 JAMS is “Judicial Arbitration and Mediation Services” which started in Orange County with retired judges Warren Knight, Robert Kneeland, and Max Eliason, and is now global.

7 CAPA was originally lawyer driven by Boyd Jensen and the smaller park operators. Later, when Disneyland and Universal joined, the organization evolved into a full time directed lobbying and educational organization currently known as “California

nival association in California “CalPRO.”⁸ He serves on the Executive Committee of the *American Society of Testing and Materials International*, “ASTM” – F24 Committee for Amusement Rides and Attractions; and the Global Safety Committee of the *International Association of Amusement Parks and Attractions* (“IAAPA”). For over 20 years, Boyd has provided presentations, written articles, and advocated for the amusement industry on many issues including G-forces, biomechanical effects of rides, industry standards and the American’s With Disabilities Act. During this time, he expanded his practice spending a significant amount of time with some of the largest carnivals and fairs in the United States. In 2010 Boyd received the IAAPA Meritorious Service Award, the first attorney so recognized.

Though Boyd’s accomplishments were elsewhere, early in his career he and Julie established their home in Riverside to raise their family. Julie served as officer and President of the PTA and the Riverside Ballet Theatre Board; while Boyd formed the Alvord School District Foundation, served on the Riverside County Committee

Attractions and Parks.”

8 CalPRO is the “California Portable Ride Operators” association which currently is managed by the international Outdoor Amusement and Business Association.

on School District Reorganization, and Boy Scouts of America. Boyd is one of those people who enjoys volunteering, be it legal matters or some other aspect of life. The amount of pro bono work he has done during his career can simply not be measured. In recent years Boyd found a dilapidated downtown residence, sprayed with graffiti and occupied by homeless, and restored the 1902 Mediterranean style residence, which now serves as his office.⁹

He credits his partners Kenneth Garrett, Bud Domino, David Sanders, David Fisher, Armand Brinton, and David Garrett as teachers, as well as, office managers Florence Dudys and Tina Armijo and secretaries, Mary Marsden and Carol Phelps, for the patience and late hours of selfless effort; and particularly his BYU JD Clerk Dennis Jensen who has been with Boyd for decades.

Attorney Betty Fracisco of Garrett & Jensen is a civil practitioner in Orange and Riverside counties for over 25 years and active member with California Women Lawyers.



9 The home had been designed by Burnham and Bleisner, the architects for the historic courthouse. As a result, Boyd received an award from the Old Riverside Foundation.



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