RIVERSIDE LAWYER

March 2008 • Volume 58 Number 3

MAGAZINE

RIVERSIDE COUNTY BAR ASSOCIATION
RCBA
EST. 1894

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

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(MCLE)

20 Family Law Section
"Pension and Retirement Division
Speaker: Rick Muir, Esq.
RCBA Bldg., 3rd Floor – Noon
(MCLE)

25 Nominating Committee
RCBA – Noon

26 Estate Planning, Probate & Trust Law Section
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(MCLE)

27 DRS Board of Directors
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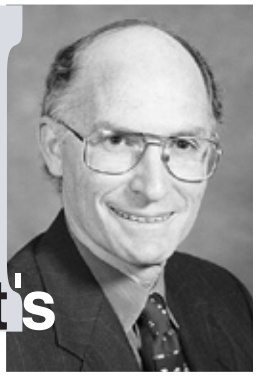
31 Court Holiday – RCBA Closed
(Cesar Chavez Day)



President's Message

by Daniel Hantman

Action Plan for Justice

Some of you attended our joint RCBA-SBCBA luncheon on December 14 and heard our State Bar President Jeff Bleich speak of Assembly Bill 2301, which established a new "Justice Gap Fund." This fund will help those who are no- or low-income persons and who seek legal advice and representation from legal aid organizations. These legal aid organizations lack sufficient funds to hire enough attorneys and support staff to meet the requests for their services.

Jeff Bleich wrote an article in the December 2007 California Bar Journal entitled, "Make a Difference This Season." He wrote eloquently about the gap between the "haves" and the "have-nots" and asked us all "to help those who are less fortunate. Although California has the largest economy in the U.S. and the fifth largest gross national product in the world, we spend a relative pittance on helping our poor and low-income neighbors get justice." "If each of us gives only $100, we will more than double the amount of money these programs received from IOLTA last year."

A.B. 2301 facilitates contributions from attorneys by allowing us to make a voluntary contribution through our State Bar annual fee statement. If you did not contribute yet, you can do so online by logging onto the new State Bar webpage at http://calbar.org/justicegapfund.

Please read Jeff's "Open Letter to Members of the Legal Community on the Justice Gap Fund" in the February 2008 issue of our *Riverside Lawyer* magazine or go to the State Bar's website (http://calbar.ca.gov/calbar/pdfs/IOLTA/JGF_Bleich-Open-Letter.pdf).

Our Inland Counties Legal Services (ICLS) is partially funded by IOLTA grants. As you may remember, I worked there until 1984. Irene Morales, Executive Director of ICLS and my former boss, wrote in our September *Riverside Lawyer*, "ICLS's major challenges are the geographically large service area and a significant poverty population. The service area encompasses 27,266 square miles – 7,214 in Riverside County and 20,052 in San Bernardino County . . . . The total service area is roughly the size of Connecticut. The poverty population at this point may exceed one half million. ICLS strives to meet these challenges by maintaining branch offices strategically located in the bi-county service area, as well as conducting client intake throughout the service area at community outreach centers, senior citizen, homeless and women's shelters and other places where vulnerable populations such as the deaf and hearing impaired or victims of domestic violence are provided supportive social services."

ICLS also provides funds for our own Public Service Law Corporation (PSLC), the Inland Empire Latino Lawyers Association (IELLA), and the Legal Aid Society of San Bernardino (LASSB). All of these organizations welcome volunteers to assist in their mission of providing legal services to those who would not otherwise benefit from full legal representation in the legal dilemmas that confront them.

Our PSLC was incorporated in 1982 as the pro bono program for the RCBA. In 2007, it closed 940 cases. Just under 1,000 hours were

donated by attorney volunteers. PSLC conducts clinics five days per week in Riverside, twice per month in Temecula and weekly in Indio. PSLC averages 275-300 clients per month. Their areas of services are family law, housing, guardianships, probate, debt collection, bankruptcy, and some general civil.

If you have time and/or money to contribute to these organizations, it will be greatly appreciated.

"God bless our country and all who lead us, may they be wise and just and fair . . . .

"God keep our country in your loving care. We'll be one people seeking freedom.

"One people seeking justice. One people seeking hope. One people seeking peace.

"God bless our country, let every race and creed unite in harmony and thrive.

"We'll join together and we'll work hand in hand.

"We are one people standing side by side . . . ."

These are some of the words from Debbie Friedman's song entitled, "One People." Debbie Friedman gave a concert to a sold-out audience at Temple Beth El in Riverside on Saturday, February 9, 2008. Debbie is known nationally and worldwide as a singer, songwriter and guitarist. She sings in the style of the 1960's and 70's, of Peter, Paul & Mary, Judy Collins, Joan Baez and Joni Mitchell. You can listen to this and more of her songs at http://www.cdbaby.com/cd/dfriedman2.

We are living in challenging times. Each of us does and can make a difference in this community and this world!

Dan Hantman, president of the Riverside County Bar Association, is a sole practitioner in Riverside.

Central District of California ADR Program Celebrates a Decade of Service

by Dawn Osborne-Adams, ADR Coordinator

The acronym "ADR," short for alternative dispute resolution, was coined in the 1970s, and was initially used to describe the private sector practice of disputing parties working together, with the assistance of a neutral facilitator, to resolve a dispute as an *alternative* to litigation. The evolution of ADR over the past several decades has led to courts recognizing the benefits of ADR processes. Today, most courts offer parties the opportunity to work toward resolving litigated cases through court-connected ADR programs.

Federal district courts first implemented ADR programs in the 1970s, after then-United States Supreme Court Chief Justice Warren Burger recognized that the judiciary's growing docket called for the institutionalization of ADR within the federal court system. The effectiveness of early federal court pilot programs led Congress eventually to pass the Alternative Dispute Resolution Act of 1998, requiring all federal district courts to implement ADR programs and allowing courts to mandate participation in these programs. The Central District of California's ADR program was first implemented in April 1998.

As the largest federal district in the nation, the Central District of California serves over 18 million residents and maintains jurisdiction in seven counties. In 2007, the court processed 11,609 civil case filings, and this number is expected to increase in 2008. The ADR program is one of many means employed by the court in its efforts to efficiently and effectively manage its growing civil caseload. The goal of the ADR program is to encourage the fair, speedy and economical resolution of controversies by means other than litigation. Since its inception, program participants have consistently and overwhelmingly confirmed that it is serving its intended purpose. In 2007, 84% of those responding to surveys distributed to participants at the completion of court-ordered settlement proceedings indicated that the settlement proceedings were instrumental in moving the case toward resolution. Participants identified numerous other benefits of using the court's ADR program, including:

- Efficient resolution of disputes: In appropriate cases, ADR may minimize the time to final resolution and conserve judicial, public and private resources. In 2007, 71% of those responding to the court's participant surveys stated that they realized savings in case costs, attorney fees, or client time as a result of the settlement proceeding.
- Less adversarial negotiation and resolution processes: In appropriate cases, ADR may help disputants avoid protracted adversarial litigation and encourage future cooperation between the parties. In 2007, more than half of those responding to participant surveys stated that the settlement proceeding reduced the emotional toll on them (or their clients) in comparison with the litigation process.
- Increased creativity in negotiating settlement terms and a broader perspective in analyzing the merits of the case: In appropriate cases, ADR may result in more creative outcomes than litigated resolutions. In 2007, more than half of participants responded that the settlement proceeding generated settlement options not otherwise considered. Furthermore, even when cases do not reach final resolution as a result of the settlement proceeding, participants may benefit from the transformative nature of the ADR experience. In 2007, 63% of participants stated that the settlement proceeding made them more realistic about the strengths and weaknesses of their case.

The mechanics of the Central District of California ADR program are governed by Local Rule 16-15, General Order 04-01, "In The Matter of Attorney Settlement Officer Panel," and General Order 07-01, "In the Matter of Alternative Dispute Resolution Pilot Program." Depending on the case, parties may engage in one of three settlement procedures: a settlement conference before the assigned district or magistrate judge; a settlement proceeding with a member of the court's Attorney Settlement Officer Panel; or a private mediation before a retired judicial officer or other private or nonprofit dispute resolution body. Whether the particular ADR method is voluntarily chosen by the parties and approved by the presiding judge or ordered by the court depends on whether the parties are engaging in ADR pursu-

ant to Local Rule 16-15 or by referral to the ADR Pilot Program.

Local Rule 16-15 permits parties to select their preferred settlement procedure and seek approval of the procedure from the assigned judge. This process was the first ADR process to be implemented in the district and resulted in the creation of the Attorney Settlement Officer Panel. Attorney Settlement Officers are appointed by the court and act as neutrals in cases referred to the Panel through the ADR program. All Panel members are admitted to practice in the Central District of California, have practiced law for at least 10 years and have either expertise in one or more areas of federal law or extensive experience in alternative dispute resolution processes.

In contrast, the ADR Pilot Program, implemented on January 1, 2003, mandatorily refers certain civil actions to the Attorney Settlement Officer Panel. District judges participating in the ADR Pilot Program mandatorily refer civil cases in which the prayer for relief is $250,000 or less, or the nature of suit falls within particular categories as outlined by the governing general order. In addition, participating judges may, at their discretion, refer cases to the program that do not meet the criteria, but that they believe would benefit from a settlement proceeding with a member of the Panel. Participating judges may also vacate referral to the program when appropriate. Currently, 16 district judges participate in the ADR Pilot Program.

For each case referred to the Attorney Settlement Officer Panel, an attorney settlement officer is either selected by the parties or, if the parties are unable to agree on a selection, randomly assigned by the court. Parties are not required to pay for the use of Panel services. Attorney settlement officers volunteer preparation time and the first three hours of the settlement proceeding. After the first three hours, attorney settlement officers may charge for their time, upon agreement of the parties and pursuant to a private, written contract.

The Attorney Settlement Officer Panel has grown from 46 members in 1998 to 152 members as of July 1, 2007. The court is incredibly proud that the Panel has sustained steady growth without compromising the high quality of service it provides. In 2007, 93% of participants responding to court surveys stated that they would choose the same settlement officer to serve as a neutral in future cases. The court greatly appreciates the hard work and dedication of its Panel members and takes several opportunities each year to express its appreciation. In the spring, attorney settlement officers, judges and

court staff come together for the annual ADR Brown Bag Lunch. This event provides an informal venue in which to exchange information and ideas about the court's ADR program. Each spring, the court also holds a two-day advanced dispute resolution training course exclusively for Panel members. The training, which is subsidized by the court and offered to Panel members for a nominal fee, is conducted by the Straus Institute for Dispute Resolution at Pepperdine University School of Law. Finally, in the fall, the district court and bankruptcy court host a joint Attorney Settlement Officer/Bankruptcy Court Mediator Appreciation Luncheon.

The court would like to take this opportunity to give special thanks to the members of the Inland Empire legal community who serve on the Panel. They are Terry Bridges of Reid & Hellyer, James Johnston of Johnston Mediation, Kendall MacVey of Best Best & Krieger, David Moore of Reid & Hellyer and Mark Schnitzer of Reid & Hellyer. The Honorable Virginia Phillips, who sits in the Eastern Division, sums up the court's gratitude well when she states, "these attorneys go above and beyond the call of duty in serving the bar, the litigants and the court. Through their dedication to public service and their acumen in mediating disputes, a great many cases are resolved promptly and fairly. Our concern, however, is that the volume of cases needing this type of ADR process will overwhelm the handful of seasoned mediators we have, and we hope that other lawyers will follow their example and volunteer to serve on our panel."

Qualified candidates are encouraged to apply for appointment to the Panel. Application forms are available on the court's website at www.cacd.uscourts.gov, under the "ADR" link. Appointments are made annually and all applications received by April 30 will be considered for appointment to a two-year term beginning the following July.

While it is certainly a pleasure to reflect on the past ten years of ADR in the Central District of California, it is an even greater pleasure and even more exciting to look forward – toward the challenge of another decade of ADR in the Central District. Over the next ten years, we will build upon our current ADR program, while continuing to offer high quality ADR services that make an ongoing contribution to the administration of justice.

Collaborative Divorce and Alternative Divorce Options

by Robyn A. Lewis

In this age of expensive litigation and an overcrowded and overburdened court system, it seems like everyone is looking for alternative legal solutions. Alternative dispute resolution services are nothing new.

In the arena of family law, however, the importance of getting to an ultimate resolution efficiently and economically is often overlooked by parties. Given the sensitive emotions that go hand-in-hand with family law litigation, litigants are often focused on going to war rather than making peace, even if it is to their own detriment. Particularly because California is a no-fault state, there is no adjudication in a divorce as to any wrongdoing on the part of a spouse. As a result, parties often look to "dragging her through the mud" or "taking him to the cleaners."

Adding to the problem, attorneys who practice in this area of law are not judged by their clients as much on their artful resolution of a case as on how aggressive they can be or how ruthless they are when it comes to the other side. "Grandstanding" in front of a client often gets in the way of taking a hard-nosed approach at resolution.

But family law is really just like every other type of civil litigation. Taking emotions out of the equation, a family law case is usually just about the division of money (either assets or debts) or an award of support (either child or spousal). When it comes to the custody and visitation of children, the court is to determine what is in the best interests of the child. In many cases, the parties themselves should be able to sit down and figure that out for themselves. After all, they co-parented prior to being involved in litigation, right? So what options do litigants in family law have if they even want to explore ADR?

In a dissolution proceedings, collaborative divorce is one option. In that type of ADR, each party selects a "team" of professionals to help him or her get through the divorce process. That team typically includes an attorney and a divorce "coach," who is a mental health professional. Once the parties have selected their own "teams," a neutral financial specialist and/or child specialist is usually retained, as well. With their respective teams in place, the parties work together on resolving issues rather than ever stepping foot in a courtroom.

According to the Coalition on Collaborative Divorce, which is a nonprofit organization serving Los Angeles and Ventura Counties, collaborative divorce is a multidisciplinary approach that focuses on the "legal, financial, emotional, spiritual and physical" ramifications of going through a divorce. The goal is to dissolve the marriage in a way that addresses both parties' emotional, financial and legal needs, by working together instead of using the divorce as a tool of war.

Sound hokey to you? Perhaps. But I am sure that each of you reading this article knows someone who is getting divorced or has been divorced. And I am sure you will agree that the court system is used as a battlefield in some cases instead of being used as a place of resolution. All of us know parties who spent all of their assets on attorneys' fees and court costs so that the other party wouldn't get a cent. We can all tell stories of someone we know who was in court for years battling over a pension plan. And it is rare that parties who have gone through that sort of embroiled battle go on to have an amicable relationship later on. When the divorce is final, the parties keep fighting by filing motions to increase or reduce support, or they use their children as new weapons of hate. This only adds to the vicious cycle of more expensive litigation and the further backlogging of our courts.

Those who practice in collaborative law look to making the dissolution process more of a healing time. Clients are informed of the "unexplained cost" of litigation. They are asked whether it is important for them to be able to be in the same room years from now at their child's wedding, for example, without everyone experiencing discomfort. Despite the fact that they are terminating their marriage, they are reminded that they will forever be bound together to co-parent (if there are children involved).

Keeping that in mind, collaborative divorce often is a faster solution for parties, as the case is resolved once the parties have come to an agreement. Clients feel more in control, as they are in charge of their own destiny rather

than leaving their fate in the hands of a judge. It becomes a "win-win" situation for everyone, as each party's legal rights are protected, while the well-being of the family is still made an absolute priority. There are no threats of being dragged back and forth to court. And ultimately, collaborative divorce is a more cost-effective way to obtain a dissolution than lengthy litigation.

Other ADR options include mediation. However, most family law mediations are not conducted like mediations in general civil litigation. Typically, the parties alone engage in mediation without their attorneys being present. Oftentimes, in fact, a family law mediator will not accept cases for mediation if the parties are represented by counsel. The mediator works with both sides for several sessions, if necessary, until an agreement is reached. Once the parties have come to a settlement, the mediator requires that each party have his or her own counsel review the agreement before the agreement is submitted to the court (by way of a proposed judgment). Again, the focus is on the parties making their own decisions and working together, rather than against each other, to accomplish the ultimate task of getting divorced.

It is important to let clients know that there are alternatives to the traditional "going to war" approach in family law. When they engage in such ADR, not only is some relief offered to our overburdened court system, but ADR in family law aids parties in surviving a divorce instead of being consumed by it.

Robyn Lewis, RCBA Secretary and a member of the Bar Publications Committee, is with the Law Offices of Harlan B. Kistler. She is also Co-Chair of Membership for the Leo A. Deegan Inn of Court.

Justice for Hire

by Richard Brent Reed

Private judges have been used to adjudicate cases for thousands of years. The word "mediator" is the Latin term used by the Romans, who also called them *intercessor*, *interpolator*, *conciliator* and *interlocutor*. Around 530 C.E., the Emperor Justinian I recognized such mediators in his *Digest*, a summary of Roman law. But as Byzantine as Justinian I was, the rules of discovery are more so – so much so that judges don't want to have to deal with discovery disputes.

In the early 1980s, the state legislature decided that superior court judges could provide for the referral of discovery disputes to private judges. The new law created a "very tempting practice, because no judges like to deal with discovery disputes," said Craig Riemer, then President of the Riverside County Bar Association (since then, he has become a superior court judge himself). Discovery disputes aside, civil litigants are often instructed by the bench to undertake some sort of alternative dispute resolution (ADR). Methods of ADR can include mediation, arbitration, or even the hiring of a private judge.

Rent-a-Judge

Attorneys and retired judges have begun to offer their services in the capacity of freelance adjudicator, also known as a rent-a-judge. The first rent-a-judge case is attributed to two Los Angeles attorneys: opposing counsels Hillel Chodos and Jerome Craig. They employed an obscure 1872 law permitting cases to be decided privately by referees, who need not even be lawyers. Under this law, actual trials may be adjudicated privately when the parties sign a stipulation conferring jurisdiction on the private judge. All decisions are final.

The crowding of court calendars, the crippling expenses associated with litigation, and the difficulty of navigating increasingly complex discovery rules have made ADR increasingly popular. And, because a private judge can give you a very certain, expedited trial date – as long as you can pay for that judge up front – the savings can be in the tens of thousands, while the intimate details of the case remain intimate.

In a case heard before a private judge, the proceedings are not public and the record is private. This is why celebrities like Brad (Pitt) and Jennifer (Aniston) turn to private judges to handle their divorces. Michael Jackson and ex-wife Debbie Rowe used a private judge to sort through their child custody issues.

Underground adjudication is growing in popularity, perhaps due to the swelling ranks of satisfied customers. Soon, there will be two parallel judicial systems: one for those who can afford to pay and one for those who can afford to wait.

Justice Ex Machina

Just as ADR is gradually replacing public courts, technology is about to rapidly replace ADR with ODR: online dispute resolution. Imagine a virtual courtroom: judge, parties, and attorneys all meet in cyberspace, the new trial venue. Now, imagine that trial without judges or attorneys. Welcome to the adjudication of the future: the e-trial.

ODR takes many forms, including online mediation, online arbitration, assisted negotiation, and automated negotiation. In automated negotiation, the case is adjudicated by arbitration software. Each side submits its case information along with the dollar range of an acceptable settlement. The software crunches the numbers – and the issues – and spits out a decision. Some cases may be decided by running a program through a single machine. Let us call it, then, "computer-assisted justice" (CAJ). ODR is already taking off in India, which has officially recognized the option of internet adjudication.

In this country, the private sector may soon provide a simpler, quicker, more user-friendly system within which to litigate, whether through private judges, computer programs, or other internet options. And the simpler the system is, the less will be the need for lawyers.

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

The Volunteer Attorney-Mediator Civil Appellate Settlement Program

by Presiding Justice Manuel A. Ramirez

The Volunteer Attorney-Mediator Mandatory Settlement Conference Program at the California State Court of Appeal, Fourth District, Division Two, located in Riverside, settles civil appeals with a minimal use of judicial resources. (Fourth Appellate District, Division Two covers Riverside, San Bernardino, and Inyo Counties). The attorney-mediators and parties on appeal are notified, assigned, and scheduled by Settlement Coordinator Jackie Hoar under my supervision, and I ultimately decide which appeals will be placed in the settlement program. The procedure has been formalized in rule 4 of the Local Rules of the Courts of Appeal of California, Fourth Appellate District.

The program was born of necessity in 1991, as the court faced a mounting backlog of civil appeals generated by three years of record-breaking filings from Riverside, San Bernardino, and Inyo County Superior Courts. While the justices of the court devoted all their time to resolving appeals and original proceedings on the merits, the volunteer attorney-mediators succeeded in settling approximately 220 appeals by the end of 1996. This successful effort greatly assisted the court in reducing its backlog and becoming current, at little additional cost to the taxpayer. Chief Justice Ronald M. George recognized the mediators' dedication and success by awarding the program the prestigious Ralph N. Kleps Improvement in the Administration of the Courts Award in January 1997.

The program has continued its success, approaching a total of 700 settlements worth approximately half a billion dollars, with a settlement rate close to 50%. Jackie Hoar has reinvigorated the program by recruiting a number of new mediators.

The settlement process may be initiated by counsel or the court any time after the notice of appeal is filed. The court-initiated process begins with a review of all civil case information statements by the settlement coordinator to determine whether the cases should be considered for settlement. As a result of this evaluation, a Settlement Conference Information Form (SCIF) is mailed to counsel in approximately 50% of civil appeals 40 to 50 days after the notice of appeal is filed. The presiding justice then screens out another 25% of the cases based on an evaluation of the SCIFs about 80 days after the filing of the notice of appeal. The significance of the 80-day time period is that the records in civil cases are generally filed between 80 and 110 days after the filing of the notice of appeal, and the settlement coordinator's goal is to finish screening out appeals before the record is filed to avoid delaying appeals that are not placed in the settlement program.

In the remaining 25% of cases, briefing is stayed, a mediator is selected based on area of expertise and settlement experience, and a settlement conference is scheduled, giving at least 30 days advance notice to counsel. A settlement conference statement is required 15 days after the date of the notice. The first settlement conference is usually held approximately 120 days after the notice of appeal is filed, but additional settlement conferences may be held if the mediator believes that settlement is possible. All parties and counsel are required to attend unless excused for good cause. Of the cases in which a settlement conference is held, about one-half will settle or be dismissed, and the remaining cases will be briefed and decided by opinion.

Jackie Hoar is currently seeking new mediators in a number of different areas of the law. Any attorney interested in participating as a mediator may contact her at (951) 248-0233.

The 38 volunteer attorney-mediators listed below emulate the ideal of the "lawyer-statesman" articulated by Yale Law School Dean Anthony T. Kronman in his 1993 book, "The Lost Lawyer." He described the lawyer-statesman as possessing fully the "character-virtue of practical wisdom" or "prudence," with "exceptional persuasive powers, devoted to the public good but keenly aware of the limitations of human beings and their political arrangements . . . ." To deliberate wisely about matters of public life, as our mediators must to successfully settle cases, the lawyer-statesman not only needs intelligence and education, but must also have courage and steadiness, experience, patience, kindness and an even temper. The lawyer-statesman "must be able to sustain the conflicting attitudes of compassion and detachment on which the imaginative anticipation of future possibilities depends." The success of the following lawyers as volunteer attorney mediators shows them to be just such lawyer-statesmen: William R. DeWolfe, Charles J. Hunt, Jr., Robert A.

McCarty, Sr., Justice James D. Ward (Ret.), Walter J. Hogan, William J. Brunick, Scott C. Van Soye, Cari S. Baum, James Johnston, Alexandra S. Ward, Elizabeth Shafrock Glasser, Warren D. Camp, Kira L. Klatchko, Robert B. Swortwood, Larry Maloney, Roland C. Bainer, Stanley O. Orrock, George S. Theios, John A. Boyd, Thomas N. Jacobson, Richard Lister, D. Brian Reider, J. E. Holmes III, Michael Bell, John W. Marshall, William D. Shapiro, Thomas L. Miller, Kevin S. Gillespie, Terry Bridges, James O. Heiting, John C. Nolan, Edward A. Fernandez, Harry E. Brown, Bruce E. Todd, Douglas S. Phillips, Don G. Grant, Simon A. Housman, and William S. Ungerman.

When Is the Right Time to Mediate? Partial Resolutions Have a Value

by Christopher G. Jensen

All too often we hear as an excuse for not resolving a dispute at mediation that the mediation was premature. The premise for the excuse can be a variety of reasons, e.g., "I have not calculated my damages," "I need an IME," "Not until experts are retained and complete their analysis," "Plaintiff's/defendant's deposition must be taken," and so on.

How often have we heard the expression, "The case has not been worked up or worked over enough to settle… yet?" Recall the postsettlement conference assessment from a settlement conference judge, recognizing that the matter is being defended for the sake of principle, and declaring that the case is not necessarily ready to settle because the principled party has yet to experience the financial expenditure necessary to achieve pragmatism. Worse than litigation ambivalence is litigation obstinance – being unwilling or unable to analyze a case and/or comprehend a position, while using the mediation process as another intervening act designed solely to push a case to an eleventh-hour, on-the-courthouse-steps resolution.

Considering the foregoing, when is the right time to mediate? The answer is that there is no wrong time. A standard court publication generally served with each new summons instructs that mediation is a cooperative process in which the parties work toward a resolution that meets everyone's interests, instead of working against each other so that at least one party loses.[1] The key to the definition is the word "work." Work is one of those nasty four-letter words that become an impediment to litigators achieving an early resolution. Early resolution is a goal to which those in our profession should aspire. Why is it, then, we struggle to achieve an early resolution? Because we want the complete resolution, nothing less. We convince ourselves less is not good enough, becoming shortsighted about the value of partial or minor agreements.

Take, for example, the simple transaction of hiring a contractor to install a roof. A fixed price is agreed upon for labor and materials and the contract is commenced. For reasons not relevant, the contractor does not complete the task, leaving the property owner with an incomplete roof. A lawsuit is commenced by the property owner against the contractor for damages. The general damages claimed would be the cost to complete the roof. Unfortunately, until such time as a subsequent contractor is retained to provide a value for completion of the work, we are unable to calculate the property owner's damage claim. Does that mean we cannot resolve the case without the additional expert expenditure? One could speculate that, without the evidence from a subsequent contractor, any mediation would be premature. In other words, I need my finite formula for calculating damages. But is it not commonplace for both parties each to retain experts, leaving a dispute as to the value of the work to be completed? By definition, that is not finite. How, then, do we resolve such a case?[2]

Consider a personal injury claimant who files a civil action but is early in treatment. Is it not true that no finite calculation of the cost to fully treat the injury can be determined until such time as the injured completes treatment?[3] Yet is it not true that experts are employed to speculate as to future treatment needs and pain *and* suffering?

What about the case of a corporate or partnership dissolution requiring extensive forensic accounting to determine the propriety of expenditures and the justification, or lack thereof, of one's business acumen? Can such cases be resolved prior to the completion of a forensic accounting?

The answer to the foregoing, in all instances, is to the extent we can completely exhaust whatever review, compilation, investigation, treatment, analysis and/or test, we place ourselves in the best position to analyze our case to most appropriately advise our client on achieving his or her settlement goals. But that perfect world of a finite damage calculation almost never exists; civil cases tend not to be as simple as a bar exam question. That being said, why, then, do we wait so long to achieve a resolution? It is because we do not adequately *work* our case to participate appropriately in a mediation.

A productive, fruitful mediation occurs when all sides have prepared lengthy analyses of the law and the facts with an assessment of the remedies. A mediation with such a well-analyzed case becomes simulating for the attorneys, with varied opinions as to potential resolutions. Clients benefit from such discussions and are provided

the best ability to make their own business decisions on proposed resolutions. In using the term business decision, such is not meant to exclude emotion or one's personal values, such as principle. Values and emotion are always components of a business decision. But the best business decision must include all variables and components. Without preparation for a mediation, the discourse between the parties degrades to emotion alone.

How, then, do we ensure that all parties to a mediation prepare fully and participate adequately? The answer is, we cannot. When not, we can use the mediation to move our case in a positive direction.

Mediators no longer have the tool of advising the court that one or more parties did not participate meaningfully and in good faith.[4] One of us attends fully prepared, the other not so prepared. The anguish experienced by the prepared party tends only to polarize him or her, unnecessarily extending the dispute. For the hourly rate attorney, the attorney is paid, but achieves nothing except maybe an irate client. The mediator is paid, but is unable to exhibit his or her skills as a mediator. If the mediation is funded by a court, the court wasted a valuable resource. Is this scenario something that can be cured? The answer is yes, provided we are willing to accept partial procedural resolutions as a laudable goal in mediating a case.

Many of us have experienced or heard of the construction defect Case Management Order (CMO). The typical construction defect case CMO outlines deadlines for all the parties to meet and exchange information, conduct discovery, and conduct onsite inspections and destructive testing; it schedules mediation sessions, expert exchanges, pretrial conferences and trial. This type of structure continues to move the construction defect case along, inevitably forcing everyone to work on time, which tends to result in a resolution. Why cannot all cases operate in this regard? Each can, but on a lesser level.

Without changing California's Code of Civil Procedure, parties can enter into a mediation agreement either prior to the first mediation session, or at the conclusion of a first mediation session, setting a timetable for needs required for productive resolution discussions. In the roofing case used as an example above, if the parties are unable to achieve a monetary resolution at the outset, they can explore information needed before assessing the final resolution, agree on the discovery devices necessary to gain the information needed, set a timetable for achieving such, and return for a second session. If all goes according to plan, then nothing should be left to chance. All information should be in hand sufficient for a complete settlement discussion. If the parties agree to disagree, then the court system is in place to conduct the

trial of the matter. One might ask, then, what if one of the participants fails to comply with that agreed upon? The answer would be to agree to a mediation order, akin to a CMO, which would be returned by the parties to the court to be entered as an interim order, placing the burden on the court of resolving noncompliance. A case large enough may very well commence with a mediator being appointed as both the mediator and a referee, or a separate mediator and a separate referee to deal with the two facets of the interim mediation agreement.

A court-sponsored program could mandate court-imposed rules, which would include a provision that any case not resolved at an initial mediation session achieve, at a minimum, an interim discovery plan with a definitive schedule, designed to resolve the conflicts determined by the participants to be an impediment to achieving a complete resolution. The agreed-upon schedule would then be returned to the court to be entered as an order, with a second mediation session scheduled shortly after the proposed timetable. Any failure to comply with the agreed-upon schedule could then be addressed by the court so as to avoid wasting assets of a court mediation program.

The purpose of creating an interim agreement designed to achieve the ultimate goal of resolution is to remove the variable of the uncooperative, unprepared, ambivalent opposition. Fast-track litigation rules, with their regular status conferences and other continued appearances, are imposed upon us. Fast-track hurdles become steps with no substance.[5] Maybe it is time we add some substance to the negotiations with uncooperative, unprepared, ambivalent participants and strive to eliminating the contention that a case is premature for resolution. Little steps do work. Partial agreements have value. It is never to early to discuss settlement, even if we achieve only a procedural goal.

Christopher G. Jensen is a partner with Reynolds, Jensen & Swan, LLP, a business litigation and transaction firm. Since 1995, he has been an officer, director and mediator of and for the Riverside County Bar Association-sponsored Dispute Resolution Service, Inc., having mediated a variety of civil disputes.

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1 Riverside County Superior Court ADR pamphlet "You Don't Have to Sue".

2 This does not ignore the value of obtaining a damage range versus no number.

3 Our old-timer colleagues will advise us of life before fast-track, wherein we had the ability to file a complaint to avoid a statute of limitations but not serve it for a year or two in order to better afford injured parties an ability to best calculate their loss.

4 Evid. Code, § 1119; Foxgate Homeowner's Association v. Bramalea (2001) 26 Cal.4th 1.

5 Best left for further, later discussion.

Litigation Update

Res Judicata: Judgment in loss of consortium action bars subsequent wrongful death action for noneconomic damages. (*Boeken v. Philip Morris USA, Inc.* (Feb. 11, 2008) ___ Cal.App.4th ___ [2008 WL 352351] [Second Dist., Div. Five].)

After the plaintiff's husband got cancer, she filed a loss of consortium action against the defendant; later, however, she voluntarily dismissed it, with prejudice. After her husband died, she filed a new wrongful death action against the defendant, seeking "[g]eneral damages for the loss of love, companionship, comfort, affection, society, solace, and moral support."

Held, both actions sought to recover based on the same primary right; accordingly, the dismissal of the loss of consortium action, as a matter of res judicata, barred the wrongful death action. The result might be different if the wife sought economic damages in her wrongful death action.

Turner, J. dissenting: The dismissal of the loss of consortium claim should not bar the wife from recovering any damages sustained *after* her husband's death.

First Amendment: Plaintiff failed to make the prima facie showing of liability necessary to obtain discovery of identity of anonymous Internet poster. (*Krinsky v. Doe 6* (Feb. 6, 2008) ___ Cal.App.4th ___ [2008 WL 315192] [Sixth Dist.].)

Defendant Doe 6, using the screen name "Senor_ Pinche_Wey," posted "scathing verbal attacks" on the plaintiff to a Yahoo! Finance message board, including that the plaintiff "has fat thighs, a fake medical degree, 'queefs' and has poor feminine hygiene." After suing Doe 6 and others for defamation and intentional interference, the plaintiff subpoenaed information about their true identities from Yahoo!.

Held, Doe 6 had a First Amendment right to have the subpoena quashed to protect his (or her) identity. "'[A]n author's decision to remain anonymous … is an aspect of the freedom of speech protected by the First Amendment.'" "[T]he plaintiff [must] make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity." The plaintiff failed to do so, because "Doe 6's messages, viewed *in context*, cannot be interpreted as asserting or implying objective facts." Because the messages were protected by the First Amendment, they also could not be the basis of an intentional interference claim.

Attorney Fees: A party who has not done anything adversely affecting the public interest is not subject to an award of attorney fees under the "private attorney general" statute. (*Adoption of Joshua S.* (Jan. 24, 2008) ___ Cal.4th ____ [70 Cal.Rptr.3d 372].)

A birth mother consented to have her child adopted by her same-sex partner. After the couple broke up, the partner filed for adoption. That litigation led to a holding by the California Supreme Court that such "second parent" adoptions are legal. (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417.) The partner then sought attorney fees under the private attorney general statute. (Code Civ. Proc., § 1021.5.)

Held, "section 1021.5 attorney fees should not be imposed on … an individual who has only engaged in litigation to adjudicate private rights from which important appellate precedent happens to emerge, but has otherwise done nothing to compromise the rights of the public or a significant class of people." "[I]n virtually every published case in which section 1021.5 attorney fees have been awarded, the party on whom the fees have been imposed had done something more than prosecute or defend a private lawsuit, but instead had engaged in conduct that in some way had adversely affected the public interest."

Anti-SLAPP Motions: A "pure" declaratory relief action can be a SLAPP. (*CKE Restaurants, Inc. v. Moore* (Jan. 24, 2008) ___ Cal.App.4th ___ [70 Cal.Rptr.3d 921] [Second Dist., Div. Six].)

The defendants sent a notice to the plaintiff, asserting that the plaintiff had failed to warn consumers that its French fries contained naphthalene, in violation of Proposition 65. The plaintiff brought an action for declaratory relief, requesting a determination of whether it was in compliance with Proposition 65. Defendants responded with an anti-SLAPP motion. (Code Civ. Proc., § 425.16.)

Held, because "[t]he filing of a Proposition 65 notice is a protected activity," and because the defendant "was unable to meet its burden to show a probability of prevailing on its declaratory relief action," the trial court properly granted the anti-SLAPP motion. The declaratory relief action arose out of the plaintiffs' filing of a Proposition 65 notice, which is a protected activity. The defendant then failed to meet its burden of showing that it had a probability of prevailing in its declaratory relief action; it introduced evidence "based upon the testing of a

small amount of food from a single restaurant. Moreover, test results were contradictory."

Note: As the court acknowledged, the defendant had argued that the anti-SLAPP statute did not apply to a "pure" declaratory relief action. The court did not confront this argument directly; nevertheless, its holding effectively rejected it.

Class Actions: Plaintiffs who are not class members may be able to obtain precertification discovery to identify class members who can be substituted as plaintiffs, depending on balancing test. (*CashCall, Inc. v. Superior Court* (Cole) (Jan. 24, 2008) ___ Cal.App.4th ___ [71 Cal. Rptr.3d 441] [Fourth Dist., Div. One].)

Plaintiffs filed a class action complaint, alleging that the defendant had invaded their privacy by secretly and illegally monitoring telephone calls with them. When they learned that the defendant had not actually monitored any telephone calls with them, they filed a motion for an order compelling the defendant to name those customers whose calls it had in fact monitored.

Held, in deciding whether to allow plaintiffs who are not class members to obtain discovery regarding the identities of class members, the trial court must balance any potential abuses of the class action procedure against the rights of the parties. "[T]here is no bright-line rule that the original class representative plaintiffs must be members of the class to have standing to obtain precertification discovery." "[A] named plaintiff's lack of standing at the beginning of an action is not necessarily fatal to continuation of the action." "Amendments to complaints… are liberally allowed to substitute in plaintiffs with standing for original plaintiffs without standing." "The general rule allowing substitution of new plaintiffs with standing in place of original plaintiffs without standing applies to class actions."

"In the circumstances of this case, the trial court could reasonably conclude the rights of the class members outweighed the potential for abuse of the class action procedure." "If, as alleged, the 551 class members were, and remain, unaware of CashCall's secret monitoring … , those class members presumably will, absent precertification discovery … , remain unaware of CashCall's secret monitoring of their calls and alleged violation of their privacy rights." "CashCall warns of a scenario in which an attorney may effectively use a 'straw' plaintiff with … no arguable or potential standing … and thereafter file a motion for precertification discovery of the identities of actual class members to find a client to substitute as a named plaintiff. … However, that scenario … does not match the circumstances in this case."

Negligence: A driver who gestures that a second driver may turn left, across the first driver's path, does not breach any duty to a third driver who is hit by the oncoming car. (*Gilmer v. Ellington* (Jan. 23, 2008) 159 Cal.App.4th 190 [70 Cal.Rptr.3d 893] [Second Dist., Div. Eight].)

Defendant Cherry was stopped at an intersection, facing south, and waiting to turn left. Both plaintiff Gilmer and defendant Ellington were headed north through the intersection. Ellington stopped and gestured to Cherry to make her turn. Cherry (who was talking on her cell phone) did so, and thus, hit Gilmer.

Held, Ellington did not breach any duty to Gilmer. "First, a yielding driver bears no moral blame for a collision between a left-turning driver and a driver that does not yield his right-of-way. This is because the Legislature has imposed upon left-turning drivers, not oncoming drivers, the statutory duty to ascertain whether it is safe to make the turn … ." "Second, it would place an unreasonable burden on yielding drivers to impose upon them the duty of assuring a left-turning driver may safely cross all lanes of traffic." "Finally, there would be reactive negative consequences to the community by imposing a duty on the yielding driver; most notably, a relaxed vigilance by left-turning drivers who may rely unthinkingly on ambiguous signals from other drivers, or at least claim to have done so."

Medical Malpractice: Medical expert must be familiar with the standard of care applicable under similar circumstances, but not necessarily in the same geographical location. (*Avivi v. Centro Medico Urgente Medical Center* (Jan. 14, 2008) ___ Cal.App.4th ___ [2008 WL 115825] [Second Dist., Div. Four].)

The plaintiff, a resident of Israel, sued for medical malpractice arising out of an injury she suffered while visiting the United States. In opposition to the defendants' motion for summary judgment, she submitted the declaration of an Israeli expert, who indicated that he was familiar with the standard of care in the United States, but not specifically in Southern California.

Held, a medical expert can qualify to testify to the applicable standard of care, even if he or she is not familiar with the standard of care in the particular locality. "[T]he standard of care for physicians is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession *under similar circumstances*. … Geographical location may be a factor considered in making that determination, but, by itself, does not provide a practical basis for measuring similar circumstances. … '[T]he unmistakable general trend … has been toward liberalizing the rules relating to the testimonial qualifications of medical experts.'"

Opposing Counsel: Kelly A. Bennett

by Kirsten S. Birkedal

"A Passionate Neutral"

Attorney Kelly Bennett is someone you should know, if you don't know her already. She is a rising star in legal, business and political circles in Riverside County. Kelly is CEO and lead mediator of Mediation Law Group, a nationwide dispute-resolution firm headquartered in Temecula. Kelly also serves as the first female city councilmember for the City of Murrieta and is a former president of the Southwest Riverside Bar Association.

Kelly Bennett

From the time she was young, Kelly dreamed of becoming a lawyer. She pursued her interest in law by taking part-time jobs with large law firms while in high school. Kelly continued to work at law firms to pay her way through college at Pepperdine University, where she studied political science. It was during college that Kelly met her husband, Greg, who shared her passion for the law. The young couple first met while attending a study-abroad program in Germany.

After graduating from college, Kelly and Greg both attended Pepperdine University School of Law. Kelly states that her law school years were intellectually challenging and fun. While at Pepperdine Law, Kelly developed an interest in mediation and attended courses at Pepperdine's Institute for Dispute Resolution. Kelly points out that Pepperdine was the first law school in the nation to offer such a program, and it served as a model program for other law schools. In fact, Kelly was a member of the first graduating class from the Institute.

Kelly and her husband had married two weeks before starting law school together. Through college and the first two years of law school, Kelly worked for Gibson, Dunn & Crutcher in both its Newport Beach and Century City offices. During those years, Kelly observed many associates working exorbitantly long hours, with little time for family. The "big firm" culture did not seem conducive to balancing both work and family, and the experience helped Kelly make career choices in line with her personal and professional goals. As a result, she focused on smaller law firm environments where she would have more time for family and also get immediate courtroom experience.

Kelly did not have to wait long to realize the benefit of her forethought involving the balance of family and work life. Before graduating from law school, Kelly and Greg welcomed their first daughter, Rachael. Kelly took a year off after graduating to care for Rachael and also to study for the bar exam. One year later, with a bar number in hand, she was ready to start her career as an attorney. Kelly found the perfect position working alongside a prominent civil and construction defect litigator, Hugo Anderson, who had his own practice in Santa Ana. Kelly states that working alongside Hugo was the best learning experience a "baby lawyer" could have.

In 1999, Kelly started her own law practice, with her husband joining the firm soon after. Bennett & Bennett opened its doors in Tustin, where Kelly focused her practice on general business litigation and real estate law. In addition to her practice, Kelly also served as a mediator and arbitrator for the Christian Conciliation Service of Orange County, as well as on a number of court panels.

A few years later, Kelly and Greg found themselves with a successful litigation practice and a growing dispute-resolution service (which was also launched in 1999) offering faith-based ADR to the Christian business and church communities. In 2002, the family decided it was time to move to a bigger home, and they set their sights on family-friendly Murrieta. Kelly and her husband found their dream home. However, they also had the task of moving their practice to the Temecula/Murrieta region. To Kelly's surprise, it did not take long after relocating for Bennett & Bennett to flourish.

Around this same time, Kelly became interested in expanding her ADR services to serve both secular and faith-based clients. Kelly already was a mediator for the Riverside Bar Association's Dispute Resolution Service. In 2002, she founded the Mediation Law Group, which is based in Temecula, but provides nationwide full-service conflict management, with partners in Dallas/Fort Worth, Seattle, Orange County, Kansas City and Chicago. Mediation Law Group provides broad-ranging dispute-resolution services to businesses, schools, and families, as well as churches and other nonprofits.

In addition to serving as founder and CEO of Mediation Law Group, Kelly is also its lead mediator. To date, Kelly has mediated over 500 cases. She is also a frequent pub-

Kelly Bennett (left) being sworn in as the first female councilmember of Murrieta by the first female presiding judge of Riverside County, Sharon Waters

lic speaker, instructor and consultant in resolution skills. While the majority of her time is spent working as a Mediation Law Group neutral, Kelly keeps current by maintaining a small, select number of cases as an advocate, alongside her husband Greg, who has a strong business and real estate litigation practice at Bennett & Bennett.

Kelly will tell you that her mediation skills led her down the path to local political life. Several years ago, a dispute arose between the homeowners in Kelly's neighborhood and a homebuilder over the final development of adjoining lots. The homeowners became upset when they learned the builder planned to build homes on the adjoining lot that had originally been designated for a private park. After bringing the dispute before the Murrieta planning commission, Kelly took the lead in a six-month negotiation with the homebuilder for a solution that would resolve the dispute in a timely manner without involving the court system. In the end, Kelly and the homeowners succeeded in getting the homebuilder to build a park as promised.

As a result of her efforts in resolving the neighborhood dispute, and her introduction to city officials in the process, Kelly was encouraged by many in the community to run for the Murrieta City Council. Just prior to her election, the City Council had experienced a great deal of negative press and had gained a reputation for infighting among its members. At first, Kelly passed on the idea of running for office, because she never thought of herself as a politician. However, she soon realized that her talent for resolving disputes might prove helpful in serving her community and help bring cohesiveness to the council. In November 2006, Kelly was elected and became the first female city councilmember for the City of Murrieta. Fittingly, she was sworn into office by Riverside County's first female Presiding Judge, Sharon Waters. One of Kelly's first accomplishments in her first year was the formation of a Youth Court program, working alongside Murrieta's police chief. The Youth Court initiative was passed by the City Council in January, with its first session commencing March 13, 2008. Kelly credits the successful formation of the program to the hard work of the police department, along with her ability to bring Southwest Riverside County lawyers and judges forward as volunteers, through her simultaneous role as 2007 President of the Southwest Riverside County Bar Association.

In reflecting back on her professional life, Kelly considers herself a neutral. On one hand, the word "neutral" captures Kelly's unbiased and impartial approach as mediator and arbitrator. On the other hand, however, the word "neutral" describes the exact opposite of Kelly's personality, because it can also mean "disinterested" and "dispassionate." To the contrary, Kelly Bennett is a strong, bright and passionate attorney who is dedicated to making our community a better place in which to live and work. Kelly's drive to succeed is infectious, and she is not about to slow down. Thus, overall, she is best described as a passionate neutral.

Kirsten S. Birkedal is an associate with the law firm Thompson & Colegate in Riverside. To learn more about Kelly Bennett and the Mediation Law Group, please visit www.mediationlawgroup.com.

Science for Lawyers

by Robyn A. Lewis

At the February 15, 2008, general membership meeting, the RCBA welcomed the Honorable Thomas E. Hollenhorst, Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, along with Professor Alan McHughen of the University of California, Riverside, and Dr. Paul Zak, Professor of Economics and founding Director of the Center for Neuroeconomics Studies at Claremont Graduate University, Professor of Neurology at Loma Linda University Medical Center, and Senior Researcher at UCLA.

The trio attended the general membership meeting to invite the legal community to join in what is sure to be a nationally ground-breaking program. Justice Hollenhorst announced the launch of a pilot program, coordinated by himself and Professor McHughen and sponsored by UCR, to educate lawyers on the fundamentals of science.

The first class to be offered is "Science 101: Introduction to Science for Lawyers." It is designed to provide a foundation for understanding and working with science and to introduce scientific methodology and scientific issues commonly occurring in legal matters. The course will be the first in a series of specialized science courses for lawyers and will be a prerequisite for future topics. Justice Hollenhorst explained that, despite the ever-growing importance of science in courts and in practice, there is no similar existing program out there for attorneys.

Photos courtesy of Robyn Lewis

Professor Alan McHughen

Justice Tom Hollenhorst

Dr. Paul Zak

The primer course will be offered on May 3, 2008, June 7, 2008 and July 12, 2008. For further information, please contact UCR Extension at (951) 827-1637 or visit www.extension.ucr.edu.

State Bar Guidelines of Civility and Professionalism

by Terry Bridges

1. Background. As the centerpiece of his 2006-2007 presidency of the California State Bar, Shelley Sloan established a State Bar Attorney Civility Task Force. The Task Force was specifically charged with preparing guidelines for civility and professionalism for review, consideration, modification and hopefully adoption by the Board of Bar Governors. It was Shelley's belief that guidelines were necessary in light of the wide acceptance and acknowledgment by many members of the bench and bar that civility and professionalism have been on a rapid decline over the recent past.

The Task Force was composed of five trial judges and thirteen trial lawyers from various regions of the state. The work of the Task Force was supported by two exceptionally qualified staff members, Mary Yen and Teri Greenman. I have been honored to serve on the Task Force. It has been one of my most productive and happy professional involvements during my practice.

The Task Force met on an as-needed, yet relatively frequent schedule. As a starting point for our mission, we reviewed guidelines from throughout California and various foreign jurisdictions. At an early stage, the attention of members of the Task Force was quickly directed to the Code of Professionalism adopted by the Santa Clara Bar Association and enacted as a local rule by the Santa Clara County Superior Court in 1992. Judge Brian Walsh, who was President of Santa Clara County Bar Association at the time of the development of the Code, and an untiring advocate of its implementation after he was appointed to the Santa Clara County Superior Court, was an invaluable member of the Task Force. Since Santa Clara's guidelines have been acknowledged throughout California and beyond, we concluded that they should be used as a model. Throughout our deliberations and considerations, we consistently referred to not only the adoption of the guidelines in Santa Clara County, but the day-to-day utilization, reference to and implementation of those guidelines by the Santa Clara bench and bar. In addition to Santa Clara's code, we referred often to ABOTA's Principles of Civility, Integrity and Professionalism.

After a number of extremely pleasant meetings and regular email exchanges and communications to and from our staff, the work of the Task Force resulted in a proposed draft of guidelines. These guidelines were thereafter posted on the State Bar website and vetted by the bench and bar throughout California. As part of the vetting process, public hearings were conducted in Los Angeles and San Francisco. In addition, numerous written comments were carefully reviewed and considered.

After reviewing and considering all comments, the Task Force adopted a proposed set of guidelines and forwarded them to the Board of Governors.

On July 20, 2007, the Board adopted the guidelines and formally entitled them "California Attorney Guidelines of Civility and Professionalism." In adopting the Task Force's proposal, the Board referred to the work of the Task Force "as a model set of guidelines for members, voluntary bar associations and courts to use and implement in a way that is effective for the local legal community . . ." The Guidelines can be viewed at www.calbar.org.

2. Aspirational Aspect of the Guidelines. In response to concerns raised at each of the public hearings, as well as written comments, the Task Force made it abundantly clear in the text of that Guidelines that they are aspirational only and intended to "foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California." The introduction also provides that the Guidelines "are not intended to supplant these or any other rules or laws that govern attorney conduct."

Finally, in further response to testimony at public hearings and other written comments, the introductory provisions of the Guidelines clarify that they are not intended to establish standards of care or to serve as a basis for disciplinary proceedings or professional negligence.

3. Contents. The Guidelines consist of three component parts. The first is comprised of sections that deal with the aspirational aspects of our professional responsibilities to the justice system, the public and our clients.

These sections also deal with a multitude of various aspects of our professional responsibilities, including discovery, law and motion, settlement, alternative dispute resolution and conduct in court.

Additional provisions address unique issues applicable to transactional counsel, family law practitioners, criminal law practitioners and the judiciary. Of course, those specific sections are in addition to the remaining sections of the Guidelines.

The great majority of the Guidelines contain a number of helpful examples designed to address situations which might frequently occur. The examples are not intended to be exclusive.

The second component consists of two pages of abbreviated Guidelines. The summary is again modeled after the format developed by Santa Clara and is intended to provide court and counsel with a brief, portable and easily accessible summary of the contents.

The third component consists of a one-page pledge, which reflects a commitment to use the Guidelines as part of our day-to-day practice as counsel. It is the hope of the Task Force that it will be signed by public and private attorneys and firms throughout the state.

4. Implementation. In the resolution approving and adopting the Guidelines, the Board of Bar Governors recommended to the Task Force that we initiate "appropriate ways and means for the State Bar to facilitate . . . usage of the guidelines by members, voluntary bar associations and the courts."

In response to such implementational responsibilities, the Task Force is presently in the process of addressing various bench and bar groups throughout the state, in the hope that the Guidelines will be reviewed, considered, adopted and implemented by public and private firms, various practice groups, professional specialty organizations, Inns of Court, applicable sections of the State Bar and, equally important, the judiciary.

As mentioned, my service on the Task Force has been most gratifying and stimulating. I look forward to working with my colleagues throughout the state in attempting to implement adoption of the Guidelines and ultimately to witness the enhancement of civility and professionalism throughout the state.

Suggestions and/or questions can be directed to the Task Force to the attention of Mary Yen at mary.yen@calbar.ca.gov.

Terry Bridges of Reid & Hellyer is a past president of the RCBA in 1987 and chair of RCBA's Judicial Evaluation Committee.

A Touch of Humor

A couple goes on vacation to a fishing resort in northern Minnesota. The husband likes to fish at the crack of dawn. The wife likes to read.

One morning the husband returns after several hours of fishing and decides to take a nap. Although not familiar with the lake, the wife decides to take the boat out. She motors out a short distance, anchors, and continues to read her book.

Along comes a game warden in his boat. He pulls up alongside the woman and says, "Good morning, Ma'am. What are you doing?"

"Reading a book," she replies, (thinking "isn't that obvious?")

"You're in a restricted fishing area," he informs her.

"I'm sorry officer, but I'm not fishing, I'm reading."

"Yes, but you have all the equipment. I'll have to take you in and write you up."

"If you do that, I'll have to charge you with sexual assault," says the woman.

"But I haven't even touched you," says the game warden.

"That's true, but you have all the equipment."

Judicial Profile: Commissioner Bradley O. Snell

by Evelyn Cordner

Okay. I am wrong. Brad Snell is not just another DA in a black robe. I, a veteran public defender, am the first to concede this point. Granted, he is a 16-year prosecutor who was recently transitioned to commissioner for the Riverside County Superior Court system, but there, the quick stroke with the same brush needs to end. Yes, I am impressed. Preliminarily, I am biased. I worked in the past with ex-prosecutor Snell on a heavy drug court calendar and later a preliminary hearing calendar. I found him then to be fair to a fault. He would actually listen, as evidenced by his putting me through his version of cross as to the mitigating evidence I would present in negotiating a settlement. No cookie-cutter sentences from him. He was the best of the old-school prosecutors: Open-minded, decisive and fair. Asked what he misses most? The law enforcement officers he worked with as a prosecutor.

So who is this man? He defines himself: A devout Mormon and the proud father of five children, all girls. The Snell family plays basketball. With a home court, the activity is joined in by all. They are formidable. His wife, Julie Snell, is an accomplished athlete who still usually outplays everyone on the court. In her youth, she was a three-time all-state champion in volleyball and basketball. She keeps her skills up. One of his favorite family pastimes, in which his competitive streak really comes out, is challenge matches with all-male teams. The Snells routinely trounce the competition. Yup, all girls plus dad. Another annual family activity gives him a chance to do what he secretly likes best, sing. Not just singing, but specifically Christmas caroling in the neighborhood. The Snell family does it up right, singing four-part harmony, a cappella. As for any transformative experiences that make up the man, he acknowledges his two-year missionary stint at age 19 in Hong Kong as one of the most important in his life. Where previously his world had been limited to the protected, homogenous environment of a tight Mormon community in Utah, where he grew up, he feels that those two years shaped his faith and world view and opened him up to people different from himself.

Interviewing him in his new office at the Southwest Criminal Justice Center, I note he has yet to move in fully. His first judicial assignment is in Courtroom S102. The juvenile dependency calendar, not an assignment for the faint of heart. He routinely hears heartbreaking cases of abuse and neglect. After only two weeks in this assignment, he is busy learning a new area of law, rampant with the subjective standard, "the best interests of the child." Earlier, while waiting for him to break for our interview, I sat in his courtroom listening to the disembodied voices of an in camera hearing over a speaker system. The voice of a young child is most compelling. Questioned by attorneys as to whether the child wants to go back home to his mother, the child says only if she is "clean." It is Commissioner Snell who finally asks the child what he meant by the word "clean." The child's definition of clean had nothing to do with drugs or alcohol.

Snell family – (standing, left to right) McKenna, 17; Lindsey, 20; Justyn, 18; (sitting, left to right) Rylee, 15; Commissioner Snell; Corrie, 11; and Julie, wife

I asked him how he feels about being in a new swimming pool. He replied that this current assignment is a good way to get his feet wet transitioning from prosecutor to fair and impartial bench officer. By leaving his allegiance to the D.A.'s office behind, he feels he will be able to disconnect from the role of prosecutor. Refreshing. What attitudes does Commissioner Snell bring to the bench? He believes most people fall in the gray area between Mother Theresa and the Truly Evil. In sentencing, "Justice requires me to consider the merits of equity." To him, mitigating circumstances are just as important as aggravating circumstances. Justice must be tempered

for the individual. What he likes best about his current assignment is that he can speak directly to the parties, both to warn and to issue encouragement to parents struggling to regain custody of their children. This paternalistic attitude probably stems from his involvement in his faith. Having served for five years as bishop of his ward of 300-500 Mormons, his main job was to act as spiritual leader, confidant and problem-solver for people with ordinary problems.

Asked what he believes was his greatest reward in his prosecutor role: Two-fold, taking really bad and dangerous people out of circulation and dismissing a case where the defendant was wrongfully accused. One case in particular he shared. A defendant was arrested under another person's warrant. It was agreed that all would return to court in two weeks, so fingerprint and records checks could be run. This was too long for prosecutor Snell, who got the needed information corroborating the person's story and had a court order releasing her in less than 24 hours. He says that there are few things more abhorrent to him than the incarceration of an innocent person. It takes a really great prosecutor to dismiss a case, and only a competent one to get a conviction.

Commissioner Brad Snell seems to be a well-balanced human being who possesses intelligence, humanity, compassion and accountability for himself and others. The black robe looks just fine on him, ex-D.A. and all.

Evelyn Cordner is blissfully retired from the Riverside County Office of the Public Defender.

Team Miceli Presents at Leo A. Deegan Inn of Court

by Robyn A. Lewis

front row (left to right) Richard Reed, Judge Miceli, Cathy Schwartz, Judge Koosed, Raeet (Rita) Tadesse, Linda Roberts-Ross; (back row) Steve Harmon, Phil Greenberg, Dave Werner

On January 30, 2008, the Leo A. Deegan Inn of Court was privileged to have the Honorable Victor Miceli (retired) join its first meeting of the year at the Victoria Club.

Judge Miceli was the namesake of the presenting team, which included Philip Greenberg, Steve Harmon, Richard Reed, Linda Roberts-Ross, Catherine Schwartz, Rita Tadesse, and David Werner and was headed by Judge Charles Koosed. The presentation focused on ethical considerations and contract issues.

Judge Miceli, as many of you already know, is an icon in the Riverside legal community. He began his legal career in Meadville, Pennsylvania, where he practiced from 1954 until 1961. He moved to Riverside and became a member of the Riverside County Bar Association in 1962. After practicing law here from 1962 until 1986, Judge Miceli was appointed as a bench officer and served as a judge from 1986 until 2001, which was the date of his retirement.

In addition to serving the legal community as one of the most well-respected and influential jurists, Judge Miceli also made two major contributions that went above and beyond the call of his duty as a judicial officer. It was Judge Miceli who spearheaded the restoration of the historic courthouse. He was also instrumental in bringing a law library to Riverside County. That facility proudly bears his name. Judge Miceli is still involved with the law library to this day, serving as a member of its board of directors.

Judge Craig Riemer has remarked of Judge Miceli: "There are many ways that we can show our appreciation to Vic. We can follow his example of service to our clients. We can strive to preserve the excellence and to defend the independence of our judiciary. And we can pledge to maintain for generations to come his beautiful courthouse as a monument to justice and the rule of law."

Judge Miceli is currently involved in the Evergreen Memorial Park restoration project. He is the chairperson of the restoration committee, which is focusing on cleaning up the cemetery where some of Riverside's most famous citizens are buried. Established in 1872, Evergreen is the burial site of Riverside's founder, John W. North, Frank Miller, who built the Mission Inn, and Eliza Tibbets, who planted the first navel orange trees in Riverside.

Public Lawyer of the Year

by Darlene Dornan

Each year, the Public Law Section of the California State Bar recognizes an exceptional lawyer who has dedicated a significant portion of his or her career to public service by awarding that lawyer the Public Lawyer of the Year ("PLOY") Award. Award recipients are lawyers who represent the highest level of professional and ethical standards and who are inspirational advocates for the public interest. We recognize PLOY Award recipients at a reception held at the State Bar's Annual Conference held in the fall.

Traditionally, Chief Justice Ronald M. George speaks at the PLOY Award ceremony and introduces the year's winner. In his introductory remarks this past year, Chief Justice George said: "Each year I enjoy attending this event because it highlights the remarkable contributions made by public lawyers to the administration of justice in our state. As a lawyer with more than 40 years spent in the public sector, I know both how satisfying this area of practice can be – and how important it is that individuals of experience and intelligence like yourselves commit your careers and your skills to serve the public interest."

The PLOY Award has been given to many outstanding lawyers over the years. Recent recipients have included Ann Miller Ravel ('07), Clara Slifkin ('06), Manuela Albuquerque ('05), Roderick Watson ('04), Ariel Pierre Calonne ('03), Herschel Elkins ('02), and Janye Williams ('01).

Ann Miller Ravel, the 2007 PLOY Award recipient, is County Counsel for Santa Clara County. Ms. Ravel has worked in public service for most of her career. Upon receiving the award, Ms. Ravel spoke about how she passed the values of being a public servant on to her son: "Finally, I must say that one of my proudest achievements is having passed this spirit that was passed to me by my parents, to my own children. One of my sons, who is now in his second year of law school, wrote me a letter a couple of years ago. The letter still makes me emotional when I read it, but one thing stood out. He wrote: 'In case you didn't already know, you are my inspiration for wanting to do public service as a career.'" She concluded her acceptance speech with the following: "It has been said that 'finding the right work is like discovering your soul in the world.' Being a public lawyer is the right work."

The Public Law Section Executive Committee is now accepting nominations for the 2008 PLOY Award. For further information on eligibility, or to nominate a colleague or friend for the 2008 PLOY Award, go to www.calbar.ca.gov/publiclaw. Applications are due by April 2, 2008.

In addition to nominating a candidate for the 2008 PLOY Award, you and your firm are encouraged to sponsor the event. Sponsors will be recognized in all publications announcing the winner, and also at the event. Our 2007 PLOY Award sponsors included Berliner Cohen, Best Best & Krieger, CEB, Kaufman Downing, LLP, Meyers Nave, Olson Hagel & Fishburn, LLP, Richards Watson & Gershon, the Sillas Law Firm and William R. Seligmann, Attorney at Law. For more information about sponsorship opportunities, please contact Julie Martinez, State Bar Section Administrator, at (415) 538-2523, or via email at Julie.Martinez@calbar.ca.gov.

Darlene Dornan is the Director of Legal Services for the Superior Court of California, County of San Diego, and a member of the Public Law Section's Executive Committee.

Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective March 30, 2008.

James C. Bechler – Law Ofcs of James C. Bechler APC, Anaheim

Luz E. Essenwanger – Office of the District Attorney, Riverside

Zakia Kator – Best Best & Krieger LLP, Riverside

Rosemary B. Koo – Lewis Brisbois Bisgaard & Smith LLP, San Bernardino

Brian Mabee – Best Best & Krieger LLP, Riverside

Rafael S. Venegas – Sole Practitioner, Riverside

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Office Space – Riverside
Office space available in the Tower Professional Building located on the corner of 13th and Lime Street in downtown Riverside. We are within walking distance to all courts. All day parking is available. Building has receptionist. Please call Carole @ 951 686-3547 or email towerpm@sbcglobal.net. Residential services available also.

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One office available for sublet in downtown Riverside. Services, clerical space and rent are negotiable. Contact John Vineyard at (951) 774-1965 or jvineyard@vineyardlaw.com.

Law Office Site for Sale
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