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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

January 2005

- 24 Judicial Liaison Committee**
RCBA – Noon
- 25 DRS Board**
RCBA – Noon
- 26 EPPTL Section (Brown Bag)**
RCBA 3rd Floor – Noon
(MCLE)
Mock Trial Steering Committee
RCBA – Noon

February 2005

- 1 RCBA/SBCBA Environmental Law Section**
RCBA 3rd Floor – Noon
(MCLE)
- 2 Bar Publications Committee**
RCBA – Noon
- 7 CLE Committee**
RCBA – Noon
- 8 PSLC Board**
RCBA – Noon
- 9 Mock Trial Steering Committee**
RCBA – Noon
Barristers
6:00 p.m.
Cask 'n Cleaver, Riverside
(MCLE)
RCBA/SBCBA Landlord/Tenant Law Section
6:00 p.m.
Cask 'n Cleaver, Riverside
(MCLE)
- 11 HOLIDAY**
- 15 Family Law Section**
RCBA 3rd Floor – Noon
(MCLE)
Mock Trial Competition, Round 1
Regional, 5:30-8:30 PM
- 16 CLE Committee (Brown Bag)**
RCBA 3rd Floor – Noon
(MCLE)
- 17 Mock Trial Competition, Round 2**
Regional, 5:30-8:30 PM
- 18 Joint RCBA/Riverside Law Alliance**
General Membership Meeting
RCBA 3rd Floor – Noon
(MCLE)





by Michelle Ouellette

STRESSED Is Just DESSERTS Spelled Backward

I'm going to lose weight this year. I will exercise more this year. Sound familiar? These are two of the most commonly made New Year's resolutions. Unfortunately, January's steadfast efforts to "get fit" rarely last through February.

It is appropriate, then, that this month's Riverside Lawyer explores the relationship (or lack of one) between the law and health and fitness. This is not one of my best subjects, as good health and fitness have not always been at the top of my priority list. I never had to think about health or fitness when I was growing up. We always seemed to be doing something physical, like running around the neighborhood, playing, or riding horses. When I went off to college, all those years ago, everyone told me that I would gain the "Freshman 10." Being a contrarian and generally difficult, not only did I not gain 10 pounds, I actually lost weight. I was a vegetarian at the time, a very tough thing to be at a small liberal arts school in the woods of Ohio in the mid-1970's. Salad bars did not exist, the food service folks in Ohio had never even heard of tofu, and the only vegetables regularly provided were canned Brussels sprouts and potatoes. Bad childhood memories rendered Brussels sprouts inedible and thus, I existed on potatoes. And beer. Yet somehow I managed to lose 20 pounds in one year without any exercise whatsoever. Oh, the good old days!

The vegetarian diet came to a quick end one day in Greece. As I was walking down the streets of Athens, the smell of lamb cooking over a small grill overcame me, and I ate 17 shish kebabs in about 15 minutes. I felt great, and never looked back. Ten years after college, I started law school, older and wiser – I now live on potatoes, beer, *and* meat. Imagine my surprise when I discovered that this diet did not result in the same weight loss I had experienced as an undergraduate. Looking back, I suppose that spending most of my time sitting in the library studying had something to do with my unanticipated weight gain. However, it was not until one of my classmates referred to my "Buddha-esque" girth that it occurred to me that maybe I needed to go to the gym.

The final blow to my physique occurred when I started working as an associate. The lifestyle of an associate does not include much room for health or fitness. In addition to the long hours sitting at a desk or in the library, there is usually food lying around, left over from a breakfast or lunch; many associates skip breakfast because you can almost always find a donut in the break-room to go with your coffee. Lunch is also frequently skipped because someone is always willing to make a cookie run in the afternoon. Unlike the much hyped "Freshman 10," no one warns you about the "Associate 20." But if the Associate 20 manages to sneak up on you, don't worry; just like my classmate in law school, there is usually someone willing to point it out. When I was an associate, my helpful partner John Brown would thoughtfully leave "anonymous" weight loss articles on my chair.

And it doesn't end with the Associate 20, although thankfully, the weight gain does slow down. It seems that, as lawyers, both in the public and private sector, we live on caffeine – America's number one mind-altering drug – and copious amounts of "comfort" food and fast food. And, of course, the use of food as a stress management tool is widespread. Mmmm. Potatoes.

Have you ever really thought about how many calories there are in a venti frappuccino from Starbucks? I have, but because it is primarily coffee, which has no calories, it can't be that bad. Right. And if you break a cookie in half, all the calories fall out. It's a stressful profession, no doubt about it, and we need to take better care of ourselves. Instead of the frappuccino, drink a glass of water. Or, if you simply must stop at Starbucks – order tea. Grab some celery instead of a donut.

My New Year's resolution is to stop eating so much, drink less wine, sleep more, and go to the gym regularly. So what if last year's resolutions didn't make it past February, this year is going to be different, right?

Happy New Year to all.

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



Barristers

by Robyn A. Beilin

December turned out to be an exciting month for Barristers! On December 8, 2004, Barristers co-hosted a Holiday Cocktail Party with the Riverside County Bar Association, which was a first-time event for Barristers. Pictures and more information about that exciting party can be found on page 18 of this magazine.

Barristers started off the new year with a bang! Mike Donner of Donner, Fernandez & Lauby was kind enough to take time from his busy schedule to give his thoughts to Barristers members on the art of taking depositions. We were honored to have him address Barristers and are sure that many of those who attended that meeting will use his tips and advice in their own practice. Thanks again to Mike!

Again, I would encourage any of you who have been in practice less than seven years and/or who are under 37 years

of age to stop by and join us for one of our monthly meetings, if you have not done so already. Barristers is designed to offer continuing legal education credits to its members by holding meetings with topics that are geared towards those who are new or relatively new to the practice of law. It is a fantastic way for you to meet other attorneys in the Riverside legal community, as well. We meet on the second Wednesday of each month at 6 p.m. at the Cask 'n Cleaver, which is located on University Avenue in downtown Riverside. Of course, we invite any Riverside County Bar Association members to join us for any of our meetings.

We are pleased to announce that on February 9, 2005, Harlan Kistler of the Law Offices of Harlan B. Kistler, Luis Lopez of Lopez & Morris, and Jonathan Lewis of J. Lewis & Associates will be joining us to discuss "Marketing Yourself and Your Practice." We look forward to seeing you all at that meeting.

We hope that each of you had a joyful holiday and wish you the happiest of New Years. If you have any questions regarding Barristers or upcoming meetings, please feel free to contact me at (951) 686-8848 or at beilinro@yahoo.com.

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



EXECUTIVE COACHING OF LAW FIRMS

by Anthony J. Mulhern

The following article was previously printed in the Orange County Lawyer. Reprinted with permission.

The practice of law has undergone enormous changes in the past decade, bringing with them enormous strains on lawyers. Consequently, law firms increasingly recognize the need for the kind of sound management systems and organizational development that their corporate clients have long taken for granted. One such resource that is seen by more and more law firms as the key to consistent high quality, efficiency and outstanding leadership is executive coaching. A quick look at the pressures of the current environment helps to explain why.

One major force creating change in law firms is merger and acquisition activity. This has produced some firms that now have on staff hundreds of lawyers. Staff from the merged entities must be integrated, with all the differences of expectations and habits that they bring with them. It requires the greatest of management finesse in any organization to integrate staff from separate entities into one firm, with one culture and set of values and way of doing things. Yet many of the lawyers who now find themselves in management positions with this responsibility not only have no formal management training but also have no interest or passion for managing at all.

A second factor is that the larger the firm, the more likely it is that it will be divided into various practice areas of specialization. As cases become more complex and the potential damages to the client increase, lawyers are increasingly required to work in teams composed of other lawyers with different areas of specialty and sometimes with non-lawyers such as CPAs, financial planners, communications specialists, and so on. Effective teamwork, however, does not come easy for those who have been educated and trained primarily to exhibit traits of independence and competitiveness. These traits can certainly serve a client extremely well when a case is being argued in court or a tough negotiation is underway. Exhibiting the same traits can be extremely counter-productive when it is necessary to hammer out a consensus with one's colleagues on the best defense or negotiation strategy.

Added to all these changes is the mounting pressure to generate billable hours in a highly competitive environment. One senior partner at a large Orange County law firm recently said, "We need executive coaching because I waste an enormous amount of otherwise billable hours resolving problems caused by poor communication between support staff and junior associates."

While the problems arising from the need for more skillful management can extend to all levels, associates just out of law

school are particularly prone to failure to recognize, respect and appreciate the expertise that resides in the non-lawyer staff. Unaware that their behavior is self-defeating, they can quickly create a severe morale problem and alienate those who can literally make or break their careers in the firm.

What is Executive Coaching?

To examine how executive coaching can help deal with these issues, some terms need first to be clarified. Usually "executive" refers to senior-level to mid-level managers or leaders in an organization. Such senior or mid-level managers are the immediate clients of executive coaching. Though not all lawyers are executives in this sense, all are making, or in the process of learning to make, executive-level decisions for their clients and in many cases are working with CEO's and business owners. Virtually all aspire to make partner one day. For these reasons, in dealing with law firms, the term "executive" should be understood to apply to all legal staff.

"Coaching" is a process aimed at developing and enhancing the executive and leadership skills of clients. The general focus is not simply to "solve problems," but also to seek out, create and make the most of opportunities. This typically involves a great deal of analysis and data gathering, separating facts from rumors or assumptions, digging for causes of difficulties, generating alternative solutions, and carefully observing or measuring the results of trying something new. This customized approach to executive coaching involves three facets.

First, it is typically conducted in private meetings between the executive coach and the client, allowing for Socratic-style dialogue. Executive development training, by contrast, is nearly always a large-group activity. The private nature of executive coaching allows law firm clients to discuss in detail issues that may be inappropriate to air in a group.

The executive coach's role in the Socratic dialogue is to become the catalyst for the client's own

development and choice of plans for action. This means a highly effective coach is not necessarily a subject matter expert. No coach can know a firm's members as well as a long-term partner, and no coach will understand a legal case as well as the lawyer who has been working on it for a year. The successful coach is, however, an expert in eliciting the active engagement of the client in mastering his or her situation. This is accomplished through insightful questioning and probing, clearheaded assessment, clarifying the client's values and objectives, and logically drawing out the implications of the alternatives that are generated. In these ways, the client arrives at solutions and commitments that have been formed with his or her own needs and priorities.

The second facet of effective executive coaching involves mentoring or advice giving. In order for the coach's advice to have credibility, he or she must have a record of accomplishment in what it is that executives do that is different from what subject area specialists do, namely organizing, inspiring, leading, and developing people. The situation is analogous to hiring a golf coach to reach the top of one's game. One would expect from a golf coach more than a series of questions, but also instruction and advice on how to actually hit the ball, as well as feedback on one's stroke. As in sports, having a coach is not seen as a sign of weakness; all champions have one.

A third facet of executive coaching is that of counselor. Issues of leadership and team relationships can be among the most emotionally distressing issues clients ever face in their work lives. Open expression and exploration of these issues is essential to resolving them, and this requires the establishment of a high level of trust and rapport with the executive coach. This is established through caring, empathetic listening, a willingness to be genuine, and a profound respect for the client's competence. Knowing how to challenge in a supportive way and to encourage emotional as well as intellectual expression is also key.

Aims and Purposes

Enhancing and developing leadership skills can mean different things for different clients. Some lawyers develop more flexibility in communication styles, with the ability to

judge when to be blunt and candid and when to be more sensitive or subtle. Others learn to more carefully choose when and with whom to express strong emotions and how to communicate less destructively. For some, political pressures internal to the firm can seem overwhelming, and a coach can help provide acceptance, perspective and adeptness. Lack of accountability may have created conflicts and disappointments, and action may be needed to "get the wrong people off the bus." It is not unusual at the outset of an executive coaching engagement to find that a difficult situation was made worse by previous attempts to resolve a problem.

Why Is Executive Coaching Needed in Law Firms?

Johns Hopkins University conducted a study in the 1990's on the rates of depression among 28 occupations. Lawyers were found to have among the highest rates of depression. In fact, their rate of depression was found to be 3.6 times the average rate for the occupations studied. Since then, pressures on the profession have only grown.

Depression can take many forms, from the mild and infrequent to the severe and chronic, with many causes. While executive coaching is not the same as psychotherapy, which may be indicated for more severe depression, it can have great value in addressing one commonly accepted cause of depression: repressed anger. Anger at an external cause that does not find adequate external expression or resolution is internally deflected to the self, producing depression.

When conflict, confusion or fear cannot be resolved in open discussion, they can easily turn into depression, with all its accompanying symptoms. These may include difficulty concentrating, fatigue due to difficulty sleeping, loss of energy due to poor appetite, low self-esteem, and general loss of interest in work. All of these symptoms can jeopardize a career and undermine a firm's effectiveness and reputation.

But most law firms lack the processes or cultural acceptance for the airing of dissatisfaction, especially from associates. Executive coaching can help dissatisfied members of the firm to clarify the source of the dissatisfaction and facilitate the expression and resolution of the issue. Sometimes the executive coach may serve as an intermediary or "honest broker" in the discussion. Providing this coaching support is far less expensive to a firm than having to replace an associate in whom they have invested many years at great cost and whom they were hoping to develop to partner.

There is widespread recognition among pacesetters in the corporate world that internal conflict is not necessarily a bad thing. Rather, it is seen as potentially positive, since it is essentially a difference of perspectives or values from which new and creative options can emerge. The problem is not conflict itself, but the lack of skill in constructively confronting it and finding solutions that all team members will commit to. These same values are no less needed in today's law firms, and coaching can help to instill them.

Case Study

For senior partners to ensure the success of junior and senior associates, it is critical that they better understand the pressures under

(continued next page)

Executive Coaching of Law Firms *(continued)*

which the latter function. One senior partner at a firm in Los Angeles County described how a friend who was a newly hired associate at a firm in a neighboring county called him on several occasions for advice on case assignments rather than ask clarification from her own firm's senior staff.

"Often the directions for research," he said, "were so vague that they could go in 50 different directions. The associate had learned that to ask questions in her firm was to be judged as stupid or incompetent. Survival required finding the information elsewhere. Unfortunately, this kind of situation is not isolated." The result was that brutal hours were frequently spent at this firm producing reports that often failed to satisfy what the senior partner wanted in the first place.

Several factors were at play in this situation that are at odds with a well-functioning organization and client satisfaction:

- Unclear communication as to the assignment's requirements, its purpose in the overall case strategy, and expected results;

- Fear on the part of the associate to ask for clarification or to decline the assignment;

- A perception that senior partners were either inaccessible or intolerant of a need for assistance;

- A fear that with every assignment her job was at stake – i.e., operating in "survival mode" rather than with enthusiasm and creativity.

In short, the associate was mired in the nightmare scenario of having an assignment over which she had no choice, with no clear directions, no resources within the firm for clarification, and the prospect of being fired if she did not get it right. Even the advice of a more senior friend at another firm would at best be only an educated guess.

The cascading effect of such circumstances eventually reaches the firm's client, who is seen as demanding perfection. For an associate with a heavy case load, working seven days a week, desperately striving to grasp that for which they need more guidance, the path of least resistance is to avoid communication as much as possible with clients on difficult cases. No one wants to deliver bad news, especially if it is seen as a potentially career-ending event, and so the client is left stewing while waiting for an update that never comes until an irate call is placed to the senior partner. The subsequent scene can be quite ugly and may involve the termination of an otherwise high potential associate.

Perception v. Reality

Few senior partners are likely to be fully aware of these dynamics and even fewer would deliberately create them. In fact, they might in some cases exist principally in the minds or perceptions of the associates. This is a situation, however, in which perceptions “are as good as” reality, for they determine the outcomes, whether they are accurate or not. This is why skillful leadership is sometimes informally defined as the “management of perceptions.”

Executive coaching provides the means to break this vicious cycle of unclear expectations, fear, sense of isolation, disappointment, and recrimination. As one business law attorney put it, “once I learned to explain in detail what I wanted and why, problems with staff became minimal.”

Oftentimes, senior partners and managers of a firm will know that something is badly amiss but have difficulty separating reality from rumor, hearsay or mistaken impressions. Additionally, time is always in short supply, and so problems are avoided until they become crises. The first step in successful executive coaching is obtaining good data, and sometimes the perceptions are the data. How can information on these perceptions be obtained if staff members feel it is too risky to openly express their concerns?

One singularly effective way is through an organizational assessment based on candid, anonymous feedback obtained in structured interviews conducted by the executive coach. Feedback is obtained on how the firm is faring on key effectiveness areas, such as conflict resolution, the way mistakes are treated, availability of needed resources, morale, supportiveness among team members, knowledge and skill utilization, among other areas. Once the pledge of anonymity has been made, the interviews in themselves can be a significant morale booster. Many staff feel the interviews are the first time in their work careers that they have ever been fully heard and listened to in depth.

After the needed data are obtained, a profile of the firm’s situation emerges and is described in a report to senior partners. This, together with accompanying recommendations, becomes the blueprint for a coaching plan to produce measurable results, according to the firm’s own priorities and agreed-upon objectives.

Numerous benefits flow from this process. With more clarity and focus on the “what and why” of assignments, for example, “24/7” work weeks may be fewer. Life balance, a subject once taboo at law firms, has become increasingly important as young families more often than not are today two-career families. Additionally, women constitute about 30% of the American bar and 50% of entering classes, and married women still assume more than 50% of home duties.

Client satisfaction was observed to increase by one attorney who has benefited from extensive coaching once associates learned to “avoid surprises.” He observed that, “even when the news is not the best, if candid, in-depth updates are provided on a regular basis, clients’ confidence can be maintained.” The other “bottom line” he noted was an increase in associates’ loyalty and a reduction in turnover.

Marketing

Marketing the firm’s services is increasingly expected of lawyers, yet it is a function that does not come naturally to all. The same communications skills that lead to more effective internal operations also tend to create the poise and persuasiveness that are essential for effective marketing. Moreover, time freed from internal conflict and unguided research is time available for making the contacts necessary for business development.

(continued next page)

by Gayle Webb

Need MCLE Self-Study Tapes?

We *have* MCLE self-study tapes . . . let us help you select the audiotapes you need to complete your MCLE requirements. It's that time of year, when attorneys realize they need to add up the hours of mandatory continuing legal education programs they have attended and fill in any gaps with self-study material before their State Bar deadline.

Compliance deadlines are as follows:

Group 3 (Last name: N-Z):	Feb. 2, 2002-Jan. 31, 2005
Group 2 (Last name: H-M):	Feb. 1, 2003-Jan. 31, 2006
Group 1 (Last name: A-G):	Feb. 1, 2004-Jan. 31, 2007

As you know, the total number of hours required is 25, with a maximum of 12.5 of those hours in self-study units. Of the 25 hours, 6 must be in specialized subjects: 4 hours in Legal Ethics, 1 hour in Detection/Prevention of Substance Abuse, and 1 hour in Elimination of Bias in the Legal Profession. Credit for the specialized subjects can be from self-study programs. This is where the Law Library can help you, with CEB-approved audiotape sets on various topics.

With your bar card, you are able to check out one audiotape set per week for free. Due to heavy demand for the tapes, however, no renewals are allowed during December-February. For those slow to return library material, a fine of \$1 per day per tape makes sure tapes are back on the shelf for the next attorney to use. Waiting lists are kept for items in demand, and staff will call as soon as they are back for circulation. The newest additions to our MCLE collection include:

- *FAQs: Client Trust Accounting* (2003) 1 hour (Legal Ethics)
- *Avoiding Malpractice in the Representation Process: Getting In and Getting Out* (2004) 3 hours (Legal Ethics)
- *FAQs: The Lawyer's Duty of Confidentiality* (2003) 1 hour (Legal Ethics)
- *Attorney and Addiction* (2003) 1 hour (Substance Abuse)
- *Representing the Incapacitated Client: Ethical and Malpractice Traps* (2004) 3 hours (Legal Ethics), 3 hours (specialization credit in Estate Planning, Trust & Probate Law)

Executive Coaching... *(continued)*

Conclusion

The practice of law will always be demanding, hard, exhausting work. It attracts highly intelligent, energetic people who relish the challenge of a good contest and the satisfaction of a well designed line of argument that wins the day. But what is true for other corporations is also true for law firms. If two otherwise comparable teams are in a contest and one of them is characterized by outstanding leadership, loyalty, mutual supportiveness, and unified focus while the other is riven by internal conflict, we all know which one is most likely to come out on top. More law firms are recognizing that executive coaching is one more way to increase the odds of being the winner.

Anthony J. Mulkern, Ph.D., is Director of Mulkern Associates, a Los Angeles-based consulting services firm specializing in executive coaching, executive launch and leadership development programs. For contact: ajmulkern@cs.com.



-
- *Estate Planning & Administration: Recent Developments* (2004)
3 hours (specialization credit in Estate Planning, Trust & Probate Law)
 - *Civil Litigation Practice: Recent Developments* (2004) 3 hours
 - *Toxic Mold: An Update* (2004)
2.75 hours
 - *Business Law Practice: Recent Developments* (2004) 3 hours
(.5 hours specialization credit in Taxation)

If you've already got your allowable 12.5 hours in self-study but still need some participatory credit hours and no workshops or programs are being given nearby, you can always go to the State Bar website, www.calbar.ca.gov, and choose from more than 500 hours of State Bar-sponsored CLE programs available via streaming video and audio, on a wide variety of topics, including the specialized ones. If you prefer attending programs in person, especially in places like Scottsdale, Sedona, Hawaii . . . the Law Library has a bulletin board filled with brochures of all available live presentations.

Whether you use the Law Library or the Bar website, it will be relatively easy to complete your requirements – good luck!

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

Friday, Feb. 11, 2005 –
Abraham Lincoln's Birthday

Monday, Feb. 21, 2005 –
George Washington's Birthday

*Gayle Webb is the Riverside County Law
Library Director.*



by G. Spencer Mynko, M.D., J.D.

First of all, let me say what this article is NOT. It's not a discussion of the latest case interpreting HIPPA, a diatribe against MICRA, or an analysis of health law policy in California (yawn). I actually want to discuss something useful.

The Journey Into Physical Decline

So let's examine our typical lawyer – yeah, you; certainly me – the person working 60-70 hours a week and subsisting on junk food and grease. How's your comprehensive program for staying healthy and in shape? Not so good? Need some fine tuning? Maybe a major overhaul? Well, let's see if we can get the old engine running right and get that body back on the road to good health.

The reality is that when we work the hours that we work, under the stress inherent in practicing law, too often we put our well-being on the back burner. Guilty of neglecting your health and wellness? During law school, maybe we hit the gym four to five times a week, had a resting pulse in the low 40's, hiked from Palm Springs to the top of San Jacinto, danced all night, played tennis without being out of breath, and climbed up and down Mount Whitney in a day. Well, that was then. And this is now. If we jog, we struggle to jog three miles at an eleven-minute-mile pace. The gym? Yeah, right. And how about that ever-increasing waistline?

So what happened? We started our first year practicing law, became parents and went from living 10 minutes from school to 40 minutes from work (on a good day). By the time Thursday night rolls around, we've already worked between 40 and 50 hours. Almost invariably, we bring something home to look at over the weekend. As a result of this schedule, the exercise program is down the drain. I think you get the picture – and the picture is not quite what it used to be. We confirm this every time we look in the mirror.

I'm Going To Pump You Up

I have realized that, for myself, being a better steward of my time would help me get back into shape. Oftentimes I'd get home at 8 p.m. and still cram in two hours of TV before going to bed. I had to shut off the damn TV. By eliminating TV, I now have time to have dinner, play with my 10-month-old, and get in a one-hour workout. Maybe you can still watch *and* find the time. I simply could not. But if we can set aside four to six hours a week for fitness and stay dedicated, we can start getting back into shape. I don't have time for the gym, so I invested in a decent pair of running shoes and bought some

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modest dumbbells for home. Less than ideal, but a real start. And, as I'll explain in a later article, modest beginnings can have a profound positive effect on your health.

Here's the regimen. Tuesday and Thursday nights, lift weights at your own pace (push yourself a bit each time) for 45 minutes to an hour – just free weights, and maybe some push-ups. Wednesday, walk and jog for about 35 minutes until you can jog the entire time; and Saturday and Sunday, do some combination of weights and running. As you can see, most of us can carve out time during the week to do this. It's simply a matter of making exercise a priority.* Whatever you do should include some type of both aerobic and weight-bearing exercises.

Now, we have to be realistic. There's no way I now can return to the intense level of dedication I had back in school – I simply don't have the time. I work too many hours, and I'm a married commuter with a young child. But I can get to looking better and, more importantly, feeling better; and, even more importantly than that, feeling and being healthier. We may not be able to run that marathon, climb Mt. Everest, or swim up the Amazon, at least not right away; but our cardiovascular fitness, strength, and overall health will improve dramatically, even with a limited exercise program. Furthermore, we can help avoid the deadly consequences of high blood pressure, diabetes, heart disease, stroke, kidney disease and metabolic syndrome.

In future articles, I'll go into metabolic syndrome, the epidemic of weight-related health problems facing America, and what we can do to prevent the consequences of being overweight and out of shape.

* Always make sure you consult your physician or a personal trainer to help you create an exercise program that works for you.

G. Spencer Mynko, an attorney with the firm of Heiting & Irwin, also practices medicine on a part-time basis.



by Mark A. Mellor

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

Changes in the CCP, effective January 1, 2005.

A.B. 3078, signed by Governor Schwarzenegger, makes several changes in the Code of Civil Procedure. The most significant are:

Code of Civil Procedure § 411.20 has been amended, probably in response to *Duran v. St. Luke's Hospital* (2003) 114 Cal.App.4th 457 [8 Cal.Rptr.3d 1]. That case held that the clerk properly refused to accept a complaint for filing when the fee tendered was \$3 less than the proper filing fee; because the complaint had been presented for filing on the last day before the statute of limitations ran, the plaintiff's case was dismissed. Code of Civil Procedure § 411.20 previously provided that if the check tendered to the clerk bounces, the clerk must give notice and the offending party has 20 days to provide the required amount in cash or by certified check. The amendment adds a similar procedure when the amount tendered is less than the required fee.

Code of Civil Procedure § 1005 deals with notice periods for motions. Previously, the statute required moving papers to be served and filed 21 *calendar* days before the noticed hearing. In the amended version, this time period is changed to 16 *court* days. The time for filing and serving opposition papers is changed from 10 *calendar* days to 9 *court* days, and for reply papers from 5 *calendar* days to 5 *court* days. The statute does not tell us whether days when some courts are closed because of budgetary restraints count as "court days" or not. And remember that the time for serving the notice of motion is extended 5, 10, or 20 days where service is

by mail, to a recipient within California, in another state, or outside the United States, respectively.

A new section, Code of Civil Procedure § 2016.060, provides that when the last day to perform an act under the discovery statutes falls on a weekend or court holiday, the time limit is extended to the next court day. Code of Civil Procedure § 2024 has been amended to provide that when matters relating to discovery must be completed a specified number of days before trial (e.g., completion of discovery, motions relating to discovery, expert witness discovery), and that date falls on a weekend or court holiday, the time limit is likewise extended to the next court day closer to the trial date. This clears up an issue that has confounded the courts for some years.

Primary assumption of risk is again before the Supreme Court.

In *Priebe v. Nelson* (June 8, 2004) 119 Cal.App.4th 235 [14 Cal.Rptr.3d 173] [First Dist., Div. Four], the doctrine of primary assumption of risk was at issue after a kennel worker was injured by a dog bite. The California Supreme Court has granted review and the case may no longer be cited.

A trap for the unwary: Time for appeal starts when clerk files minute order dismissing the action on basis of forum non conveniens.

Anyone confronted with an order dismissing a case either on the basis of inconvenient forum or on the basis of a forum selection clause had better read *Quest International, Inc. v. Icode Corp.* (Sept. 22, 2004) 122 Cal.App.4th 745 [19 Cal.Rptr.3d

173, 2004 DJDAR 11907] [Fourth Dist., Div. Three]. In nearly all cases, an appeal lies only after the judge signs and files the order or judgment; the time for filing a notice of appeal is measured from the date of notice or service of the signed judgment or order. *Not so for an order dismissing an action for forum non conveniens.* As the appellant in *Quest* discovered, to its distress, a peculiarity of the statute (Code Civ. Proc. § 904.1 (a)(3)) makes an *unsigned* minute order granting a motion to dismiss for inconvenient forum directly appealable. As a result, the trial court may not consider a motion for reconsideration (a motion for new trial would be the appropriate procedure) and the time limits for appeal start with notice or service of the minute order. In *Quest*, the appellant waited until the judge signed a formal order, but by that time it was too late and the appellate court lacked jurisdiction to consider the appeal.

Even judges can tell when a defect is trivial.

In *Caloroso v. Hathaway* (Sept. 28, 2004) 122 Cal. App.4th 922 [19 Cal.Rptr.3d 254, 2004 DJDAR 12118] [Second Dist., Div. Four], the trial court awarded summary judgment to a defendant sued in a trip-and-fall case. The court refused to consider plaintiff's expert, who opined the defect was dangerous, and decided, as a matter of law, that an elevation difference of 7/16 of an inch along a sidewalk crack was so trivial as not to impose a duty on the adjoining landowner to warn pedestrians. The Court of Appeal affirmed and concluded that reasonable minds could not differ on the issue of whether such a defect was trivial. See also *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719 [139 Cal.App.3d 876].

However, in a somewhat similar situation, a plaintiff in a slip-and-fall case fared better. In *Martinez v. Chippewa Enterprises, Inc.* (Aug. 26, 2004) 121 Cal.App.4th 1179 [18 Cal.Rptr.3d 152, 2004 DJDAR 10677] [Second Dist., Div. Eight], the trial court granted summary judgment against a plaintiff who had slipped on wet cement because "the existence of water on concrete or asphalt located outdoors is an open and obvious condition," and thus cannot provide a basis for liability. The Court of Appeal agreed with the first of these conclusions but rejected the latter, noting that "the obviousness of a condition does not necessarily excuse the potential duty of a landowner, not simply to warn of the condition but to rectify it."

To obtain a continuance of a summary judgment motion, specific facts must be shown.

A superficial reading of Code of Civil Procedure § 437c(h) might lead to the conclusion that a party opposing a motion for summary judgment is entitled to a continuance to

conduct further discovery. Not necessarily so! A declaration in support of the motion to continue the hearing is required and it must (1) identify the facts to be obtained from the contemplated discovery, (2) include a showing that there is reason to believe these facts exist, and (3) explain why additional time is needed to obtain these facts. The continuance may be denied if the party seeking the continuance has failed to exercise diligence in obtaining the discovery. *Cooksey v. Alexakis* (Oct. 21, 2004) 123 Cal.App.4th 246 [19 Cal.Rptr.3d 810, 2004 DJDAR 12850] [Second Dist., Div. Five]; see also *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548 [30 Cal.Rptr.2d 706]; Weil & Brown, *Civil Procedure Before Trial*, ch. 10, §§ 10:207.15-10:208.

The statute requiring dismissal for failure to bring a case to trial within five years is alive and well.

Code of Civil Procedure § 583.310(a) requires that a case be dismissed unless brought to trial within five years from the date the original complaint was filed. In this day of judge-managed litigation, cases rarely linger this long. Before implementation of the Trial Court Delay Reduction Act, this statute was frequently litigated and the Courts of Appeal issued many opinions dealing with exceptions to and implementation of the statute. (See Weil & Brown, *Civil Procedure Before Trial*, ch. 11, §§ 11:191-11:266.2.) But the statute is still with us and during the last three years, a dozen published and almost 70 unpublished appellate decisions have dealt with the statute. For example, *Sagi Plumbing v. Chartered Construction Corp.* (Oct. 25, 2004) 123 Cal.App.4th 443 [19 Cal.Rptr.3d 835, 2004 DJDAR 12993] [Second Dist., Div. Four] (as modified November 10, 2004) applied the statute to affirm the dismissal of a number of causes of action that had not been brought to trial within five years, even though there had been an earlier trial on a separate cause of action that had commenced well before the five years had run.

Note Discretionary Two Year Dismissal: Code of Civil Procedure § 583.410 also provides for a discretionary dismissal for delay in failing to bring a case to trial within two years from date of filing. Lack of diligence by plaintiff's lawyer in getting a case ready for trial may result in a dismissal after two years.

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



JUDICIAL PROFILE: COMMISSIONER THOMAS HUDSPETH

by Rick Lantz



L: If not a commissioner, what would you like to be?

H: A judge.

L: Any regrets about no longer being in private practice?

H: Yes. I miss the interaction with other attorneys that as a bench officer I no longer am allowed to have, and I had a whole lot of friends in practice and I really don't get to see them.

L: If you could hold any political position, elected or appointed, what would it be?

H: Probably a judicial officer at some level here in the state.

L: Which historical figure do you most identify with?

H: Ulysses Grant.

L: Why is that?

H: I regularly am taking on what the world sees as unsolvable problems in a very, very narrow time frame, and then having to solve them in an expeditious and decent manner.

L: Which person living or dead do you most admire?

H: I'd say Stephen Hawking, the physicist who holds the same chair at Oxford as Newton did. Amazing man. Has ALS so badly he cannot communicate without a computer, and yet his mind is still stronger than just about any alive.

L: What trait do you most dislike in yourself?

H: Probably short temper from time to time.

L: What trait do you most dislike in others?

H: Lack of civility.

L: What is your greatest extravagance?

H: My motorcycle.

L: When and where were you the happiest?

H: Probably here and now. I don't spend a lot of time thinking about or living in the past, and the future is going to be what the future is going to be.

L: Which talent would you most like to have?

H: An ability to dance.

L: What is your biggest regret?

H: Not getting to know my father. He died when I was 14 and I would love to have known him as an adult, even if for a short period, to swap philosophies with him.

L: Who are your favorite writers?

H: I love Charles Dickens because of his use of the English language. I seem to read everything that John Le Carré writes and also admire his use of the language. And Brian Greene, he writes on astrophysics, that I find very fascinating. I'm currently reading a two-volume set on the Rothschild family, which is a great read, and I'm always reading at least one biography, I mean always. I just finished a biography on Harry Truman that was fascinating. In my stack of biographies, I think I have one on Frank and Jesse James that someone gave me. So I read constantly.

L: Who is your favorite hero in fiction?

H: I like Bugs Bunny. I like him because he has a whimsical sense of humor and the outcomes are always unbelievable but successful. Even when he falls off a building, he can stop just before he hits the ground, and he can be blown up in the air and somehow he always comes out on top.

L: What are your hobbies?

H: I like to bicycle ride a lot.

L: When you say bicycle, you mean motorcycle?

H: No, I mean bicycle bicycle. I love road bikes and riding lots and lots of miles. I love fly fishing. I've done that my whole life. And reading. I think those are my three most frequently done hobbies. You can throw motorcycle in there if you want.

L: What place would you like to visit that you haven't been?

H: The Somme American Cemetery in Bony, France.

L: I gather you've gone to the one in Normandy.

H: I actually haven't, but my father went in on D-Day, and the reason I want to go to the cemetery in Bony is my great-uncle died in the First World War and is buried there. No member of my family has ever been there. Until the advent of computers, we didn't know where he was. I found where he is, I know the site, and I'm going to pay the respects of three generations of my family to my grandmother's brother.

L: What is your greatest strength professionally?

H: I think a good well-rounded knowledge of the law.

L: And what is your greatest weakness professionally?

H: I'd say I probably don't care enough about the political aspects of what I do.

L: On what occasion do you lie?

H: Never.

L: What is the most frustrating part of your job?

H: Not having the resources necessary to make the court and our systems truly available to all.

L: What is the most rewarding part of your job?

H: Success stories, particularly with families in the family law arena. Getting children reunited with parents. Getting parents off of drugs or out of trouble and on the straight and narrow. And that is really amazingly rewarding.

L: I know you were a soldier in Vietnam. What are your thoughts concerning our soldiers in Afghanistan and Iraq?

H: Well, having been a combat soldier, I think that all combat soldiers from any nation in any time need to know that, politics aside, their countries support them and appreciate greatly that they follow the orders given and do their jobs decently and within Geneva Convention rules. I've just adopted by mail a soldier in the Middle East and my wife and I will be communicating with that soldier and giving them simple things that they can't get through their chain of command: a can of WD-40, postage stamps, something as simple as a few good cigars in a box or cans of corn. And I hope that our soldiers know that we, the body politic in this country, love them all, appreciate them all, and support them in what they're doing, whether or not we support the policies that have them there.

L: I suspect that the military has been part of your family.

H: My family in every generation, as far back as I can find, have, when Uncle Sam called, been combat soldiers. I was in Vietnam, as was my brother. My father went in on D-Day and

marched across Europe. My uncles all were part of the Second World War. My grandmother's brother is buried in the Somme American Cemetery in Bony, France, and died May 23, 1918 in France. I have relatives on both sides in the Civil War, and I have a direct progenitor who was at Valley Forge with George Washington. We have been active supporters of liberty since this country was founded and before. That's why I have a tremendous empathy for combat soldiers of all nations wherever they are. It is not a desirable lot, but from time to time very necessary.

L: Is there anything you would like to say to your fellow judges or attorneys?

H: I would like to see the budget situation solved so that once again we can reopen the branch courts in Riverside County and become more user-friendly to the public, and I would like to see programs in place to get more interpreters trained and available on all calendars so that all of the public finds the court user-friendly. And I will do anything possible to assist in both of those.

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



BARRISTERS/RCBA HOLIDAY SOCIAL

by Robyn A. Beilin

Riverside County Bar Association members welcomed the holiday season with a cocktail party on December 8, 2004. Hosted by Jim and Cindy Heiting at the beautiful offices of Heiting & Irwin, members of the Bar Association and of Barristers as well as esteemed members of the judiciary were treated to the festive scene of twinkling holiday lights, strolling Christmas carolers, fabulous hors d'oeuvres from chef Shane Collins of Catering by Shane, and cocktails. The event proved to be a success, with so many people stopping by to mingle with other colleagues and to enjoy the beginning of the holiday season.

In addition to enjoying good friends and good cheer, guests of the Holiday Cocktail Social rallied to support the RCBA Elves Program, which is spearheaded every year by Brian Percy. Guests were asked to bring wrapping paper, ribbon, bows, and tape to help wrap all of the holiday presents for the various families that are the recipients of that program. Thank you to all of the RCBA members for their generosity and support.

On behalf of the Riverside County Bar Association and Barristers, we wish to thank all of our sponsors, who helped to make this event possible:

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We look forward to seeing all of you at next year's Holiday Cocktail Social!

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



John Brown, Jeremy Hanson, Daniel Hantman



Jeremy Hanson, Cindy Heiting, Spencer Myrko



Charlotte Butt, Judge Dallas Holmes, David Bristow

CURRENT AFFAIRS

by Richard Brent Reed, Esq.

High Court Hung By Hemp

The case is *Ashcroft v. Raich*. Angel Raich of Oakland and Diane Monson of Oroville suffer from ailments the pain of which is relieved by the regular and frequent use of marijuana. California law says that's O.K. because they have notes from their doctors. U.S. Drug Enforcement Administration agents seized Monson's pot garden and told Raich that her friends have to stop supplying her. Angel and Diane sued U.S. Attorney General John Ashcroft, asking the court to enjoin the feds

(continued on page 21)



James Heiting, Judge Elwood Rich (Ret.)



Lisa Visingardi, Virginia Field, Judge Charles Field (Ret.)



Michelle Ouellette, Theresa Han Savage, Lisa Visingardi



Bill DeWolfe, John Higginbotham, Ellen Stern



Chris Peterson, Jonathan Lewis



Current Affairs *(continued from page 19)*

from interfering with California's permissive medical marijuana policies. In March 2003, U.S. District Judge Martin Jenkins refused to grant an injunction. In December 2003, the 9th Circuit Court of Appeals overruled him, saying that possession and use of marijuana for medical purposes does not have a substantial effect on interstate commerce. Ashcroft appealed.

Now, the U.S. Supreme Court is faced with a Hobson's choice: follow its own chain of recent decisions limiting federal intrusion into state sovereignty under the Commerce Clause, or maintain that the federal government has power to regulate the intrastate, non-commercial use of marijuana. The controversy places two historic cases on a collision course. The infamous landmark case *Wickard v. Filburn*, 317 U.S. 111 (1942) held that the federal government could prevent a farmer from growing wheat for his own use because making your own bread impacts interstate commerce indirectly by theoretically reducing consumption of out-of-state baked goods.

That decision was disapproved in the watershed case *U.S. v. Lopez*, where the Supreme Court slapped some legislative hands after Congress passed a law forbidding the possession of a firearm within a school zone (the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(a)). The idea that a gun is subject to regulation under the Commerce Clause because it might have come from out of state did not pass the judicial giggle test – in this case, the substantial effect test. But what effect could home-grown wheat – or marijuana – have on interstate commerce?

It's "fungible," says Justice Kennedy. In other words, you can swap home-grown pot for store-bought pot. As the *Wickard* court put it, "... if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."

The smart money says that the Supreme will rule in favor of the feds. But there is local precedent that says otherwise. About 30 years ago, in Department 1 of Riverside's historic courthouse, a certain judge was approached by a deputy sheriff, accompanied by a deputy district attorney, who knew of a hardship case – a very sick woman – who needed to alleviate her illness. And, it just so happened, the deputy sheriff knew where he could put his hands on a few kilos of high-grade cannabis: the evidence locker. So the deputy sheriff and the deputy district attorney asked the judge to sign an order releasing the "evidence" to the sick woman. He did.

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



by Rick Lantz

Protect Yourself

We live in a Protect Yourself World. Whatever happened to taking a stand and sticking to it, no matter what the consequences? Today our language is sprinkled with “maybes,” “probablys,” “could bes,” “let’s hope,” and yadda yadda yadda.

I’m just as much a protector as the next guy. During my legal practice, self-serving letters to my not-so-worthy adversaries abounded with facts shaded in favor of yours truly, which of course drew counter-missives depicting me as a lying no-goodnik. All in a day’s work. Also, how often did I coach my clients before testifying to qualify their answers with, “To the best of my recollection,” “I don’t recall at this time,” “That may be so but I can’t swear by it”, and yadda yadda yadda. And speaking about clients, like clockwork, following a telephone call, out would come that memo pad memorializing our conversation to the nth degree, since there is as much trust between attorney and client as between cobra and mongoose.

Everywhere you look, it’s cover, cover, cover. Example: In today’s sports section, the Las Vegas point spreads between National Football League teams was published, immediately followed by the telephone number of Gamblers Anonymous. It’s as if the paper is saying, “All of you uncontrollable gamblers can get help, after you make your bets with your bookies using the point spreads we’ve provided as a community service.”

How about those raucous beer commercials where downing those brewskis makes you a man, ending with the somber words, “Drink responsibly.” I say, “Drink responsibly” is a poor excuse for butt covering. What they should show is the telephone number of Alcoholics Anonymous. Now that’s really covering your tush.

My hat’s off to the cigarette companies, which are masters at the art of protecting the old booty. A Camel print ad reads, “Surgeon General’s Warning: Smoking causes lung cancer, heart disease, emphysema, and may complicate pregnancy.” That covers a wide swath of booty, but wait. Salem did the ultimate, with a stroke of genius: “Surgeon General’s Warning: Quitting smoking now greatly reduces serious risks to your health.” That warning covers every serious malady that can befall the human race. “See, we told you to quit smoking. Don’t blame us for that fatal, insidious, pain-racking lung cancer.”

But the industry that has written epics on the way to protect is the pharmaceuticals. Viagra. The erectile dysfunction treatment that started it all. By the way, have you noticed the new ads? No longer old-timers with a twinkle in their eyes. Now men in their 30’s to 40’s, with sly, guess-who-got-it grins and devil horns sticking up behind their heads. But, oh my, what could befall you if you partake. Viagra can cause some side effects. These effects are usually mild to moderate and include headaches, flushing of the face, upset stomach, temporary changes in color vision, an erection that last more than four hours (that’s bad?), heart attack, stroke, irregular heartbeat and death. Don’t sweat the death part, as it will only be mild to moderate.

But the mother of all protectors of the booty is Lipitor. Lipitor is used to lower cholesterol and to reduce the risk of heart attack. Get ready for the risks: chest pain, facial edema, fever, neck rigidity, vomiting, rectal hemorrhage, hepatitis, pancreatitis, bronchitis, pneumonia, dizziness, amnesia, abnormal dreams, decreased libido, acne, skin ulcers, impotence, vaginal hemorrhage, urinary incontinence, and the triumvirate of constipation, diarrhea and flatulence. My, oh my, I hope the last three don’t happen at the same time, what a mess that would be.

Well, there you are, from gambling to booze to smokes to pills. Masters all at the fine art of *derrière* defense.

Oh, one last thing. Reading this essay might cause impatience. I figure if it actually happens, I’m covered.

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



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Office Space Available

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



MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective January 31, 2005.

Casey Clements –

Sole Practitioner, Rancho Cucamonga

Michael J. DiVita (A) –

The Justice Connection, Moreno Valley

John C. Fitzgerald –

Sole Practitioner, Murrieta

James D. Mercer –

Sole Practitioner, Lake Elsinore

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