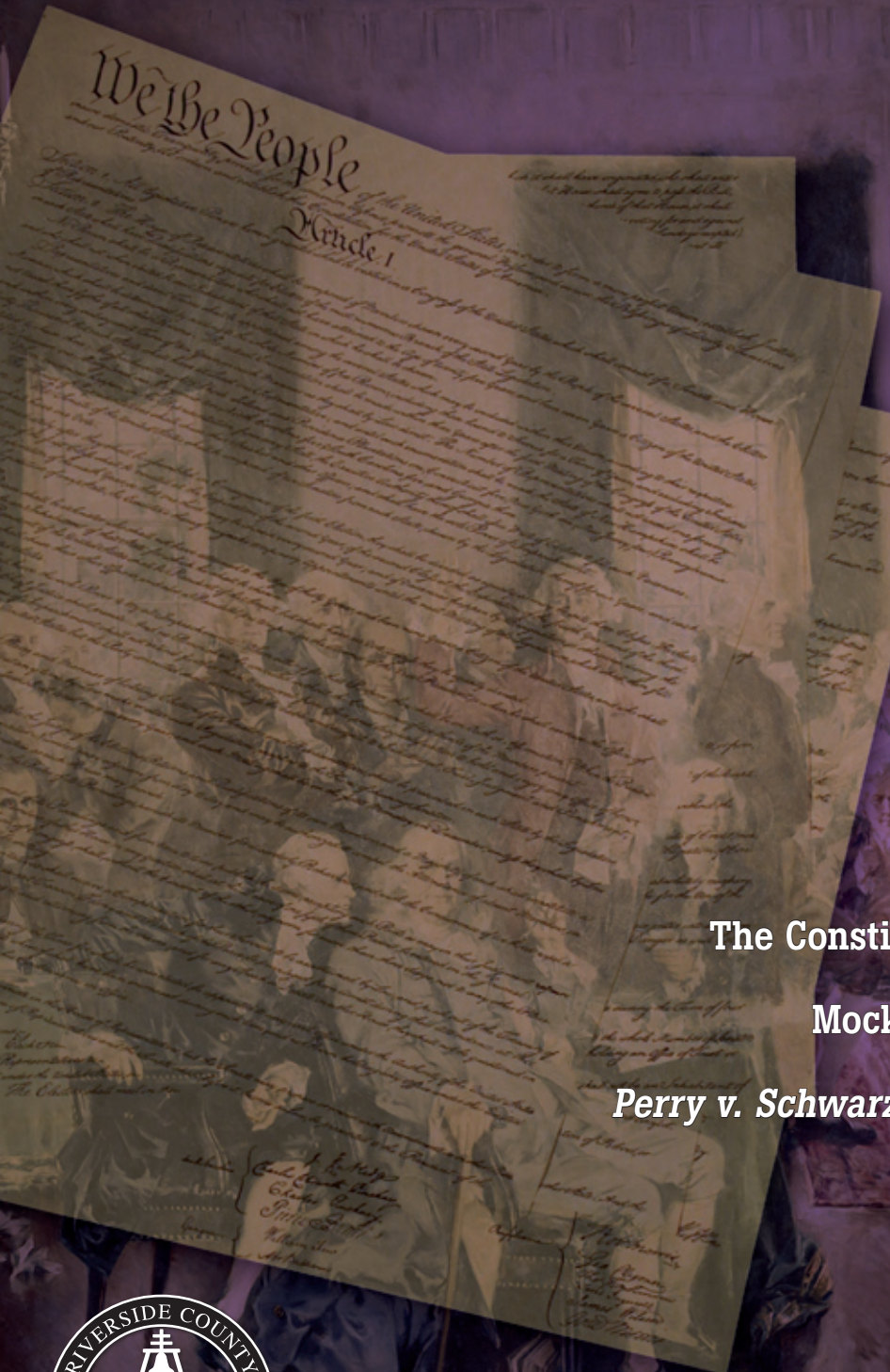


# RIVERSIDE LAWYER

July/August 2011 • Volume 61 Number 7

MAGAZINE



## In This Issue:

**The Constitution and American Citizenship**

**Mock Trial and the First Amendment**

***Perry v. Schwarzenegger* and Marriage Equality:  
Where Do We Stand?**

***Camreta v. Greene***

***Montana v. Wyoming***

**If It's on the Internet, It Must Be in the Public  
Domain, Right?**



The official publication of the Riverside County Bar Association

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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 6<sup>th</sup> 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

## JULY

**27 RCBA Bar Publications Committee Meeting**  
Noon – RCBA Boardroom

**Federal Bar Association, IE Chapter**  
George E. Brown, Jr., U.S. Courthouse -- Noon  
“Zealous Representation and Ethical Considerations”  
Speakers: Alan H. Schonfeld and Cecelia Preciado  
(MCLE-Ethics 1 hr.)

**29 Old Fashioned, Cutting-Edge Lawyering**  
RCBA John Gabbert Gallery ~ 1:30 p.m. to 4:30 p.m.  
Speakers include Com. Michael McCoy, Judge Irma Asberry, Judge Randall White, Judge John Evans, Judge Dale Wells and court managers.  
(MCLE: One hour general, two hours ethics)  
No cost to RCBA members, \$25 for non-members  
RSVP to the RCBA (951) 682-1015 or rcba@riversidecountybar.com

**Temporary Judge Training**  
San Bernardino County Courts  
San Bernardino Superior Court – Rancho Cucamonga Training Room  
2:00 p.m. to 4:00 p.m.  
(MCLE 2 hrs.)

## AUGUST

**4 Justice John G. Gabbert Historic Oral Argument and Lecture Series**  
*Brown v. Board of Education*  
Court of Appeal – 3:00 p.m.  
3389 12th Street, Riverside  
RSVP: Paula Garcia @ (951) 248-0212  
(MCLE-General 1 hr.)

## SEPTEMBER

**5 Holiday – Labor Day**  
RCBA Offices Closed

**7 Bar Publications Committee**  
RCBA - Noon

**14 Mock Trial Steering Committee**  
RCBA - Noon

**15-18 State Bar of California 84th Annual Meeting**  
Long Beach

**21 RCBA Annual Installation of Officers Dinner**  
Mission Inn, Music Room - 5:30 p.m.



**In the June 2011 issue, we failed to acknowledge that the cover photo was taken by Jim Zuckerman. We are grateful that Mr. Zuckerman allowed the RCBA to publish his photograph on the cover of the *Riverside Lawyer*.**



# President's Message

by Harlan Kistler

It is hard to believe that this is my last monthly article for the *Riverside Lawyer*, and it is even more difficult to imagine where the time went. I can honestly say that this was a very rewarding experience for me in so many ways. First, I experienced first-hand the very wonderful individuals working behind the scenes who make this association work as well as it does. This includes the RCBA board and staff, our judiciary, our chairpersons, and the hard-working individuals assisting with the Mock Trial, pro bono and mediation programs. I observed the impact our volunteers' efforts have had on the community.

Since I was sworn in as president, I witnessed many of you volunteer your efforts and participate in many exciting events. We celebrated Judge Rich's 90th birthday, while sadly saying goodbye to Judge Victor Miceli and our past bar president, Aurora Hughes. We welcomed new attorneys to our legal community and provided them with the "Bridging the Gap" experience. We honored many high school students with good citizenship awards and assisted many more through the Mock Trial program. We donated food and blood and provided hundreds of attorney hours for pro bono services, mediation services and everything else necessary to help our community. We have a lot to be proud of as a members of this association, which provides so much to our community.

Initially, I thought this past year was going to be a spine-breaking year, as I had responsibilities as King High School head wrestling coach, panel mediator with the Riverside Superior Court, and youth wrestling coach, not to mention my law firm's litigation schedule. I checked my blood pressure more this year than at any other time in my life. As my term comes to an end, I want to extend my

gratitude and appreciation to those who assisted me through the year – Executive Director Charlene Nelson, firm manager Kerri Holstein, King High School team mom Lynn Boal, and of course my wife, Lori, for her support, understanding and unfailing love. I have had a wonderful year. Thank you for allowing me the privilege of serving as your president.

I also want to thank the RCBA board members – Robyn Lewis, Chris Harmon, Jackie Carey- Wilson, Chad Firetag, Jim Manning, Kira Klatchko, Tim Hollenhorst and Jean Serrano. I want to extend special thanks to Harry Histen for standing in for me on one occasion, when my schedule prevented my participation in an event. I know that the new board will continue its fine work and continue to improve the benefits and assistance that we offer our members and the impact that we have in our community. I welcome our new board members, Jack Clarke, Jr. and Richard Roth, and look forward to their leadership and vision on the RCBA board.

I want to thank the bar association staff – Lisa Yang and Sue Burns – for their hard work. I want to thank the Publications Committee – especially Jackie Carey-Wilson – for their efforts in publishing our monthly articles. I want to thank the chairs of our committees and sections for scheduling quality programs for our members during the year.

Have a wonderful summer! I hope to see you at our installation dinner on September 21, at 5:30 p.m. at the Mission Inn.

*Harlan B. Kistler, President of the Riverside County Bar Association, is a personal injury attorney for the Law Offices of Harlan B. Kistler.*



## MCLE WORKSHOP

### “OLD FASHIONED, CUTTING-EDGE LAWYERING”

On July 29, 2011, the Riverside Superior Court will be presenting “Old Fashioned, Cutting-Edge Lawyering,” an informative and dynamic skills-based workshop with emphasis on persuasion, shaped by professionalism, civility and ethics, utilizing proven principles and evolving techniques and technology. Presenters include Commissioner Michael McCoy, Judge Irma Asberry, Judge Randall White, Judge John Evans, Judge Dale Wells, and court managers. This skills-based workshop will go outside the box while staying within the lines, focusing on the 80/20 principle, technology principles, and architectural principles. The training, which is co-sponsored by the court and the Riverside County Bar Association, will be held from 1:30 p.m. to 4:30 p.m. in the John Gabbert Gallery located on the third floor of the RCBA building in Riverside (4129 Main Street). Participants will receive the following MCLE credits: one hour general and two hours ethics. Please call the Riverside County Bar Association at (951)682-1015 to register. RCBA members free and \$25.00 for non-members.



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# BARRISTERS PRESIDENT'S MESSAGE

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*by Jean-Simon Serrano*



My term as President of the Riverside County Barristers has come to an end. Reflecting on the past year, I'm proud of what the Barristers were able to accomplish. The January meeting was touted as the first public speaking event by newly elected District Attorney Zellerbach. This event was a huge success, with over 170 people in attendance, including local press.

March was an exciting meeting, with my mentor James Heiting, along with a guest, giving a great speech on the prevalence of

substance abuse within the legal profession.

April saw another blockbuster event, at which we had the managing partners of several local firms speak on the topic of business development. This event was also hugely successful and showcased the newly opened (at the time) Salted Pig.

In the past year, the Barristers have expanded their membership by many degrees and proven themselves to be a relevant part of the local legal community. In order to effectively manage an organization that I saw to be expanding, I oversaw the amendment of the Barristers bylaws – something that had not been done since 1993. I can proudly say that the Barristers now have a solid set of bylaws by which future boards can govern the organization.

For the first time since I joined the Barristers, we held an official election in which any member could attempt to get on the board. Gone are the days of the previous lock-step system, which made it difficult for eager members to get on the board and get involved.

I'm proud of my board and what we've accomplished this past year and I'm excited to see what the Barristers will accomplish next.

I'm pleased to announce that Scott Talkov of Reid & Hellyer was elected to be the next President of the Barristers. Based on his hard work,

commitment, and dedication to the association this past year, I know that he will do a fantastic job.

Other elected board members are Brian Pedigo (Vice-President) of the Pedigo Law Corporation; Arlene Cordoba (Treasurer) of the Legal Action Group; Amanda Schneider (Secretary) of Gresham Savage Nolan & Tilden; and Sophia Choi (Member at Large) of Riverside County Counsel.

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*Jean-Simon Serrano, president of Barristers, is an associate attorney with the law firm of Heiting and Irwin. He is also a member of the Bar Publications Committee.*



# THE CONSTITUTION AND AMERICAN CITIZENSHIP

*by Donna Thierbach*

Lately, it seems there has been a lot of talk in the news about citizenship, starting with where Barack Obama was born and moving on to the citizenship of illegal immigrants' children born in the United States. I must admit that, although it has been about 20 years since I graduated from law school, I still recall I did not like constitutional law much, and my knowledge of the subject is pretty pitiful. I also did not delve into very many sections of the constitution when I practiced law as a public defender, mostly referring to the Fourth, Fifth and Fourteenth Amendments. However, since this issue is devoted to constitutional law, our editor decided it was time I do a little studying up on the subject. So here we go . . .

## **Who's an American citizen, anyway?**

Boy, was I surprised that citizenship is defined in my beloved Fourteenth Amendment, though of course all I was worried about as a public defender was due process, so I must have skipped over the first sentence! The Fourteenth Amendment defines citizenship thus: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Thus, automatic citizenship is granted to all babies born in the U.S., even if they do not have a parent who is an American citizen or even a permanent legal immigrant. The amendment, a part of post-Civil War reforms, was ratified in 1868 to extend citizenship to freed slaves and their children. The Fourteenth Amendment provides the framework, and section 1401 of Title 8 of the United States Code fills in the gaps. Interestingly, the U.S. remains one of a handful of countries that still grants automatic citizenship to children just because they were born in the country.

Of course, nothing in constitutional law is ever that easy. There are those who argue that this "birthright citizenship" is an improper interpretation of the Fourteenth Amendment. According to them, children born to parents temporarily in the country as students or tourists are not automatically U.S. citizens, since they are not subject to the "jurisdiction thereof," as the Fourteenth Amendment requires; rather, those children are subject to the political jurisdiction of (and allegiance to) the country of their parents. It then follows that the same would apply to the children of illegal aliens, because children born in the U.S. to foreign citizens would be citizens of their parents' home country.

## **Why all the recent debate about citizenship?**

The amendment has recently been controversial in the American public political debate because of poor, illegal immigrants from Mexico and Central America coming to the U.S. and giving birth.

However, there is another group of people arriving in the U.S. to have children. Recently, the Los Angeles Times reported a story about unlicensed birthing centers discovered in a residential neighborhood in San Gabriel, California. According to the newspaper, pregnant Chinese women traveled to the U.S. to give birth, so their children would be American citizens. These women were relatively wealthy and here legally on tourist visas. Most of them returned to China with their American babies, but their children now can easily return in the future.

It was speculated that the Chinese women wanted U.S. citizenship for their children because it provided an insurance policy should they wish to move to the U.S. in the future. Once the children turn 21, they would be able to petition the U.S. government to grant their parents permanent resident status. Additionally, even though there are many opportunities in China, access to a free U.S. public school education and the reduced college costs that come with being an American citizen could be an incentive, as the children can later return, establish residency and take advantage of state-supported schools. It was also suggested that the women were giving birth in the U.S. to avoid China's one-child policy.

What closed down the operation in San Gabriel were simple technicalities, such as building code violations, but the debate about whether this kind of citizenship should be allowed continues.

Some lawmakers have set a goal of limiting automatic citizenship for children born in the U.S. and hope to either trigger a Supreme Court review of the Fourteenth Amendment or force Congress to take action by passing legislation they have drafted on the issue. Iowa Republican Representative Steve King sponsored H.R. 140, while Louisiana Senator David Vitter introduced S. 723. Each bill proposes to limit automatic citizenship to people with at least one parent who is a citizen, is a legal permanent resident, or served in the military. Vitter said in a news release, "Closing this loophole will not prevent them from becoming citizens, but will ensure that they have to go



---

through the same process as anyone else who wants to become an American citizen.”

Those opposed to the bills, including the American Civil Liberties Union, argue equality under the law for every person born in the U.S. is fundamental to our society. Our nation is based on principles of equality, fairness, and opportunity, and every child, regardless of background, is born with the same rights as every other U.S. citizen. It is feared that the alternative would be fundamentally unjust and create a permanent racial subcaste. They argue the framers of the Fourteenth Amendment codified the principle of citizenship at birth to ensure that race, ethnicity, or ancestry could never again be used by politicians to decide who among those born in our country are worthy of citizenship.

### **What would it take to amend the Fourteenth Amendment?**

The Constitution is a living and evolving document. There are essentially two ways specified in Article V of the Constitution to propose an amendment, one of which has never been used.

The first method is for a bill to pass both houses of Congress, by a two-thirds majority in each. Once the

bill has passed both houses, it goes on to the states and requires ratification by three-fourths of the states. This is the route taken by all current amendments. Congress will normally put a time limit (typically seven years) on ratification.

The second method is for a constitutional convention to be called by two-thirds of the legislatures of the states, and for that convention to propose one or more amendments. These amendments are then sent to the states to be approved by three-fourths of their legislatures or conventions. This route has never been taken.

Since the ratification of the United States Constitution in 1787, only 33 amendments have received a two-thirds vote from both houses of Congress. Of those, only 27 have been ratified by the states. This citizenship issue is not new. A quick search showed similar bills were introduced in both the 110th and 111th sessions of Congress, and each died in committee. That's politics!

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*Donna Thierbach, a member of the Bar Publications Committee, is retired Chief Deputy of the Riverside County Probation Department.*



# MOCK TRIAL AND THE FIRST AMENDMENT

by Alex Hackworth

The First Amendment is by far one of the most recognized, quoted, and adaptable amendments to the Constitution. Among the many rights given to the people of the United States of America, the right to freedom of speech is one that is always evolving as communication changes with the times. After competing on the Riverside Poly High School Mock Trial team for three years as a pre-trial attorney, I have been able to witness two cases that both took an interesting look at how the First Amendment plays into the modern world and how it affects the rights of people today. The greatest thing about being a pretrial attorney in Mock Trial is that your research into constitutional rights and the law doesn't end with the case briefs provided by CRF in the case packet; it goes on to looking up current events and more case law that relates to the issues presented in the case. The amount of research needed to compete and win in the Mock Trial competition has immensely expanded my knowledge of constitutional law and, in particular, the First Amendment.

Three years ago, the *People v. Lane* Mock Trial case dealt with a First Amendment freedom of speech issue that had pretrial attorneys researching the extent of the protections of freedom of speech in regards to incendiary lyrics performed by musicians. The defendant in that case gave a speech, lit an effigy on fire, and sang a song to a crowd of people who in turn became unruly and frenzied and were accused of starting a fire at a nearby building. The goal of the defense pretrial attorney was to obtain the dismissal of the charge against the defendant of incitement to riot on the grounds that the defendant was making a symbolic political statement, much like the defendant in the landmark *Texas v. Johnson* case, and that the defendant's words were not likely to create imminent, lawless action by those listening. The goal of the prosecution pretrial attorney was to counter the defense argument and keep the charge in for trial. Arguments consisted of references to case law, public policy arguments, and examples of modern orators and musicians who have used words as a means of getting a crowd excited and even frenzied. Throughout the season, team members made connections from the case to the real world and constantly analyzed the First Amendment rights of people in the media at the time.

Two years after *People v. Lane*, pretrial attorneys were faced with another First Amendment issue. This past season dealt with the First Amendment rights of elementary,

middle, and high school students and the effects of a hypothetical anti-bullying statute on students' rights. In this case, *People v. Woodson*, the defendant (Jesse Woodson) was charged with a violation of the Anti-Bullying and Cyber-Bullying Act (also called the ABC's Act). The issue of bullying has become more prominent in schools today, and to be able to research, learn, argue the pros and cons of an anti-bullying statute was interesting. There were many First Amendment issues that were brought up during pretrial arguments in this case, and every one required a deeper understanding of constitutional law and First Amendment rights.

The first issue to be considered was whether or not the advantages and benefits of an anti-bullying statute outweighed students' First Amendment rights. What should be considered bullying and how should it be defined by the legislature were also two key questions that were discussed both in and out of court. Furthermore, what were the least restrictive means that could be employed to ensure the safety of students, not only in the middle school in the Woodson case, but also in all schools?

To prepare for arguments, attorneys looked at current cases of bullying and used these incidents as examples to show that severe bullying is a harmful class of speech that can be as serious as forms of unprotected speech like profanity, obscenity, libel, and fighting words. Additionally, attorneys cited case law like the 1969 Supreme Court case of *Tinker v. Des Moines* or the 2007 Supreme Court case of *Morse v. Frederick*, which established that there is a delicate relationship between the rights of school authority to restrict student speech and the First Amendment rights of students while on campus. Also, more recent case law regarding bullying in schools was discussed, such as the case of *Evans v. Bayer*, which dealt with online or cyber-bullying.

It was fascinating to see a current issue of First Amendment rights being debated in court and even more fascinating when the constitutional knowledge obtained from the Mock Trial season was applied outside of court. Mock Trial has been a great learning experience and has sparked my interest in understanding and keeping up to date with constitutional law.

Alex Hackworth will be a senior at Poly High School this coming school year.



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# PERRY V. SCHWARZENEGGER AND MARRIAGE EQUALITY: WHERE DO WE STAND?

by Christopher J. Buechler

There is nothing like a highly controversial issue in the courts to bring up issues regarding civil procedure, especially the issue of standing.<sup>1</sup> Currently, the Ninth Circuit is considering the case of *Perry v. Schwarzenegger*, in which, on August 4, 2010, the Hon. Vaughn R. Walker held California's Constitutional amendment known as Proposition 8,<sup>2</sup> which states, "Only marriage between a man and a woman is valid or recognized in California," was unconstitutional as violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>3</sup> Oral arguments in the appeal were heard in front of a three-judge panel of the Ninth Circuit on December 6, 2010 and were broadcast on C-SPAN. But besides standing and the broader issue of gays' and lesbians' right to marry, this case has raised a few other interesting procedural and substantive issues in the courts.

## Standing in the Ninth Circuit

The major issue the Ninth Circuit addressed in oral arguments was standing. The reason standing is at issue in this case is because the governor (Arnold Schwarzenegger) and the attorney-general (Jerry Brown) declined to file an appeal of the district court's decision, leaving it up to proponents of Proposition 8 to bring the appeal to the Ninth Circuit. However, since the proponents are not enjoined by the ruling and were defendant-intervenors, not named defendants, in the case, the court is suspicious of any injury they may suffer as a result of the ruling. Thus, the court had the parties brief whether a proposition's proponents have standing to appeal a federal district court ruling when a state actor with appropriate standing declines to do so. An appeal was also brought by a deputy county clerk from Imperial County, but the court ruled that as a deputy and not the county clerk, she did not have standing to appeal.<sup>4</sup> As to the proposition's proponents, the Ninth Circuit has certified a question to the California Supreme Court asking:

"Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so."<sup>5</sup>

Based on the oral argument, the Ninth Circuit seems concerned that without such a right to intervene, the governor and attorney general have a de facto veto power over initiatives that are ruled unconstitutional. The California Supreme Court has agreed to take up the question, having already received briefs on the matter, and is expected to hear oral arguments on the issue as early as September 2011.

## Proponents' Motion to Set Aside Judgment

At this point, we would expect parties interested in this matter to wait for the California Supreme Court to decide the certified question. But on April 6, 2011, a published interview with the Hon. Vaughn R. Walker, then retired, revealed that he had been in a long-term committed relationship with another man for the past 10 years. The defendant-intervenors quickly filed a motion to vacate Judge Walker's ruling under 28 U.S.C. § 455, alleging that Judge Walker had a substantial non-pecuniary interest in the case and that his same-sex relationship status reasonably called into question his impartiality in handling the matter.<sup>6</sup> The Hon. James Ware, to whom the case had been reassigned, heard oral arguments on the issues on June 13, 2011 and issued an order denying the motion the next day. The court held, "In a case that could affect the general public based on the circumstances or characteristics of various members of that public, the

1 See *Elk Grove Unified School District v. Newdow* (2004) 542 U.S. 1 [rejecting a father's challenge to his daughter being compelled to say "under God" in the Pledge of Allegiance because, as a noncustodial parent, he did not have standing].

2 Codified at Cal. Const., art. I, § 7.5.

3 *Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 92.

4 *Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898, 903.

5 *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Jan. 4, 2011) [order certifying a question to the Supreme Court of California], available at <http://courts.ca.gov/1-s189476-question-supreme-court-of-california-1-4-11.pdf>.

6 *Perry v. Schwarzenegger*, No. C 09-02292 (N.D. Cal. June 14, 2011) [order denying defendant-intervenors' motion to vacate], available at <https://ecf.cand.uscourts.gov/cand/09cv2292>.

fact that a federal judge happens to share the same circumstances or characteristic and will only be affected in a similar manner because the judge is a member of the public, is not a basis for disqualifying the judge under Section 455(b)(4).<sup>77</sup> The court set forth several rationales for the decision. First, Judge Walker's potential for marrying his partner in light of his ruling is too attenuated to warrant recusal. Second, "it is inconsistent with the general principles of constitutional adjudication to presume that a member of a minority group reaps a greater benefit from application of the substantive protections of our Constitution than would a member of the majority."<sup>78</sup> And finally, "disqualifying Judge Walker based on an inference that he intended to take advantage of a future legal benefit made available by constitutional protections would result in an unworkable standard for disqualification."<sup>79</sup>

### In Related News . . .

Another notable decision regarding gays' and lesbians' right to marry, or lack thereof, was handed down by another federal court this June. *In re Ballas* involved a joint petition for bankruptcy in the Central District of California's Los Angeles court by a same-sex couple who were married in California during the brief window when such marriages were legal. The bankruptcy trustee moved to have the joint petition set aside under the federal Defense of Marriage Act (DOMA). The court denied the trustee's motion in a memorandum of decision signed by 20 of the court's bankruptcy judges, ruling that DOMA violated the petitioners' Fifth Amendment equal protection rights.<sup>10</sup>

*Christopher J. Buechler, a member of the RCBA Publications Committee, is an attorney in Riverside. He can be reached at [chris.buechler@gmail.com](mailto:chris.buechler@gmail.com).*



7 *Id.*

8 *Id.*

9 *Id.*

10 *In re Ballas*, No. 2:11-bk-17831 (Bankr. C.D. Cal. June 13, 2011) [memorandum of decision], available at <http://metroweekly.com/poliglot/57794777-DOMA-Memorandum-of-Decision.pdf>.

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# CAMRETA V. GREENE

by Kristina M. Robb

On May 26, 2011, the United States Supreme Court decided the case of *Camreta v. Greene* (2011) \_\_\_ U.S. \_\_\_ [131 S.Ct. 2020]. The Ninth Circuit had held that a social worker (Camreta) who interviewed an elementary school student (S.G.) at her school without parental consent or a warrant violated the Fourth Amendment, but nevertheless was free from liability based on qualified immunity. The Supreme Court concluded that a government official who is a prevailing party on qualified immunity grounds may nevertheless be granted review of the constitutional issues decided by the court of appeals. However, the court concluded that the circumstances of the case rendered the issue moot and declined to decide the constitutional issues, instead vacating the portion of the Ninth Circuit's opinion regarding the Fourth Amendment violations.

This case began in 2003, after S.G.'s father, Nimrod Greene, was accused of sexual abuse of an unrelated child, leading to an investigation of possible abuse of S.G. by Nimrod. Camreta was assigned to the case; he interviewed S.G. at her elementary school, without her parents present or a warrant, and was accompanied by a uniformed and armed police officer, Alford. Information obtained from that interview led to the filing of a dependency action, the institution of a safety plan and criminal charges against Nimrod. In the end, the dependency case was resolved and the criminal charges as to S.G. were dropped.

S.G., through her mother, Sarah Greene, filed the underlying action in the district court, naming various parties, including Camreta and Alford, and raising numerous causes of action, including that Camreta and Alford's in-school seizure of her violated the Fourth Amendment. The district court granted summary judgment in favor of the defendants.

Sarah appealed to the Ninth Circuit, which ruled on the merits before ruling on the qualified immunity defense. It concluded that in the absence of a warrant, a court order, exigent circumstances or parental consent, the seizure (in-school interview) violated the Fourth Amendment. The court rejected reliance on the "special need" exception, based upon the presence of Alford during the interview, which evidenced law enforcement's deep involvement with the activity. However, it went on to hold that Camreta and Alford were entitled to qualified immunity because their conduct did not violate a clearly established statutory or constitutional right of which a reasonable person would have known.

Alford and Camreta petitioned the Supreme Court to review the Ninth Circuit's ruling that their conduct violated the Fourth Amendment. The decision was split 7 to 2, with Justice Kagan writing for the majority, joined by Justices Roberts, Scalia, Ginsburg, and Alito. Justice Scalia wrote a concurring opinion, as did Justice Sotomayor, who was joined by Justice Breyer. Justice Kennedy wrote the dissent and was joined by Justice Thomas.

The majority opinion first tackled the propriety of accepting a request for review from a prevailing party, concluding that the Supreme Court generally may review a lower court's constitutional ruling at the behest of a governmental official granted immunity. Under 28 U.S.C. § 1254(1), the court is given unqualified power to grant certiorari upon the petition of any party, including the winning party.

S.G. objected to the review based on the Article III requirement of a case or controversy. The court explained that it has the authority to adjudicate legal disputes only in the context of a case or controversy, meaning a litigant has demonstrated a personal stake in the suit. This must be shown by the litigant suffering injury in fact, which is caused by the conduct complained of, and which will be redressed by a favorable decision. The opposing party also must have an ongoing interest in the dispute, and the interests of both parties must remain throughout the litigation. The court found the Article III standard is met in cases of qualified immunity where a decision is reached on the constitutional issue, because the judgment may have a prospective effect on the parties. This is true if the official regularly engages in the conduct deemed to be unconstitutional, in which case, although the official prevails on qualified immunity grounds, he or she still suffers injury from the adverse constitutional ruling.

Turning to S.G.'s second objection, based on the judicial policy of rejecting appeals by a prevailing party, the court stated that on occasions where a policy reason is of sufficient importance, the appeal should be allowed. Such was the case here, where the constitutional decision was not mere dicta, but a ruling that had significant future effect on the conduct of public officials and the policies of government units to which they belong.

Despite asserting that the constitutional question was sufficiently important to allow review, the court declined to decide the case on the merits, instead finding that it had become moot due to S.G.'s subsequent move

to Florida and her impending 18th birthday. The court concluded that due to these circumstances, S.G. would never again be subject to the Oregon in-school interviewing practices whose constitutionality was at issue, and therefore she no longer retained a stake in the outcome. Thus, the court concluded it had no live controversy to review.

Returning to the importance of the constitutional question at the heart of the appeal, the court found that in fairness to Camreta, who was entitled to review, the portion of the Ninth Circuit’s opinion that found Camreta’s conduct unconstitutional should be vacated. The court summarized its ruling by stating: “[A] constitutional ruling in a qualified immunity case is a legally consequential decision; that is the very reason we think it appropriate for review even at the behest of a prevailing party. [Citation.] When happenstance prevents that review from occurring, . . . [v]acatur . . . rightly “strips the decision below of its binding effect,” [citation], and “clears the path for future relitigation,” [citation].”

In her concurrence, Justice Sotomayor took issue with the court reaching the issue of a prevailing party’s right to seek review, instead concluding that the case should have been dismissed outright as moot. Justice Kennedy, in dissent, argued that the case should have been dismissed and warned that the court’s decision elevated dicta in opinions concerning qualified immunity to the status of a judgment.

*Kristina M. Robb is a deputy with the San Bernardino County Counsel’s office.*



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# LAW DAY 2011

by Kira Klatchko

This past May 9, the entire Inland Empire legal community came together to support a special Law Day event celebrating service to the bench and bar. The RCBA, the San Bernardino County Bar Association, the Federal Bar Association (Inland Empire Chapter), the Western San Bernardino County Bar Association, the Inland Empire Legal Association of Women, and three chapters of the Inns of Court (the Warren Slaughter-Richard Roemer Inn, the Joseph B. Campbell Inn, and the Leo A. Deegan Inn) jointly sponsored the Law Day event, along with the Court of Appeal for the Fourth District, Division Two. Well over 150 members of the legal community attended the function in the Music Room of the Mission Inn. All of the justices of the court of appeal, along with numerous judges and officials from the Riverside and San Bernardino Superior Courts, were in attendance, as was the Chief Justice of the California Supreme Court, Justice Tani Cantil-Sakauye. The community-wide support for the event was no surprise, given that the event honored both the spirit of Law Day, a day of national dedication to the rule of law, and the 20th anniversary of the court of appeal's award-winning and unique mediation program.

The Presiding Justice of the Court of Appeal, Manuel A. Ramirez, emceed the event and recounted the history of the mediation program. Among other things, he said that the mediation program, the first of its kind in the state, has resulted in 941 cases being settled since the program began in 1991. The program's success, he said, is based on the hard work of its volunteer mediators, all 45 of whom donate their time to the court, spending, on the average, four to eight hours on each case. Justice Ramirez recognized each of the mediators and thanked them for collectively mediating over 2,000 cases. He also recognized Jacqueline Hoar and past settlement conference coordinators, all of whom he said have contributed immeasurably to the program's success.

Justice Ramirez also gave a brief history of Law Day and a moving speech about pioneering female attorneys who struggled to gain acceptance in the profession. That speech made a fine introduction for the keynote speaker, a pioneering female attorney and jurist in her own right, the recently confirmed Chief Justice Cantil-Sakauye. Her Honor spoke extemporaneously about the importance of the rule of law in our society and joked about the volume of work set before



Chief Justice Tani Cantil-Sakauye and Riverside County Public Defender Gary Windom

her on her first week as Chief Justice, which included, among other things, a contentious fight about massive budget shortfalls, Justice Moreno's retirement, and the certification by the Ninth Circuit of an issue relating to the Proposition 8 marriage cases. The Chief Justice's remarks were warmly received, and, though she was on a very tight schedule, she made time after the event to speak with attendees, noting that she would be back in the Inland Empire soon.

Photos courtesy of Jacqueline Carey-Wilson



left to right: April Rylaarsdam, Yoginee Braslaw, Jacqueline Hoar, Chief Justice Tani Cantil-Sakauye, and Susan Heiser





*Presiding Justice Manual Ramirez reading the certificate presented to the attorneys who have participated in the Court of Appeal's settlement program.*



*Chief Justice Tani Cantil-Sakauye and Justice John Gabbert*



*Chief Justice Tani Cantil-Sakauye and Jacqueline Carey-Wilson*



*Presiding Justice Manual Ramirez, Chief Justice Tani Cantil-Sakauye, and Justice John Gabbert*



*Chief Justice Tani Cantil-Sakauye and Karen Feld*



*Chief Justice Tani Cantil-Sakauye and Kira Klatchko*

# INTRODUCTION OF CHIEF JUSTICE TANI CANTIL-SAKAUYE

by Presiding Justice Manuel A. Ramirez

On May 9, 2011, the Inland Empire legal community welcomed Chief Justice Tani Cantil-Sakauye at a luncheon in celebration of Law Day. The luncheon was held at the Mission Inn and sponsored by the Inland Empire Chapter of the Federal Bar Association, the Inland Empire Legal Association of Women, the Riverside County Bar Association, the San Bernardino County Bar Association, and the Western San Bernardino County Bar Association. The following is Presiding Justice Manuel A. Ramirez's speech introducing the Chief Justice.

Ladies and gentlemen, in a few moments, I will invite our Chief Justice, the Honorable Tani Cantil-Sakauye, to the microphone, but before I do, and continuing with the Law Day theme, please allow me to share a few thoughts.

In preparing for this event, I couldn't help but realize that many of our [settlement] program's most successful mediators are women. Women have not had an easy go of it in the legal profession, although they have tackled the task of breaking into and rising up through the ranks of the legal field with strength, intelligence, and determination.

That task, having been undertaken by a great number of women, known and unknown, through the past century and a half, is by no means complete.

But it is getting easier, and it's getting easier because of women like our guest, Chief Justice Cantil-Sakauye, a pioneer in a long line of pioneers, plodding down the long and difficult path toward gender equality in a demanding profession still dominated by men at the upper levels.

Shakespeare's heroine Portia in "The Merchant of Venice" assumed the role of lawyer to defeat Shylock's claim for a pound of Antonio's flesh, and, in doing so, became – and I would submit to you, remains to this day – a model for the many women who have endeavored to use and shape the law throughout the centuries.

Those very first women seeking admission to the predominantly male world of the law were certainly in need of such role models.

Involved as they were in the growth and evolution of American law since colonial times, virtually all of the women who tried to make their mark on our justice system faced significant opposition. Indeed, many of the early pioneering women lawyers encountered a tremendous number of obstacles, which of course included both bias and discrimination.

Let me share some vivid examples.

In 1869, Myra Bradwell's application for a license to practice law, made after she had studied the law and passed the Chicago bar exam, was denied by the Illinois Supreme Court, because, in part, of the well-settled law that "wives were prohibited from entering into contracts, inheriting property or obtaining goods and services . . ." The issue arose because Myra Bradwell was both a wife and a lawyer.

Unpersuaded by Mrs. Bradwell's argument that, under the 14th Amendment and Article Six of the United States Constitution, she was entitled to the same privileges and immunities as any other citizen, male or female, including the right to practice law, the United States Supreme Court denied her appeal. Three concurring justices stated, in part, and I quote, "The harmony, not to say the identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."

Seventeen years later, in 1890, the Illinois Supreme Court, now acting on its own petition, finally granted Myra Bradwell's license to practice law. Sadly, Mrs. Bradwell passed away a short four years later.

Then there is the case of Rhoda Lavinia Goodell. Her petition to practice law in the State of Wisconsin was denied by the Wisconsin Supreme Court in 1879.

Listen, now to the words written by Chief Justice Edward G. Ryan, which I quote: "The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature . . ."

And let us consider Clara Foltz, whose application in 1878 to the University of California Hastings College of Law in San Francisco triggered a ruling by the school's board of directors that women would not be admitted, in part, as one of the directors told her, because the "rustle of the ladies' garments would distract the attention of the young gentlemen."

Thankfully, in an 1879 mandamus action to compel the board of directors to admit Clara Foltz, the California Supreme Court unanimously held that "[f]emales are entitled, by law, to be admitted as attorneys and counsellors in all the courts of this State, upon the same terms as males."

Clara Foltz became the first woman to be admitted to the California bar.

And finally, I would be remiss if I didn't mention Litta Belle Campbell. Litta Belle Campbell graduated from the USC School of Law in 1913 and became the very first woman deputy district attorney, not only in California, but in all of the United States. She had a brilliant mind and a passion for the law, both of which she passed on to her son, our own Joseph B. Campbell, our former presiding justice at this court of appeal.

Based on the efforts of these women and others like them, who broke the ground of the legal profession for women in the 19th and early 20th centuries, many more followed to harrow and cultivate that ground so that women might grow and prosper as lawyers.

Grow and prosper they did, and today both the bench and the bar benefit from the skill and intellect of many women attorneys, judges, and justices. Our own Court of Appeal is fortunate to have two such women on our bench, Justice Betty Richli and Justice Carol Codrington, both of whom are pioneers in their own way.

Justice Richli was the second woman to be entrusted and honored with the office of Associate Justice at this court, being appointed in 1994, and expanding a trail started two decades earlier by another distinguished woman of the law, Margaret J. Morris.

Justice Morris was the first woman Associate Justice in this division, being appointed in 1976, and she was the first woman presiding justice in this entire district.

As did each of these very different trailblazers in the 19th and 20th centuries, Justice Richli has used her particular talents and personality to find and clear the path for women to come with energy and intensity, an enthusiasm for and thorough knowledge of the law, a quick and sharp wit, tempered with humanity, and an abiding commitment to our founding constitutional principles of due process and inalienable rights. She has made her mark on our appellate system by being perhaps the most productive woman associate justice in the entire state, authoring an average of about 185 appellate opinions a year since she came to our bench in 1994. She takes seriously every case that crosses her desk, and she manages her chambers and her case load with alacrity. She has set the bar high in not only quantity but also quality of work.

Our newest justice, Justice Carol Codrington, is a historical figure on our court in her own right, as the first African-American to be appointed to our bench. Although she has been with us only a few months, it is already apparent that she possesses many of the same qualities that make Justice Richli such an outstanding jurist. She is dedicated and hardworking, and we expect great things from her over the course of her anticipated long career on our court of appeal.

While Justice Morris, Justice Richli, and now Justice Codrington were and are still making their marks in our division, other equally phenomenal women were and are making inroads in the courts of appeal around the state.

We are deeply honored and delighted to have as our guest speaker one such woman. Since this is the first of what we hope will be many visits to our area, please let me give you a very brief overview of Chief Justice Tani Cantil-Sakauye's history.

Chief Justice Cantil-Sakauye comes from humble beginnings, the youngest of four children of Filipino immigrants who worked hard on the land in California's Central Valley in order to provide a good life and, most importantly, a good education for their children. She is, as Governor Arnold Schwarzenegger calls her, a "living, breathing example of the American Dream." If I may, let me quote a story she told in an address to a small group of aspiring UC Davis law students a few years ago, which I ran across in the UC Davis Magazine Online (Fall 2010 edition).

Her mother had taken her as a child to a Veterans of Foreign Wars hall without air conditioning, where they sat on metal chairs, to see what she had never seen before, a Filipina

lawyer, Gloria Ochoa, the first female Filipino-American to graduate from the UC Davis School of Law.

"My mother threw me the elbow jab and said, 'You could do that too,'" she recalled. "I didn't know what 'that' was, but I knew the elbow jab, and I knew that whatever Gloria was doing and had done was important, good work for the public."

Following in Ms. Ochoa's footsteps, Chief Justice Cantil-Sakauye graduated from the UC Davis School of Law in 1984. She started her legal career as a deputy district attorney in Sacramento in 1984. She later served in Governor George Deukmejian's administration.

In 1990, Governor Deukmejian appointed her to the municipal court bench, and in 1997, Governor Pete Wilson appointed her to the superior court.

In 2005, Governor Arnold Schwarzenegger appointed her as associate justice on the Third District Court of Appeal in Sacramento, a court not unfamiliar with trailblazing women. Take, for example, Annette Abbott Adams, who, in 1942, became the first woman appellate court justice in California when she was appointed as the presiding justice of the Third District. Or Janice Rogers Brown, who sat on that court until her appointment as the first African-American woman on the California Supreme Court and who is now a federal judge on the D.C. Circuit of the United States Court of Appeals.

And now from that illustrious court, our distinguished guest has stepped into the robes of the Chief Justice of the California Supreme Court.

With her appointment to our highest court, a new era for California begins: We have, for the first time in the history of our state, joined the very small ranks of states in this country that have a majority of women sitting on their supreme courts.

Justice Cantil-Sakauye is not only taking the helm of this historic bench, she is also taking it at a very difficult and demanding time. Her task is not an easy one. She must lead the judicial branch of this state through the murky waters of a budget crisis. She must understand the individual needs of each appellate district, and each division within those districts, and attempt to fairly meet all those needs. She must seek the counsel of learned men and women on all sides of every question and make the decisions that are best for the judiciary as a whole and for the citizens that that judiciary serves.

And she must do all these things while managing the administration of the Supreme Court and while carrying her share of what we all know is an incredibly heavy caseload.

No, her task is not an easy one. But we at Division Two of the Fourth District Court of Appeal believe wholeheartedly that she is up to it. We are excited about and looking forward to her tenure as our Chief Justice. And we are beyond honored that she has agreed to speak at this Law Day event.

Ladies and gentlemen, it is my great privilege to introduce to you the Chief Justice of the California Supreme Court, the Honorable Tani Cantil-Sakauye.



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# MONTANA V. WYOMING

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*by Eli Underwood*

Under Article 3, section 2 of the United States Constitution, the United States Supreme Court has exclusive jurisdiction to resolve disputes between two or more states. In *Montana v. Wyoming* (2011) \_\_\_ U.S. \_\_\_ [131 S.Ct. 1765], the Supreme Court recently had occasion to exercise this often overlooked constitutional power in one of the most contentious legal areas.

Montana, Wyoming, and South Dakota entered an interstate compact concerning the Yellowstone River that Congress ratified in 1950. The compact created three tiers of water rights: (1) pre-1950 appropriative rights; (2) rights to the tributaries of the Yellowstone River; and (3) rights to all waters in the Yellowstone River that were not appropriated before 1950. Specifically, the compact described the pre-1950 right as the right to beneficially use water appropriated from the Yellowstone River, and defined “beneficial use” as depletion of the river.

Both Montana and Wyoming had pre-1950 appropriative right holders. Because pre-1950 right holders had the first priority, each state’s pre-1950 right holders were considered co-equal, except that Wyoming’s pre-1950 right holders could use all of the water from the Yellowstone River to the full extent of their rights, and Montana’s right holders could not compel them to release any water until Wyoming’s pre-1950 rights are satisfied.

In 2006, farmers in Wyoming changed from flood irrigation to sprinkler irrigation, which reduced the amount of return flow to the Yellowstone River. Montana brought a claim before the special master alleging, among other things, that the reduced return flow to the Yellowstone River infringed on the rights of pre-1950 right holders in Montana. The special master found that Montana’s allegations relating to the increased irrigation efficiency failed to state a claim because the pre-1950 right holders were irrigating the same acreage, just with a more efficient method. Montana took exception to the special master’s finding, and the Supreme Court heard the case as within its original jurisdiction.

The Supreme Court held 7-1, with Justice Kagan not participating in the consideration or decision, that Wyoming’s increased irrigation efficiency practices did not violate the terms of

the compact. While the court (per Justice Thomas) found that both states allow an appropriator to recapture and reuse water on its property before it returns to the river under the law of recapture, the law of return flows is unclear. The court found that beneficial use refers to a type of use, rather than an amount of use, and provided a preference for irrigation over power generation, a non-depletive use.

Significantly, the court’s decision focused on the substantive law of the several states, as well as what the court referred to as Western water law generally, as background in interpreting the interstate compact. The court noted settled state substantive law, unsettled state substantive law, and an absence of state law when construing the provisions. The court also questioned, without deciding, whether the substantive water law of the states should be interpreted under 1949 water law or current water law.

Justice Scalia filed a dissenting opinion, concluding that Wyoming’s irrigation practices violated the compact, because it defines “beneficial use” as “depletion” rather than “diversion.” Scalia viewed the question as whether “beneficial use” measures the volume diverted or the volume depleted. Scalia noted that the compact’s definition of appropriative rights excludes power generation. As the irrigation practices increased the amount depleted, he would have held that Wyoming’s practices violated the terms of the compact.

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*Eli Underwood is an associate with Redwine & Sherri11 and a member of the Bar Publications Committee.*



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# IF IT'S ON THE INTERNET, IT MUST BE IN THE PUBLIC DOMAIN, RIGHT?

*by Michael Trenholm*

Well, no, actually. When you're talking about content, such as articles, songs, pictures, images, etc. that are on the Internet, these items are subject to copyright protection, regardless of whether a copyright notice is displayed. Prior to the 1989 revision of the Copyright Act, public distribution of copyrighted subject matter without a copyright notice could result in the work being considered in the public domain, but this is no longer the case. Thus, virtually anything on the Internet is likely copyrighted, and the copyright is owned by the author or someone else, whether a copyright notice is displayed or not.

But lots of people copy and paste content off of the Internet, and it doesn't seem to be a problem. Indeed, we all get copies of jokes, anecdotes, articles, etc. that our friends send to us from time to time. One of the truly wonderful things about the Internet is that it makes sharing of content so easy. While these shared items may be subject to copyright protection, there are a number of reasons why it may not pose a problem.

First, lots of content on the Internet is effectively public domain. It may not be identified as such, but lots of people are posting things online for the express purpose of those items being disseminated. Generally, the terms of service of any particular website will spell out exactly what you can and can't do with the content on the site. It pays to read the terms of service carefully. For those of you who cut and paste articles from the New York Times on your favorite public political forum, you'll be interested to note that the NYT's terms of service include the following language: "You may not modify, publish, transmit, participate in the transfer or sale of, reproduce, . . . create new works from, distribute, perform, display or in any way exploit any of the Content or Services (including software) in whole or in part." The only exception they make is to download content for personal use only.

Pretty harsh terms of service. Cutting and pasting articles is thus likely not permitted by the New York Times, or by most commercial news sites, for that matter.

But what about fair use? The fair use doctrine permits some reproduction and use of copyrighted subject matter. Often people believe that, if the purpose of the use is educational, then the copyrighted subject matter can be used without compensating the copyright owner, as it is a fair use. But the purpose of the use is only one of four factors

that determine whether a use of copyrighted subject matter is a fair use. The factors are listed in 17 U.S.C. § 107 and also include the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.

In fact, it is often the last factor, the effect on the market for or value of the work, that is the key determinant of whether a use of copyrighted subject matter is a fair use. By way of illustration, let's say a well-meaning educator realized that not all of her students could afford an expensive but brilliantly informative textbook, and that she could solve this problem by photocopying a bunch of copies of the book and distributing them to the class. Her intentions are pure; the use is only for educational purposes, to let those kids get ahead in life. But it does destroy the market for the textbook. Clearly it is not a fair use, regardless of the intentions of the teacher.

But here's another example. A substantially less pure-hearted lawyer type is writing an article about copyright and the Internet and, to illustrate a point, quotes a portion of the New York Times terms of service in his article. He did, in fact, reproduce content that was on the New York Times website and therefore, arguably, "exploited" it. But he did it for educational purposes. He took only what he needed to make his point. He wasn't making any money off of it, and the use did not have any effect on the potential market for the content. The less pure-hearted lawyer type is probably protected by fair use. Or he can hope that the New York Times has a sense of humor about these sorts of things.

But what if you're the content provider and some ne'er-do-well reproduces the work that you've sweated to create? What remedies do you have? Like all answers to tricky legal questions, the answer is that it depends.

One of the big things it depends on is whether you've bothered to file a copyright registration before the nefarious infringer absconded with your work. You don't currently have to have a copyright registration to claim copyright protection. But if you filed your registration prior to the infringement occurring or within three months of publication, you are entitled to statutory damages of up to \$150,000 per infringement (if it's willful) under 17 U.S.C. § 504 and also attorney fees under 17 U.S.C. § 505. If you don't have a registration, you may be limited to your actual damages or

the infringer's profits, and you may have to pay your own attorney fees.

Actual damages or infringer's profits can, however, be difficult to prove. Say, for example, you're a manufacturer that has a catalog in which your products are illustrated and described. The illustrations and descriptions are copyrighted subject matter. Now let's say your competitor decides to be lazy, and instead of illustrating and describing his product, which is pretty much the same as yours, he simply lifts your illustration and description.

What are your actual damages? It might be kind of hard to prove that everyone who bought his product would have bought yours, but for the ripped-off illustration and description. His profits? Again, it may be hard to attribute his sales to the purloined material. However, if you had a registration on file before the infringement occurred, you could at least get your attorney fees and also have the court assess statutory damages.

Oddly, many content providers don't register their copyrighted subject matter, then find themselves in a position of having a good case of copyright infringement on the merits that isn't justified in terms of economics. If they file the registration, that equation changes.

And it's not hard to file a registration. It's a one-page electronic form on the Copyright Office's website that asks vexing questions, such as when did you create the work, and what is it called. The fees are also pretty reasonable – 35 bucks per application. All the information and forms can be found at [www.copyright.gov](http://www.copyright.gov). Interestingly, you can copy some (but not all) public federal government works wholesale without running the risk of copyright infringement, as copyright protection is not available for "works of the United States Government" under 17 U.S.C. § 105.

Nonetheless, it pays to be careful when you're reproducing or making use of content from the Internet, as it may be copyright protected, even if it isn't expressly identified as such.

*Michael Trenholm is the managing partner in the Riverside office of Knobbe Martens Olson & Bear, LLP.*



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# IN MEMORIAM: THE HONORABLE JAMES EDWARD PEARCE

by Kevin Miller and Jacqueline Carey-Wilson

*Note from Jacqueline Carey-Wilson, Editor:*

*Judge James Edward Pearce, my dear uncle, passed away at his home in Murrieta, California on June 4, 2011. My uncle was surrounded by family at the time of his passing and I was honored to be there. At 90, Uncle Jim was the patriarch of our family. He was a loving and caring person and will be deeply missed.*

Judge Pearce was born in Farrell, Pennsylvania on March 6, 1921, the second child of William Wade and Annabelle Diamond Pearce. He was one of 10 children and spent his formative years contributing to his family and community during the Great Depression. He graduated from Farrell High School in the summer of 1939.

After graduation, Judge Pearce worked at Westinghouse Corp. in Sharon, Pennsylvania and then at Carnegie-Illinois Steel in Farrell. While at Carnegie, he started his own confectionery and gambling store in Farrell called "Jim's Place." In the winter of 1941, he enlisted in the Army Air Corps, and when war broke out, he was assigned to Maxwell Air Field in Montgomery, Alabama. On July 25, 1942, he married his sweetheart, Marie Deichler Masury, Ohio. Judge Pearce served for almost four years in the Air Corps and spent a little over one year in the South Pacific during World War II. He continued his service with the Air Force Reserves for the next 20 years.

In 1945, Judge Pearce was discharged from active duty and returned home to New Castle, Pennsylvania, where he met his one-year-old daughter, Judy Marie, for the first time. He attended Youngstown College and worked at United Engineering and Foundry and at Youngstown Sheet & Tube Co. In 1946, James, Jr. was born, and in 1947 Judge Pearce and the family moved west to Los Angeles, where he attended the University of Southern California.

While in college at USC, Judge Pearce became a Los Angeles County Deputy Sheriff. After six years as a deputy, he served eight years as a clerk for the Superior Court. His time in the courtroom inspired him to become a lawyer. After graduation from USC, he went to Southwestern Law School, graduating in 1963. Judge Pearce and Marie



*The Honorable James Edward Pearce*

also added William, John, and Joanyyn to their family. Judge Pearce's sister, Dorothy Pearce Carey, her husband, John P. Carey, and his brother, Richard Pearce, also migrated to California and established families, in Compton and then Cerritos.

While in private practice, Judge Pearce had offices in Bell and Artesia, and he became politically active. In these years, he was a member of the Cerritos Redevelopment Agency that brought in the Los Cerritos Shopping Center and the Cerritos Auto Mall, and in 1974, he was elected to the Cerritos City Council.

Judge Pearce was elected to serve as a judge of the Los Angeles Municipal Court in 1976. He sat in the Norwalk Courthouse, which is in the Southeast District. According to Christine Fuentes, who clerked for Judge Pearce, and Deputy Bob Meredith, who was his bailiff, Judge Pearce was in charge of his courtroom. He would arrive at 6 a.m. to prepare his cases for the day, and he would sometimes keep court in session until 7 p.m. He was fair and treated everyone who appeared before him with respect. He presided over many interesting cases, including the criminal prosecution of the president of Jalisco Mexican Products, Inc., for 60 misdemeanor criminal violations of state agriculture, health, and safety laws, after an investigation into a tainted cheese epidemic that killed as many as 40 people.

Judge Pearce retired in 1991 and sat on assignment in Los Angeles and San Bernardino County until he was 80. By that time, he and Marie had resettled in Nuevo, California. He spent his years in retirement researching his family genealogy, tracing the Pearce lineage back to John Pearce, "the mason" (so-called to distinguish him from another contemporary John Pearce), who settled in Rhode Island in the 1600's. Judge Pearce had some health challenges in the past two years and moved closer to family in Murrieta, California in 2009. This did not deter him from working. At 90, he was writing a book on the history of the Pearce family.

Judge Pearce leaves, to mourn, his wife of almost 69 years, Marie; his son, William Pearce, and his wife, Dawneen Pearce, of Yorba Linda; his son, John Pearce,



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and his wife, Lyn Pearce, of Lake Elsinore; and his daughter, Joann Miller, and her husband, Kevin Miller, of Murrieta. He also leaves seven grandchildren – Derek, Carin, Shawn, Jamie, Megan, Ryan and Haley Pearce – and three sisters – Mary Hogue, Caroline Pearce, and Virginia Hamilton, along with the latter’s husband, Richard Hamilton. All three sisters had flown in from New Castle, Pennsylvania to be with him during his final days. He also leaves behind his brother, Richard Pearce, and his wife, Gloria Kirkland Pearce, and brother-in-law, John P. Carey, in addition to numerous nieces and nephews throughout California, Pennsylvania, and Ohio. He is preceded in death by his two oldest children, Judy Pearce and James Pearce, Jr., as well as his brothers, Charles Pearce, John Pearce, and William Pearce, and his sisters, Dorothy Carey and Marjorie Drenzo.



# JUDICIAL PROFILE: THE HONORABLE STEVEN G. COUNELIS

by Sophia Choi

I had the pleasure of becoming acquainted with the Honorable Steven G. Counselis through a mutual friend from the Riverside County District Attorney's office during the judge's electoral campaign in 2010.

Judge Counselis took the oath of office on January 3, 2011 during a private ceremony. His public investiture ceremony occurred on January 7, 2011, in Historic Department No. 1 of the Riverside County Superior Court. Judge

Robert McIntyre, as the predecessor of Judge Counselis in Judicial Office No. 21, administered the oath of office (pictured). Judge Counselis offered the following remarks at the investiture:

"As public servants, we are stewards of the public trust for the benefit of the common good, preserving our civil society by respecting the rights and responsibilities of all people.

I offer these thoughts only as a reminder that while our role and responsibilities are great, our time in this role is necessarily transitory.

Therefore, I commit to being the best servant to the public I can be, during the time I am allowed to serve."

Judge Counselis grew up in Contra Costa County and came to Riverside County in January 2002 to join the Riverside County District Attorney's office. As a child, he and his brother spent their summers in Riverside visiting their aunt and uncle, so Riverside became a second home. Interestingly, the judge's grandparents honeymooned at the Mission Inn in 1924, when it was the resort of the Hollywood elite.

When I asked Judge Counselis what inspired him to enter the legal profession, he stated that he wanted to go to law school because of his 11th grade government class, in which he enjoyed tremendously participating in a mock trial, and in which he received very positive grades. Realizing that he would enjoy working in government and public service, Judge Counselis was inspired to go to law school. Laughingly, Judge Counselis also said that another factor motivating him



Steven G. Counselis

to go to law school was his poor grade in chemistry.

In pursuit of his goal, Judge Counselis attended the University of San Francisco, graduating Magna Cum Laude with a Bachelor of Arts degree in Government and a minor in Philosophy. During his undergraduate studies, he spent a semester in Washington, D.C. and interned at the United States Supreme Court as a judicial intern in the Office of the Administrative Assistant to the

Chief Justice.<sup>1</sup> Judge Counselis commented that his internship was during the time of Judge Robert Bork's nomination by President Ronald Reagan to serve as an Associate Justice of the United States Supreme Court. Judge Counselis had the opportunity to attend the hearings at the U.S. Senate.<sup>2</sup> His experience as an intern at the United States Supreme Court inspired him to become a judge one day.

Judge Counselis attended the University of San Francisco School of Law. By this time, he was convinced that he wanted to be in the courtroom. After being admitted to the California State Bar, he served as a deputy district attorney. He started as a volunteer prosecutor in Alameda County and then continued to serve in Stanislaus, Contra Costa, and Riverside Counties. As a prosecutor for 16 years, Judge Counselis tried 84 jury trials. Because he specialized in prosecutions of identity theft and high-technology crimes, the Riverside County District Attorney's office assigned him to the Special Prosecutions Section's identity theft and consumer fraud units and then subsequently assigned him for two years to lead the Computer and Technology Crime High-Tech Response Team ("CATCH") in Riverside as part of a multi-agency, multi-county task force. He enjoyed writing and teaching for the California District Attorneys Association and training for the National

1 At the time, in 1987, the Chief Justice of the United States was William Rehnquist, the 16th Chief Justice of the United States.

2 Robert Bork was nominated to the United States Supreme Court by President Ronald Reagan in 1987, but the U.S. Senate rejected his nomination.

District Attorneys Association in the area of high-technology crime.

Judge Counselis is currently assigned to the Indio Larson Justice Center Courthouse. His assignment is the criminal master calendar in the morning session. During his afternoon calendar, he hears civil harassment restraining order requests. Judge Counselis takes every case seriously and listens carefully to each litigant's claims and needs.

Judge Counselis does not only devote himself to the legal profession, but is also active in all aspects of his life. He is an active volunteer for his church, he has served on his homeowners association board for three years in the past, and he devotes himself to his family as a loving husband and father. Although many of his hobbies were put on the back burner because of his active involvement in all aspects of his community, Judge Counselis does designate some time to driving his Chevy Volt<sup>3</sup> during the evenings or weekends. He also enjoys travel whenever possible. Judge Counselis happily stated that he enjoys his weekends because he is able to spend time with his family. Coming from Greek ancestors, Judge Counselis thoroughly enjoys participating in various cultural activities.

Judge Counselis' favorite saying is that everything should be in moderation, which is an ancient Greek philosophical phrase: "Pan métron áriston." He stated that extreme views are not sustainable. His favorite phrase illustrates the kind of judicial officer that he strives to be: a neutral judge, fairly administering justice. Riverside County's citizens and legal community are fortunate to have him as a judge serving on the Superior Court.

*Sophia Choi, a member of the Bar Publications Committee, is a deputy county counsel for the County of Riverside.*



<sup>3</sup> The Chevrolet Volt is a plug-in hybrid electric car.

**Superior Court of California,  
County of San Bernardino  
TEMPORARY JUDGE TRAINING**

**Friday, July 29, 2011**

**2:00 pm to 4:00 pm**

*San Bernardino Superior Court – Rancho Cucamonga  
Training Room*

*9607 Business Center Drive, Suite B  
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Training conducted by  
Judge Stanford Reichert  
and Judge Christopher Marshall

**Pursuant to CRC 2.815 there are three mandatory education and training requirements for attorneys to serve as a temporary judge, and the training must repeated every three years. The first requirement is the Bench Conduct training. The second and third requirements are substantive training in the subject area in which the attorney will serve as a temporary judge, and judicial ethics; both can be completed online at [www2.courtinfo.ca.gov/protem/](http://www2.courtinfo.ca.gov/protem/).**

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- Civil Harassment

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<http://www.sb-court.org>

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Friday, July 22, 2011

For questions, please contact:

Sharon Prentiss

Director of Court Administrative Services

303 W. 3rd Street, 4th Floor

San Bernardino, CA 92415 909-708-8745

[sprentiss@sb-court.org](mailto:sprentiss@sb-court.org)

# THIRD ANNUAL "CELEBRATING EQUAL ACCESS TO JUSTICE" WINE AND CHEESE BENEFIT EVENT

*by Jennifer Jilk*



*(l-r) Judge Samuel Diaz, Judge Helios J. Hernandez, Executive Director Irene C. Morales, Judge Jorge C. Hernandez*

On April 28, 2011, Inland Counties Legal Services (ICLS) and the Public Service Law Corporation (PSLC) of the Riverside County Bar Association co-hosted the Third Annual "Celebrating Equal Access to Justice" Wine and Cheese Benefit Event. It was an evening filled with delicious edibles, fine wines, and fantastic auction items.

A powerful and heartfelt speech was given by Judge Jorge C. Hernandez of the Riverside Superior Court. He talked about his own trials and tribulations, which led him to be the person he is today who strongly believes in justice. At the event, three local attorneys received Volunteer Outstanding Service Awards. ICLS recognized seven-year volunteer Alexandra F. Lopez, who recently joined the Riverside Superior Court as a Family Law Facilitator for the family law court in downtown Riverside. The PSLC recognized committed volunteers Katie Greene and Diane Singleton-Smith. The benefit raised funds for ICLS and the PSLC to be able to provide free quality legal services to low-income and elderly persons in Riverside and San Bernardino Counties.

## **ICLS and the PSLC would like to thank our Community Event Contributors**

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at (951) 682-1015  
or [feearb@riversidecountybar.com](mailto:feearb@riversidecountybar.com).**

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The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective August 30, 2011.

**Kenneth P. Avila** – Sole Practitioner, Loma Linda

**Willard P. Bakeman, III** – Law Office of Willard Bakeman, Lake Elsinore

**Heath L. Baker** – Law Office of Heath L. Baker, Riverside

**Arlene M. Cordoba** – The Legal Action Group, Chino

**Kymberlee A. De La Vara** – Sole Practitioner, Banning

**Gilbert A. Diaz, Jr.** – The Legal Action Group, Chino

**Lauren E. Hawkins** – Sole Practitioner, San Bernardino

**Laura Hock** – Gresham Savage Nolan & Tilden, Riverside

**William Derek May** – Law Offices of Stephen R. Wade, Upland

**Cindy Moran-Aguirre** – Inland Empire Latino Lawyers Assn, Riverside

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**Thomas A. Grossman** – Thomas A. Grossman PLC, Rancho Mirage

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## 2011 Red Mass

Tuesday, October 11, 2011

@ 6 p.m.

Our Lady of the Rosary Cathedral

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