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# CITATIONS

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## COMMISSIONER JOANN JOHNSON ELEVATED TO JUDGE

by Eric R. Reed

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*Photo credit: Victoria Borjesson*

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## PRESIDENT'S MESSAGE

by P. Mark Kirwin

Micro brews are the new trend these days, with wonderful new breweries opening up in our county each year. Although a tasty, local micro-beer is my first choice, I can appreciate the joy and enthusiasm of wine connoisseurs when they taste and talk about wine. So I asked my friend Paul Feuerborn, whom I consider to be very knowledgeable about wine, to tell us something unique about wine. Paul chose an interesting, maybe not so well-known topic.

### Seasonal Diary of a Garagiste

“Garagi-what?” \*

It’s about this time of the year that my choice of a midlife crisis hobby reminds me of the decision between purchasing a Harley-Davidson or something else kept in my garage. As a healthcare provider, the choice was made relatively easily, as I have seen too many lost limbs from the trauma caused when a motorcyclist loses the battle between a car or the road. So becoming a garage-based wine maker was an easier choice.

I had always enjoyed the end product from other winemakers, so why not give it a go to make our wine and along the way share the fun with our friends, neighbors and colleagues here in Ventura? So back to this time of year...

Our annual activities really begin in late February or early March when we have to decide what wine is on the desired list for this upcoming harvest. Have we had enough pinot noir and cabernet sauvignon? Shall we try something exotic this year like an Alsace-style dry riesling? Yikes!

Next comes the sourcing of grapes. It turns out only a few vineyard owners/managers

like to sell their grapes in single field bin lots (about a half ton) or less. Finding contacts who will sell to small garage-based amateur wine makers is like finding gold. After negotiating price and quantity (and adding them to my phone’s favorites list), we sign a contract for grapes that is a commitment for purchase, and reciprocally, a commitment for the vineyard owner to provide grape chemistry to us.

The grape harvest and crush season begins in early fall and extends generally through late October. The in-between period involves the cellaring of wine in tanks or barrels, adjusting as necessary any chemistry issues present. Sometimes acid adjustments are made if the wine is “flabby” or lower than ideal acidity. The “flabby” description reflects the mouthfeel of the wine, often lacking the “pop” of the wine on the palate. Newer concepts of winemaking may include the tank or barrel addition of tannins or maybe the spent yeast cells from a previously fermented grape juice. To assure the wine is protected from spoilage or oxygen exposure while it ages in the cellar, sulfites are added throughout the pre-bottling time period.

White varietals are generally bottled after a few months of cellar aging. We try to bottle so we can enjoy our white wine by the summer, poolside! Our reds age for a year or more prior to bottling. The characteristic higher acids in wine require that amount of time to have the wine smooth out some prior to bottling and of course, drinking. The safest place for wine is in a bottle, so when the time is perceived to be right, the bottling trigger is pulled to get the wine out of the barrels.

Ok, back to harvest. Some garage-based winemakers will make wine with kits or concentrated juice that gets water added.

Our group drives up to the wine country on the arranged picking date, hauling the bin(s) in a trailer. Once back home, we use a powered crusher/de-stemmer and schlepp the “must” (grapes destemmed and skins broken) up into various-sized tanks for a few hours or days of chilling prior to starting the first of two fermentations. White grapes are crushed and pressed on the same day generally. The reds are pressed following ten to fourteen days of fermentation, when the yeasts are done with the party. After a few days of letting the solids settle, the wines are pumped into the barrel or tanks. A “secondary” fermentation is undertaken when bacteria is introduced that will convert the aggressive malic acid into the mouthfeel-pleasing lactic acid.

And the cycle of a garagiste starts again.

\*GARAGISTES – (garage-east) *n*, Fr. – A term originally used in the Bordeaux region of France to denigrate renegade small-lot wine makers, sometimes working in their garage, who refused to follow the “rules.” Now a full-fledged movement responsible for making some of the best wine in the world. Who’s laughing now, Francois? *Syn*: Rule-breakers, pioneers, renegades, mavericks, driven by passion.

Thank you, Paul!

*Mark Kirwin, 2018 Ventura County Bar President, is a civil litigator at Kirwin & Francis, LLP, and is Director of the Kirwin International Relief Foundation.*



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## COMMISSIONER JOANN JOHNSON ELEVATED TO JUDGE

by Eric R. Reed

If you arrived a few minutes late for **Judge Joann Johnson's** enrobement ceremony on Feb. 1, you probably found yourself standing in the back of Department 22 with a few dozen others and wondering just how early one has to arrive these days to get a decent seat (or any seat) at these functions. It was that kind of event. Not typical. But neither is Joann Johnson.

The door-busting attendance showed just how many folks in our legal community wanted to celebrate her achievement. Yet few of these hundred-plus seemed surprised by her appointment by Governor Brown last November (her official oath was administered privately three months prior).

**Judge Jack Smiley**, who was among Johnson's 25 or so robed colleagues observing the installation from the jury box, came forward with memories of Johnson sitting attentively in the front row of his family law course at Ventura College of Law. He recalled how Johnson progressed from student, to private practitioner, then to facilitator of Ventura Superior's Family Law Self-Help Center, where for eight years she personally assisted, by his calculation, more than 100,000 of the court's self-represented family litigants as they negotiated the court system. The current supervising attorney of the court's Self-Help Legal Access Center, **Jodi Prior**, worked under Johnson during these years. She explained how many of the forms and brochures designed by her former boss are still used by the center's visitors.

Once appointed Commissioner in 2010, Johnson joined the Family Law Curriculum Committee of the Center of Judicial Education and Research and quickly became responsible for designing curriculum for judges preparing for family law assignments throughout California. She also squeezed in a stint on the Judicial Council's Domestic Violence Task Force and the Judicial Branch DCSS Stakeholders Committee. She has also returned to Ventura College of Law each year to instruct courses on community property and family law.

**Presiding Judge Patricia Murphy** lauded Johnson as a kind but straight-talking bench officer who found herself elevated to commissioner, then judge, not because she "desired the robe" but because she genuinely desired to do the work. Smiley described Johnson's job duties as "twice the work for 25 percent less pay." He also admitted to now seeking his former student's wisdom in some of his thornier cases.

Johnson's duties have not changed significantly in the opening months of her judgeship. Perhaps this reflects how fully the court utilized her as Commissioner and in particular, her family law and DCSS expertise. But eventually she will have the opportunity given all judges to request assignments in different departments. Will we see Johnson in probate this time next year? In criminal? The appellate division? Wherever she lands, she will probably be teaching the rest of us the ropes within a year or two.

Author's Note: For those curious about why Governor Brown's press release listed Lancaster as Johnson's hometown (and to confirm whether she does, in fact, own more livestock than the typical jurist), I recommend reading **Kathi Smith's** "Commissioner Johnson Brings Patience to the Family Law Court," found in December 2014's CITATIONS.



*Eric R. Reed is an attorney at Ventura's Myers, Widders, Gibson, Jones & Feingold, LLP.*

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# WHAT DOES AN APPEAL REALLY COST?

by Wendy Lascher

According to journalist-lawyer Dahlia Lithwick, “The Supreme Court clerkship, that’s the golden ticket in our world, right? There’s signing bonuses, you’re making your own destiny. I mean, it’s hard to overstate how much law schools, and law professors and the whole legal world values each of those clerkships. That’s everything, right?”

Ironically, the phrase “golden ticket” was popularized in Roald Dahl’s *Charlie and the Chocolate Factory*, a children’s novel inspired by a trade secrets dispute between two candy companies. Trade secret and other real world appeals generally are not handled by golden-ticket lawyers, or even by silver- or bronze-ticket lawyers. Paper-ticket lawyers do most of the country’s appellate business. (Some of us pre-internet folk also remember “e-tickets,” which provided passage onto the really good Disneyland rides.)

The day-to-day work of paper-ticket lawyers is not urging groundbreaking constitutional interpretations or revolutions in the common law. These lawyers handle mundane cases that reflect everyday life: personal injuries, probate feuds, business problems (including trade secrets), divorces, license revocations, construction disputes, and criminal convictions. But just because these cases are unexceptional from the legal system’s perspective does not mean they are unimportant. Litigation, especially if it results in an appeal, may be a turning point in an individual’s life or the key to a small business’s success – or failure.

The ordinariness of an appeal does not mean it will be inexpensive, either. Even paper-ticket lawyers need to charge enough to keep the lights on, the rent paid, and the children fed. How much that is varies by state, and by lifestyle, but suppose a lawyer wants to earn as much as a U.S. Court of Appeals judge? That’s \$220,000 per year. Working 40 hours a week for 48 weeks at \$114.50 per hour would generate \$220,000, but it is not easy to work that many billable hours. In addition to billing clients, lawyers celebrate holidays, dine with colleagues, take bathroom breaks,

read new decisions, attend kids’ school activities, check the internet, participate in office administration, and market their services.

And lawyers rarely collect every penny of the time they bill. Even when they do, the common wisdom is that overhead will consume 35 to 50 percent of collections. To earn \$220,000, a lawyer who works full-time for 48 weeks a year (1920 hours) would have to bill and collect \$171- \$229 for each of those hours.

When courts award attorney fees, they generally start by calculating a “lodestar,” i.e., a reasonable hourly rate multiplied by a reasonable number of hours for the work. How much hours does the “typical” appeal consume (assuming there are typical appeals)? Enough to:

- Discuss the case with the client and trial lawyer, repeatedly
- Analyze relevant documents to get a “feel” for the case
- File notice of appeal, record designation, and other routine documents
- Write and respond to any appropriate appellate motions
- Read and summarize transcripts and exhibits at three hours per 100 or so pages of transcript; a 2,000-page trial record might take 60 hours to summarize
- Write a procedural history and fact statement
- Identify issues and research to see if they are viable
- Discuss the case again with client and trial counsel
- Outline, research and write an initial draft
- Edit the first draft
- Review the draft with co-counsel, trial counsel, and client

- Supervise assembly of excerpts of record or appendix
- Repeatedly review and revise the draft
- Polish final drafts of the brief and supervise filing
- Read, analyze, and discuss the opposing party’s brief
- Reply to the opposing party’s brief, including discussion, research, outlining, writing, revising and editing
- Recruit amici curiae
- Prepare for oral argument, possibly including moot court
- Present argument
- Review the opinion with client, trial counsel and co-counsel.

If the appellant also needs help getting a stay of enforcement, even more work is necessary. And then there are post-decision proceedings – petitions for rehearing, review and certiorari – and perhaps further briefing and argument.

Depending on the length of the record, it could take 50 hours or less (for a short-record, one-issue case) to 300 hours or more (long record, multiple issues), i.e., \$10,000 to \$75,000 and up from the start of an appeal to the appellate court’s initial opinion. An appellate lawyer might advise a client to anticipate even more expense if trial counsel was clueless, opposing counsel obstreperous, or rulings not just wrong but obtuse. Unrealistic client expectations and just plain bad facts also make appeals harder than they might initially appear.

For some clients, even a \$10,000 appeal is out of the question, especially because the odds are so heavy against reversal. Conversely, there are clients willing to spend hundreds of thousands of dollars on appeal regardless whether they are likely to win. Some clients are reluctant to retain lawyers whose fees seem too low; they have been conditioned to believe that the quality of legal work is a function of its cost. That



is true only up to a point. There is little evidence that lawyers who charge \$900 per hour are three times as effective or three times as efficient as those who charge \$300 per hour, golden ticket or not.

Whatever the hourly rate, clients should be on the lookout for excessive lawyering. Too often, four or five or more lawyers combine efforts on an appeal and then seek compensation for all of their work. Collaboration is fine – to a point. Brainstorming with other lawyers produces insights one person working alone might miss. Having another lawyer read one’s work product helps identify ambiguities and inconsistencies invisible to the writer. But there comes a point when there are too many drafts, and too many reviewers, writers and editors. At some point, redundant work is simply that: redundant. It does not result in a better appeal, only a more expensive one.

Sometimes ego drives up the cost of an appeal. In a recent fee request, five lawyers

from four different firms worked on various parts of an appeal. Two of them charged the client for preparing to argue the case notwithstanding a court rule – which the lawyers should have known – allowing only one to argue. In the same case, three lawyers attended argument in person, but a fourth lawyer charged the client for listening to a recording of the argument. Why? The fourth lawyer contended it would have been malpractice for him to speculate how the appellate court might decide the case without knowing what happened at argument. Apparently, he thought the other three lawyers were not smart enough to report accurately.

Often it is fear, not avarice, that causes lawyers to make appeals more expensive than they need to be. “What if I miss something?” becomes the driving force, causing a lawyer to obsess about finding the perfect authority or the perfect phrase, rather than being satisfied with a good enough one. When several lawyers work together, their anxieties can rub

off on one another and amplify the fees disproportionately to how much the combined efforts improve the outcome. As a profession, no one has taught us that the search for the perfect may destroy the good, let alone the affordable.

To make appeals affordable, the bar needs to get a more realistic handle on what work needs to be done (see the bullet points above), how it can be done efficiently rather than merely expensively and when it is time to turn off the billing machine and take the risk of saying we’re done with a project.



*Wendy Lascher is a State-Bar certified specialist in appellate law, and a partner at Ferguson Case Orr Paterson, LLP in Ventura. She is co-editor of CITATIONS. This article is a version of*

*one Lascher recently presented at DRI’s 2018 Appellate Advocacy Seminar.*



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## FEB. 24, 1988: THE TOP HAT MURDER LAUNCHES DNA EVIDENCE DNA used for first time to convict in California

by Bill Grewe

*People v. Axell* (1991) 235 Cal.App.3d 842

“We’ve talked to hundreds of people, and to this point all the information has been fruitless.” Sgt. Roger Nustad, VPD. Ventura County Star Free Press, March 4, 1988.

“Read this carefully so that you understand it.” Francis Crick, March 19, 1953 in a letter to his twelve-year-old son upon the discovery of the double-helix structure of DNA.

It looks like a large box that fell from a passing flatbed and was pushed onto the corner of Main and Palm, where it has sat for the past 70 years. Small and square. Red and white. Shut down by a developer in 2010 to make way for progress that has yet to come.

The Top Hat Hamburger Palace. Brassy name for a pre-fab building first used to sell war bonds. Today, it is stripped of its signage, boarded, padlocked and wrapped in canvas-covered chain link as if to guard against it returning to life.

Inside its walls is the story of a life taken on Feb. 24, 1988. George White. He “opened” the Top Hat. Rising with the sun to make sure everything was ship-shape for the day ahead, White would return each evening at closing time to turn the lights out, lock-up and take the day’s receipts home to be given to the owner the following day.

The night before, White might have watched the Winter Olympics from Calgary or read a news story about Anthony Kennedy’s appointment to the land’s highest court.

As Main Street awoke and White brewed a pot of Top Hat 50-cent coffee, on the other side of the country a former Detroit Tiger was arriving for the first time at Vero Beach where he told reporters he planned to do whatever he could to help the Dodgers win a world championship. White would not see October. White, who was born the same week as Truman Capote, would take his last breath on that February 1988 morning while lying in a pool of blood. Alone.

White, 63, had weathered a rough patch in his life. He had experienced, in his presence, the accidental death of a toddler-age daughter. It caused him to drink heavily, but he was now living sober. The owner of the Top Hat, Charlotte Bell, and her mother before her, had stood by White in times of trouble. He now repaid Bell daily by putting a shine on her small stand as it readied for business and by watching out for her investment. Bell said White was a friend to everyone and generous.

A nine-year-old school boy, who met his bus in front of the Top Hat, would always say good morning at 7:40. On his toes, he peered in the front window of the Top Hat and saw another man fighting with White. With a rag in his hand, the stranger waved the boy away. A few minutes later, the boy looked again but saw no one. A co-worker would discover White’s body.

Thirty years later Nustad, assigned to major crimes and in charge of homicides, now retired, recalled the crime scene, “There was blood everywhere. Hair, everywhere. On the walls, on the counter, on the floor.” White had fought hard, but it was not enough against the larger attacker armed with a large knife.

Arriving without a weapon, the killer used a chef’s knife, stabbing White 50 times. White did not go gently. He knew his killer, Nustad concluded early on. Bell would later confirm that.

Detectives set about doing what detectives do. They talked to anyone who might know something. Given the large amount of hair at the crime scene, a decision was made to ask those in the area for hair samples.

The boy awaiting the bus was the only witness to the crime. He described what he saw, and later, would consistently testify that he saw a male attacker. Someone else had seen a transient named Chris C. in the area. A search was made to find Chris, but he acted like any good suspect: He left town and hid out. He could not be found.

The investigation was going nowhere. Nustad had no leads. Then, “I remember it. I was sitting at my desk. I was thinking about the case. The phone rang, and I picked it up. It was someone from the sheriff’s department. He said, ‘We’ve got an informant here who says he knows who killed George White. He wants to get paid.’ I couldn’t move fast enough. I arranged to meet him at the beach. I wanted this so bad. I drove down. I had two tape recorders. I was taking no chances. I was going to get his statement. He got in the back seat. I had taken all the money we had in the Informant Fund, \$400. I told him, ‘I’ve got \$400.’ If he had said he wanted 4,000 or 40,000, I would have found a way to get it. He was fine with \$400. He said the name Linda Axell. ‘Linda Axell killed George White.’”

It was a name out of the blue. A woman? Who was she? She wasn’t a suspect.

As it turned out, Axell had long black hair. She was a large woman, much bigger than George White. She worked at The Party Palace across the street from the Top Hat. She had worked in the early morning hours on the day of the killing. She left and went home and then returned mid-morning. She was among the shopkeepers who had given a hair sample.

The pieces, particulars and ponderings of the investigation, when combined, now pointed to Linda Axell.

With a suspect, the Senior Deputy District Attorney handling the case – **Carol Selby**, who at the time went by Carol Nelson – had somewhere to focus her efforts.

Selby began attending law school at night at age 30. Her children were older. She had worked as a singer and in the engineering department of a telephone company. She wanted to challenge herself.

Selby was hired in Stockton to prosecute those who failed to pay child support. Looking to move, she interviewed with

**District Attorney Michael Bradbury**, who hired her. She began with child support cases but soon rose to prosecuting serious felonies. One co-worker said Selby was so congenial you might be caught by surprise in trial. Another, when recalling Carol Selby in the courtroom, paused and then said, “She was a hammer.”

Selby worked on the Top Hat case with Investigator Richard Haas, also of the Ventura County District Attorney’s Office. Haas passed away in 2016. Selby said there was no better investigator. He would read all case materials and sit through trial knowing the facts better than anyone else in the courtroom.

The Top Hat murder was a challenge. The facts fit, but Selby didn’t know how she could prove guilt beyond a reasonable doubt. She was confident that they had enough for the preliminary hearing – the informant and hair similar in appearance – but from the start, Selby was focused on

the higher standard. She was convinced that Linda Axell committed the murder. Axell was addicted to cocaine and in need of money. She knew White. She knew White’s routine and knew he arrived each day with money. She made incriminating statements as well, but no one put Axell at the crime scene. In fact, the only witness, the boy, excluded her and all other women.

Years later, Bell would recall that Axell had asked White for money in the past, but he had always turned her down. Bell said that on the morning of his murder, White had forgotten the receipts from the previous day. He left them at home. What was said between White and Axell has not been learned. Maybe, having crossed the threshold of reason to commit robbery, she could not accept that White did not have the money from the previous day. We don’t know, but perhaps it followed that, once Axell used a knife, she felt she could not let White live for fear of being identified. Whatever the trigger, Axell’s fury

in inflicting 50 stab wounds and White’s valiant fight for life tell us something about the heart and mind of each.

The young witness was certain he had seen a man. Selby was certain he had not. If the boy was mistaken, it was the right mistake. He actually fumbled the ball forward, and White put it in the red zone.

To get a conviction, Selby felt she had to show that the boy had actually seen Axell. White’s last act would make that possible. White died with the proof in his hand. Clenched in his fist were long strands of hair, including the roots perfect for harvesting DNA, ripped from the scalp of his killer.

Investigator Richard Haas had a thought. He had attended a seminar while working on the Top Hat case. The speaker talked about something new that was going to be the future: DNA finger printing. The speaker described how everyone has a unique DNA

*Continued on page 15*



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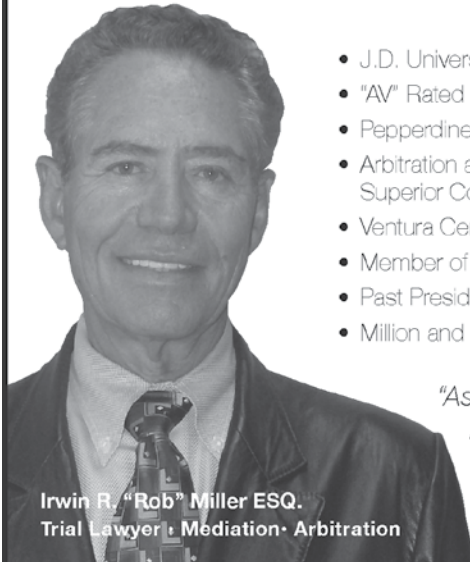


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**THE TOP HAT MURDER**

*Continued from page 11*

fingerprint. The speaker explained that someday it would be used in trials but, at the time, the California Attorney General's office was not quite ready to run with it. At the conclusion of the presentation, Haas approached the speaker and asked whether this DNA fingerprinting could be used with hair. It could. Haas shared what he had learned with Selby.

Perhaps they could put Axell at the crime scene.

*"Someone had to do it."* Selby.

Selby and Haas began reading up on DNA. When they felt they had a handle on it, they went to see Bradbury. Selby recalls sitting in Bradbury's office, just the three of them, and Bradbury listening quietly as she and Haas explained DNA and the facts of the Top Hat murder case. It was clear to everyone that the cost of proving the case through DNA would be exorbitant, but Bradbury did not mention it. No one had proven a case this way before. It was uncertain if it could be done.

Even so, Selby and Haas were confident. Carol explained that Bradbury could make a decision. She said that in other counties, she expected that there would have been layers of approval one would have to climb for such an undertaking. The process would have been time consuming and ponderous. She said Ventura was the perfect county. The buck stopped with Bradbury, and he was accessible. He wasn't always right but most times he was, and he did not fear being wrong.

They concluded their presentation. Bradbury looked both of them in the eye and said, "Go with it." That was all. They were off.

Watch for the second installment of the Top Hat DNA story in May's CITATIONS.



*Bill Grewe is a personal injury lawyer at Rose, Klein & Marias LLP in Ventura. He is a past president of VCBA, and a thoughtful historian*

# ETHICAL AND OTHER ISSUES CONCERNING TECHNOLOGY AND YOUR LAW PRACTICE

by Gregory W. Herring

As our lives are increasingly dominated by e-mails, texts, social media, electronically stored information (“ESI”) and related technology, so are our law practices. We have ethical and other obligations to identify and handle it all, and a “head in the sand” approach will not cut it.

## E-mails

E-mail is not a secure method of communication. The increasing frequency and sophistication of hacking, spying, phishing, ransomware and internet infiltrations should make this insecurity impossible to ignore. Any e-mail that is sent may be copied and held (innocently or hostilely) by the computers it passes through as it goes from law office to client and *vice-versa*. Our family law firm systematically emphasizes to our clients that:

- E-mails may be inadvertently accessed by, or delivered to, unintended or unauthorized persons.
- E-mails may be intercepted by persons improperly accessing a client’s or law firm’s computer, or even some computer unconnected to either through which the e-mail passes.
- By inadvertence, someone may mistakenly include an unauthorized person, even opposing counsel or the opposing party, by using the “reply to all” feature.

California now requires technical competence. Law offices must constantly analyze how they communicate electronically about client matters using a case-by-case method for their decision-making.

ABA Formal Opinion 477 (May 2017) provides that law offices should implement appropriate and measured protection for electronic communications depending on the circumstances. “The use of unencrypted routine e-mail generally remains an acceptable method of lawyer-client communication. ... However, [because] cyber-threats and the proliferation of electronic communications devices have changed the landscape it is not always reasonable to rely on the use of unencrypted e-mail.” The Opinion offers this guidance about whether to use unsecure

or secured electronic communications or some other non-electronic method of communications about confidential client matters:

- Understand the nature of the threat.
- Understand how client confidential information is transmitted and where it is stored, making sure it is not open to inappropriate access.
- Understand and use reasonable electronic security measures considering the nature of the communication and information contained.
- Determine how electronic communications about client matters should be protected in each instance.
- Appropriately label confidential client information and privileged attorney-client communications.
- Train lawyers and nonlawyer assistants in appropriate technology and information security protocols and practices.
- Conduct regular due diligence reviews on vendors that provide communications technologies for the lawyer, including e-mail, document storage, internet and wi-fi access, and other related services.

Other ways of addressing e-mail concerns include:

- Warn clients through a standard written “personal privacy” memo.
- Consider “old-fashioned” alternatives like overnight delivery services or direct messengers.
- Investigate and offer encrypted e-mail systems.
- Use encrypted attachment systems for confidential documents, like client reports and tax returns. Dropbox alone is not enough without using an associated encryption service. Our office has productively used “Sharefile” and we are presently moving to Clio’s practice management system, which

includes a client portal for encrypted communications at the industry standard.

Personal e-mails to and from an employer’s computer are non-confidential. Tell your clients to set up a new personal e-mail address, and with a nondescript user name.

## Texts

Does your office text with clients? If so, are these communications documented and in the file? The ethereal nature of texts make them problematic, especially in the new era of Snapchat and like applications. Either bar the practice or develop methods of systematically downloading them into the file.

## Social Media

Managing clients’ social media is a major and growing concern. Facebook and similar posts constitute potential evidence that can help or hurt your clients’ cases. They are non-confidential by definition. Advise your clients to **cease** posting.

But you have an affirmative ethical duty to **preserve existing posts**. The duty is a serious one, with potential consequences including disbarment to attorneys who might advise or otherwise cooperate with spoliation. Immediately advise your clients to refrain from deleting old posts. If posts “must” be deleted, ensure that that they are first preserved by taking “snapshots” through appropriate software. Professional assistance may be appropriate.

## ESI

San Diego attorney Gordon Cruse, a nationally-recognized ESI expert, explains:

- ESI is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities. Both users and machines create ESI.
- Users create hidden data including background spreadsheet formulae, and revisions and notations in word processing programs.
- Machines create metadata and system level

data. “Metadata” is “data regarding data,” or information used by a computer to manage and often classify the origin and other attributes of a computer file. It describes how, when and by whom a set of data is collected, and how the it is formatted. It is embedded information that is stored in electronically generated materials, and it is generally not visible when documents or materials are printed.

Sources of ESI include hardware, servers, old-fashioned discs and thumb drives. They also include personal devices including smartphones, tablets and automobile and other navigation systems. E-mails, Dropbox files, word processing files, accounting and billing systems, photo applications, security systems, voice-mails, home Nest and Alexa systems, as well as other sources are other examples.

Recognize the many sources of ESI. Learn how to obtain it through e-discovery. Maintain confidential ESI when it is already in hand. Think about what happened to the hard drive full of confidential data in the leased copier/scanner your firm turned in for a replacement!

### Technology outside the law office

Generally, eavesdropping and recording private communications by another person is illegal. Warn your clients regarding hidden cameras, automobile tracking and other means of surveillance, and also of reading private e-mail messages/texts/chats and copying electronic data. California law now extends the definition of “domestic violence” to include the unauthorized downloading and distribution of contents from cell phones and the unauthorized hacking of social media accounts.

### Other practical tips

- Actively redact sensitive information, like social security and credit card account numbers, from clients’ documents before producing them. Use computer technology that avoids transparency.
- Lock all USBs (“thumb drives”) that leave your office.
- Use a password security program like Dashlane, OneNote or others to randomize your password for each account and change your passwords regularly.
- Proactively gather historical e-mails and other ESI from prior counsel when

substituting into an existing case. Too often, prior counsel overlooks transferring this often difficult-to-organize data. New counsel has an ethical duty to affirmatively acquire it. You will not have a complete file and you will not fully understand your new case until and unless you do this. Conversely, your office has an ethical duty to gather and provide such communications and data when transferring out of a case.

- Install a “find your phone” application so that mobile endpoints (cell phones, tablets, computers, etc.) can be retrieved if lost or stolen.
- Beware public Wi-Fi networks (including at coffee houses, hotels and airports) that can be exploited to steal your laptop’s data.
- Calendar regular office privacy and security reviews.
- Sign all the way out of computers and devices including logging out of Remote Desktop and like programs, and erase software log-in credentials.
- Warn clients about security concerns, risks and obligations in writing and proactively monitor their ESI preservation efforts.
- Regularly update your software to receive timely “fixes.” Also update your anti-virus, anti-malware and other security systems.
- Consider installing an ad-blocker to protect against ads that carry malware.
- Consider providing your staff iPhones. Their updated operating systems are now more

secure than ever, and include safeguards that will automatically wipe the phone if an outsider might probe it. Even the default mail program’s data is encrypted.

- Work with your merchant services vendor to ensure credit card processes achieve Payment Card Industry Data Security Standard compliance. Failure to meet PCI standards can result in fines up to \$50,000 per incident.
- Train your employees on the proper use of computers and devices and how to recognize threats.
- Retain an ESI consultant, who can be a knowledgeable co-counsel or a non-attorney vendor, when you are out of your comfort zone.

### Conclusion

Consider these issues and create your own office policies and practices. These are no longer optional obligations in our rapidly-changing and challenging new world of law practice technology.



*Greg Herring is a Certified Family Law Specialist and is the principal of Herring Law Group, a family law firm serving the 805 with offices in Santa Barbara and in Ventura County. His articles and blog entries are at [theherringlawgroup.com](http://theherringlawgroup.com).*

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## BARRISTERS CORNER

*by Jessica M. Wan*

Throughout the year, the Ventura County Barristers hosts all types of events for lawyers, judges, law students, and members of the community, many at little to no cost for attendees. It is always a good time to get involved with groups that you are interested in or causes that you are passionate about.

We are excited to partner with the Ventura County Trial Lawyers Association (VCTLA) on an event in April entitled *Civil Case Management and Court Legal Research: How It's Done in Ventura County*. **Genalin Riley** and **Michael Mayer** will be speaking. Riley is a case management attorney for the Ventura County Superior Court. Mayer is the Senior Attorney for the Ventura County Superior Court's Legal Research Department. From their unique perspective they will discuss the ins and outs of Ventura's civil case management system and what attorneys should know. This event will be free for Barristers. More information regarding specific date, time, and location to come!

VCTLA also is generously extending its policy of free attendance for Barristers for all other events of the year. This means that Barristers are welcome to attend any VCTLA evening program for free – complete with a meal. To obtain MCLE for an event, the cost for a Barrister is just \$15. If checking off those MCLE requirements at a low cost interests you, VCTLA offers a discounted \$40 membership for Barristers. If you join now, you will get free MCLE through VCTLA for the rest of the year. Visit the VCTLA website for more membership information and event details ([www.vctla.org](http://www.vctla.org)).

Feel free to reach out at [vcbabarristers@gmail.com](mailto:vcbabarristers@gmail.com) for more information on how to get involved with the Barristers or to get on our email blast list to keep up to date on upcoming events and outings.



*Jessica M. Wan is an associate at the Ventura office of Ferguson Case Orr Paterson, LLP.*

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## EXEC'S DOT...DOT...DOT...

by Steve Henderson, M.A., CAE



I knew it when I wrote it! I rarely, if ever, get it correct and once again I neglected to name a few lawyers as “Super Lawyers.” They are **Jonathan Light**, **Karen Gabler**, **Michael Silvers** and **David Shaneyfelt**... Police say a damning clue led to the arrest of a Pennsylvania man charged with stealing a pot of meatballs-red sauce smeared on his face and clothes ...

FCOP has moved its East County offices to 4550 East Thousand Oaks Blvd., Suite 250, Westlake Village, 91362...



The Utah State Bar has apologized after it emailed a photo of a topless woman to all active attorneys in the state. The *Salt Lake Tribune* reports the State Bar had emailed lawyers to advertise its spring convention, but included in that email was the photo of the bare-chested woman. Bar Executive Director John Baldwin says the State Bar’s goal “is to find out what happened and insure it never happens again.” No kidding

... There’s an immediate opening for a legal secretary with a minimum of five years’ experience in family law. Taylor, McCord, Praver & Cherry are seeking a detailed-oriented, strong work ethic and a team player. [apraver@taylormccord.com](mailto:apraver@taylormccord.com)...



This is seriously deprived and not even legally related, but it must be revealed. A Wisconsin retiree, Don Gorske, who found fame after his brief appearance on the 2014 film *Super Size Me*, has eaten two Big Macs every day since May 17, 1972, and is scheduled to eat his 30,000th on May 4. He was officially entered into the Guinness Book of Records last year after devouring his 28,788th in front of judges, a feat no one has come close to surpassing. Don told *The Sun Online*, “I love Big Macs so much I’ll keep eating them until I die. There’s a joke I tell people – that if my wife has to place them into a blender then it’s over...”

Get your Nomination Form for the 2017 Trial Lawyer of the Year in by May 1. The form is on the backside of the VCTLA flyer contained herein ... Seven new proposals to amend the Code of Judicial Ethics have been posted to the California Courts website, at [www.courts.ca.gov/policyadministrationstocomment.htm](http://www.courts.ca.gov/policyadministrationstocomment.htm). Deadline for comment if May 31. Contact Mark Jacobson at [mark.jacobson@jud.ca.gov](mailto:mark.jacobson@jud.ca.gov), or at (415) 865.7898...



NEWS OF NOTE: **Hon. Glen Reiser** will be presenting his annual “State of the Probate Court” luncheon on April 26 inside the Tower Club. This is an always popular and sold-out affair, so RSVP quickly by emailing

Rosie at [bar@vcba.org](mailto:bar@vcba.org) or 650.7599. Judge Reiser will be retiring soon, so this will be his last Estate Planning & Probate appearance...



The Women Lawyers of Ventura County is hosting a lunch at Sterling Hills entitled, “Women In Office,” featuring retired **Judge Gay Conroy**, Assembly member Jacquie Irwin, Assembly member Monique Limon and Oxnard Mayor Pro Tem **Carmen Ramirez**. **Sasha Collins** is the President of the WLVC and to register go to [www.wlvc.org/calendar](http://www.wlvc.org/calendar) or [lrad@fcoplav.com](mailto:lrad@fcoplav.com)...

**Steve Henderson** has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. Winning the NCAA March Madness Pools is certainly getting old, but absolutely willing to take the beer money to the bank thanks to the Loyola-Chicago Ramblers. In another season without Vinny, let’s play ball. Henderson may be reached at [steve@vcba.org](mailto:steve@vcba.org), FB, LinkedIn, Twitter at [steve\\_hendo1](https://twitter.com/steve_hendo1), Instagram at [steve\\_hendo](https://www.instagram.com/steve_hendo), or better yet, 650.7599.

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