



# CITATIONS

DECEMBER - TWO THOUSAND TWENTY

## EMBEDDED INSTAGRAM POSTS INFRINGEMENT OR FAIR USE?

by *Rebecca Makitalo*

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KATHRYN E. CLUNEN

H. FREDERICK SEIGENFELD

WILLIAM WINFIELD

JOSEPH O'NEILL

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This is my final message in *Citations* as VCBA President. It has been my honor to serve as your Ventura County Bar President.

Without a doubt 2020 has been one for the record books. No one could have foreseen where we would be as a world right now and I never imagined that almost all of my tenure as VCBA President would be spent in a virtual environment. Remember in January when I mentioned plans for all of us to meet in big groups at our bowling tournament and golf tournament, and that I was committing to volunteer at my daughter's school and in legal clinics?

But that was not in the cards for us. When the shutdown first happened, I was in a funk because of the unknown and uncertainty. At our first virtual meeting, VCBA Board member, **Rabiah Rahman**, recognized the importance of having a COVID-19 task force to keep the public and members informed of what was going on with not just the courts but also the county and state. We quickly formed a task force and jumped into a new virtual world and continued helping the public and our members. **Stephanie Johnson** and **J.P. McWaters** led the way to revise *VCBA.org* and to keep it up-to-date.

VCBA directors on the MCLE committee stepped up and launched virtual webinars and MCLE programs. VCBA sections quickly followed suit and the programs have been very well-attended since our members can sign on from anywhere and don't have to make a trip in the car. Some programs even make time for people to be

## PRESIDENT'S MESSAGE

by Kathryn E. Clunen

social and catch up with their colleagues before the programs start.


Even Ventura County Legal Aid and Conejo Free Clinic were able to start offering services virtually. Although I wasn't able to volunteer on a monthly basis after the shut down, I was able to offer pro bono services to someone who came from VCLA. As for volunteering in my daughter's class, there wasn't much I could do besides help her with her online classes. In October, she went back in-person for 2.5 hours a day and I have been helping out the PTA since no volunteers are allowed in the classroom.

VCBA has adapted well to the changes and we continue to make advancements and improvements. I am immensely proud of the VCBA Board and want to thank each director. I also want to thank our sponsors. And, special heartfelt thanks to **Sandra Rubio**, VCBA Executive Director, who does so much for all of us. I also can't forget to thank my husband for believing in me, supporting me, and encouraging me to chase my dreams.

**Marc Anderson** is our 2021 VCBA President and has already built a strong Board. I am excited to help Marc with his plans next year. He is stepping into the presidency as we continue operating in a virtual world. These are challenging times to serve on any Board, so please extend your support to Marc whenever possible. In fact, I encourage all members to make 2021 the year to get more involved with VCBA. This is your organization and you will get so much more out of it if you're involved with the different sections and affiliates.


I look excitedly into the new year and look forward to continuing as your Immediate Past President. I hope you have enjoyed my articles and learning more about me and VCBA. Let's raise a virtual glass to welcome Marc!

*Kathryn E. Clunen is a family law attorney and mediator at Clunen and Oakman Law, LLP in Newbury Park. She can be reached at [Katie@ClunenandOakman.com](mailto:Katie@ClunenandOakman.com) or (805) 273-4200.*



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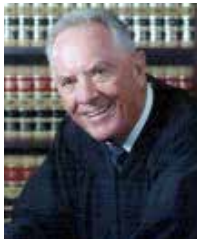
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## HAVE YOU HEARD?



Farewell this month to retired Court of Appeal Justice **Paul Coffee**, “a good man, judge and Justice. Paul contributed much to our justice system,” noted Coffee’s former

colleague, retired Presiding Justice **Steven J. Stone**. CITATIONS profiled Coffee in Feb. 2012. [https://www.vcba.org/wp-content/uploads/2018/03/Feb\\_Citations\\_Web-2012.pdf](https://www.vcba.org/wp-content/uploads/2018/03/Feb_Citations_Web-2012.pdf).



**Herman Mora**



**Gordon Lindeen**



**Hillary Shankin**

In addition to Coffee, VCBA lost three other members recently: **Herman Mora** (see remembrance on p. 16), **Gordon Lindeen**, **Hillary Shankin**, Shankin’s son David

Robinson has launched a fundraiser to help with funeral expenses. [https://www.facebook.com/donate/279903429956364/?fundraiser\\_source=external\\_url](https://www.facebook.com/donate/279903429956364/?fundraiser_source=external_url).



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The Green Law Group is proud to announce its newest associate, **Kirk Rodby**, who will be working in the firm’s construction, employment and estate planning practices. He



District Attorney **Gregory D. Totten** is retiring from office and issued the following statement:

*After 38 years as a prosecutor and eighteen years as district attorney, I will retire from this office, effective Jan. 9, 2021. I have accepted a new role as chief executive for the California District Attorneys Association in Sacramento, where I will proudly serve prosecutors statewide.*

*I walked through the doors of the Ventura County District Attorney’s Office for the very first time in 1981 as a young law student and summer clerk. At that moment, I never could have imagined the incredible career that awaited me. Being a prosecutor and district attorney is the best job in the world and words are inadequate to express my gratitude to the Ventura County voters for allowing me to serve as their district attorney for nearly two decades.*

*I have been very fortunate to work with exceptionally dedicated and principled prosecutors, investigators, victim advocates, and support staff. Serving with these talented men and women has unquestionably been the best part of this job; I so admire and respect their devotion to the cause of justice and safety. I also want to thank all my colleagues in our law enforcement and county government families for their commitment to excellence and support of this office over many years.*

*Throughout my career, I have looked upon the Office of District Attorney as a sacred trust and always did my best to do what was right. It has been the privilege of a lifetime. Thank you for trusting me.*



Ventura County Legal Aid announced that they have selected their new President and CEO, attorney **Christopher Beck**. Beck has been a longtime volunteer

with VCLA, and previously served as its Vice President. Beck replaces **Mark Kirwin**, also an attorney who has a history of providing significant pro bono services and a staple of the local legal community.

Beck was previously the General Counsel of the Housing Authority of the City of San Buenaventura, and presently serves as City Attorney for the City of Palmdale, CA. He is also an adjunct professor at California Lutheran University teaching law and policy in the Masters in Public Policy and Administration.

Of the appointment, Beck says he is honored and humbled to assume the helm of such a vital organization. “My initial priorities will be fund development and ensuring continued services to the residents of Ventura County,” Beck said.

VCLA was founded by the Ventura County Bar Association in 1996 and incorporated in 2002 as a private 501(c)3 non-profit. Its mission is to provide equal access to justice for income-qualified residents of Ventura County. This is accomplished through the private donations of the Ventura County Bar Members, private foundations, and Ventura County community members at large.

Services are free as long as you fall under 125percent of the federal poverty guidelines; households with income above the guidelines will be denied service and provided with relevant referrals to other non-profits that do not income qualify. VCLA cannot, and does not make any referrals to private attorneys or businesses.

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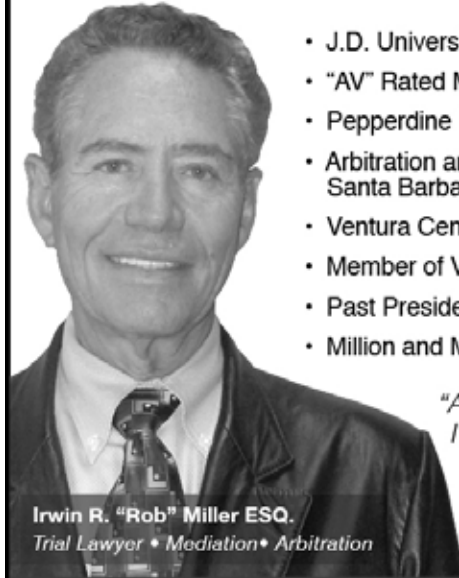
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*"The civil trial departments will no longer accept appearances from Court Call on the morning of a hearing. Court Call reservations must be made no later than 4:30 of the day preceding the hearing. Late reservations have caused delay in the hearing of hearings, and have caused unnecessary work for court staff. To be specific, Court Call appearances will not be accepted if not made by 4:30 of the day before the hearing.*

And Presiding Probate Judge **Roger Lund** wrote to the probate bar:

*I have really appreciated how many of you have taken measures to help keep our community safe by appearing remotely, providing orders prior to hearing, and minimizing the number of people coming into the courthouse for filings and hearings.*

*I am grateful that eDelivery is available at this time. We still utilize the drop box located by the front entrance to the Juvenile and Probate Courthouse.*

*As COVID-19 cases continue to rise, we need to be even more vigilant. As much as I enjoy seeing your masked faces in person from time to time, there is almost no situation presently that requires a personal appearance in court. Appearances by CourtCall video or audio Tuesday-Thursday, and Zoom appearances on Friday should be sufficient. I continue to be willing to do Zoom MSCs where requested on Mondays. We continue to be able to process your signed orders on the same day they are made and return them to you in the manner you direct. We continue to be able to process your filings through eDelivery.*

*I believe we may be fast approaching a time when the courts may need to restrict operations in some way, perhaps only to essential services as we did from March-June. During the last shutdown, I am aware of many other counties that did not close or even slow down their probate operation because they were able to operate entirely virtually. We now have that capability.*

*Therefore, I am asking all of you, effective immediately, to avoid coming into the courthouse in person for any reason for the foreseeable future. At this moment, this is an urgent request, and not an order, but may become one very soon. I appreciate how cooperative you have been in the past, and how I anticipate you will respond to this most urgent request.*

*Please forward this message to your colleagues in other counties.*

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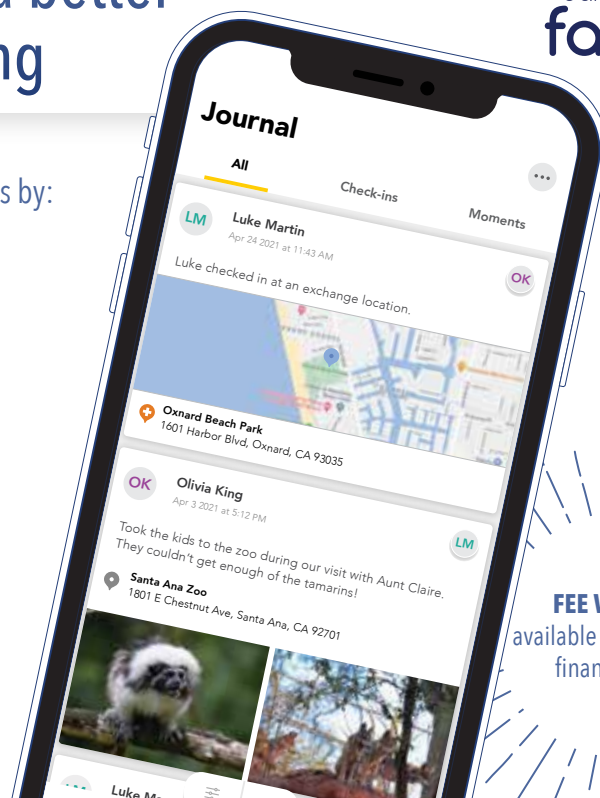


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# EMBEDDED INSTAGRAM POSTS – INFRINGEMENT OR FAIR USE?

by Rebecca Makitalo



Recently, fair use has become a topic of interest in the context of social media as complaints alleging copyright infringement are filed for embedding a user's Instagram post on third-party sites. Embedding occurs where a photograph is stored on a remote server, such as Instagram, and displayed directly on another website. Using copyrighted works to accompany an article or news resources often weighs in favor of finding fair use.

**The fair use defense against copyright infringement is one of the most important and well-established limitations to a copyright owner's exclusive rights. An equitable doctrine that was first codified in the Copyright Act of 1976, fair use encompasses the use of copyrighted works "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."** (17 U.S.C. § 107.)

Congress acknowledged that courts must analyze the fair use doctrine on a case-by-case basis "The factors to be considered shall include – 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

Despite ample case law applying the defendant-friendly doctrine, because courts analyze the doctrine on a case-by-case basis, no generally applicable definition of fair use exists. This often leads to inconsistent rulings. For example, in *Boesen v. United Sports Publ'ns, Ltd.* (E.D.N.Y. Nov. 2, 2020) 2020 U.S. Dist. LEXIS 203682, at \*p2, professional tennis player Caroline Wozniacki announced her retirement by posting on her Instagram page. The Instagram post included a photograph taken by professional photographer Michael Barrett. (*Id.*) Subsequently, United Sports Publications Ltd., a sports news publisher, ran an article on the announcement of Wozniacki's retirement and embedded Wozniacki's Instagram post in the article. (*Id.*, at \*p. 3.) The court held that the sports news outlet's use of the Instagram post featuring Barrett's photo constituted fair use, based on a weight and analysis of the fair use factors. (*Id.* at \*p. 6.) The judge determined that the embedded Instagram post, which incidentally included the photograph, was transformative even though the news outlet was a "for-profit publisher." (*Id.* at \* pp. 8-9.) Further, the article embedded the Instagram post's "cropped low-resolution version of the photograph that would be a poor substitute for the original" and was aimed to inform readers of the famous tennis player's retirement announcement on social media. (*Id.* at \* p. 15.) The finding of fair use led the court to dismiss the photographer's claim for copyright infringement.

In contrast to the defendant-friendly ruling in *Boesen*, other courts within the Second Circuit have ruled otherwise. For example, in *McGucken v. Newsweek LLC* (S.D.N.Y. June 1, 2020) 2020 U.S. Dist. Lexis 96126, at \*pp. 12-25, the court ruled that an article embedding a photographer's Instagram post did not constitute fair use as a matter of law. Weighing the fair use factors, the court found that the use of the photograph was transformative, the article published the entirety of the photograph, although anything less would not have preserved the meaning of the photograph, and the defendant's article was commercial in nature. Thus, the court denied the motion to dismiss the case based on fair use.

In another recent example, six journalists claiming copyright infringement against BuzzFeed alleged that they risked their lives to capture photos of George Floyd protesters, which BuzzFeed, without a license, embedded and displayed on their website. (*Hunley, et al. v. BuzzFeed, Inc.* (S.D.N.Y. 2020) 1:20-cv-08844-MKV.) The digital media company has yet to respond to the photographers' complaint; nevertheless, we can be assured BuzzFeed will plead fair use. We can only hope that the court's analysis will give further clarity on defining fair use with respect to the embedding of Instagram content on third-party sites.

We expect that courts will continue to issue disparate fair use rulings about whether unauthorized embedding of an Instagram post on a third-party website constitutes copyright infringement. Given that the issues in these cases are unique to social media, and particularly Instagram, a relatively new technology in terms of the fair use defense, there will be little clarity until the appellate courts weigh in on these issues.



**Rebecca Makitalo** is an intellectual property attorney at *Cislo & Thomas LLP* in Westlake Village. [rmakitalo@cislo.com](mailto:rmakitalo@cislo.com); (310) 979-9190.



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## CONEJO FREE CLINIC

### Clinic receives third grant

The Conejo Free Clinic Legal Clinic is honored to receive a \$10,000 grant from the American College of Bankruptcy Foundation in Virginia. ([www.americancollegeofbankruptcy.com](http://www.americancollegeofbankruptcy.com).) This grant represents the ACBF's third consecutive grant to support legal client care, bankruptcy educational materials and new attorney volunteer recruitment.

"We are honored to receive the ACBF's leadership grant again this year," said **Karen Oakman**, Vice Chair of the CFC Board of Directors and Legal Clinic Chair. "It will support our work helping people understand the bankruptcy legal process and how to navigate the legal system.... COVID-19 has caused a serious increase in calls for bankruptcy guidance."

The Conejo Free Clinic serves low income residents of Ventura County and North Los Angeles County in most areas of the law, free of charge. Numerous VCBA members have been dedicated Legal Clinic volunteers for years, including two attorneys who have volunteered since the Legal Clinic began at the CFC in 1976. Visit online at [www.conejofreeclinic.org](http://www.conejofreeclinic.org).

To discuss attorney volunteer opportunities with the CFC Legal Clinic, please call Oakman at Clunen & Oakman, (805) 273-4200.

### Fall donor appeal

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## BARRISTERS' CORNER

by H. Frederick "Rick" Seigenfeld

This was not your average year for the Ventura County Barristers. One reason it was a different year is that, despite intending to avoid all fun this year, I was Barristers President. I realize that sounds like a hefty task, but I like a good challenge and believe I was pretty successful in the end. You be the judge.

With the support of the Barristers Board, I cancelled our March Game Night, our May Trivia Night, our August Wine and Cheese Social, Meet the Bench this month and even our upcoming Barristers Board Dinner in December. If not for the impressive Zoom Trivia Night helmed by none other than our Vice President, **Kevin J. Heimberg** of Slaughter, Reagan & Cole, LLP, I think I would have successfully eliminated all fun. Maybe next year.

All kidding aside, this has been a trying year for us all. My thoughts are with everyone reading this and especially those who have suffered. We hope to bring back all the aforementioned events next year, but not before it is safe to do so. In reality, I consider myself a purveyor of fun and promise I will pressure Mr. Heimberg into moderating another glorious night of trivia

on Zoom. This time we shall dethrone Ferguson Case Orr Patterson LLP, the 2019 and 2020 victors. You have been warned, **Wendy Lascher**.

I am proud to announce that the Barristers have nominated the following slate of officers for 2021:

President: Kevin J. Heimberg  
Vice-President: **Jessica M. Wan**  
Treasurer: **Leonidas G. Nicol**  
Secretary: **Kristine A. Tijam**  
Past-President: **H. Frederick Seigenfeld**

Members-at-Large:  
**Benjamin L. Baumer, Tatiana DeVita, Meredith C. Doyle, Brian C. Israel, Taryn A. Reid and Joshua S. Smith**

I encourage all younger and newly practicing attorneys to join Barristers. As always, we are always looking for new members. Nominations for Barristers Board positions for 2021 are still open.

A "Barrister" is any member in good standing of the Ventura County Bar Association who, on Jan. 1 of a given year, meets at least one of the following

requirements: (i) is under the age 36 years; (ii) has been admitted to practice law in any jurisdiction for a period of seven years or fewer; or (iii) has been in practice in any jurisdiction for a total of seven years or fewer. Active law students who are members of the VCBA are considered "Student Barristers" and may serve on the Barristers Board as a Member-at-Large.

If there are no additional nominations, the proposed slate will be seated on Jan. 1, 2021. Any questions, comments or requests for more information about the requirements to serve on the Barristers Board, the time commitment and/or expectations, may be sent to Heimberg at [kheimberg@srllplaw.com](mailto:kheimberg@srllplaw.com). I would also encourage you to email Heimberg demanding more trivia nights or just to say hi.



**H. Frederick Seigenfeld** is the principal attorney for Seige Law PC in Santa Barbara, Oxnard and Westlake Village. He serves on the Barristers Board as its President and sits on the VCBA Board of Directors.

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# HOMESTEAD EXEMPTION SIGNIFICANTLY INCREASED IN 2021

by William E. Winfield



A very significant law change for homeowners will take effect on Jan. 1, 2021, when the homestead exemption for most Californians will increase to \$600,000.

The homestead exemption protects homeowners against involuntary liens, such as judgment liens, by preventing a judgment lien sale if the debtor has less equity than the allowed homestead exemption. For many years the homestead exemption has been tiered: an individual could exempt \$75,000; a homeowner with family members or spouse could exempt \$150,000; and homeowners over age 65 or with a disability could exempt \$175,000 of equity. Those amounts have been the same for many years and were not indexed for inflation.

The public policy of the homestead exemption is to allow people to stay in their homes against the threat of involuntary liens. When homestead exemptions were first enacted, they were a sufficient amount to allow the purchase of a modest home. As housing values have appreciated, the Legislature has occasionally increased the exemption amounts, but those changes have not kept up with California housing prices.

In September, Governor Newsom signed AB 1885, 2 which dramatically altering the homestead law. The new exemption for all homeowners will be a minimum of \$300,000 and a maximum equal to the

median home price in the homeowner's county with a cap of \$600,000. The maximum homestead exemption will fluctuate with the median price of homes.

The new law is found in amended Code of Civil Procedure section 704.730, which has been amended to read:

(a) The amount of the homestead exemption is the greater of the following:

(1) The countywide median sale price for a single-family home in the calendar year prior to the calendar year in which the judgment debtor claims the exemption, not to exceed six hundred thousand dollars (\$600,000).

(2) Three hundred thousand dollars (\$300,000).

(b) The amounts specified in this section shall adjust annually for inflation, beginning on January 1, 2022, based on the change in the annual California Consumer Price Index for All Urban Consumers for the prior fiscal year, published by the Department of Industrial Relations.

There is a textual conflict between subsections (a)(1) and (b). Subsection (a) (1) states that the exemption is based on the prior year's median sale price, while (b) states that the amount will be adjusted

annually for inflation. Future court decisions may decide whether the language in (b) is superfluous or was intended to prevent the homestead exemption from adjusting downward.

The median home prices are published at California Association of Realtors website (<https://www.car.org/marketdata/data/housingdata%20>). The median home price in Ventura County and most coastal counties is over \$700,000, leading to an effective homestead exemption of \$600,000 for local residents. The new law will apply to protect all homeowners without regard to whether they have recorded a formal homestead exemption. Since the exemption is automatic, homeowners will not need to take any action to take advantage of the new protections.

The increased homestead exemption will benefit many people experiencing financial hardship because it will make bankruptcy a more practical alternative for many who were not good candidates for bankruptcy before Jan. 1, 2021 due to the risk of losing their home in the process. By the same token, the dramatic increase in the homestead exemption will hurt some creditors who were expecting to collect on a judgment lien. Judgment lien sales, which were already infrequent occurrences, will become rare cases where the homestead exemption applies.

Because a home is often the greatest asset these changes to the homestead exemption will limit creditor options for collecting on debts. It remains to be seen how this might impact credit availability and lending practices in the future.



**William E. Winfield**  
is a partner at Nelson  
Comis Kettle & Kinney  
LLP, where he handles  
commercial litigation,  
bankruptcy, and  
creditors' rights matters.



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## Memories of Mora

by Joseph O'Neill

It takes a special person with a unique personality, legal skills and a great sense of humor to enjoy practicing law for 40 years. We respect an attorney who makes an extra effort to work with others to resolve problems, who respectfully listens and considers the opinion of everyone and also builds a life-long friendship with former opposing counsel. Our friend and associate **Herman P. Mora** will be long remembered as that type of person. Herman went to Heaven on Oct. 17.

Born and raised in Santa Paula, Herman was a big fan and constant supporter of his alma mater – Santa Paula High School, Class of 1964. Leaving home for college, Herman attended San Jose State and began his student activist years. The Vietnam protests and parades, rallies for Hispanic civil rights and calls for protecting immigrants fueled his passion for justice and his desire to seek a legal career. He graduated from Santa Clara University School of law in 1973.

Side note: Displayed in his front office was a large framed photo of young Governor

Jerry Brown shaking hands with college student Herman, then sporting a large Afro hair style. The photo grew more humorous with each passing year.

Herman began to practice family law with friends **Frank Urias** and **Victor Moheno** in the new downtown Oxnard firm of Urias, Moheno and Mora. His caseload took him to all areas of Southern and Central California where his enjoyable personality and knowledge of Spanish phrases and maxims helped to make new friends.

As a founding member of the Ventura County Mexican American Bar Association, Herman was devoted to assisting others who were desperate for legal advice but spoke only Spanish. He spent days at Legal Aid donating time to assist everyone seeking help and was often the last to leave. We relied upon his talents at the Family Law Self Help Center, where he never refused a request for help.

I knew my friend Herman as a man who loved to laugh. He was a perfect role model for our Mock Trial students at Pacifica High School in Oxnard. He became our Mock Trial Coach for the next ten years. Every coach knows the time and energy demands of Mock Trial, but Herman went

far beyond the hours and days usually dedicated to team practice. Herman made it a regular practice to take students to court to observe.

Once, after spending a day listening to a domestic hearing, we asked these high school students about their experience. We were all surprised (and the memory remains strong) when all four responded that they wanted to go to law school and become “divorce lawyers.” Herman explained that it was an example of unintended consequences, but agreed to visit the criminal courts on future trips.

Herman was a fine example of a professional attorney. He will always remind us that a gentleman is known by the way he treats others; and it’s a very good thing to listen and respect what the other person has to say.

Herman will be missed and remembered by his son, his brothers and sister, many friends, classmates and a new generation of “divorce lawyers.”

*Joseph O'Neill is a retired criminal defense lawyer.*

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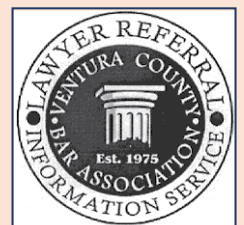
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Bob McCord is retired and only wanders in from time to time to keep us informed about his grandchildren. **David Praver** and Richard Taylor will both remain as 'of counsel' to the firm, while **Patrick Cherry** will continue to practice under the Taylor, McCord, Praver and Cherry firm name. Our contact information, email addresses and online presence will remain the same.

Although the size of the firm has decreased, we are committed to providing the same high quality, thorough representation you have come to expect from Taylor, McCord, Praver & Cherry. We appreciate your continued referrals of family law and appellate cases, and we remain available for consultation or co-counsel on specific issues or complex problems in family law.

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