



CITATIONS

OCTOBER - TWO THOUSAND TWENTY ONE



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Frank R. Bellinghiere

RECIPIENT OF THE 2020 BEN E. NORDMAN AWARD
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NOVEMBER 13, 2021
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PRESIDENT'S MESSAGE

by Marc D. Anderson

Fall is my favorite season.

I think I have a fall personality, if there is such a thing. I'm quiet and introspective, nostalgic and melancholy. Fall is that feeling that time might be getting away from you. My favorite Shakespeare sonnet captures it well:

That time of year thou mayst in me behold
When yellow leaves, or none, or few,
do hang
Upon those boughs which shake against
the cold,
Bare ruin'd choirs, where late the sweet
birds sang.
In me thou see'st the twilight of such day
As after sunset fadeth in the west,
Which by and by black night doth take
away,
Death's second self, that seals up all in rest.
In me thou see'st the glowing of such fire
That on the ashes of his youth doth lie,
As the death-bed whereon it must expire,
Consum'd with that which it was nourish'd
by.
This thou perceiv'st, which makes thy love
more strong,
To love that well which thou must leave
ere long.

I memorized this sonnet when I was in college and would try to impress others by reciting it. The response was usually a questioning look and, honestly, the sonnet is a bit of a downer. You would have more success reciting Pablo Neruda, but no thank you, his is spring poetry.

In Minnesota, the State Fair (the Great Minnesota Get-Together) at the end of August marked the transition from summer to fall, the last hurrah before school started in September. We would drive to Saint Paul, pay five dollars to park in someone's yard, and wander around the fairgrounds. Farm animals, livestock shows, farm equipment, politicians, arts and crafts, midway rides and food everywhere. Nothing beats deep-fried cheese curds or a bucket of warm chocolate chip cookies.

Fall in Minnesota was all preparation and change. Raking leaves into big piles, putting up storm windows, moving bikes to the



shed or basement, packing summer clothes away, and, when I was young, watching dad put snow tires on the cars. There was one last trip to Duluth to take the boat out of the water and say goodbye to our summer friends. We waited for the first snow. Would it be a blizzard or just flurries? Would it be before or after Halloween?

I prefer it cold, or at least cool. I like sweaters and coats, thick socks and warm hats, sleeping under heavy blankets. Growing up, I loved fires in the fireplace, our dachshund, Leo, stretched out in front of it, hot to the touch.

Thanksgiving, the highlight of fall, is my favorite holiday. A time to express and celebrate gratitude for all the blessings of the year. I was born the week before Thanksgiving and my mom and I spent it together but alone at home while dad and my sister drove my grandaunt Melvina back to the farm. Mom tells me we both cried that Thanksgiving. As a young boy, I remember watching out the front window, waiting for my grandparents to arrive. We brought out the fancy china and silverware for this special meal together and dad carved the turkey with an electric knife.

A few years ago my 50th birthday fell on Thanksgiving – a double treat. Kristi, Bodie, Libby and I gave our thanks with Kristi's sister in a nearly empty campground outside of Independence in the shadow of the Sierras.

Fall in Southern California is more subtle than fall in Minnesota. The elements of preparation and change are still there though. You just need to look a little closer to see them.



Later this fall, we will be Together Again at Spanish Hills Club for the Annual Dinner. We will honor **Frank Bellinghiere** as the 2020 recipient and **Vanessa Frank** as the 2021 recipient of the Ben E. Nordman Award. We will honor **Donna Munyon** as the recipient of the Verna R. Kagan Pro Bono Award and **Elvia Garcia** as the recipient of the James D. Loebel Pro Bono Award. Congratulations to you all.

Enjoy your fall.



Marc D. Anderson is a lawyer with Hiepler & Hiepler, APC, in Oxnard. He represents plaintiffs in personal injury and wrongful death cases.

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HAVE YOU HEARD?



Sad news. VCBA's legal community was shocked and saddened to learn of the September death of Ventura defense attorney **Jay Leiderman**. An obituary appearing in *Gizmodo* says "Leiderman's rebellious lawyering made him a go-to attorney for Anonymous hackers." <https://gizmodo.com/hacker-lawyer-jay-leiderman-is-dead-at-50-1847646284>.

Barristers season. It's the time of year people figure out what they're wearing to the VCBA Annual Dinner, fish out their best Halloween masks, and – if they are attorneys who will be under 36 years old next January 1, have been admitted to practice law for seven years or fewer – submit nominations or nominate

themselves for next year's Barristers Board. There are three open member-at-large slots, and nominations are also open for secretary, treasurer, vice president and president of Barristers.

Barristers helps newer lawyers with networking, mentoring and continuing legal education. Law students are welcome as Student Members of Barristers, and are eligible only for the at-large Board positions.

Submit nominations to **Leonidas Nicol** at LN@QLFLaw.com (subject line: Barristers Nomination) by 11:59 p.m. on Nov. 9.

If you would like more information or to see a Barristers Board meeting in action, please join us on Thursday, Oct. 7th at noon for our next regular board meeting. Email Nicol at LN@QLFLaw.com for the zoom link to our next meeting.

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WE READ SO YOU DON'T HAVE TO


Bare breasts v. the Equal Protection Clause

In *Eline, et al. v. Town of Ocean City, Maryland* (4th Cir. 2021), case no. 20-1530, a three-judge panel recognized that neither the Fourth Circuit nor the Supreme Court has yet squarely addressed whether laws that prohibit public nudity by referencing anatomical differences between women and men qualify as gender-based classifications subject to heightened scrutiny for purposes of the Equal Protection Clause. But the Court of Appeals “declined to delve into that issue because, even assuming that the classification in the Ordinance is subject to heightened scrutiny, the gender-based classification in the Ordinance “serves important governmental objectives and... the discriminatory means employed are substantially related to the achievement of those objectives.” (Slip opn., p. 12, quoting *United States v. Virginia* (1996) 518 U.S. 515, 533.)

What important objectives are those? A 1991 decision (*United States v. Biopic* (4th Cir. 1991) 928 F2d 112) said it is:


... protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens’ anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast.

Even though “public attitudes about gender and sexuality are constantly changing and evolving,” the panel thought it could not overturn *Biopic*. The plaintiffs’ expert planned to opine about evolving public sensibilities based on systematic review of more than a thousand historical and contemporary photographs of Ocean City, not to mention the establishment of two Hooters locations, but the court thought that opinion was not relevant to the issue of the public sensibilities of Ocean City residents and vacationers public toplessness.



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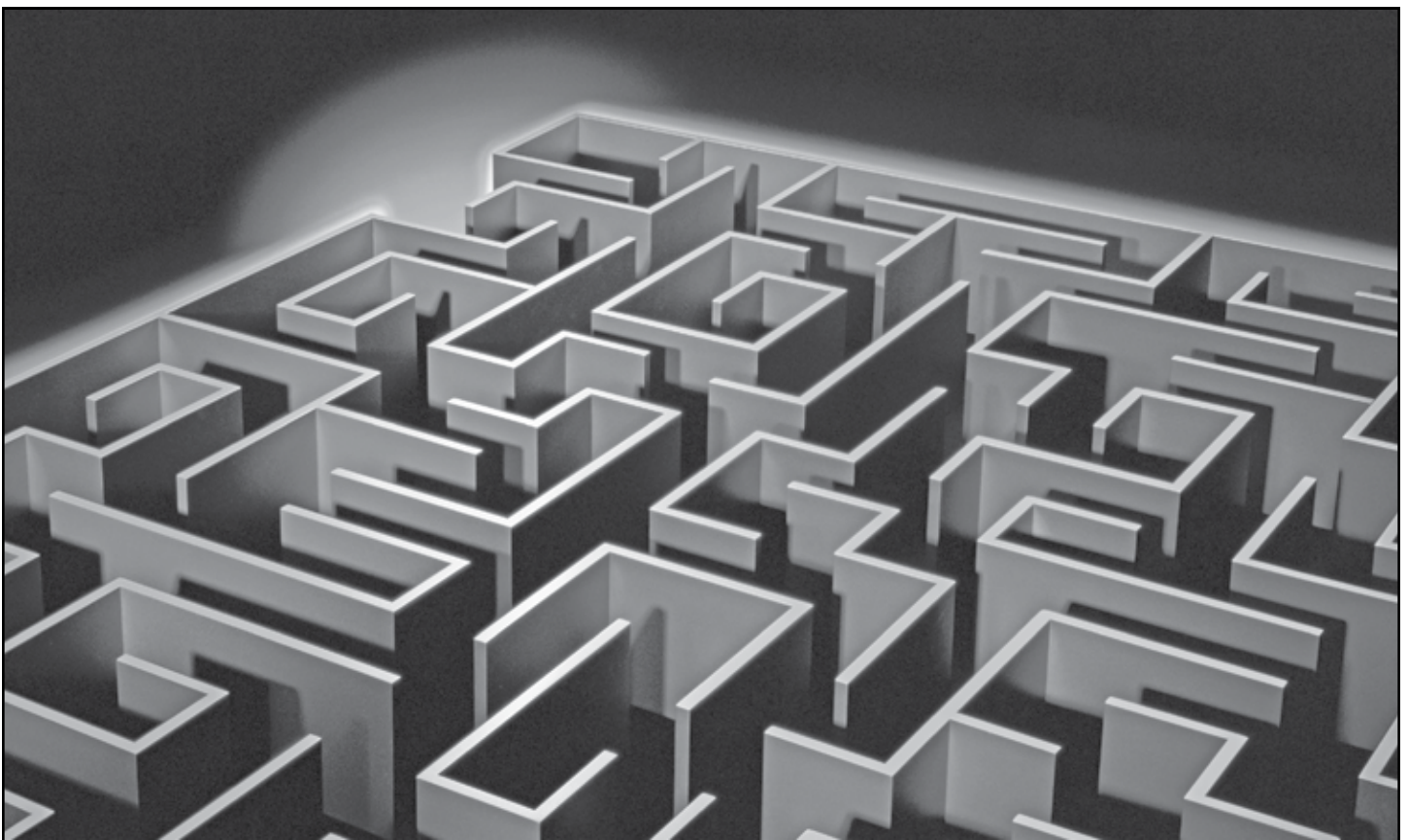
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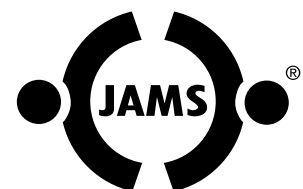


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Frank Bellinghiere: 2020 Recipient of The Ben E. Nordman Award

by Robin Britt



left to right, Cecilia Bellinghiere (spouse), Janice Bellinghiere (sister), Patricia Bellinghiere (Mom), Frank Bellinghiere

I met **Frank Bellinghiere** in 2014 in my capacity as the new Executive Director of Community Conscience. Soon I came to know him as one of the most kind, caring and truly philanthropic people I have ever met. Members of the community told me Bellinghiere is well known and respected because of how much he has helped a multitude of non-profits in a variety of ways.

How does he balance his professional life and philanthropic life to accomplish so much? Bellinghiere gives credit to his incredible wife of 32 years, Cecilia, for being there to support him each and every step of the way.

After passing the bar in 1983, Bellinghiere opened his first practice in Thousand Oaks; he would later open offices in Westlake Village and Oxnard. He learned of the extreme difficulties some clients faced, and being a compassionate person, Bellinghiere began to volunteer in 1984 for the Conejo Free Clinic and Ventura County Bar Legal Clinic.

When I asked Bellinghiere what makes him want to continually help others, he told me it is because of three instrumental things as he was growing up. The first was his mother, Patricia. She taught him early that it is important to extend help to those who are less privileged. Through her involvement in the church, Patricia included Bellinghiere in

projects to help the needy. This instilled in him a natural response to assist others who were in need and bring hope and light to their lives.

The next is the Boy Scouts of America. On his journey to become an Eagle Scout, Bellinghiere conducted several community drives for clothing, blankets and more to donate to Native Americans on a nearby reservation. This taught him how to utilize the help of others to directly make a big difference. He states the experience was invaluable.

Finally, Newbury Park High School English teacher Judy Urita-Hutchison taught Bellinghiere to be a true citizen in his junior year of high school. Through creative writing projects and positive reinforcement, it was the push he needed to follow his calling in life.

Bellinghiere has spent his time volunteering in the Conejo Valley since he moved there more than four decades ago. Here are some highlights:

- Volunteer Wrestling Coach, Hoover High School 1978-1980
- Big Brothers, Laramie, WY 1982-1983
- Volunteer Attorney for Conejo Free Clinic and Ventura County Bar Legal Clinic

- Three-term Past President and 24-year Advisory Board member of the Conejo Free Clinic
- Advisory Board member and pro bono attorney for Westlake Community Hospital
- Volunteer with Ventura County Bar Association and Legal Aid Clinic
- Past-President and longtime member of the Advisory Council of Community Conscience fundraising committee
- Founding Board Member for the Wellness Community/Cancer Support Community
- Member of the Board of Directors of the Greater Conejo Valley Chamber of Commerce from 2013 to 2016
- Volunteer fundraiser for Community Leaders Association at CLU
- Volunteer fundraiser for Senior Concerns
- Eagle Scout and past-District Chairman for Boy Scouts of America
- Volunteer at Westlake Sunrise Rotary, Thousand Oaks Rotary, YMCA, Indian Guides, Boy Scouts, 4H, Manna, Food Share, Hospice of the Conejo, and New West Symphony
- Citizens Emergency Response Team (CERT) Member

In addition to his volunteer work, Bellinghiere has been recognized for the following awards:

- The 1987 Agency Volunteer of The Year award from United Way of Ventura County
- Honoree of the Board of Supervisors County of Ventura for his commitment of time and expertise to the Council On Economic Vitality
- Community Conscience's Mardi Gras Ball King in 2007
- Conejo Valley Historical Society Don Triunfo in 2016
- One of the top five volunteers in Conejo Valley by the Ventura County Area Agency on Aging and Conejo Senior Volunteer Program in 2020

Bellinghiere continues to maintain his high visibility and activity level locally in spite of the fact that he splits his time between California and Wyoming. Bellinghiere has had a role in supporting and assisting in the development of many non-profits and service organizations to more effectively serve the community. Community Conscience has benefitted immensely from his creative ideas and energy in fundraising. He currently serves as a silent auction and major sponsor committee member in preparation for the 2022 Mardi Gras Ball. He plans to assist numerous other agencies this year as well.

Bellinghiere always asks, "What else can I do to help?"



Robin Britt is the Executive Director of Community Conscience.

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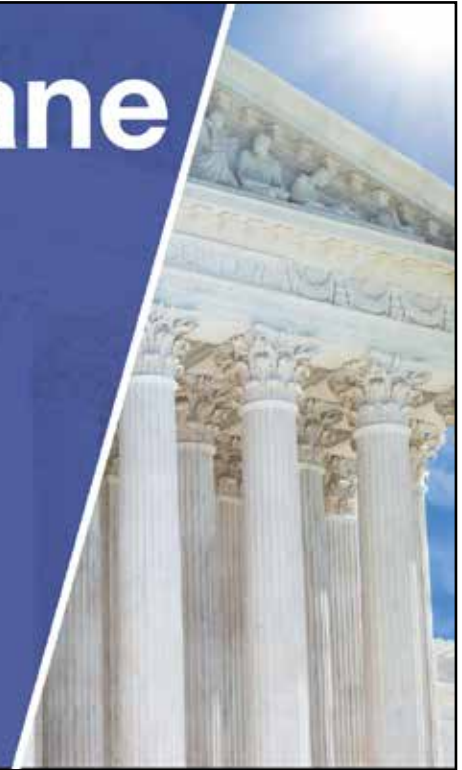
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Vanessa Frank: 2021 Recipient of The Ben E. Nordman Award

by Kate Wood



Left to Right: Michael Paz, Vanessa Frank, Jimena Perez Arroyo, Melissa Sobolik, Michelle Carballo Agustin, Maritza Garcia-Lopez and Lorella Thomas Hess

The Ventura County Bar Association is privileged to award **Vanessa Frank**, the 2021 Ben E. Nordman Public Service Award, recognizing her leadership, dedication, and tangible impact furthering community justice in Ventura County.

Frank is the quintessential community lawyer, a humble and tireless advocate for community-led solutions to the social harms our system of laws too often inflicts on the innocent. Her mission as a lawyer reflects this character: “To engage clients with their own power. To see them cast aside a layer of worry and concern and move forward to exercise their rights, to dream big and feel as though they have both feet on the ground and can move forward.” Empowering others to assert their rights and personhood in the face of a hostile system is not a simple task. It requires not only a fighting spirit, but also the heart of a healer and the mind of a teacher. Frank possesses these characteristics in spades.

Frank is a graduate of Stanford Law School, where she also earned her Bachelor’s in Public Policy. She began her career serving the public in Ventura County sixteen years ago this month, joining the California Rural Legal Assistance branch office in Oxnard to work within the Agricultural Workers Program (as it is now known), providing free legal assistance to the low-income workers whose labor feeds our nation. In 2009, Frank decided to launch The Law Office of Vanessa Frank in Ventura, providing high quality legal services to immigrants and their

families. Joining the private bar did not lessen her commitment to public service, as she continued to expand her community-focused advocacy in the years since.

Over the years, Frank has led, launched and supported countless efforts to protect our neighbors and improve the conditions of our community. She takes a broad approach to her work, not limiting her advocacy to client case work, but also seeking to engage the entire community in the response effort. For several years, she has partnered with attorney **Rennée Dehesa** to establish and maintain a network of volunteers providing “Know Your Rights” education presentations on immigration issues at local community and church groups. Frank herself is a frequent guest on Facebook live broadcasts for *Radio Indigena* and the Mixteco Indigena Community Organizing Project (MICOP). She is also the main force behind Oxnard College’s Swap Meet Justice program, providing a free monthly legal clinic offering assistance with citizenship and immigration issues, applications for Deferred Action for Childhood Arrivals (DACA) status, COVID-19 vaccines, and voter registration for eligible persons. And she has been a scholarship liaison for DACA applicants, recruiting the support of local non-profits to help low-income students with the cost prohibitive \$500 application fee.

Frank’s efforts to educate and support the community targets the legal community as well. She is a frequent MCLE presenter, expanding the resources available to help

the extremely underserved immigrant population. Impressively, in the aftermath of President Trump announcing plans to phase out the DACA program, Frank rushed to put on clinics training 50 attorneys and legal assistants how to assist DACA applicants maintain their status. She has also trained advocates to protect immigrant children who have survived abuse, abandonment or neglect by one or both of their parents by obtaining special immigration status. And just this summer, she provided training through VCBA for attorneys to expand guardianship resources for unaccompanied minors. Frank has created a group of “immigration warriors” – lawyers, accredited representatives, social workers, and activists among the immigration bar of Ventura County. “Immigration Warriors” just happens to be the name of the informal gathering of advocates she convenes each month.

All of Frank’s accomplishments improving knowledge and expanding resources for the immigrant community in Ventura County should not overshadow her impressive contributions to the public policy of Ventura County. She has partnered with law enforcement to reduce the unintended harms of immigration enforcement, working to obtain a memorandum of understanding from several Ventura County agencies to assist children of detained or deported parents, improving the likelihood those children are placed with family members rather than lost in the foster care system. She also worked with the District Attorney’s office to set up a specialized unit to receive reports of predatory *notarios*, grifters who defraud immigrant communities by falsely holding themselves out as qualified legal professionals and perform no work for the unsuspecting client. Her efforts also include working to end modern slavery as part of the Human Trafficking Victims’ Services Task Force at Interface.

Vanessa Frank is shaping the minds of the future. From her pre-law school days as an Americorps fellow working in Bay Area public schools, to teaching ethics of immigration law and liberation theology at California Lutheran University, to teaching the immigrant community and the immigration bar about the rights of people entangled in the U.S. immigration process, Frank has always sought to empower those

around her to do good. Her immense contributions to community justice continue to receive frequent recognition, having received the Holly G. Spevak Public Service Award from the Women Lawyers of Ventura County in 2014, the Verna Rose Kagan Award for Public Service from Ventura County Legal Aid in 2018, and being recognized as one of four “Women of the Year” for 2020 by Senator Hannah-Beth Jackson and Assemblymember Monique Limón.

The Ventura County Bar Association is proud to add the 2021 Ben E. Nordman Public Service Award to Vanessa Frank’s long list of recognitions. This is a well-deserved award to an attorney who will no doubt continue to improve the quality of the Ventura County Bar for as long as she blesses us with her presence.



***Kate Wood** is the statewide LGBTQ+ Program Staff Attorney at California Rural Legal Assistance working in the Oxnard Office and member of CITATIONS’ editorial board.*

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TEXTING WITH UR CLIENT?

by Kathleen Smith



When you text with your client, you should be taking reasonable steps to preserve this data as part of the client's file. (State Bar of California Formal Opinion 2007-174.) This rule casts a wide net over communications with the client. If a text message was "generated during the representation" for continuing use therein, the text is "reasonably necessary to the client's representation," and becomes part of the client file.

California Rule of Professional Conduct 3-500 requires a lawyer to "keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."

The client's file must be provided to the client when you withdraw from representing them. California Rule of Professional Conduct 3-700 states:

A member whose employment has terminated shall:

- (1) Subject to any protective order or nondisclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not. . . .

Law firms can contract with a vendor to siphon client text messages into client files. For example, Kenect.com will capture client text messages, while also sending collection reminders and the all-important review requests. Kenect.com enables the firm to set up a texting file for each client, and then when the client sends a text message, it automatically goes to the Kenect platform. Caveat: clients need to aim

their text to the attorney's mobile number, otherwise the text goes to the office line.

While useful for capturing communications into the 3-700 client file, law firms may find that clients respond faster to past due notifications. That way, if the texting attorney in our opening example does succeed in resigning the client's employment under rule 3-700, they will be owed less money because of those helpful past-due notifications.

Kathleen J. Smith practices law at *Schneiders & Associates* in



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CAREFUL WHAT YOU TEXT:

Will it be disclosed under the California Public Records Act?

by Mari K. Rockenstein

Are texts or emails sent by a public employee on their personal device or account a matter of public record if the texts or emails are about official business?

During a May 2021 hearing before the City of Ventura's Planning Commission regarding a controversial townhome project, Associate Planner Jamie Peltier was seen texting on her phone while members of the public were speaking before the Commission. Peltier's text were harsh: "I hate the public so much," and "They hate everything and everyone." She also wrote, "What a lovely development that the community HATES" and described project opponents saying, "They went straight psycho." ("Editorial: Officials must learn private thoughts are best kept to themselves," *Ventura County Star*, July 17, 2021.)

Members of the public who saw Peltier texting requested that the texts be made public, as the Commission had approved the project 4-0 and a resident appealed the decision to the City Council. They argued that the public had a legitimate right to know what a staff person was communicating during the course of a public hearing. Although Peltier had been using her private phone to text both family members and colleagues, the City promptly retrieved and disclosed the text messages and apologized for the comments (*Ibid.*)

The California Supreme Court has unanimously ruled that emails and text messages from the personal accounts of public officials in California can be subject to public review if the official is conducting public business on those private accounts. (*City of San Jose v. Superior Court of Santa Clara County* (2017) 2 Cal.5th 608.) In that case petitioner Ted Smith made a California Public Records Act ("CPRA") request to the City for 32 categories of public records involving specified persons and issues related to redevelopment efforts in downtown San Jose. (*Ibid.*) The request included voicemails, emails, and text messages sent or received on private electronic devices used by the mayor, members of the city council, and their staffs. The City disclosed communications

made using City telephone numbers and email accounts, but did not disclose communications made using the individuals' personal accounts, taking the position that such items were not "public records" subject to the CPRA. (*Ibid.*)

Smith sued for declaratory relief, arguing that the CPRA's definition of "public records" encompasses all communications about official business, regardless of how they are created, communicated or stored (*City of San Jose*, 2 Cal.5th at p.616.) The City argued that messages communicated through personal accounts are not public records because they are not within the public entity's custody or control. The City also argued that privacy law protected their employees' personal text messages and email messages from public disclosure. (*Ibid.*)

The trial court granted summary judgment in favor of Smith, ordering disclosure of the records he sought. The Court of Appeal issued a writ of mandate overturning the trial court's order (*City of San Jose*, 2 Cal. 5th at p.618.)

The Supreme Court granted review and ruled that emails and text message communications are **not** excluded from disclosure under the CPRA when they are on a personal account or device. The court held that it is the content, not the location of a communication, that determines whether an email or text message is a public record. (*City of San Jose*, 2 Cal.5th at p. 618.)

CPRA establishes a basic rule requiring disclosure of public records upon request. (Gov. Code, § 6253.) In general, it creates "a presumptive right of access to any record *created or maintained* by a public agency that relates in any way to the business of the public agency." (*Sander v. State Bar of California* (2013) 58 Cal.4th 300, 323.) Every such record "must be disclosed unless a statutory exception is shown." (*Ibid.*) Section 6254 sets out a variety of exemptions, "many of which are designed to protect individual privacy." The Act also includes a catchall provision exempting disclosure if "the public interest

served by not disclosing the record clearly outweighs the public interest served by disclosure" (Gov. Code, § 6255, subd. (a).)

Open access to government records is essential to verify that government officials are acting responsibly and held accountable to the public they serve. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.) "Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." (*Ibid.*) The whole purpose of CPRA is to ensure transparency in government activities. If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny. (*Ibid.*)

Whether a writing is sufficiently related to public business will not always be clear. For example, depending on the context, an e-mail to a spouse complaining "my coworker is an idiot" would likely not be a public record. Conversely, an e-mail to a superior reporting the coworker's mismanagement of an agency project might well be. The Court established several factors to use in determining whether such writings should be disclosed, including: (1) the content itself; (2) the context in, or purpose for which, it was written; (3) the audience to whom it was directed; and (4) whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment (*City of San Jose*, 2 Cal.5th at 619.) For example, the public might be titillated to learn that not all agency workers enjoy the company of their colleagues, or hold them in high regard. However, an employee's electronic musings about a colleague's personal shortcomings will often fall far short of being a "writing containing information relating to the conduct of the public's business." (Gov. Code, § 6252, subd. (e).)

If there is such a request that seeks public records held in an employee's nongovernmental accounts, the agency's first step should be to communicate the request to the employee in question. The agency may then reasonably rely on the

employee to search **their own** personal files, accounts, and devices for responsive material. Agencies are also in the best position to implement policies that fulfill their obligations under CPRA and preserve the privacy rights of their employees. No one particular search method is required or necessarily adequate. Ultimately, however, a city employee's writings about public business are not excluded from CPRA simply because they have been sent, received or stored in a personal account.



Mari K. Rockenstein is a Ventura County attorney and law professor.



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THE FURTHER EXPANSION OF – AND ASSERTION OF “GUARDRAILS” TO – CALIFORNIA’S NOTIONS OF “DOMESTIC VIOLENCE” IN FAMILY LAW

by Gregory W. Herring



Over the past 20 or so years, the Legislature has enacted a “hodgepodge” of confusing and sometimes contradictory provisions, as California Family Law guru, Garrett Dailey, has put it, in its rush to enact one domestic violence (“DV”) statute after another.

As of Jan. 1, *coercive control* is a newly codified form of DV under the Domestic Violence Protection Act (“DVPA”) (Fam. Code, § 6200, *et seq.*). Family Code section 6320 provides for *ex parte* orders enjoining harassment, threats and violence. Under the statute, “coercive control” is defined as:

“... a pattern of behavior that in purpose or effect unreasonably interferes with a person’s free will and personal liberty. Examples of coercive control include, but are not limited to, unreasonably engaging in any of the following:

- (1) Isolating the other party from friends, relatives, or other sources of support.
- (2) Depriving the other party of basic necessities.
- (3) Controlling, regulating, or monitoring the other party’s movements, communications, daily behavior, finances, economic resources, or access to services.
- (4) Compelling the other party by force, threat of force, or intimidation, including threats based on actual or suspected immigration status, to

engage in conduct from which the other party has a right to abstain or to abstain from conduct in which the other party has a right to engage.”

As of the same date, the standard for “disturbing the peace of the other party” sufficient to warrant DV orders is “conduct that, based on the totality of the circumstances, destroys the mental or emotional calm of the other party.” (Fam. Code, § 6320, subd. (c).) This grew from *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1146, which rejected arguments that the Penal Code’s stricter definition ought to apply.

In making these amendments, the Legislature was concerned about expanding the scope of abusive conduct beyond what was necessary, taking care to “... limit the application ... to clearly abusive behaviors.” (Senate Judiciary Committee Analysis, cited by *In re Marriage of L.R. and K.A.* (July 27, 2021, D077533) ___ Cal. App.5th ___.) The trial courts were left with the hard work of analyzing and applying these arguably amorphous notions, including in the context of complex child custody disputes (under Family Code sections 3020, 3111, and 3044, DV is an express factor in any custody matter).

On July 27, the Court of Appeal issued its Opinion in the now-certified for publication *In re Marriage of L.R. and K.A.*, *supra*. The case involved alleged DV in the context of a high conflict custody proceeding. The

Court emphasized that coercive control is to be viewed within “certain parameters,” including,

“... ‘a mental state, objective reasonableness, causation, foreseeable harm, actual harm’ – [toward] ‘provid[ing] strong guardrails to help ensure that the [law] will function as intended and not reach benign conduct that is ordinarily tolerated in relationships or that does not actually distress the person.’”

It explained, “These ‘guardrails’ are necessary because [a DV] order implicates fundamental liberty rights, as a violation of its provisions is a crime, ... and it is a factor that is weighed in child custody and visitation determinations.” The Court continued, “Respecting these guardrails, courts are concluding that the [DV laws were] not enacted to address all disputes between [former and existing] couples, or to create an alternative forum for resolution of every dispute between such individuals.”

Earlier in the case, the San Diego trial court found that the mother involved acted “obsessively” in an incident with the father and their ten-year-old daughter during the mother’s scheduled parenting time at a visitation center. The trial court found that the mother was “aggressive and controlling” during the incident, and that she “escalated an already emotionally intense situation, and subjected both the [father] and the child to further distress,” and “she manipulated that child’s already sensitive emotional state to a degree that was not acceptable.” It noted that a responding law enforcement officer testified that it was “one of the worse” DV calls of his 28-year career. The trial court found that the mother “escalated [the situation] beyond control.”

Based on those findings, the trial court found that the mother committed DV by disturbing the father’s mental peace and calm, including through “controlling and coercive behavior.” It therefore issued DV orders against the mother, protecting the father and child.

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But the Court of Appeal reversed, concluding that “[m]other’s conduct did not rise to the level of destroying father’s mental and emotional calm to constitute abuse with the meaning of the [law].” In short: *The trial court had the authority to handle the matter as a “pure” child custody dispute outside of the DVPA, and should have done so.*

This Opinion immediately set off alarms. Appellate specialists raised concerns that the Court of Appeal appeared to have wrongly asserted its own assessment of the facts over that of the proper factfinder – the trial court.

At the substantive level, the Opinion’s logic – if extrapolated – could erode hard-fought gains in the eyes of DV prevention professionals (including child development specialists, child advocates, women’s advocates, family law attorneys, judicial officers and many others). *Of course*, trial courts in *any* custody case have the authority to handle custody matters outside of the DVPA. Determinations of DV are always ones of degree. These analyses and applications are well within the normal purview of the trial courts. As the Legislature continues to find it popular to expand notions of DV, *In re Marriage of L.R. and K.A* may be a harbinger of further “guardrails” from the appellate courts.



Gregory W. Herring is a CFLS, and a Fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. He is the principal of Herring Law Group, a family law firm primarily serving “the 805” with offices in Santa Barbara, Ventura and San Luis Obispo Counties. His prior articles and blog entries are at www.theherringlawgroup.com.

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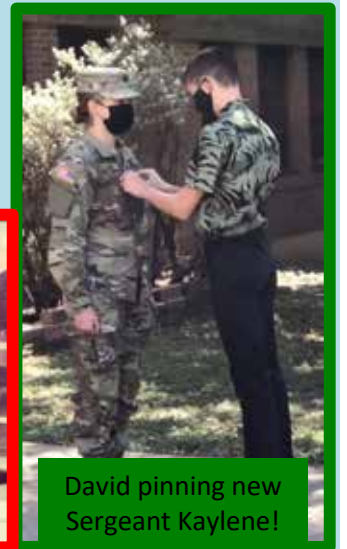
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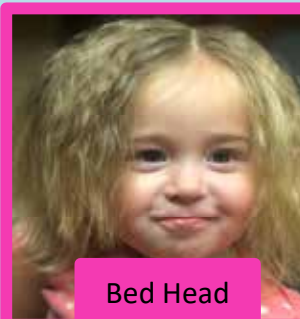
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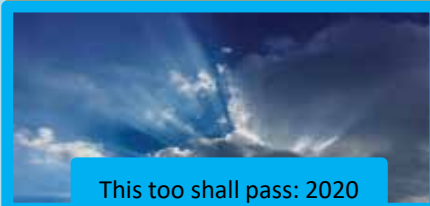
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