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# CITATIONS

MARCH – TWO THOUSAND TWENTY TWO

## FIVE BASICS I WISH NON-IP ATTORNEYS KNEW ABOUT INTELLECTUAL PROPERY LAW

*By Brian Fitzgerald*

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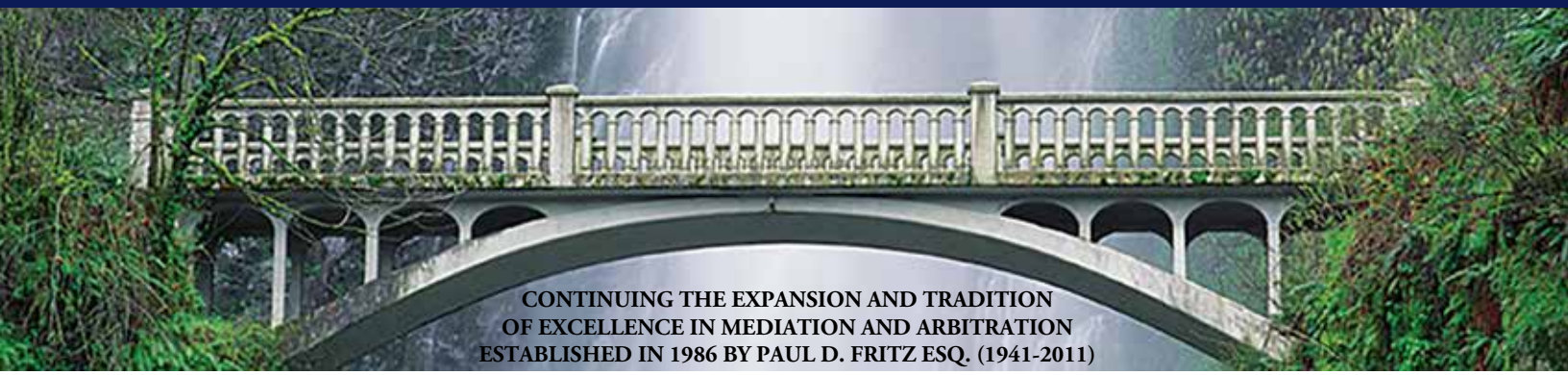


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# PRESIDENT'S MESSAGE

*by Jacquelyn D. Ruffin*

March 19, 2020 is a date that we will not easily forget. You probably remember where you were when you learned that Governor Newsom issued the first stay-at-home order in response to COVID-19. With a moment of reflection, you can likely recall your initial reaction. Maybe it was concern, annoyance, confusion, shock or fear. Perhaps you thought about family members, friends or coworkers with pre-existing conditions or who are otherwise high risk; the food or supplies you needed at home; the files, equipment or technology you required to work remotely; how the pandemic would affect your clients, cases or even the viability of your business; or whether things would be "back to normal" in a couple of weeks or a few months.

We have been grappling with the pandemic for two years. As lawyers, we have the privilege of helping people, fighting for justice and advancing the public good all while being intellectually challenged. Our work is unquestionably rewarding. However, being an attorney is notoriously and inherently stressful because of the high stakes, tight deadlines, long hours, heavy caseloads, laborious administrative tasks and adversarial nature of our profession. Grim statistics about attorney burnout, anxiety and depression were plentiful before March 2020. Unfortunately, for many lawyers, the pandemic exacerbated the problem. (*See*, *e.g.*, ALM 2021 Mental Health and Substance Abuse Survey.) An ABA report explains that "[s]tarting in March 2020, lawyers throughout the country were compelled to quickly and fundamentally change how they worked with each other, provided client services, handled their workload, developed business, and managed the people and processes that take place in every organization. At the same time, lawyers were reacting to the many personal and family disruptions that accompanied the pandemic, and which affected lawyers' productivity, effectiveness and mental well-being in working from home." (Scharf et al, *Practicing Law in the Pandemic and Moving Forward: Results and Best Practices from a Nationwide Survey of the Profession* (2021) ABA, p. vi.) Although the pandemic impacted the entire legal profession, the ABA study revealed significant disparities based upon demographic factors (including age, gender, gender identity, sexual orientation, race/ethnicity, disability), workplace factors (*e.g.*, seniority, practice area) and household circumstances (such as whether there are dependent children in the home). For example, women were much more likely than men to have taken on additional childcare obligations during the pandemic while maintaining or even increasing their pre-pandemic workload. (*Id.* at p. 12.)

History demonstrates that periods of significant upheaval are opportunities for positive change. Indeed, individuals, law firms and legal organizations across the nation have responded to the unprecedented nature of the pandemic by envisioning and advocating for greater, holistic attorney wellness. (*See*, *e.g.*, *Moving Forward*, *supra*.) In hopes of bolstering our local legal community's focus on wellbeing, I asked several local attorneys to share their experiences of lawyering through the pandemic and lessons learned.

**Sean Perez** deeply felt each wave of the pandemic. The statewide shutdown was alarming because his grandparents, who raised him, are high-risk and reside out of town in East L.A. Perez immediately took steps to enhance their protection by organizing delivery and replenishment of food, medical supplies, masks and gloves. Often, after a full day of work and on the weekends, Perez would travel to East L.A. to check on their welfare. The availability of the vaccine brought Perez some reprieve. But then his best friend survived a heart attack. Subsequently, a close family member faced a serious medical problem. Perez added helping those individuals to his already full list of responsibilities, noting that his wellbeing is inextricably tied to the wellbeing of his loved ones. To offset the stress of managing a busy case load during the pandemic, Perez and his wife started taking daily walks on the beach. Watching the rolling waves and the sandpipers running along the shore, listening to crashing surf and being immersed in nature has been rejuvenating for Perez. He recommends that attorneys integrate a peaceful habit into their demanding lives.

For **Jennifer Volcy**, that sense of tranquility derives from her artwork. She discovered her love of the visual arts in elementary school but began consistently painting in law school. Now, in addition to being a fulltime litigator, she sells her oil and acrylic paintings. Volcy enjoys being an attorney yet appreciates that her artwork is "completely different than and unconnected to practicing law." Lawyering is fast paced, adversarial and analytical. Painting is a way to slow down, relax and use a different part of her brain. During the pandemic, Volcy found remote working to be challenging because of the lack of separation between the professional and personal. However, she gave herself a "hard stop" at the end of the workday and dedicated the evenings to art. Volcy notes that painting brings her balance and encourages attorneys to find "a healthy outlet that serves as a safeguard from work bleeding into all aspects of their lives."

**Dien Le** agrees that "balance is important." He observes that "lawyers have a stressful profession. We need a place of calm after the contentiousness of work and a way to not focus on work 24/7." Three months into the pandemic, Le found that outlet in long distance running. Incredibly, he was not a runner pre-pandemic. He tried it because gyms were closed, and he needed exercise, wanted a challenge and likes being in nature. After completing his first half marathon in November 2021, he became "hooked." He now plans vacations around races. This month, he will compete in Napa Valley. Le's advice? "Get out of your comfort zone. If I can start running half marathons at 50, then you can challenge yourself at any age. It's never too late to strive for something more or try something new."

*Continued on page 4*

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Three years ago, **Keri Sepulveda Kettle** had an epiphany. While playing tennis with a friend one Saturday, Kettle said, "I wish I could play during the week." Her friend queried, "Can't you?" That simple question inspired Kettle to be creative with her work schedule. Since she was rarely in court on Fridays and Friday afternoons were typically quiet, she began to leave work on Fridays around 1:00 p.m. After an afternoon of tennis, she meets her spouse for dinner. The change "has been valuable. It has put work in proper perspective. It is important but not everything." Additionally, because Kettle adjusted her schedule before the pandemic, she already knew that "it is a false idea that you need to be in a physical office from 8:00 a.m. to 5:00 p.m. to be productive, serve clients well and have a successful practice." This knowledge facilitated her firm's transition to remote working during the pandemic. Notably, Kettle's paralegal now takes Fridays off completely. Kettle affirms that "it is important for partners to set an example of work-home balance and normalize [tending to personal] wellbeing."

**Katie Becker** is taking an inventive approach to her entire practice due to the pandemic. In addition to the inherent complications of working from home with two small children, Becker has been navigating an unexpected, challenging medical issue that arose with her son. Although Becker's firm culture is "very supportive, understanding, compassionate and flexible," her personal drive to excel as a partner, attorney, wife and mother became exhausting. Realizing that something needed to change, Becker retained a business coach. With the coach's guidance, Becker shifted from a draining caseload to an uplifting one. For example, during intake, Becker no longer asks herself whether she can help the client; instead, she asks whether she wants to work with the client and would enjoy the work. Becker emphasized time away from work as another critical aspect of attorney wellness. A recent ski trip was "fantastic" – the quiet serenity of Lake Tahoe provided Becker the reinvigoration she needed. "The work never stops but working all the time is not healthy for ourselves, our families or our relationships. We have to take breaks."

**Joshua Hopstone** had an innovative approach to wellness during the pandemic. In September 2021, he decided to "unplug" for the entire month of December. To prepare, he analyzed each of his cases, determined where he wanted them to be in spring 2022 and which motions needed to be filed before his leave, communicated with clients and opposing counsel about his intention to be out of the office and negotiated staggered briefing/hearing schedules. For the first two weeks of December, Hopstone's kids were still in school, which meant that he had time to himself. The last two weeks, the entire family enjoyed a staycation. Hopstone's transition back to the office was "smooth." Due to careful planning and transparency, he "did not have a mountain of work waiting" for him. There were no adverse impacts on his practice. Hopstone describes the block of time off as "refreshing" and confirms that the benefits outlasted the month of December.

As we reflect on the toll the pandemic has taken in our personal lives and community, let's recommit ourselves to attorney wellness. For additional reading, I recommend the 2018 ABA *Well-Being Toolkit for Lawyers and Legal Employers*. This comprehensive document elaborates upon the critical import of giving time and attention to attorney wellbeing from an occupational, emotional, physical, intellectual, spiritual and social perspective; offers action plans for individuals and legal employers; suggests wellbeing activities and events; and provides numerous templates, books, online resources and a list of potential speakers and consultants.


***Jacquelyn D. Ruffin*** *is a partner at Myers, Widders, Gibson, Jones & Feingold LLP. Her practice focuses on corporate/business, real estate and land use matters. She can be reached at jruffin@mwgjlaw.com or 805-644-7188.*

# HAVE YOU HEARD?

Congratulations to recently appointed Ventura County Superior Court Commissioner **Kristi Pearlso.** A former deputy public defender, Pearlso has been in private practice the past fifteen years.



Presiding Justice **Arthur Gilbert** has been a member of Division Six of the Second Appellate District since that panel's creation in 1981. The Division Six courtroom at 200 E. Santa Clara St., Ventura, is being renamed in his Honor's honor, with a celebration when COVID allows, says Second District Administrative Presiding Justice Elwood Lui. Meanwhile, CITATIONS thanks Associate Justice **Steven Z. Perren** for the scoop.

The partners of Myers, Widders, Gibson, Jones & Feingold, LLP are happy to announce that they have purchased the historic building at 39 N. California Street in downtown Ventura, former home of Benton, Orr, Duval & Buckingham. The Myers Widders firm plans to celebrate its 50th year anniversary in its new offices later this year, after renovations are completed.

**Mari Rockenstein** (who happens to be a member of the CITATIONS editorial board) is an adjunct professor of business law at California Lutheran University. Rockenstein sponsors the Pre-Law Society, which is soliciting volunteer attorneys to talk about legal career opportunities with members of the group. You can reach her at *mkrock2011@gmail.com*.

Oops, we goofed in the February 2022 CITATIONS by forgetting to note that the cover article about **John Howard** was based on past nominations of Howard that ABOTA's Cal Coast Chapter submitted to the parent organization.

The Legal Aid Clinic is back! Starting April 5th 2022 and every 1st and 3rd Tuesday of the month, Ventura County Legal Aid and the Ventura County Law Library will hold a clinic for Ventura County Residents seeking advice and assistance. Visit *vclegalaid.org* for more details.

**Sasha Collins**, a partner in Ventura's Myers, Widders, Gibson, Jones & Feingold, LLP, was honored recently by being selected to Pacific Coast Business Times' 40 Under 40 list. Collins can be reached at 805.644.7188, *scollins@mwgjlaw.com*.

Longtime Ferguson Case Orr Paterson partner **David Shain** (past VCBA president and CITATIONS editor, too) has retired. Reach Shain, and possibly arrange a tennis game, at *dshain310@gmail.com.*

The Ventura Superior Court announced Feb. 14 that it will continue requiring most people, regardless of vaccination status, to wear masks in public areas in all court facilities even after the state and county mask mandates end. For details, see Administrative Order no. 22.06.

CITATIONS' very own **Carol Mack** was recently engaged to Dr. Raymond Brie, a professor of Elementary Education as CSU Northridge, where Mack also teaches. Her tweet announcing the engagement went viral, receiving more than one million likes, and has been reposted numerous time by other social media accounts.

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# FIVE BASICS I WISH NON-IP ATTORNEYS KNEW ABOUT INTELLECTUAL PROPERY LAW

*by Brian Fitzgerald*

When your client comes to you with an IP question, there are a few basics you'll want to know so you can determine whether to refer them to an IP lawyer.

**1) Never publicly disclose the details of an invention you want to patent before having an application on file** – The first rule of patent club is "we don't talk about patent club." This is technically the second rule, as well. Indeed, if you take nothing else from this article, please make sure any clients interested in patent protection do not publicly disclose or offer to sell their invention before they at least have a provisional application on file.

When a patent application is examined, being "anticipated" by prior art is a ground for denal. While this typically refers to prior disclosures "by another," in certain circumstances one's own previous disclosures can be used as a basis to deny the application. Although in the United States the USPTO provides a one-year statutory "grace period" from such a disclosure in which to file an application (35 U.S.C.§ 102(b)(1)), utilizing this "grace period" is ill-advised for at least two reasons: (1) If your client wants to pursue foreign protection, many other countries do not have this grace period and will consider the less-than-one-year prior disclosure as prior art to deny the application; 2) In the U.S., we are on a "first inventor to file" system, and some unscrupulous individual seeing your disclosure may try to file a patent on your invention before you, which can result in a costly and uncertain litigation or derivation proceeding before the USPTO.

If your client does come to you having already disclosed less than a year ago, you can still utilize the "grace period" in the United States, but his or her rights might already be forfeited in certain desirable foreign markets and your client may be also exposed to potential IP thieves aware of the disclosure trying to file and claim they thought of it first.

**2) Know the difference between patents, copyrights and trademarks** – Considered the "big three" of IP law, it is surprising how often people mix these up and how much misinformation there is out there about this subject. (In truth, I should have started this article with this general topic, but for the importance of the first topic above.) Many news articles from reputable sources get this wrong. Television shows likewise get this wrong and talk about things like comedians trying to "patent" one of their jokes and the like.

The "big three" protect different things and grant different degrees of protection for different terms. Patents protect "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor." (35 USC § 101.) Copyrights protect "original works of authorship fixed in any tangible medium of expression." (17 USC § 102.) Trademarks protect a source designation of goods and/or services. (15 U.S. Code § 1051.) In general, you can think of patents protecting physical inventions or processes; copyrights protecting creative expressions such as books, art, music and movies; and trademarks as protecting brand names, slogans and logos.

**3) Design patents can be a useful tool in protecting the ornamental appearance of a product** – Design patents are a type of patent intended to protect the ornamental appearance of an object. While one might think of patents in terms of the standard "utility patent," which can protect the structural composition and corresponding function of a device, a design patent can be used to protect its appearance. Design patents are also typically cheaper and examined much faster than utility patents. Essentially, you can think of utility patents as protecting what something does (based on its structural components and configuration) and design patents protecting how something looks.

**4) One subject can be protected by multiple forms of IP** – If you're Apple and you want to protect both the internal "guts" and circuitry of your new iPhone as well as its new sleek ornamental design, file for both utility patent protection **and** design patent protection. That way if your competitor rips off the internal component configuration and function, but not the appearance, or *vice versa*, you can go after them either way. If they rip off both, they are facing down two patents instead of just one. If you're Disney and you want to protect the copyright on your character Mickey Mouse, but want to also mark your products with it as an indication that the product comes from Disney, register it as both a copyright and a trademark. Certain images of famous people can be subject both to copyrights and rights of publicity (a fourth kind of IP). The list goes on, but you can often double or triple up on IP protection if it makes sense from a legal standpoint.

**5) Each IP right can be viewed as a collection of separate rights due to the nature of IP licensing agreements** – Your patented technology doesn't have to be assigned in gross to a single entity. Maybe the a major contractor for the U.S. government licenses your x-ray goggles for exclusive military applications, while a national hospital chain licenses it for exclusive medical uses and a foreign company licenses it for exclusive geographical use in Australia. One's IP rights can be divided up in myriad ways to more effectively monetize them if one can manage to negotiate such deals.

***Brian Fitzgerald*** *is an associate in the Ventura office of Ferguson Case Orr Paterson. He is available to discuss questions about IP law and to advise clients interested in procuring and preserving IP protection. Call 805-659-6800 or email bfitzgerald@fcoplaw.com.*

# WHAT'S IN MY PANTS IS NONE OF YOUR BUSINESS: SEALING COURT RECORDS IN NAME CHANGE AND GENDER MARKER CORRECTION CASES

*by Kate Wood*

Every March 31 we celebrate Transgender Day of Visibility, a day on which many – myself included, seven springs ago – decide to come out to the world and no longer hide their gender identity. The coming out decision is one of profound importance to the individual, and it is not just a one-time occurrence in a queer person's life. Every new acquaintance or new environment a person enters raises the issue. It is a decision to be made over and over and over again throughout a transgender person's life, and rarely a simple one. Each time this decision is made, it has the potential to upend that person's life. To come out to someone is to make oneself completely vulnerable to their possible bigotries. Should one find themselves now out to a person who holds obstinately to negative opinions about LGBTQ+ people, whether it be their friend, family, boss, colleague, landlord, or otherwise, that relationship is over. And whatever environment was shared with that person, whether a home, an office or social space, is now hostile and no longer a place that the transgender person can occupy without negative physical and mental health consequences. With the fundamental act of expressing one's identity all can be lost.

Presently, California law usurps the autonomy of transgender people to choose when, to whom, and how to come out. Often, one of the first steps in the coming out process for a transgender person is correcting their identification documents with their appropriate name and gender marker. For transgender Californians, this creates multiple public records disclosing the individual's transgender status to the public without consent. The filing of a petition in court for a name change and to correct the gender marker on an individual's identification documents first creates a public record of that person's gender transition in the courthouse, the case record being available for inspection by any who inquire. When the petition is granted, a second public record is created in the Secretary of State's Office, pursuant to a peculiar statutory provision, Health & Safety Code section 103435, that requires all name change and gender marker correction decrees to be filed as public records in that office, while excusing all other name change decrees from a similar disclosure.

As practitioners, we must protect our clients from unnecessary personal privacy invasions caused by the non-consensual public disclosure of their transgender status. When assisting transgender clients filing name change and/or gender marker correction petitions, it is best practice to simultaneously file an application to seal the entirety of the court record, pursuant to Cal. Rules of Court, rules 2.550-2.551. This will not only keep the civil case record out of the public eye, but will also mark the decree filed with the Secretary of State confidential.

While the First Amendment upholds the common law tradition that civil court proceedings are open to the public, the right of public access is not absolute and can be overcome by a proper showing that sealing the record is "essential to preserve" an "overriding interest." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999)

20 Cal.4th 1178, 1211.) Under this test, which is codified as Cal. Rules of Court, rule 2.550(d), the Court of Appeal has held that, where records pertaining to a party's medical and/or psychological history are involved, an order sealing records is proper because the party's constitutional and statutory rights to privacy outweigh the public interest in accessing those court records. (*Oiye v. Fox* (2012) 211 Cal. App.4th 1036, 1068-1070.)

Name change court actions for transgender people are in fact one of the therapeutic treatments recommended by the World Professional Association of Transgender Health (WPATH) for gender dysphoria – the distress experienced by transgender people caused by experiencing their bodies as a sex different from their sex assigned at birth – and as such disclose the medical history of each and every petitioner. Any person with access to the records or proceedings in such a case will become privy to the petitioner's medical information without consent, invading the petitioner's expectation that medical information remains confidential.

Beyond concerns about disclosing confidential medical information, disclosures of an individual's transgender status significantly increase the rates of workplace and housing discrimination. According to the 2015 U.S. Transgender Survey, the largest and most comprehensive survey of the transgender community in the United States to date, over one-half (53 percent) of respondents who held a job indicated that they had to hide their gender identity at work to avoid discrimination in the past year, and 30 percent reported being fired, harassed or experiencing other mistreatment at work in the past year due to their transgender status being known. (James, S. E., et al., *The Report of the 2015 U.S. Transgender Survey* at pp. 154-55 (2016).) Similar increased rates of discrimination in housing are also reported. Twenty-three percent of all respondents reported that they had experienced housing discrimination or homelessness in the past year because of their gender identity. (*Id.* at p. 180.) It is common practice that employers and housing providers conduct background checks on prospective employees and tenants, which often includes conducting civil case searches that might reveal past name change and gender marker actions that remain in the public domain, outing the individual as transgender to the prospective employer or housing provider and substantially increasing the risk of discrimination.

The personal privacy and safety interests at stake for a transgender petitioner outweigh the public interest in gaining access to the records of the case. Sealing the entirety of the case file and proceedings is the only means by which to maintain the petitioner's autonomy regarding the decision of when, how, and to whom to disclose their transgender status.

***Kate Wood*** *is the staff attorney for the California Rural Legal Assistance LGBTQ+ Program, engaging in statewide impact advocacy. kwood@crla.org; (805) 483-8083 x. 1205*

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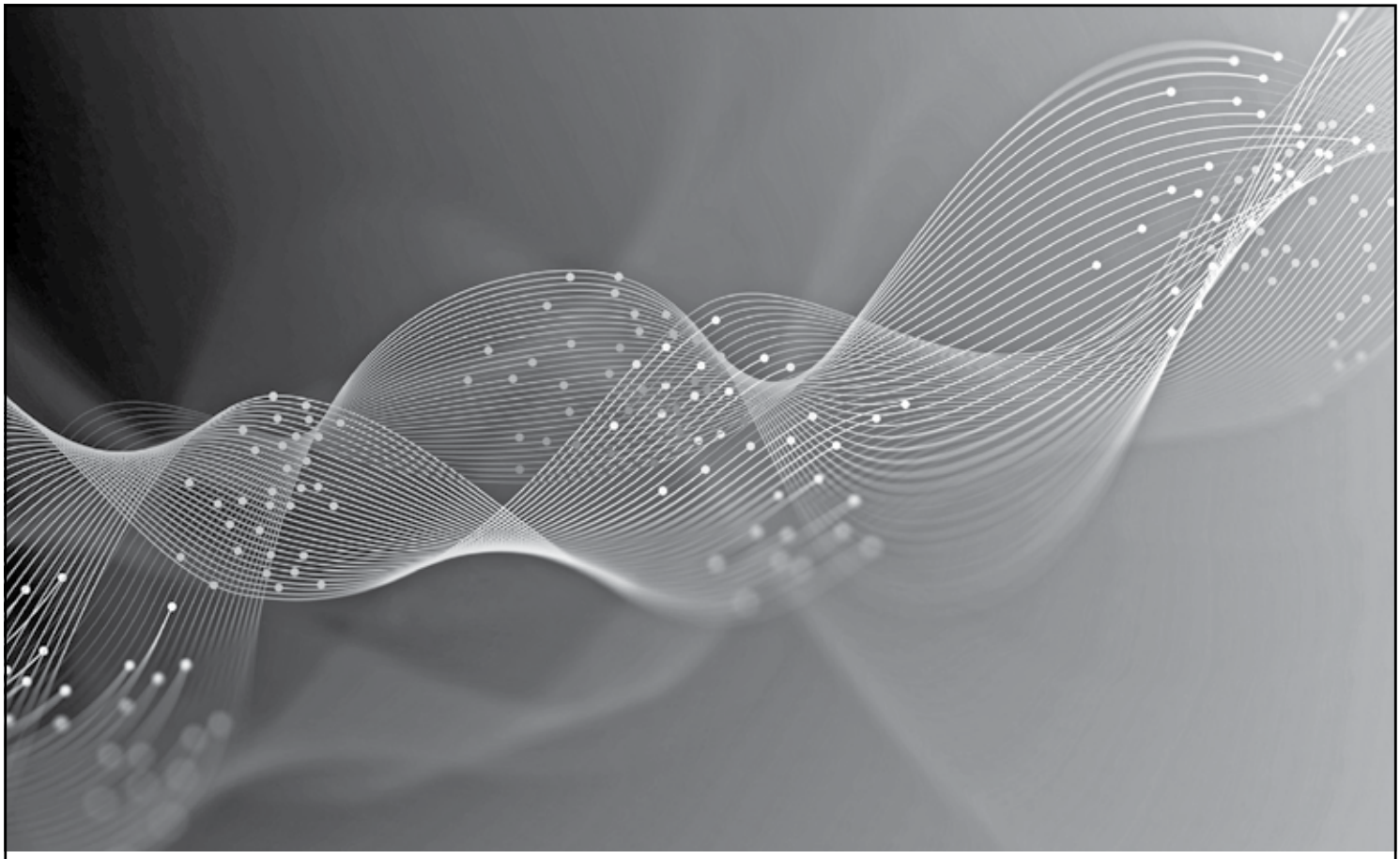

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# VCBA'S FOODIES

*by Lou Vigorita*

You know who you are, attorney-foodies. Conversations about food are integral in our relationships.

Chicken Rose Marie is not named after my wife Rosemary, but it comes with a VCBA pedigree lineage. Annette Whipple, you might recall, worked at the courthouse for many years before retirement. She was married to attorney **Ed Whipple**, a great guy who died far too young. This recipe keeps Annette and Ed alive in our hearts (and stomachs). Annette found it in a cook book.

According to Rosemary V., the key to this delicious dish is to make your own fresh "French" bread crumbs. Google it. Don't take a short cut; make them fresh! The lemony flavor of the sauce beautifully lends itself to dipping French bread and soaking up the juices (sorry, Mom). I cannot say enough how this "go to" chicken dish hits the mark every time. One Word: Sparkling!

**4 whole chicken breasts, halved and skinned**

**1 cup French bread crumbs (preferably fresh)**

**SAUCE:**

Juice of 2 large lemons (about½ cup)

½ cup olive oil

½ cup water

2 cloves garlic, minced

1 teaspoon dried oregano

¼ cup chopped fresh parsley

Salt and freshly ground black pepper

Fresh parsley sprigs and lemon slices for garnish

Preheat oven to 325 degrees.

Rinse chicken in cold water; shake off excess water. Roll the damp breasts in the bread crumbs; shake off excess crumbs. Place chicken in a shallow 9-by 13-inch baking pan or one large enough to hold the breasts in a single layer.

Combine sauce ingredients. Spoon 1 cup of sauce over breast halves.

Sprinkle with salt and pepper.

Bake, uncovered, 30 minutes. Spoon the remaining sauce over chicken and continue to bake for another 30 minutes, or until chicken is lightly browned, but not dried out.

Serve garnished with parsley sprigs and lemon slices.

***Lou Vigorita*** *is a retired lawyer in Ventura.*

# GREY LAW: YOU ARE WHAT'S MISSING

*by Lou Vigorita*

After 40 years of delivering legal services, Grey Law of Ventura County Inc. has fundamentally changed as ability to meet face-to-face, one-on-one evaporated with COVID-19. Nothing new there, everything changed for everyone, right? Except, of course, for the need for our service.

During the two-plus years since the start of the pandemic our volunteers have resigned, moved and retired, leaving Grey Law potentially to remain what we have seemingly become, a Senior Legal Hotline. Although the foundation of our service is elder/poverty law, we are asked questions on virtually every possible legal topic. When it is something we specifically don't or can't do (fee-generating or litigation) we have been able to refer clients to VCBA or to private attorneys willing to give low income seniors a discounted price. NOT FREE, fair. Yes, our services are free, and providing a free service can be extremely rewarding, but that's not what we ask.

We are heading out to the senior centers as soon as the pandemic allows. Most of our clients are seen at senior centers fairly close to where you live or work. If you, or someone in your firm, could spare a few hours once a month to help people in your community's adult center, you would be totally surprised at the pride and satisfaction you are likely to feel.

Also, we would like to add you to our referral list so we can send people for a free consultation in your field, with no obligation whatsoever. We do ask that they receive a senior discount based on the level of their ability to pay.

Finally, another way to serve is to join our board of directors and make sure we are doing what your (our) community needs.

*For more information, contact Lou Vigorita, lvigorita@gmail.com.*

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**LEGAL ASSISTANT** or **PARALEGAL.** Small busy family law firm seeking a legal assistant, paralegal or new associate with at least one year experience located in Westlake Village. Excellent written and communication skills. Ability to work in a fast-paced environment and meet deadlines. Full-time or part-time position. Compensation depends on experience. Please forward résumé and salary requirement to *Anita@gummandgreen.com.*

**LEGAL SECRETARY.** Slaughter, Reagan & Cole, LLP is seeking a legal secretary for a senior partner. Ideal applicant should have a minimum of three years' applicable experience with strong writing skills and the ability to perform a variety of secretarial and administrative duties for other attorneys and/or paralegals. Applicants should send résumé and salary expectations to *elvia@srllplaw.com* for consideration.

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## Need to reach out to your colleagues and rely on their experiences?

## Use the VCBA ListServes which are a Member Benefit!

The ListServe is intended to facilitate communication among its members by providing an opportunity to post a query on a substantive or procedural issue. Once you send an email, every member on that specific list will receive the message. To protect the ListServe participants from spam or other unwanted solicitation, you can only send messages using the email in your VCBA Profile. Otherwise, it will automatically be rejected. Members are automatically added based off your Areas of Practice and VCBA Sections you belong to. **If you do not belong to that group email, the system will not allow you to use it.**

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