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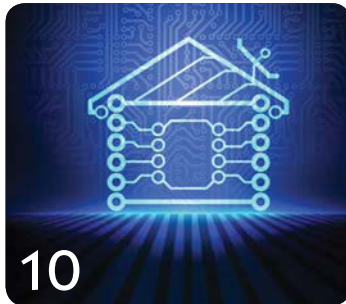
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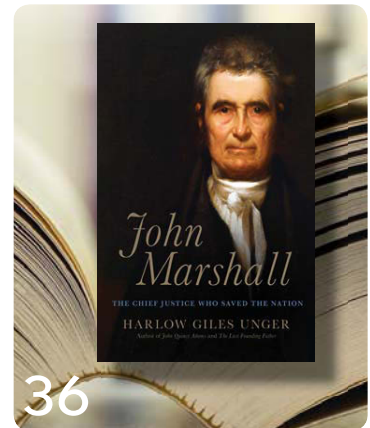
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A New Cycle of Bar Leadership

I AM EXCITED AND HONORED TO serve as President of the San Fernando Valley Bar Association this year. As the Bar enters its 88th year, I am proud to be the ninth female President and hope that the diversity of the Executive Committee and Board of Trustees Bar continues to evolve. I have some very big shoes to fill and humbly promise to fill them with determination, hard work, open communication and teamwork.

A speaker at the ABA's Bar Leadership Institute this past March said that there are three types of Bar leaders: sustainers, complainers, and doers. I have to disagree. I think a successful Bar leader is a mixture of all three. I adhere to the following axioms: if it is not broken don't fix it (characteristic of sustainers); if it is broken or there is room for improvement, figure out why (typical of complainers); and just do it (obvious trait of doers).

I am excited to work with the Executive Committee, the Board of Trustees, the Section and Committee Chairs, and the amazing Bar staff to continue to build on the rich history of the Bar to keep it a relevant and important resource to our members, the Bench, and the community at large.

Like the leaders of any organization, its members are also sustainers, complainers and doers. While people may think that the leaders only want to hear from the doers or those that selflessly want to jump in and help, it is a common misconception. Or at least it is for me. I truly want to hear from everyone.

If there is something we do particularly well, let me know. If there is something we need to fix,

let me know (especially if you have suggestions for fixing it, but even if you don't). If there is something we should be doing (especially if you want to spearhead getting it done, but even if you don't), let me know. If you are a past member but did not renew, or a member considering not renewing, I absolutely encourage you to renew your membership, but perhaps more importantly, I want to hear from you. I honestly want this to be a year of increased communication and open dialogue. We are your Bar. Help us help you, the profession, and the community. I encourage you all to get involved in some way!

As President, I will continue our work in expanding the Attorney Referral Service to improve access to justice, match clients with qualified attorneys, and provide a much-needed service to the community. I will support the continued growth of the Valley Bar Mediation Center which will serve our members and litigants in the Valley by filling the gap created by the termination of the court's ADR panels. I have also appointed new section chairs and hope to revitalize some of our sections and committees to get more people involved in Bar activities.

I will also strengthen the relationship between the SFVBA and the Valley Community Legal Foundation. While the organizations are separate legal entities, we are sister organizations. The VCLF allows the Bar to do wonderful things.

Lastly, I will encourage more people to get involved with our delegation to the Conference of California Bar Associations. Many people may not even be aware of this important conference, but it is where

CARYN BROTTMAN SANDERS
SFVBA President



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members of bar associations from across the state submit, debate and present resolutions to the legislature with the goal of impacting laws in the state. If you hate a provision of the Code of Civil Procedure, Probate Code, Penal Code or any statute, or are just curious as to how changes to statutes come about, this is where changes begin and can happen.

As I move into the office of President and look forward to the great things that are to come, I also look back at how I got here. I had two amazingly strong role models who were strong independent women, leaders, moms and all around superwomen: my grandmother and my mother. I wish both could be here to see what they helped create, but I know they are looking down on me and smiling.

There is also my father, who always works tirelessly, who perseveres no matter what life throws at him and still manages to always be there for his family.

I also have to acknowledge Rob Werner, William Lively, Tamiko Herron, and Jane McNamara with whom I served on the Board of and as the President of the Santa Clarita Valley Bar Association. I can truly say that without them, I would not have continued on to serve for the last eight years on the Board of the SFVBA.

Last, but certainly not least, I have to say thank you to my wonderful family. My daughter was three when I joined the Board of the SCVBA, and she has been so supportive of my Bar activities. I would not be here with this wonderful opportunity to lead this amazing organization without their support.

I look forward to working with all of you in the coming year! 

| SUN | MON | TUE | WED | THU | FRI | SAT |
|------------------------------|--|---|--|--|-----------|---|
| LATINO HERITAGE MONTH | | | Valley Lawyer Member Bulletin 1 Deadline to submit announcements to editor@sfvba.org for November issue. | Membership & Marketing Committee 2 6:00 PM SFVBA OFFICE | 3 | 4 |
| 5 | The new Bar year has begun! Make sure your membership hasn't lapsed! 6 Renew online at www.sfvba.org or call (818) 227-0490. | 7 | Business Law Section Immigration: What Every Lawyer Should Know 8 12:00 NOON SFVBA OFFICE Jeff Ehrenpreis provides an overview of essential immigration issues. Every attorney should have a basic understanding of work permits and options regarding permanent resident status. (1 MCLE Hour) | | 9 | 10 |
| 11 | | | | | 12 | 13 |
| 12 | Tarzana Networking Meeting 13 5:00 PM SFVBA OFFICE  | Probate & Estate Planning Section IRA and Retirement Issues for Estate Planners 14 12:00 NOON MONTEREY AT ENCINO RESTAURANT Speaker Bill Barry will review issues like IRD, qualified beneficiaries, required minimum distributions, taxation/definition of IRA income in a trust and the choice of primary and secondary beneficiaries. (1 MCLE Hour) | Workers' Compensation Section 15 12:00 NOON MONTEREY AT ENCINO RESTAURANT | Bankruptcy Law Section Ninth Circuit Court of Appeals Decisions 16 12:00 NOON SFVBA OFFICE Bankruptcy Judge Alan Ahart will review the most relevant decisions. (1 MCLE Hour) | 17 | 18 |
| 19 | 20 | Board of Trustees 6:00 PM SFVBA OFFICE | | | | |
| | | Taxation Law Section 21 Updates on the Internal Revenue Service's OVDP 12:00 NOON SFVBA OFFICE Attorney Lavonne Lawson updates the group on international tax matters and the Offshore Voluntary Disclosure Program. (1 MCLE Hour) | Elder Law Section 22 6:00 PM SFVBA OFFICE SFVBA Networking Reception with CalCPA Hosted by San Fernando Valley Business Journal See page 22 | | 23 | 24 |
| 25 | | | | | 26 | 27 |
| | Family Law Section Motions 28 5:30 PM SPORTSMEN'S LODGE This interactive module will offer valuable practice pointers and demonstration for effective argument. Approved for legal specialization. (1.5 MCLE Hours) | Editorial Committee 29 12:00 NOON SFVBA OFFICE | | | 30 | 31 |
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| SUN | MON | TUE | WED | THU | FRI | SAT |
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| 2 | Valley Lawyer Member Bulletin Deadline to submit announcements to editor@sfvba.org for December issue. | 4 | 5 | Membership & Marketing Committee 6:00 PM SFVBA OFFICE | 7 | 8 |
| 9 | Tarzana Networking Meeting 5:00 PM SFVBA OFFICE  | 11  Veterans Day | Probate & Estate Planning Section Day change due to holiday 12:00 NOON MONTEREY AT ENCINO RESTAURANT Attorney Linda Retz leads a legal ethics discussion regarding estate planning issues. (1 MCLE Hour—Legal Ethics) | Bankruptcy Law Section Chapter 13 Update 12:00 NOON SFVBA OFFICE Always one of the most popular seminars. Judge Maureen Tighe joins the panel, which includes Rene Garcia and Stella Havkin. (1 MCLE Hour) | 14 | 15 |
| 16 | 17 | Taxation Law Section Ethics for Tax Lawyers 12:00 NOON SFVBA OFFICE Kneave Riggall will outline the problems tax attorneys might encounter. (1 MCLE Hour—Legal Ethics) | Workers' Compensation Section 12:00 NOON MONTEREY AT ENCINO RESTAURANT | 19 | 20 | 21 |
| 23 | Family Law Section Hot Tips 5:30 PM MONTEREY AT ENCINO RESTAURANT The don't miss seminar for all family law attorneys. Gary Weyman and our distinguished panel of judges and attorneys offer insight into the latest family law developments both inside and outside the courts. Approved for legal specialization. (1.5 MCLE Hours) | 25 | 26 |  THANKSGIVING | 28 | 29 |
| 30 | | | | | | |



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Managing a Virtual Estate

By Judith M. Sack

A PERSON WHO HAS NEVER USED THE INTERNET would not need to prepare a digital estate plan. On the other hand, for 87% of the nation's adult population who go online about 23 hours a week,¹ having this particular option provides a convenient and manageable way to direct their virtual assets. While many people may assume that they have complete control over their property in a virtual environment, oftentimes they unknowingly or without forethought waive significant legal rights.

By clicking on the "I agree" button, the user consents to the terms of a service agreement which appears on the web page they have chosen to access.² Simultaneously, the net user acquiesces to the server's demand for authority over access to emails, photos, as well as personal business and financial information.³ As more and more people expand their property interests online, they are also running the risks of accepting terms and conditions that limit their ability to control the disposition of their virtual assets.

To illustrate this point further, consider the adversarial process that ensued when parents of a U.S. Marine who was killed in action sought help from the service provider Yahoo to access the contents of their son's email account. In *In re Ellsworth*,⁴ Yahoo does not appear to deny that the parents had an interest in their son's effects post-mortem, but the company refused to disclose the deceased Marine's password,

absent a court order. In the end, pursuant to that court order, Yahoo provided the parents with the contents of their son's email account on computer discs.

The aftermath of the *Ellsworth* case highlights the gap in the scope of the probate code. Most practitioners know at least one person who has managed the digital accounts of a deceased or disabled person for whom they were personally responsible, by pretending to be that person.⁵ While no one is promoting this unethical practice as an acceptable alternative, members of the legal profession must recognize that such conditions will persist if legitimate and fair procedures are not enacted to allow the person or persons who are serving in the role of a trustee, agent, or guardian to access the principal's accounts.⁶ Consequently, lawyers must look to the probate code and other laws to insure our clients can oversee the allocation and distribution of their digital property.

Historically, the California Probate Code, similar to statutory enactments dating back to the 1850s, reflects a societal propensity to recognize the right⁷ and interest each person has in the direction and management of personal property, and its ultimate distribution.⁸ In this regard, these rights should not be diluted, simply because the property exists in cyberspace. This basic concept of individual rights in virtual property has already been addressed in significant detail by several pioneers in the field of digital estate planning.⁹ Such a discussion requires an article of its own and the reader is encouraged to consult those authorities.



Judith M. Sack is an estate planning attorney in the San Fernando Valley. She may be reached at jmsack@sbcglobal.net.

More recently, however, the Uniform Law Commission (ULC) has updated and adopted a draft of the proposed Uniform Fiduciary Access to Digital Assets Act (UFADAA).¹⁰ It is advisable for legal scholars and practitioners alike to take note of this advance and to set aside enough time to become familiar with the provisions of this legislative act.

In significant part, the ULC identifies categories of online behaviors and objects that will constitute digital assets;¹¹ identifies what should be accessible;¹² provides for the same treatment of virtual property for protected persons under a conservatorship;¹³ provides similar access to a principal's accounts;¹⁴ and ultimately subjects all such property to the agent's control on behalf of the account owner.¹⁵ As the commission explained, the UFADAA governs four common types of fiduciaries: personal representatives of a deceased person's estate,¹⁶ guardians or conservators of a protected person's estate,¹⁷ agents under a power of attorney,¹⁸ and trustees.¹⁹ The access and authority provided to these categories of fiduciaries includes any action the account holder might have taken.²⁰ The UFADAA voids any provision to the contrary in terms of service agreements,²¹ choice of law provisions,²² as well as voiding limitations on third-party access.²³

While there is no one-size-fits-all approach to drafting a will, trust or power of attorney, adding specificity to all estate planning documents would appear to be the most reasonable direction in which to proceed when drafting legal directives. The practitioner might also wish to take into account the nature of the client's possessions and presence in the virtual world, such as banks, health care providers, insurance carriers, and corporate or business enterprises through which the client may interact or conduct business on an ongoing basis.

Likewise, an estate-planning attorney may want to take into consideration that this landscape shall remain in a state of perpetual change as he or she completes a client intake and drafts the corresponding estate planning documents. Similarly, while many lawyers may include questions about the digital activities of their clients during this intake process, a detailed discussion could also be warranted.

Moreover, while lawyers may use many different approaches to drafting estate planning documents, the area of digital assets would appear to warrant a separate and detailed durable power of attorney, as well as self-contained trust provisions and designation of these significant assets in the client's will. Thus, UFADAA §5 appears to have anticipated California's preference for stand-alone legal instruments governing a particular area of an individual's rights.

For instance, the California legislature amended Probate Code §§4260 et seq. concerning the identification of acceptable matters over which a power of attorney may govern. These amendments mandate that in order to create a power of attorney that allows the designated agent to

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revoke a principal's trust (the settlor or first trustee) or change beneficiaries or other acts that might differ from the principal's initial designations and intent, the principal must state specifically that the agent has been vested with that authority. Arguably, the trust documents to which it applies ought to vest the agent with corresponding powers.


Likewise, California Probate Code §§4700-4701 was amended to provide for a separate, durable power of attorney for health care, referred to as a health care directive, which permits substituted medical decision making and end-of-life palliative care to be initiated. While one legal instrument might address several areas of concern, the legislature has firmly expressed its preference for separate documents. In this instance, the preference is for using a health care directive, in lieu of a durable power of attorney, that ought to address a single area of concern—health—whereas financial matters are to be treated in a power of attorney.²⁴

Furthermore, since the field of virtual estate planning is still relatively new, and the laws which govern related activities are constantly in a state of flux, more precise directions for digital account holders (of every kind and manner), is an advisable approach that will effectively reduce the legal posturing required of unique stakeholders, such as Yahoo.

Future Directions

In the future, lawyers ought to consider cataloging their client's typical and specific digital usage, email, social web pages, bank and brokerage accounts, e-books, blog pages, online actions, and the like. At the same time, attorneys should educate their clients to catalog all virtual possessions, as well as records, additions and deletions. These modifications should be discussed during a client's annual update during periodic consultations.

Similarly, professional action and research is needed to develop a compendium of the practices employed by every online vendor who creates and posts a service agreement. In fact, practitioners should collaborate on the establishment of a database for storing terms of service agreements that can be managed on a multilevel Internet platform, which can easily be vetted by the legal community over time. This database could take the form of an encyclopedic online storage system.

Concomitantly, the global nature of the Internet makes it imperative that a comparative legal analysis be initiated, since the rules vary regarding disposition of property upon the death of the account holder, and the allocation of digital property, in particular. Correspondingly, countries in which digital service providers are based, operating, doing business, or licensed to operate, should receive heightened examination of their common practices, with regard to estate planning. Finally, attorneys may promote the idea that we need research on the status of digital asset ownership on a global scale, and advocate specific management approaches as well. 

¹ "Internet User Demographics," PEW Research Center Project on the Internet & American Life, available at <http://www.pewinternet.org/data-trend/internet-use/latest-stats/> (last accessed September 2014); David Mielach, "Americans Spend 23 Hours Per Week Online, Texting," *Business News Daily*, July 2, 2013, available at <http://www.businessnewsdaily.com/4718-weekly-online-social-media-time.html>, (last accessed, July 2014).

² Courts have ruled that parties are bound by the terms of a contract online whether or not it was ever read or understood. For discussion of the digital contract formation process and its legal consequences see *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1169 (N.D. Cal 2002); *Schnabel v. Trilegiant Corp. & Affinion, Inc.*, 697 F. 3d 110, 121-122 (Cir. 2 2012); *5381 Partners LLC v. Shareasale.Com, Inc.*, Dist. Court, No. 12-CV-4263 (JFB) (AKT)(ED NY 2013); and *Zaltz v. JDate*, 952 F. Supp. 2d 439 (JFB)(ARL)(E.D.N.Y 2013).

³ See Sandi S. Varnado, "Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind," 74 La. L. Rev. (2014) at 731, available at <http://digitalcommons.law.lsu.edu/lalrev/vol74/iss3/7> (Provides an excellent point from which to create an inventory of "virtual things" that have value. Digital constructs having value might include those that are financial in nature. Items classified as financial in nature are items "that offer the ability to manage, spend or earn money" such as online gaming accounts, accounts on marketplaces like Ebay and Amazon, and customer rewards programs.).

⁴ *In re Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005). See also Jonathan J. Darrow and Gerald R. Ferrera, "Who Owns a Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?" *Legislation and Public Policy*, Vol. 10:281, 2007, accessible online at: <http://www.nyuilpp.org/wp-content/uploads/2012/11/darrow-ferrera-who-owns-a-decedents-emails-inheritable-probate-assets-or-property-of-the-network.pdf> (last accessed July 2014).

⁵ Jim Lamm, "Wisconsin Family Struggles to Obtain Access to Deceased Son's Facebook and Gmail Accounts," *Digital Passing*, June 1, 2012, available at <http://www.digitalpassing.com/2012/06/01/wisconsin-family-struggles-access-deceased-sons-facebook-gmail> (last accessed July 2014).

⁶ In this regard, many people may recall the notorious battles over domain name squatting and the subsequent creation of Internet Corporation for Assigned Names and Numbers (ICANN) to resolve these disputes. See ICANN, Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, Paragraph 3, <https://www.icann.org/resources/pages/articles-2012-02-25-en>, revised November 21, 1998, accessed July 2014.

⁷ A brief review of the history of the laws on succession of wills, trusts, and estates reveals that while there are many tensions concerning the procedural requirements for distributing one's property at death, there is no legally or judicially recognized natural right to dispose of one's property at death. The right to transfer ownership is a creature of statute that the English common law scholars attribute, in the first instance, to the provisions of the Statute of Frauds in 1677. See John H. Langbein, "Substantial Compliance With the Wills Act," *Harvard Law Review*, Vol. 88, No. 3, 1975 489-531, at 491-492, available at http://www.law.yale.edu/documents/pdf/Faculty/Langbein_Substantial_Compliance.pdf (last accessed July 2014). The Supreme Court provides a concise historical review of the statutory nature of these rights in *United States v. Perkins*, 163 US 625, 627-628 (1896) (holding that since the State of New York may prohibit testamentary distributions completely it might allow testamentary distributions subject to a tax even if the intended beneficiary of the gift is the United States government).

⁸ California has had a law governing succession since the early 1850s. See Lowell Turrentine, *Introduction to the California Probate Code*, West Publishing Company, 1956.

⁹ See e.g., Gerry W. Beyer, ProfessorBeyer.com, <http://professorbeyer.com/Articles/Articles.html>; Naomi Cahn, "Postmortem Life On-Line," *Probate & Property*, Vol. 25, No. 4, p. 36, 2011; and Maria Perrone, "What Happens When We Die: Estate Planning Of Digital Assets," *CommLaw Conspectus: Journal of Communications Law and Technology Policy*, Vol. 21, 2012, 185-210.

¹⁰ "Uniform Fiduciary Access to Digital Assets Act Approved," News, Uniform Law Commission, July 16, 2014, available at <http://www.uniformlaws.org/NewsDetail.aspx?title=Uniform%20Fiduciary%20Access%20to%20Digital%20Assets%20Act%20Approved>. (last accessed July 21, 2014).

¹¹ UFADAA §2(8).

¹² UFADAA §3 (decedent's' electronic communications, catalogue of electronic communications or any other digital asset shall be accessible).

¹³ UFADAA §4.

¹⁴ UFADAA §5.

¹⁵ UFADAA, *passim*.

¹⁶ UFADAA §3.

¹⁷ UFADAA §4.

¹⁸ UFADAA §5.

¹⁹ UFADAA §6.

²⁰ UFADAA §7(a)(1).

²¹ UFADAA §7(b).

²² UFADAA §7(c).

²³ UFADAA §7(d).

²⁴ See e.g. Cal. Probate Code §§4000 et seq., especially the California Uniform Statutory Form Power of Attorney Act, §§4400-4409, 4450-4465.



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A New Technological Age at the Los Angeles Superior Court:

A Dialog with Judge Daniel J. Buckley

By Hon. Mary Thornton House



JUDGE MARY THORNTON HOUSE INTERVIEWED Judge Daniel J. Buckley recently about the Los Angeles Superior Court's (LASC) upcoming technological upgrades. Judge Buckley is the Supervising Judge of LASC's Civil Division and Chair of the court's Technology Committee. He recently was elected by his judicial colleagues to serve as LASC's new Assistant Presiding Judge.

MTH: Judge Buckley, how would you describe the current state of the court's technology?

DJB: In a word, outdated. In more words, we know that we must improve and update on many fronts. First and foremost, we must improve our case management systems. Right now, we have 20 different systems based upon DOS and Cobalt¹ software that do not communicate with one another. Our traffic system is 33 years old. In some quarters, we have no "system" at all. For example, in juvenile, clerks are using manual (but electric) typewriters to make docket entries!

MTH: What will be the goals of the court's new case management systems?

DJB: The systems we develop will allow all case types to communicate with each other, have an ability to share information with our justice partners, and save the court significant annual maintenance costs.

MTH: How can new systems save us money?

DJB: First, we know that every improvement we implement will cost less to maintain than current systems. Second, the new systems will be more efficient by automating staff functions, thereby enabling us to direct and redeploy staff for even greater efficiencies.

MTH: Are there priorities and a time table?

DJB: Yes. We expect to start with traffic, juvenile, probate and civil. Criminal will follow traffic. We anticipate it will take about four years for all systems to be running.



Judge Mary Thornton House is the Supervising Judge for the Northeast/North Central Districts and Supervising Judge of Hub Operations. She is in her nineteenth year on the bench and was honored in 2013 by the SFVBA as their Judge of the Year.

MTH: What efficiencies are we deploying behind the scenes for use by bench officers, research attorneys and staff in the clerk's office and the courtroom?

DJB: We are working toward becoming paperless. Probate is taking the lead with a "paper on demand" system. Usage in probate will be a test for other case types.

MTH: That's in civil, what about traffic?

DJB: We are just about completing a conversion to "Benchview," a paperless procedure in all of our traffic courts throughout the county. All tickets and supporting documentation are scanned and available on the bench on the monitor. This same information is on monitors for staff in the traffic clerk's office. This saves significant staff time in copying and delivering all the paperwork and increases our efficiencies in dealing with the public.

MTH: I think our readers for this article are most interested in e-filing. Any chance of that happening in the near future?

DJB: Yes. We hope to have e-filing in 2016. And, to coin your phrase, that's Hands Off Paper Emphasis—HOPE.

MTH: What other improvements benefitting the public are in the offing?

DJB: We are installing a new website with a soft launch in the next month or so. This website will have a new look with a format designed to have access to more information and with that information being easier to find. The public can expect much more services on the website by early 2015. Traffic is an example as we will be able to do much more processing and paying of fines online, including periodic payments.

MTH: So, we'll have more people doing their fine-paying online instead of in-line?

DJB: ☺

MTH: Are there any other upgrades being planned?

DJB: We are working on a new jury portal that will be faster and more efficient for jurors to communicate with the court and to do their orientation online. And, we are installing a new phone system.

MTH: That sounds like a lot of new e-toys....

DJB: No, the primary purpose is to save money. Without these one-time expenditures and upgrades, we would be supporting outdated and more expensive systems that, in the long run, are more costly and inefficient. We will save significant money by going to VOIP (voice over internet protocol) and have significantly better service. We will have access to modern communication tools such as webinars, multiple people on conference calls, video conferences with decision makers during settlement conferences and so forth. The only downside is that we will need to change phone numbers. This is happening now and will be fully implemented by March 2015.

MTH: This sounds like a herculean effort. Just how is the court going about setting up these programs?

DJB: Our Technology Committee, comprised of over 100 judicial officers, has subcommittees that cover education, the new website, the new case management systems and computer program and hardware acquisitions. The case management systems will be developed by teams of court administrators, courtroom staff, and judicial officers, with oversight by the Technology Committee and our CEO, Sherri Carter. It's an exciting time for the court and the public we serve. 

¹ For those of you less technologically inclined, having computer systems based upon DOS and Cobalt would be comparable to using the old party lines in telephones.



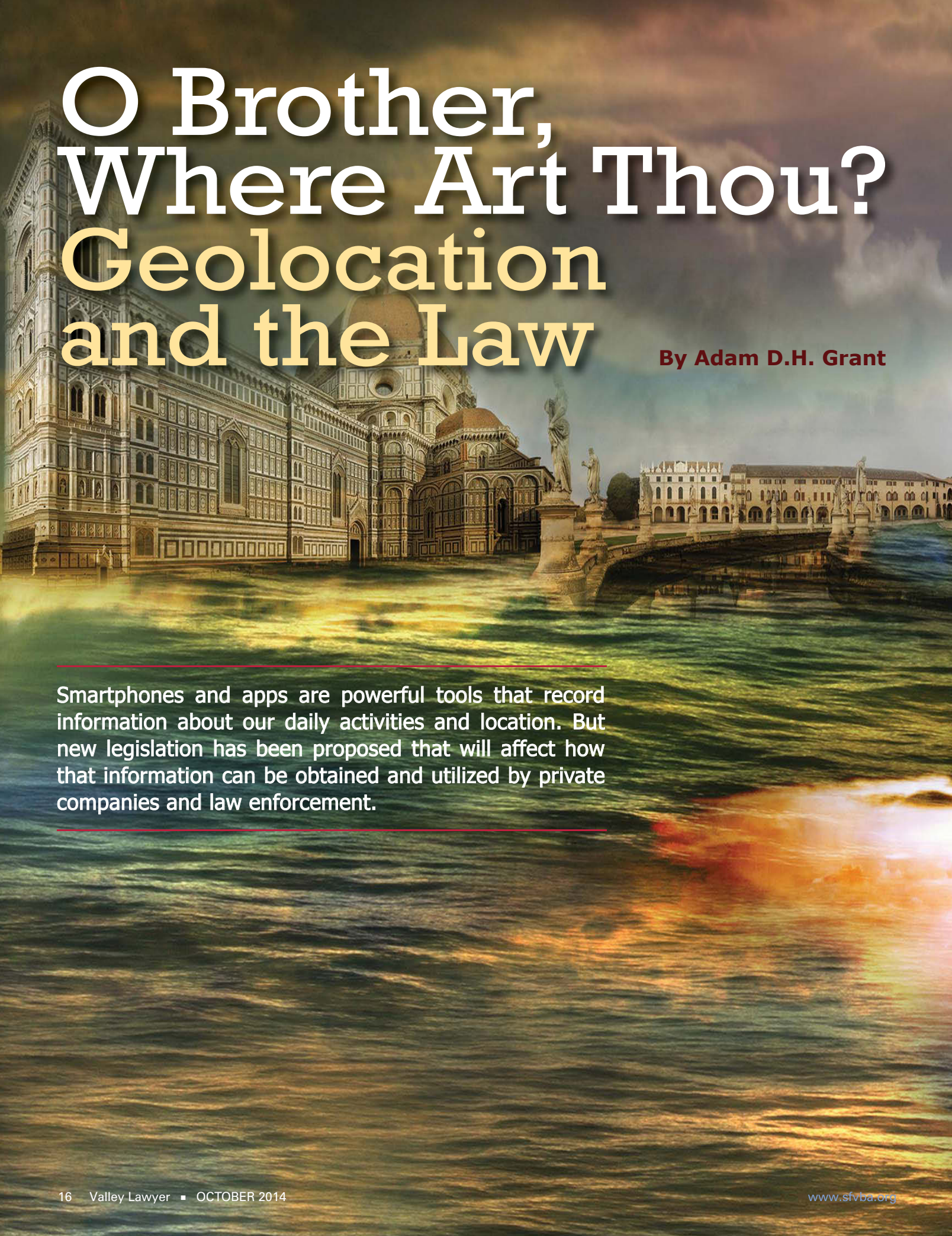
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O Brother, Where Art Thou? Geolocation and the Law

By Adam D.H. Grant

Smartphones and apps are powerful tools that record information about our daily activities and location. But new legislation has been proposed that will affect how that information can be obtained and utilized by private companies and law enforcement.



By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 23.



IN 2000, GEORGE CLOONEY APPEARED IN THE JOEL and Ethan Coen comedy titled *O Brother, Where Art Thou?* The Coen brothers' movie created the story as a modern satire loosely based on Homer's poem, *The Odyssey*, and set in 1937 rural Mississippi. In the movie, Ulysses Everett McGill, played by Clooney, walks into a general store and asks a clerk when the store would have in stock certain car parts and Clooney's hair jelly of choice, Dapper Dan. In response to Clooney's query, the man in the store tells Clooney it would be two weeks to get the car parts he needed and two weeks to get the jelly. In true Clooney fashion, his character retorts, "Well isn't this place a geographical oddity. Two weeks from everywhere!"

Fast forward fourteen years since the release of the film to the age of the smartphone and Clooney would not have to ask that question. He could simply ask Siri to find an auto parts store or a beauty supply store near him. Siri, using the geolocation capabilities in Clooney's iPhone, would be able to tell exactly where he was in the world and within seconds, tell him the closet businesses meeting his needs. Using the phone's location, Siri could even provide Clooney with turn by turn directions to the stores.

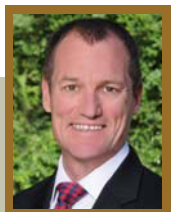
Trying to find out where someone or something is located is valuable information for individuals, businesses, and attorneys but there are new laws on the horizon which will directly impact how this information is obtained.

What is Geolocation?

Knowledge of such geolocation capabilities begs the question: What is geolocation? Geolocation is the process of determining the geographic location of a particular object, like a computer terminal, a mobile phone or tablet. There are different types of geolocation: IP geolocation, W3C geolocation, and geocoding. IP geolocation identifies the object's Internet Protocol (IP) address and then determines what country, state, city, ZIP Code, organization, or location the IP address has been assigned to.

W3C geolocation is used by the World Wide Web Consortium (W3C) to rely on a standardized ability to retrieve the geographic location. Finally, geocoding relies on geographic coordinates (latitude and longitude) from other data like a city or an address. In short, it is a way to find out where you are when you are holding your smart phone or tablet.

The Coen brothers' film title suggests the answer to the location question may be provided by a higher authority.



Adam D.H. Grant is Immediate Past President of the SFVBA and is a partner with Alpert, Barr & Grant in Encino. He is an experienced trial lawyer and has considerable expertise and litigation experience in online privacy matters and complex business litigation. He can be reached at agrnt@alpertbarr.com.

But in the present day, the answer may really be determined by a number of new laws governing the collection and use of geolocation information. These bills were introduced in the 113th U.S. Congress in 2013-2014 and are presently in committee.

Geolocation Privacy and Surveillance (GPS) Act

The Geolocation Privacy and Surveillance (GPS) Act (H.R. 1312 and S. 639) was introduced in the U.S. Senate by Senators Ron Wyden (D-OR) and Mark Kirk (R-IL) and in the House by Congressmen Jason Chaffetz (R-UT), Jim Sensenbrenner (R-WI), and John Conyers (D-MI). Shortly after introduction, the bills were referred to the Judiciary Committee for each chamber and to the House Intelligence Committee.

The GPS Act provides guidance to law enforcement officers and to private companies. It assists law enforcement in determining the amount of geolocation evidence they need if they want to track an individual's movement or location.

Private companies can also benefit from the legislation as it provides guidance as to how the companies should respond to law enforcement requests and what the companies need to do to protect customer information. The Act has a tertiary effect of providing consumers with the confidence that their privacy rights are being protected. Modeled after the federal wiretapping statutes, the GPS Act creates a modern day process to obtain warrants that will enable law enforcement to obtain geolocation information from a suspect, much in the same way warrants for wiretaps are currently obtained.

The GPS Act primarily and most directly impacts law enforcement. However, given the sensitivity of this information and the vast amount collected on a daily basis, it is reasonable to assume that the Act will impact the manner in which such information is obtained in civil litigation. Currently in California, you must obtain consent from both individuals before you record a conversation. It is reasonable to assume that in a civil context, unless actual and valid consent is obtained from the consumer, a strong argument could be made that such evidence could not be introduced in a hearing or at trial.

The GPS Act includes certain punitive provisions which could cause problems of a criminal and civil nature. The Act creates criminal penalties for people and companies that track a person's movements without obtaining consent. Additionally, it is very likely that the Federal Trade Commission or California's Attorney General could use the Act as a means of finding civil penalties for violation of Business and Professions Code Section 17200, as an unfair business practice, which



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has been the section of choice in similar prosecutions. Thus, if the law makes it out of committee and is enacted, it is expected to become an additional arrow in the FTC's arsenal of statutes to enforce increased transparency in the area of digital privacy.

Online Communications and Geolocation Protection Act

The Online Communications and Geolocation Protection (OCGP) Act includes similar safeguards as the GPS Act but extends to online communications. It was introduced in the House by Representatives Zoe Lofgren (D-CA), Ted Poe (R-TX) and Suzan DelBene (D-WA) in March 2013. The bill was promptly referred to the House Judiciary Committee and Intelligence Committee and remains in the committees for further evaluation.

The OCGP Act changes the federal criminal code by permitting a governmental entity to require the disclosure of electronic information, including geolocation data, pursuant to a duly obtained warrant. Upon receiving the warrant from the governmental entity, the business must provide a copy of the warrant to the service subscriber, customer, or user. Generally, the OCGP Act prevents the intentional gathering, disclosing or using of geolocation information. The OCGP Act includes exemptions when the parent consents for their child to assist an emergency responder to locate an individual in danger or when the information is otherwise generally available to the public. The exemptions are reasonable and are not likely, as has been the case with many exemptions, to completely undermine the intent of the statute.

What is particularly noteworthy about the OCGP Act is the effect of a violation. If the identifying information is obtained in violation of the Act, the evidence can't be used in "any trial, hearing, or other government proceeding." However, the geolocation information can be used in a civil action to obtain relief for violations of the Act. Additionally, the OCGP Act specifically provides for civil actions to recover damages from persons, other than the United States, when the information is obtained in violation of the Act.

The next important question involves the definition of "damage." The OCGP Act does not define what the Act considers damages. Thus, the concept is left to the courts to decide. In January 2014, the case involving a data breach relating to Sony's Playstation survived a Motion to Dismiss in District Court. In the class action suit, the plaintiffs alleged they suffered damages as a result of the data breach, including having to purchase identity theft protection. Thus, it is reasonable to expect that similar arguments could be made as a basis for a class action lawsuit against companies that violate the OCGP Act.¹

Location Privacy Protection Act

The Location Privacy Protection Act (LPPA) of 2014, if enacted into law, would prohibit companies from collecting

or disclosing geolocation information from a smartphone without obtaining the proper consent. As with the OCGP Act, it includes exceptions for parents tracking their children, emergency services and law enforcement. The bill also prohibits the development and distribution of so called "stalking apps." Stalking apps are mobile apps used by individuals to secretly track the movements of individuals (e.g., as used by jealous spouses or concerned parents of teenagers).

According to Senator Al Franken (D-MN) who introduced the bill, the LPPA fixes outdated federal law to protect consumers and victims of stalking.² As is the common theme in these proposed laws, and in many existing laws, the LPPA requires companies who want to obtain geolocation information to first obtain consent and to tell the people who do consent how the information is being shared. Additionally, the LPPA exempts compliance to parents tracking their children, in emergency and other similar situations. As an additional safeguard, the Act requires companies that collect geolocation data from 1,000 or more devices to post online how they collect the information, the kinds of information collected, how they share and use the information and how people can prevent the collection and sharing of the information.

At the heart of the LPPA are provisions which completely ban the development, operation and sale of stalking apps. As a deterrent, law enforcement is authorized to seize the proceeds from the sale of the apps to fund anti-stalking efforts. However, this provision is undermined by the practicality of what really occurs in the market place. Specifically, such stalking apps are not "sold." The apps are offered for free—so there are no proceeds from the sale of the apps. In reality, the developer makes money from the free app by selling the information obtained from consumers who use the apps. Consequently, the hammer of disgorging proceeds from the sale of the app, unless courts interpret a sale to include the sale of the information to a third party, is entirely without teeth.

The Senate Judiciary Committee's Subcommittee on Privacy, Technology and the Law held a hearing on the Location Privacy Protection Act on June 4, 2014. In addition to representatives from various federal and local agencies, leaders from Digital Advertising Association, National Consumers League, and the National Network to End Domestic Violence gave testimony.

The United States Government Accountability Office (GAO) testified about its recent findings on the topics of the sharing and use of location data by companies; actions by companies and federal agencies to protect location data; and privacy risks associated with collecting the data. The GOA testified that, of the companies it surveyed, they did not properly disclose to customers what they did with the geolocation data even if the companies had privacy policies

or similar practices. As a result, the GAO testified, the consumer is not always aware of what is being done with the information collected by the companies. Of the privacy policies the GAO reviewed, it found the policies failed to tell the customer how long the company would keep the information. Thus, the company could keep the information indefinitely, which creates a higher risk of identity theft.³

The Federal Trade Commission (FTC) provided some additional insight during the Senate's hearing on the LPPA. Jessica Rich, the Director of the FTC's Bureau of Consumer Protection recommended that the FTC, as the "federal government's leading privacy enforcement agency" should be permitted to enforce the LPPA pursuant to Section 5 of the FTC Act.⁴ As currently drafted, the LPPA allows only the Department of Justice to enforce the Act, after consulting with the FTC.

The Importance of Geolocation in *Riley vs. California*

Earlier this year, the United States Supreme Court issued its opinion in *Riley vs. California*⁵ in which it addressed the question of whether the police properly searched Riley's mobile phone as part of a traffic violation stop. The officer reviewed certain information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents.

Based in part on the photos and videos the detective found, the state charged Riley in connection with a shooting that occurred several weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police obtained from his cell phone. The trial court denied the motion and convicted Riley. The Court of Appeal affirmed the denial and the conviction. However, the Supreme Court reversed the judgment and remanded the case to the trial court.

In the unanimous opinion, Chief Justice John Roberts observed that cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."⁶ Further, in rejecting the government's assertion that searching data stored on a cell phone is materially indistinguishable from searches of a person's physical items, Justice Roberts retorted, "[t]hat is like saying a ride on a horseback is materially indistinguishable from a flight to the moon."⁷

The Court particularly noted that the immense storage capacity of the most common phone equates to far more than anyone ever stores in their own home. The Court recognized that "[t]he sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet."⁸

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The Court went on to explain that “[d]ata on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.”⁹

Justice Roberts’ discussion of geolocation data and the significance of the data obtained by a smart phone is particularly relevant to attorneys practicing in California. Since 2012, the FTC and California Attorney General Kamala Harris have, practically speaking, entered into a virtual partnership in combating perceived abuses of the data culled from smart phones. California attorneys should expect that California will continue to lead the nation in promulgating additional legislation similar to the bills discussed in this article.

Additionally, the rise of wearable devices increases the importance of geolocation and these laws. Information gathered through devices such as wristbands that monitor mileage and calories or contact lenses that monitor glucose levels can be transmitted via an app or by merely connecting to a wireless hot spot. Along with that specific information, a user’s geolocation data can also be transmitted. Consequently, a company can link the medical information with the geolocation data and use the combined information to market to you in a very targeted and timely manner.

The Kill Switch on Geolocation

California SB 962, otherwise known as the “Kill Switch” law, was approved by Governor Brown on August 25, 2014 and just recently became law. The law requires that all smartphones sold in California or shipped to California residents have some form of technology which permits a consumer to disable the phone if it is acquired by an unauthorized user. The law is intended to address the increasing number of thefts of smart phones in California.

The new law, however, creates an interesting dilemma for the use of geolocation information by law enforcement. Frequently, smartphones are stolen and

used in the commission of a crime. Law enforcement can use the geolocation from the phone, as well as much of the information obtained from the phone once it is in the unauthorized user’s possession, to solve the crime or to obtain information to solve other crimes. If the purchaser uses the kill switch technology as soon as the phone is stolen, the opportunity to solve other crime is lost. Of course, at the same time, the victim’s personal information is swiftly protected. Thus, the new law has both pitfalls and benefits in this age of technology.

Whether you talk with Odysseus, George Clooney or Chief Justice Roberts, the answer to the question, “Where are you?” will be very different. According to Odysseus, it would likely involve some reference to the gods and celestial bodies. According to George Clooney, it would involve his ability to acquire car parts and hair gel. However, Chief Justice Roberts clearly understands that that answer has much more to do with your GPS coordinates, IP address and whether you gave Google consent to locate you.

As we transition into an increasingly computerized, technologically associated daily life, the future answer to such a question will likely be found in the 21st century version of a cloud! 🏠

¹ In re: Sony Gaming Networks and Customer Data Security Breach Litigation, Case No. 311-MD-02258-AJB-MDD.

² Senator Al Franken, “The Location Privacy Protection Act of 2014—Summary,” available at <http://www.franken.senate.gov/files/documents/140327Locationprivacy.pdf>, last accessed September 6, 2014.

³ United State Government Accountability Office, Testimony Before the Subcommittee on Privacy, Technology and the Law, Committee on the Judiciary, United States Senate, June 4, 2014, available at <http://www.judiciary.senate.gov/imo/media/doc/06-04-14GoldsteinTestimony.pdf>.

⁴ Prepared Statement of the Federal Trade Commission on S. 2171 the Location Privacy Protection Act of 2014 Before the United States Senate Committee on the Judiciary Subcommittee for Privacy, Technology and the Law, June 4, 2014, available at <http://www.judiciary.senate.gov/imo/media/doc/06-04-14RichTestimony.pdf>.

⁵ *Riley v. California*, 134 S. Ct. 2473 (2014).

⁶ *Ibid.* at 2485.

⁷ *Ibid.* at 2488.

⁸ *Ibid.* at 2489.

⁹ *Ibid.* at 2490.



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This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. The Geolocation Privacy and Surveillance Act was first introduced in 2010.
☐ True ☐ False
2. The GPS Act provides guidance to law enforcement officers and private companies.
☐ True ☐ False
3. The law specifically impacts how companies conduct direct mailings.
☐ True ☐ False
4. The GPS Act includes certain punitive provisions that are both criminal and civil in nature.
☐ True ☐ False
5. The Online Communications and Geolocation Protection Act (OCGPA) changes the federal Criminal Code.
☐ True ☐ False
6. According to the OCGPA, once a business receives a warrant, a copy of the warrant must be provided to the service subscriber, customer or user.
☐ True ☐ False
7. The OCGPA only prevents the intentional gathering of phone numbers.
☐ True ☐ False
8. A company would be exempt from the OCGPA when a parent consents to the gathering and use of information for a child.
☐ True ☐ False
9. If the OCGPA is violated, the violation is excluded from being used in any civil proceeding.
☐ True ☐ False
10. The OCGPA provides for civil actions to recover damages.
☐ True ☐ False
11. Credit monitoring fees is an example of pure economic damage for a data breach in California.
☐ True ☐ False
12. The Location Privacy Protection Act (LPPA) of 2014 seeks to protect the collecting, or disclosing of geolocation information from a smart phone.
☐ True ☐ False
13. As currently drafted, the LPPA gives the Federal Trade Commission the exclusive enforcement authority.
☐ True ☐ False
14. Chief Justice John Roberts believes geolocation is unimportant.
☐ True ☐ False
15. The US Supreme Court in *Riley vs. California* required the law enforcement agency to obtain a warrant before it searched Riley's phone.
☐ True ☐ False
16. The FTC and Kamala Harris have worked together to combat alleged abuses of electronic data obtained via a smartphone since 2012.
☐ True ☐ False
17. Wearable devices with GPS capabilities increase the value of geolocation information.
☐ True ☐ False
18. SB 962, or the "kill Switch" law, allows thieves to turn off stolen smartphones.
☐ True ☐ False
19. The LPPA bans the development, operation and sale of stalking apps.
☐ True ☐ False
20. There are two types of geolocation.
☐ True ☐ False

MCLE Answer Sheet No. 72

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the \$15 testing fee for SFVBA members (or \$25 for non-SFVBA members) to:

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| 1. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 3. | <input type="checkbox"/> True | <input type="checkbox"/> False |
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Irma Mejia is Editor of *Valley Lawyer* and serves as Publications and Social Media Manager at the San Fernando Valley Bar Association. She also administers the Bar's Mandatory Fee Arbitration Program. She can be reached at editor@sfvba.org.




MEET THE PEOPLE BEHIND THE MAGIC

By Irma Mejia

The San Fernando Valley Bar Association's new fiscal year brings a fresh slate of quality events and programs. But many members may not be aware that behind the success of the Bar's programming is a team of bright and hard-working women. Read on to learn more about this talented squad. Together, they form a team of champions.

Photos by Marco Padilla at Balboa Sports Complex.

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Liz Post

Earlier this year, Post celebrated her twentieth anniversary as Executive Director of the SFVBA. Under her direction, the SFVBA has weathered the storms of a recession and office relocations and made it through stronger and more vibrant than ever. Thanks to her leadership, the SFVBA is entering its 88th year with expanded services and programs and growing visibility in the community.

It was under her command that the Bar has seen the expansion of the Attorney Referral Service, the establishment of *Valley Lawyer* as a regular and comprehensive publication, and the expansion of law firm memberships. After so many years, she continues to be excited about the start of a new Bar year. "I still look forward to working with a new Board and President each year," she says.

Her outstanding leadership has garnered her many commendations, including the Justice Armand Arabian Leaders in Public Service Award this month. With two decades of a proven track record, Post has no intention of just coasting the rest of the way. She continually looks for ways to improve the organization. "I would like to see the Bar focus even more on young attorneys and the New Lawyers Section," she says. "They are the life blood of our Association and our future leaders."

Outside of work, Post can be found hiking in the hills surrounding her home, going to the beach, and traveling with her husband of 20 years, Gary, and 9-year-old daughter, Hannah. She also enjoys swimming and running. Just last year she completed her first half marathon. When not participating in active sports, she is cheering on the New York Mets or the Syracuse University basketball team.

Team SFVBA



Position:
Director,
Education &
Events

Hometown:
Long Island, NY

Drafted: 1999

Education:
Film and
Television, New York University
Acting, Lee Strasberg Theatre and Film Institute

5-year Plan:
"Probably still stuck on the 405."

Linda Temkin

Over the course of 14 years, Temkin has transformed the SFVBA's programming into an exciting array of seminars for members in all practice areas. Working with section chairs, she organizes monthly meetings for 17 practice sections. She is also the leading force behind Bar-wide networking and gala events, including Judges' Night and the Installation Celebration.

Temkin credits the people of the Bar, both members and staff, for making her work so enjoyable. "We've been blessed with truly hard-working and keenly intelligent people over the years," she says. "It has also been wonderful to work with so many attorneys and bench officers who share our sense of community involvement and dedication to the delivery of justice."

With so many years at the SFVBA, Temkin has some great insight into what the Bar needs to continue thriving. "I would like to see more law firm involvement. Our President's Circle was the right step in this direction," she says. "I would also love to see our many law sections increase their member participation."

When not at work, you can find her navigating the trails of the Santa Monica Mountains, reading, taking in a play or hitting the open road for a weekend getaway. She's also two-thirds into writing her first novel.

While she's a tremendous player on Team SFVBA, she's not much of a sports fan. But she does maintain an emotional attachment to particular teams. "I cheer on the New York Yankees for my dad and the Detroit Red Wings for my significant other."

Team SFVBA



Position:
Director,
Public Services

Hometown:
Thermal, CA

Drafted: 2001

Education:
Business
Administration,
California State
University,
Northridge

**Favorite
Rollercoaster:**
Goliath at Magic
Mountain. "That
first drop is
breathtaking!"

Rosie Soto Cohen



Team SFVBA



Positions: Referral
Consultant;
Senior Citizens Legal
Services Program
Coordinator

Hometown: Lake View
Terrace, CA

Drafted: 2006

Education: Paralegal
Studies, Mission College

Spanish-English Court
Interpretation and
Translation, California
State University,
Los Angeles

Favorite Books:
I can't pick just one!"
Hemingway's *The Old
Man and the Sea*, Isabel
Allende's *The House of
Spirits*, and more.

Lucia Senda



Cohen first joined the SFVBA thirteen years ago as an Administrative Assistant, later becoming a Referral Consultant, coordinating the Senior Citizens Legal Services Program, the Modest Means Program and the Legal Grind Program. Since 2008, she has served as the Director of Public Services, managing the Attorney Referral Service and the Bar's community education and outreach. "My mission is two-fold: to provide the public with meaningful access to legal representation and assist attorneys in growing their client base," explains Cohen.

As an approachable and affable leader, it is no surprise that her favorite part of the job is the community outreach. "I enjoy engaging with members of the community and coordinating activities and programs such as Lawyers in the Library and Ask a Lawyer," she says. "I also enjoy meeting new ARS attorneys and getting to know them and their staff."

She didn't always expect to be working in the legal field. As a child, she aspired to own a convenience store "like the good man Vicente," she says. "He owned the only store for miles where I grew up. In my young eyes, there was something lavish about having everything at your fingertips."

As a big sports fan, Cohen can be seen rooting for her favorite teams year-round. But her all-time favorite team is the Los Angeles Dodgers. She attributes her love of the team to her exposure to games while growing up. "My father wanted to be a baseball player when he first came to this country," she says. "His love of the team was inspiring."

Since joining the team eight years ago, Senda has been a stellar Referral Consultant, responsible for interacting with the majority of the Bar's Spanish callers. In recent years, she has also taken on the role of Senior Citizens Legal Services Program Coordinator, working with local senior centers to increase access to justice in underserved communities. She also handles referrals coming through the Modest Means and Limited Scope Representation Programs. Bar members and the public will often see her at various ARS community outreach events.

Senda is also a skilled Spanish-English translator, having completed a court interpreting and translation program at Cal State LA. Her unique skills have enriched the ARS offerings as she is able to translate materials for the public and recently created a Spanish-English glossary of legal terms. She also worked on the Spanish translation of the ARS's new website. When asked what she expects to be doing in the next few years, she answers right away, "I see myself serving as an established court interpreter."

Those weren't always her career aspirations. As a child, she dreamed of being an anthropologist, and a lawyer. In her teen and young adult years, Senda worked as a fashion model, gracing photo ads and walking runways in Europe and the United States. "It was fun but I had other goals to achieve," she says.

When not working hard at the Bar, Senda can be found enjoying movies, spending time with family and traveling. "I especially enjoy spooky trips with the family, like visiting ghost towns," she says. As for her favorite movie? "It's always been *The Wizard of Oz*."

Team SFVBA



Irma Mejia

Positions:
Mandatory Fee
Arbitration
Program
Administrator;
Publications and
Social Media
Manager

Hometown: Los
Angeles, CA

Drafted: 2010

Education:
Archaeology and
Latin American
Studies, Yale
University

**Favorite
Theme Park:**
"Hands down,
Disneyland!"



Team SFVBA

Rookie



Martha Benitez

Positions: Referral
Consultant;
Member &
Client Services
Coordinator

Hometown:
Sylmar, CA

Drafted: 2013

Education:
Chicano Studies
and Spanish,
University of
California, Santa
Barbara

**Favorite
Rollercoaster:**
X2 at Magic
Mountain. "I love
rollercoasters!"



Mejia joined the Bar four years ago as the Member Services Coordinator, serving as the first point of contact for all members and coordinating membership drives. She soon became Administrator of the Mandatory Fee Arbitration Program which has since expanded to become one of the Bar's major public service programs. Two years ago, she found her niche overseeing *Valley Lawyer Magazine*, the Bar's email marketing and its social media efforts.

What she loves most about working at the SFVBA is the opportunity to help others while being able to expand and develop her individual talents. In the next few years, she sees herself expanding her career in marketing and communications.

When not at the office, Mejia can be found soaking up local culture through concerts, film screenings, and plays. She is a budding patron of the arts and can often be found at the Music Center downtown or the Hollywood Bowl during the summer. She is also a major fan of all things vintage, especially film.

But not all of her pastimes are related to the arts. As basketball season begins, she'll be seen rooting for her favorite team, the Los Angeles Clippers, whom she has been cheering on since before they sold out stadiums.

The newest addition to the team, Benitez initially joined the bar as a part-time Referral Consultant for the Attorney Referral Service, matching callers from the public with qualified attorneys. This summer, her duties expanded to include Member and Client Services and she was promoted to a full-time position. She now handles all aspects of Bar membership, including processing renewals, and handles the client surveys and Attorney Case Manager reports.

"The best part of working for the SFVBA is the staff," she says. "From day one, I felt welcomed by everyone. It is truly a unique environment because we all work together on every Bar-related task and treat each other like family."

As a child, Benitez loved dancing so much that she dreamed of joining a competitive dance team or being a professional cheerleader. "I cheered at Sylmar High School and loved watching football ever since," she says. Her favorite team? "The San Francisco 49ers!"

While she still enjoys cutting a rug, her career aspirations have changed. "Ultimately, my goal in life is to help people and my community," she says. She found her niche helping the community through the SFVBA and other avenues. "When I'm not at the Bar office, I get to help families as a financial advisor," she says. In the next few years, she sees herself owning her own financial brokerage office.



WHAT WILL BE YOUR HALLOWEEN COSTUME THIS YEAR?

Lucia: The Wicked Witch of the West.

Martha: I still have no idea.

Linda: No need, I mainly shroud myself in black.

Irma: I want to be a wizard, like Harry Potter.

Rosie: Still to be determined.

Liz: My daughter wants to be a candy princess and she wants me to get the matching mom dress from the catalog.

WHAT MAKES YOUR SKIN CRAWL?

Martha: I hate insects of all types. I'm also very superstitious, so I do believe in ghosts and haunted anything.

Rosie: I don't know if I hate or fear them, but there's something about moths that gives me chills.

Irma: I hate cockroaches.

Liz: Heights. Earthquakes too.

Linda: The Kardashians.

Lucia: All bugs are disgusting to me. I am especially scared of worms, and red-eyed rabbits.

WHAT WAS THE LAST SCARY MOVIE YOU WATCHED?

Lucia: *Deliver Us from Evil* and it was frightening.

Irma: I don't like scary movies but the last one I watched was the original *House on Haunted Hill*.

Martha: *Oculus*. I hadn't seen any previews before I watched it so it definitely scared the heck out of me!

Liz: I don't watch horror movies. In fact, the monkeys in *The Wizard of Oz* still scare me.

Linda: The original *Paranormal Activity* and found it pretty creepy.

Rosie: *Mama* and yes, it lived up to the horror hype.

SFVBA Welcomes Its Newest Trustees

LAST MONTH, VALLEY ATTORNEYS PARTICIPATED in a Bar-wide election. On September 10, six members were elected and three were appointed to the 2014-2015 Board of Trustees. The following members will direct the SFVBA in the new fiscal year:



Jonathan Birdt
2014-2015



Michelle Diaz
2014-2016



Sean Judge
2014-2016



Nicole Kamm
2014-2016



Alan Kassan
2014-2016



Yi Sun Kim
2014-2016



Gregory Lampert
2014-2015



Kathy Neumann
2014-2016



Toni Vargas
2014-2015

In Support of Sensible Legislation on Digital Assets

By KC Marie Knox

by mail. While there are many benefits to this method of communication and storage of information, there are just as many pitfalls. Primarily, if you have not provided your next of kin the username and password for each digital account you own, it may be impossible for anyone else to secure access to that account.

Upon your death, someone else will be left in charge of your estate and will have to make sense of your digital assets notwithstanding their grief at your passing. Calls to email service providers will be met with roadblocks since the owner of the account is no longer around. The service provider will consistently reference the end-user license agreement that is between the provider and the owner, citing statements that those agreements are designed to protect the integrity of their accounts and insure privacy. There is nothing that can be done and it may be months, years and potentially never before all of the digital information is recreated.

A person's digital information is just like any other asset that needs to be administered correctly on incapacitation or death. The time has come where personal representatives, trustees, and agents acting under a power of attorney can access such digital assets with greater ease and less red tape.

According to a 2011 Census Bureau report,¹ more than three-quarters of all Americans owned a computer. That number increased to nearly ninety percent of all Americans

FOR THE PAST TEN OR SO YEARS, NEWS ARTICLES have abounded regarding the difficulty in accessing the digital records of the dearly departed. Famous examples include the case of Justin Ellsworth, the U.S. Marine who was killed while serving in Fallujah, and his father's desperate pleas to access his Yahoo account, which were denied. Another is the case of Karen Williams, whose 22-year-old son was killed in a motorcycle accident, and her desire to access his Facebook account, which was also refused. Both parents were faced with bureaucratic roadblocks during a time when emotions were already being pushed to their limits.

The problems associated with digital records are exacerbated by our desire to "go green." No matter how the picture is painted, it seems as though people of all generations are eschewing traditional paper communications for digital. In fact, many companies are now making email the default method of communication and will charge a fee for communication



KC Marie Knox has over a decade of experience in wills, trusts and estate in California. She joined the law firm of Anker, Hymes and Schreiber LLP in March of 2007 and in addition to estate planning and asset protection, primarily handles the firm's probate, trust administration, and trust litigation matters throughout the state. She can be contacted at kknox@ahslawyers.com.

with a bachelor's degree or higher.² A quick look around your room will likely produce a computer, a tablet, laptop, cell phone, or perhaps all three. All of those electronic devices likely hold at least one component that can be characterized as a digital asset (e.g., email, pictures, books, apps, etc.). Individually or in combination with traditional assets, those digital assets have the potential to cause a significant impact on one's estate, both in terms of valuation issues and administrative logistical issues.

Delaware has taken the first major step forward to address some of those issues. On August 12, 2014, Delaware Governor Jack Markell signed HB 345 into law, more formally known as "The Fiduciary Access to Digital Assets and Digital Accounts Act." The law, which will go into effect on January 1, 2015, is the first comprehensive law that provides access to a person's digital estate following death. The Act is a legislative response to the fast-growing problem of the inability to retrieve information from email accounts, social media accounts, business records and other digitized accounts following a person's death.

Some states have started to address these issues. Narrow statutes have been enacted in a handful of states³ but they only address email accounts—not social media or other internet-based accounts—and are relatively restrictive, limited to turning over copies of emails, but not providing actual access to the account. In Delaware, however, if a

person dies and is a resident of Delaware at the time of death, all companies are obligated to provide the username, login and password information to the estate representative. The company would be able to withhold this information only if they were directed that the account not be accessible in the event of death or incapacity.

The Act provides authority to a decedent's personal representative, an agent authorized under a power of attorney or a trustee of a trust. The representative would essentially step into the shoes of the deceased or disabled account holder and would have all of the powers, rights and responsibilities the account holder had.⁴ Following proof of death or disability and appropriate appointment of authority, the custodian of the account is obligated to turn over all username, password and any other relevant information necessary to fully access the account. Failure to do so could result in court orders and potential liability for damages to the estate.⁵

California has the opportunity to improve upon the statute already passed in Delaware by addressing some of the shortfalls that Delaware's HB345 does not address. Legislation is currently pending in California on this issue. On January 9, 2014, Senator Joel Anderson introduced SB 849, proposed legislation in California to address the same subject matter as Delaware's HB345. The proposed legislation was amended on April 21, 2014 and the first hearing on the matter

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He noted, "Whether as a mediator or an arbitrator I look forward to helping the parties achieve the finality they are seeking. I am always humbled when the parties place their trust in me to help them resolve their most difficult matters."

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was held on May 6, 2014 with testimony being taken. If passed, the new legislation would expand California Probate Code §9650 to require that electronic communication services or remote computer services provide a decedent's personal representative access to the decedent's account.⁶

At first blush, this proposed legislation is much more restrictive than the Delaware law, since it may be interpreted to only address email accounts. It is essential that any proposed legislation cover a much more expansive group of digital assets. Email is just the tip of the iceberg.


There are other digital assets, some of which may hold significant monetary value, which also must be addressed. For example, self-published authors are using the web and cloud storage as a means by which to create, preserve and distribute their works. California's legislature should adopt the more expansive definition of digital assets as proposed by the Uniform Law Commission: "a record that is electronic,"⁷ with record meaning "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."⁸ This would not only include email, but also encompass a broader spectrum of digital assets.

Secondarily, the proposed California legislation only gives authority to a personal representative appointed by the court, which means that agents acting under a power of attorney or trustees acting outside of the oversight of the Probate Court

are not covered. The expansion of the breadth of digital assets covered and the persons entitled to the information following disability or death are crucial for any proposed legislation to adequately address the issues arising from the expanding realm of digital assets.

On a positive note, California's proposed legislation does deal with an issue relating to the disclosure liability of the service providers. The Electronic Communications Privacy Act⁹ and the Stored Communications Act¹⁰ regulate the disclosure and transmission of digital assets. While these Acts were initially intended to prevent unauthorized wiretapping or disclosure of information without the user's consent, it has been interpreted much more broadly, thereby potentially exposing a service provider to liability for disclosure to anyone other than the registered owner.

The proposed California legislation provides indemnity for the service providers who comply with an order to release information to a personal representative. It will remain to be seen if this will provide enough incentive for service providers to comply with the court's order or whether the federal government will prosecute these types of cases in the first instance.

It is hoped that the ultimate law passed in California will be more expansive both in terms of coverage and in authority granted, but still maintain the additional protections of liability indemnification. What should be clear though is that these new laws are important and are definitely needed in this technological age. Digital assets are not going away and these laws are designed to make administration of the assets easier. The days of maintaining business records, check registers, bank accounts, photo albums, and other communications through traditional pen and paper are dwindling; computers are becoming our filing cabinets. Storage, back-ups and original works—art, short stories, novels, biographies—are being digitized. Now it is up to us to incorporate those digitized assets into our overall estate plan, addressing both concerns of disability and death. 

¹ Thom File, United States Census Bureau, "Computer and Internet Use in the United States: Population Characteristics," May 2013, available at www.census.gov/prod/2013pubs/p20-569.pdf, last accessed September 16, 2014.

² *Supra* Table 1.

³ Connecticut (SB262, effective October 1, 2005); Idaho (SB1044, effective July 1, 2011); Indiana (SB0212, effective July 1, 2007); Maine (LD850, proposed); Maryland (SB0029, proposed); Michigan (HB5929, proposed); Nebraska (LB783, proposed); Nevada (SB131, effective October 1, 2013); New Hampshire (HB0116, proposed); New Jersey (A2943, proposed); New York (A823, proposed); North Carolina (SB279, effective June 12, 2013); North Dakota (HB1455, proposed); Oklahoma (HB2800, effective November 1, 2010); Oregon (SB54, proposed); Pennsylvania (HB2580, proposed); Rhode Island (33-27-3, effective May 1, 2007); and Virginia (SB914, proposed).

⁴ Delaware Code, Title 12, Chapter 50, §5005.

⁵ *Supra* §5006.

⁶ Proposed legislation California Probate Code §9650(a)(3).

⁷ Uniform Fiduciary Access to Digital Assets Act §2(9).

⁸ UFADAA §2(21).

⁹ 28 U.S.C. §2510 et seq.

¹⁰ 28 U.S.C. §2710 et seq.

Terri L. Asanovich, M.F.T. Inc.



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Boundaries: Regaining Control over Your Electronic Devices

By Terri L. Asanovich

WORKING IN A COMPETITIVE marketplace has encouraged the reduction of healthy boundaries between our professional and personal life. While studies have shown that it is healthy to set boundaries on the use of technical devices and social media, including smartphones, tablets, Facebook, Twitter, etc., we are now much more available to clients through email and smartphones at all hours and during the weekend. This, in turn, impacts our ability to rest and recharge.

Researchers have been observing the relationship between work-home segmentation and psychological detachment from work. They found the psychological detachment from work during non-work time is crucial for employee health.¹ Detachment, however, can be complicated by our increased accessibility through smartphones and the internet.

Moreover, research has shown it is not only important to be physically away from work, but also to be “mentally switched off” from work-related thoughts and activities in order to recover from stress during non-work time.² Lack of recovery from work, especially over time, becomes visible and affects an individual’s resources in such ways as having a lack of rest and increased fatigue.

Setting Boundaries

A new phenomenon has been created with today’s technology: a constant need to “check in” with the smartphone to view messages, status updates and news. In the article, “You Don’t Need a Digital Detox: You Just Need to Learn to Set Limits and Boundaries,” Dr. Larry Rosen explains his research and that of colleagues at the George Marsh Applied Cognition Lab at California

State University, Dominguez Hills.³ The demographic of the population they have studied is under 40 years of age, but the data can be extrapolated to most working professional adults.

It was noted in these studies that the cell phone is checked without an alert and more than half of the study participants typically checked their smart phones every fifteen minutes or less. Further, in a study of technology’s impact on sleep habits, it was found that seventy-five percent of participants sleep with their phone at their bedside and wake up most nights to an alert or because of an ingrained habit to check the device. Individuals who used their smartphone before sleep had more difficulties sleeping and suffered from increased sleep deprivation.

From the field of neuroscience, we know that when a person feels anxious, their brain releases certain



Terri Asanovich, M.F.T. is a marriage and family therapist practicing in Sherman Oaks. She provides individual, relationship and family counseling, specializing in divorce-related issues such as 730 evaluations, reunification therapy, co-parenting and case consultation. She can be reached at tasanovichmft@aol.com.

neurotransmitters while others are removed, resulting in physical symptoms of anxiety, including intense intrusive thoughts, sweaty palms, and racing heart. An example of this is when a person begins to aimlessly browse through various apps for no particular reason while watching the news or some other television program. The urge to check in with a phone or tablet disrupts the attention being paid to the television program.

Technology has an effect on practically all working professionals who play video games, respond to emails, check Twitter, and review various apps. Dr. Rosen suggests limits on our own personal behavior to break these bad habits, including turning off the smartphone at 11:00 p.m. and abstaining from checking it even if one is awakened in the middle of the night.

So how do we cure this mindless urge? Dr. Rosen suggests setting three types of limits on our behavior. First, do not use technology for more than 90 minutes in one sitting. A ten-minute break after every 90-minute session resets our brain chemistry. Use the ten minutes to go outside into nature, exercise, meditate, talk to someone in person, listen to music, practice a foreign language or take a hot shower.

The second limit suggested by Dr. Rosen is the ratio of tech time to non-tech time. A healthy ratio is 5:1, with sleeping not counted as non-tech time. A person working for two hours on a computer should set aside 20 to 25 minutes for time without technology. This change in activity applies a different skill set than just taking a simple break as prescribed in the first limit.

Dr. Rosen's final limit is the implementation of "technology breaks." This tactic is used in schools and businesses nationwide and can easily be applied to families who bring their phones to the dinner table. Everyone is allowed to check their phone for one to two minutes and then all the phones are turned to silent and placed upside down on the table or desk in plain sight.

An alarm is set for 15 minutes and when it goes off, everyone gets one minute to check in. After doing this for a week or so, the time periods in between the technology breaks are extended to 20, 25, and 30 minutes.

Dr. Rosen believes 30 minutes is the maximum time that keeps the anxiety neurotransmitters from triggering a negative response. These three behavioral interventions are a healthy alternative to a digital detox, which is not practical in today's information driven world.

Benefits of Psychological Detachment


Diary studies show that psychological detachment in the evening was associated with lower fatigue at bedtime⁴ and during the following morning.⁵ Also, cross-sectional research has found that detachment during leisure time was positively associated with life satisfaction⁶ and negatively associated with emotional exhaustion, sleep problems, and depressive symptoms.⁷

Further, longitudinal research demonstrated that psychological detachment from work during the weekend was positively related to positive affective experiences (i.e., joviality and serenity) during the following work week.⁸ However, having an office in one's home which would be considered a permeable physical boundary at home was negatively related to psychological detachment from work among a group of professionals.⁹

Home Life and Relationships

When you are with someone, that relationship is your priority. Remember, using smartphones, tablets, text messages or social media can foster isolation in relationships. Real relationships require real conversations and real emotions. In regards to home life and relationships, the following suggestions are provided for maximum benefit¹⁰:

- No devices on the dinner table
- No phone calls at the restaurant
- No texting someone when both people are at home
- No texting or talking about really important personal issues over the phone (this is a tough one to do)
- Regulate use of all devices on vacations

Also, remember when we text, email, Instagram, or Facebook, we lose facial expressions, tone of voice, body language, and therefore make those communications more easily misunderstood or misinterpreted. Hopefully, these suggestions will help promote better self-care and quality of life that encourages positive interpersonal relationships between you and the ones you love. 

¹ YoungAh Park et al., "Relationships between Work-Home Segmentation and Psychological Detachment from Work: The Role of Communication Technology Use at Home," *Journal of Occupational Health Psychology*, 2011, Vol. 16, No. 4, 457-467.

² Etzion, Dalia et al., "Relief from Job Stressors and Burnout: Reserve Service as a Respite," *Journal of Applied Psychology*, Vol 83(4), Aug 1998, 577-585.

³ Larry Rosen, "You Don't Need a Digital Detox: You Just Need to Learn to Set Limits and Boundaries," *The Blog, Huffington Post*, last updated September 22, 2013, available at http://www.huffingtonpost.com/dr-larry-rosen/you-dont-need-a-digital-d_b_3637031.html.

⁴ Sabine Sonnentag and Ute-Vera Bayer, "Switching Off Mentally: Predictors and Consequences of Psychological Detachment from Work during Off-Job Time," *Journal of Occupational Health Psychology*, 10 (2005), 393-414.

⁵ Sabine Sonnentag et al., "Did You Have a Nice Evening? A Day-Level Study on Recovery Experiences, Sleep, and Affect," *Journal of Applied Psychology*, 93 (2008), 674-684.

⁶ Charlotte Fritz et al., "Happy, Healthy and Productive? The Role of Detachment from Work During Non-Work Time," *Journal of Applied Psychology*, 95 (2010), 977-983.

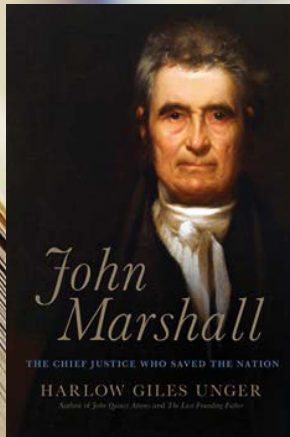
⁷ Sabine Sonnentag and Charlotte Fritz, "The Recovery Experience Questionnaire: Development and Validation of a Measure for Assessing Recuporation and Unwinding from Work," *Journal of Occupational Health Psychology*, 12 (2007), 204-221.

⁸ Charlotte Fritz et al., "The Weekend Matters: Relationships between Stress Recovery and Affective Experiences," *Journal of Organizational Behavior*, 31 (2010), 1137-1162.

⁹ Sabine Sonnentag et al., "Job Stressors, Emotional Exhaustion, and Need for Recovery: A Multisource Study on the Benefits of Psychological Detachment," *Journal of Vocational Behavior*, 76 (2010), 355-365.

¹⁰ Dave Boehl, "Setting Boundaries for Mobile Technology," *FamilyLife.com*, May 2012, accessible at <http://www.familylife.com/articles/topics/life-issues/challenges/media-and-entertainment/setting-boundaries-for-mobile-technology#.VBDzwhbJ1Rw>.

Who Saved Our Nation?



Read On—and On—to Find Out

By Mark S. Shipow

AS THE SAYING GOES, DON'T judge a book by its cover. Or, as it turns out, by its title. So it is with *John Marshall: The Chief Justice Who Saved the Nation* (Da Capo Press, September 30, 2014). How else to explain that author Harlow Giles Unger doesn't get to the period during which Marshall was on the Supreme Court—much less saving the nation as its Chief Justice—until more than halfway through the book?

Granted, getting to that point is interesting reading. Much of the first half of the book is devoted to the early history of our nation, in which Marshall certainly played a significant role. Not being an avid reader of history, I can't say whether Unger offers any new insights into our history. But I will say that Unger tells a pretty fascinating story.

He writes extensively about the relationship among the people who were responsible for creating our nation. I found it particularly interesting to read about how many of the Founding Fathers grew up together and had relationships before the Revolutionary War. Marshall and Thomas Jefferson were cousins. Marshall and James Monroe were buddies from grammar school days. George Washington was close friends with Benjamin Harrison and Patrick Henry. It's hard to imagine these icons of America fraternizing and just hanging out together, but it seems that they did, even in the midst of fighting for liberty and justice. Just hearing all these names mentioned together brings a wistfulness for the days when there were—at least seemingly—throngs of true American heroes.

In telling the story of the nation, Unger gives the reader multiple interesting tidbits of history. We learn that, after being instrumental in the Declaration of Independence, Jefferson did not fight in the Revolutionary War, instead went home to Virginia where he “sipped his favorite wines, bowed his beloved violin, and read philosophy.”

Judge George Wythe, a signer of the Declaration of Independence, was the designer of the legal curriculum that went beyond “book learning” to include moot court exercises to enhance the learning experience. Three of the first five Presidents died on July 4. (My wife, who is big into coincidences, really appreciated that nugget.) Only 39 of 70 delegates elected to the Constitutional Convention actually signed the document, leading Unger to comment that this was hardly a good start for the



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document that supposedly was the will of “we the people.” So on the way to the Supreme Court, Unger entertains and enlightens the reader.

Also leading up to the Chief Justice days, the book offers some highlights of how our early elected officials conducted themselves, making me think that by comparison, our current elected officials work together fairly well. Hard to believe! But contrast what goes on today with what happened in the early years of our Republic: “congressmen wrestling each other to the floor of the House, pummeling each other;” members of Congress “shouting insults and even assaulting each other;” one member of Congress “spat in the face” of another, who retaliated by beating his assailant “about the head with his cane.”

Perhaps because of incidents like this, it already was becoming apparent, at least to President Washington, that political parties would have a negative effect on the nation, tending to “kindle the animosity of one part [of the nation] against another” and allow “cunning, ambitious and unprincipled men [to] subvert the power of the people . . .” How prescient! Unger relates that there was “deep disgust with the political system,” and that “the American people seethed with hatred for Congress.” Today we seem to be reawakening the feelings that existed at a time of chaos and experimentation with a new country and a new political system. Have we regressed that far?

Certainly, a substantial portion of the book is about John Marshall. We learn that, early in his life, Marshall decided that he was “destined for the bar.” He was gregarious, fun-loving, and even-tempered. He was a devoted family man, and spent considerable effort caring for his rather sickly wife. Indicative of his concern for societal issues, he wrote articles under the pseudonym *Gracchus*, the name of a Roman tribute who championed social, political and judicial reform. He was staunchly opposed to nationalism and misguided “patriotism” at the expense of

individuals’ constitutional rights. When he was a member of the House, he used his warmth and joviality to earn friendships across party lines. He had the “faculty of putting his own ideas in the minds of others, unconsciously to them.”

Unger also gives us some insight into a very different relationship between public and private life—and the resulting conflicts of interest—in the early days of our country. Thus, along the way to saving the nation, Marshall managed to make a fortune. He negotiated a lucrative land deal, through his son, and then handled the litigation that arose out of the transaction. When he was elected to the Virginia Assembly, he helped form a federalist majority in the U.S. Senate (senators being determined by each state’s legislature at the time). The federalists then approved the Jay Treaty with England, which then was interpreted by the Supreme Court (before Marshall was a justice) as endorsing Marshall’s right to sell certain land he had purchased for a substantial profit in a case in which Marshall himself was a party.

Marshall acted as an envoy to France in situations that allowed him to also use his influence to obtain financing in Holland that he needed to be able to keep valuable real estate he had purchased. Marshall (and others) reaped financial rewards for their participation in the constitutional convention: businessmen who favored the new federalist system that Marshall had promoted entrusted him with their legal portfolios.

Today the press would have a field day with these situations. And while Unger describes what seem to be significant conflict issues, he then—disappointingly—ignores their impact on Marshall. Granted, the conflicts don’t come within the parameters of the title of the book, but more analysis might have given better insight into Marshall and how the state of the legal profession at the time affected his view of the law and the legal process.

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The first half of the book is interesting and contains necessary background to what I expected to be the focus of the book. But what I really wanted to know was, what about Marshall's tenure as Chief Justice "saved the nation?" Why did I need to wait until half way through the book to find out?

Finally, in Chapter 10 of 16, Marshall is appointed Chief Justice of the Supreme Court. This was in 1801, as Marshall embarked on his 35-year tenure as Chief Justice.

Even after getting into the meat of the book, there are diversions into other events happening at the time: presidential elections and the associated political maneuvering, the story behind the Louisiana Purchase, the Burr/Hamilton duel, and the War of 1812.

All of this leaves Unger only a single chapter of 26 pages to discuss what he says were "the twelve most important years in Supreme Court and U.S. government history," including frustratingly brief descriptions of the seminal decision of *McCulloch v. Maryland*, which repudiated state sovereignty over federal activities and thereby "stabilized the foundation and structure of the entire federal government..." and *Gibbons v. Ogden*, which was called "the emancipation of American commerce."

Unger does give the reader some background into Marshall's thinking about the role of the Court. Although the framers of the Constitution had failed to enumerate the powers of the

judiciary, Marshall firmly believed that it was necessary to reinforce and expand the judiciary, to prevent the tyranny that likely would result if the President and Congress could collude without oversight by the third branch of government. Clearly, Marshall intended to be an activist jurist.


We also learn that Marshall had all the justices lodge together to build rapport and ensure focus; that Marshall insisted that the justices work out their differences regarding cases before them so that they could deliver opinions without dissents; that Marshall would be the one to announce the decision, in order to emphasize the unity of the Court; and that Marshall weathered the storm of essentially having the Supreme Court shut down for two years as a result of the Judiciary Act of 1802, as part of President Jefferson's continuing attempts to prevent the judiciary from becoming an effective third branch of the government. All of these things certainly helped shape the Court, but are they what saved the nation?

To be sure, there is some discussion of the key cases from the Marshall Court. Unger describes the decisions, and does review the general impact on the nation. For example, Unger quotes from the decision in *Marbury v. Madison* and then offers the conclusion that the case "effectively changed the Constitution and reshaped the U.S. government by establishing the judiciary as a third, coequal branch of the federal government." Unger describes in detail

the facts and procedural background of various other cases, quotes from the decisions, and summarizes the importance of the case.

But there is no analysis of how or why Marshall reached these decisions. As a lawyer, I already know the basics of these cases. What I really want to learn is how Marshall came to the reasoning in these decisions? What did the justices discuss? What conflicting beliefs did they grapple with? How did they view the case in the context of the system established by the Constitution? Did they truly understand that they were making history?

The book is filled with citations to notes, correspondence and other writings by Marshall and others on a host of historical subjects. Is there none of this that reveals any insight into the thought process of Marshall—and his fellow jurists—as they wrote the most influential decisions of our nation? I expected information from a diary kept by Marshall that would shed light on his thought process, or notes from meetings of the justices as they were arriving at decisions, or letters among the justices or between them and their confidants. There was almost none of that with regard to the actual decisions. Maybe there is no record from which to draw such insights. But if in fact that is the case, Unger should say so and not leave the reader wondering why we don't have Marshall's personal comments about his reasoning and his decisions.

Thus, ultimately, the book is somewhat disappointing. Perhaps this is because I assumed from the title that I would learn some deep insights into how it was that Chief Justice Marshall in fact "saved the nation." It was interesting reading, provided some great history lessons, and helped me understand that Marshall gave direction to a Supreme Court that pointed the United States in the right direction. Yet I still don't really know how Marshall came to render the decisions that he did. I understand Marshall may have "saved the nation," but I'm still trying to understand how that came to be. 



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Starting From the Bottom

I am a second year lawyer unsuccessfully interviewing for associate positions. I work at a small PI mill, where I draft complaints that are pretty much always the same. The cases generally always settle for \$10,000–\$15,000.

I would like to advance my career by working at a better firm with more challenging, high-dollar and diverse cases and clients. But I don't have a writing sample because I don't really write anything. I don't have trial experience because these small-cap matters are not worth litigating; everything settles. Not a lot of attorneys know me or respect me, because I see the same small number of people over and over, and I am always handling small-potatoes matters.

What do I need to do to get out of this low-level situation and have a shot at learning and practicing new skills?

Yours Sincerely,

Trying so hard, getting nowhere

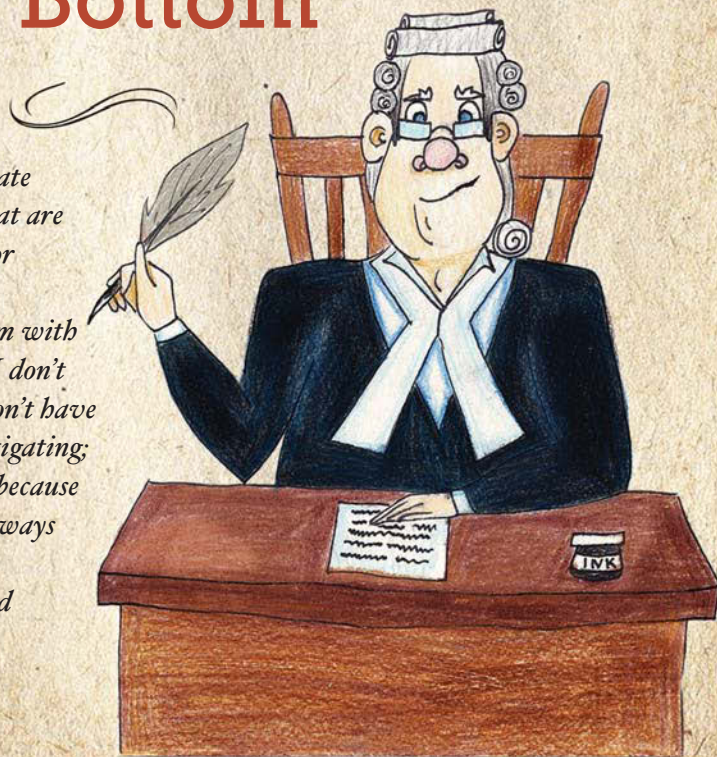


Illustration by Gabriella Senderov

DEAR NOWHEREMAN, Unfortunately, you have challenges that cannot be retroactively fixed (inexperience, lack of demonstrable skills, unholy competition), so they must be circumvented. Staying at your current firm is unlikely to advance you in any way, so you must begin planning an exit strategy. Contact your entire network and let them know, confidentially, that you are opening an office, and that they should be comfortable referring smaller matters to you, considering you for conflicts referrals, or bringing you in as second chair. The consumer bar will respect your chutzpa (one of them might even have an empty cube for you).

Create an online presence that is truthful and not misleading, but spins

you in your best light (great relationships with the judges and opposing counsels, efficiency, lots of PI experience, large amount of total dollars handled, etc.) and keep it updated.

You must keep attracting the smaller matters to stay afloat. Create profiles of your top three ideal clients and figure out where they get attorney referrals (websites, social media, AVVO) and become an active contributor in these arenas. Attend in-person networking events at least twice each week; go to meetings of different SFVBA sections, those focused on practice areas outside of PI. Polish your vessel; significant clients with important cases want sophisticated, poised counsel, like they see on TV.

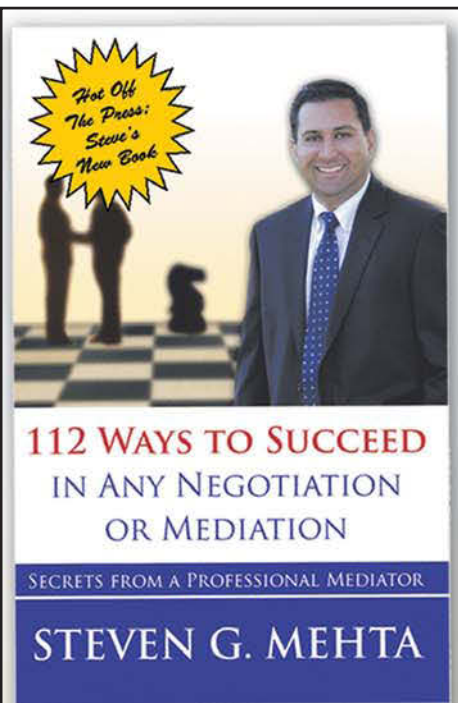
Once better cases start coming in, work them up in a thoughtful, dedicated, energetic manner. It will be excruciating at first, but you will eventually begin to develop a reputation as a dedicated advocate with talent, drive, acumen, and a successful track record with some pretty decent cases. In about two years, you will have a respectable book of business and a nice reputation. This can overcome the stench of your bottom-dweller beginnings, and you might then be attractive to better firms that handle larger matters.

But you may no longer want to join them! By then, your young firm might start receiving some resumes of its own...

Good luck!

Phil

Dear Phil is a new advice column appearing regularly in *Valley Lawyer Magazine*. Members are invited to submit questions seeking advice on ethics, career advancement, workplace relations, law firm management and more. Answers are drafted by *Valley Lawyer's* Editorial Committee. Submit questions to editor@sfvba.org.



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Tried in the Court of Public Opinion

OVER THE PAST FEW months, the power of social media has become more and more apparent, with recent articles explaining how social media platforms, such as Facebook and Twitter, have been used in unusual ways: aiding authorities in tracking down suspected thieves (who posted selfies taken at the location of the crime), raising public awareness of diseases such as ALS, and unfortunately, to sway public opinion.

Prior to the advent of social media, people tended to get their news from sources such as local and national news channels and newspapers, often remaining skeptical of internet news sources. But as we become more conditioned to sharing our lives in JPEGs and 140 characters, it becomes possible that we become less wary of the sources of information we receive and more easily swayed by what we read online.

Some examples of this are the recent events in Ferguson, MO and the Martin/Zimmerman case in Florida last year. Has society stopped waiting until all the facts are in, or an official investigation is completed? Are we so accustomed to the instant gratification that social media offers that we have stopped waiting for the justice system to work as it was designed?

As I write this, tensions are still high in Ferguson, MO. So far, there has been little in the way of an official statement about what happened, yet it seems that lines have been drawn and the parties involved appear to

have already been tried and convicted by the public. But while I have seen many blurbs across my Twitter and Facebook feeds, snippets of articles and blogs, with arguments on both sides, any official word is sparse. This makes me question what people (including various news outlets) are basing their opinions on.

In the Martin/Zimmerman case, it seemed as if many were speaking out about the parties' guilt or innocence before anyone really knew what had happened. The question remains whether much of the country would

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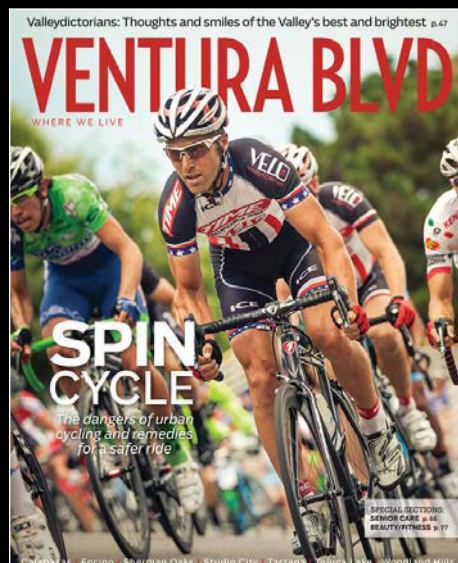


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have known of either of these cases without the instant push of information through social media, where these and similar stories play out.

In some of these situations, before there is even a judge or jury, a person's guilt is a done deal in the court of public opinion. Has "innocent until proven guilty" been completely forgotten? Unfortunately, because of the way these matters play out in social media, regardless of how the situations actually resolve themselves, people's lives will never be the same again.

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I recently became aware of a similar situation in my own hometown in Ohio. It is a very small "everyone-knows-your-business" type of town and it is not uncommon for people to graduate from high school, go to college, move back home and take jobs locally, living and working the rest of their lives there. For some families, many generations have lived and worked in that town and know other families who have done the same. News travels fast, both good and bad, and reaches far afield to those who moved away (like me.) An email, text message, or Facebook post from someone local might begin with "did you hear what happened to..."

Such an email came a few weeks ago from my sister. Someone who grew up there and volunteered at the local high school with several sports teams was arrested for allegedly inappropriate behavior. Knowing the person from when I was in high school, I would like to believe that the situation is simply a misunderstanding and I want to believe in that person's innocence. I want to wait for all of the facts to be in before I cast judgment on this person. But in reading some of the comments to the various articles about the arrest online, many are not waiting for such a finding of facts.

Many comments are sure of the person's guilt and calling for authorities to lock this person up and "throw away the key." More aggressive comments are requesting that the person be "fried" for the alleged crimes. A trial date has not even been set, and yet society seems to be stepping in and demanding "justice" without even knowing if such justice is warranted.


How is it that we, as a society, seem to have stopped waiting for authorities to investigate claims of alleged crimes and wrongdoing? Is it simply easier to believe everything we

read online? How do we choose who to believe? Given the serious nature of some of these acts, shouldn't we be more careful?

There is so much to these stories that we may never know or could never understand, things that cannot be covered in two-minute sound bites or 140-character tweets. Even articles posted to newspaper websites could be slanted according to the particular author's leanings. We have to temper our desire for an "Old West" type of vigilante justice (the call for which seems more prevalent now that news is more readily available) and allow the system to work.

Instant gratification can be good, in situations where you really need or want something easy to obtain, such as an ice cream sundae or a new pair of shoes. At the same time, it can be a double-edged sword where the thing you want (news or information) may come with its own host of problems simply because of where it comes from or that it is being pushed out to the masses in record time. Be wary of what you read or hear. Wait for all of the facts to be in. Wait for a case to be made. And wait for the jury to decide. You never know who might be tried in the court of public opinion next.

October is a busy month for the Santa Clarita Valley Bar Association. Members will be receiving ballots for the upcoming Board of Trustee Election and voting will take place in October. This month we are also featuring our popular CLE Luncheon presentation by Brian Koegele of Poole & Shaffery regarding updates in Employment Law at TPC-Valencia.

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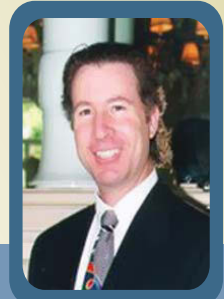
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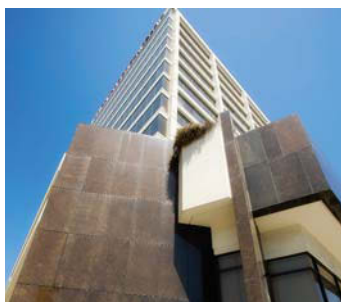
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