Los Angeles lawyer Charles G. Bakaly IV discusses the various types of gun violence restraining orders and related procedures involved in requesting and applying these orders under California law.

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**FEATURES**

**16 Flag the Shooter**  
**BY CHARLES G. BAKALY IV**  
In recent years, California has adopted measures to restrict gun violence by allowing law enforcement and family members to petition courts for injunctive relief to prevent volatile individuals from access to firearms

**22 Protecting Influence**  
**BY OLIVER BAJRACHARYA AND DREW WILSON**  
The ever-increasing rise in status and income potential of social influencers via the Internet has created a commensurate need to protect influencers’ rights of publicity in the manner traditionally afforded celebrities and other public figures

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I got a pleasant surprise when I went online to renew my Los Angeles County Bar Association membership yesterday—a month for free if I enrolled for auto-pay. I jumped at that, hit “submit,” and then learned I had also earned a voucher for some free MCLE. Altogether, it was a gratifying experience. The free month for auto-payers, free MCLE, and similar member-friendly business innovations, plus several substantive upgrades in what LACBA offers members comprise a welcome process for which President Ron Brot, in this month’s President’s Page, gives due credit to LACBA’s professional staff. Los Angeles Lawyer takes pride in being part of the process. Thanks, Ron, for the shout-out for our dedicated and amazing professional editors.

So, what does Los Angeles Lawyer have for you in February 2020? As always, there is really cheap ($20), if not free, MCLE. This month, it is for reading the article on “Protecting Influence” on page 22 and taking our MCLE test on page 25. Authors Oliver Bajracharya and Drew Wilson offer a lively and illuminating explanation of trademark rights and rights of publicity, the distinctions between them, and the uses that social media “influencers” like Kylie Jenner and Kim Kardashian make of both.

Rounding out a quartet of substantive law discussions, gun violence restraining orders, as provided in Penal Code sections 18100 and following, are the focus of Charles Bakaly’s informative piece on California’s efforts to combat gun violence and mass shootings.

Justin Wales and Farah Alkayed take on the intriguing question of whether “tokens” (virtual assets similar, but not identical, to bitcoins and other blockchain “coins”) are “securities,” subject to federal securities laws. The authors identify the circumstances in which tokens may, or may not, be subject to federal regulations or may be entitled to exemptions.

Nicholas Starkman examines the persistent and resistant problem of gender-based inequalities in pay for equal work. He outlines Congress’s slow and largely ineffectual efforts, over the course of 60 years, to fix the inequities. He then describes three promising ways in which several states, including California, are taking charge.

Terri Keville’s review of The Chief, Supreme Court journalist Joan Biscupic’s recent biography of Chief Justice John Roberts, is excellent. When I started reading it, I was one of those who, in the reviewer’s words, “want[ed] to dislike” Roberts. By the time I finished, I found myself actually eager to keep an open mind about him—a goodly distance to go in two pages.

Finally, David Hoffman and Preston Howard offer some concise and solid advice on effective networking. There’s way more to it than handing out business cards at business breakfasts.

We hope you benefit from and enjoy this month’s issue of Los Angeles Lawyer. We welcome your comments.

Tyna Thall Orren is the 2019-20 chair of the Los Angeles Lawyer Editorial Board. She is an appellate attorney and a partner in the firm of Orren & Orren in Pasadena, California.
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I AM MORE THAN PLEASED with the unmistakable resurgence of the Los Angeles County Bar Association this year. We are grateful for the leadership of our executive director, our elected officers, and the board of trustees, who have given purpose and direction to our efforts. Likewise, our sections and committees have contributed greatly. The significant progress we have experienced this year is also due to the unsung accomplishments of our staff. Without the efforts of our tireless LACBA personnel, our aspirations would be largely unfulfilled.

As we have moved to increased financial responsibility, our LACBA staff has been reduced in size while we insist on continued service. Remarkably, our staff has not only accepted this challenge but has raised the bar with overall increased performance in the services we provide to our members and the public.

First Contact and Beyond

The LACBA experience begins when someone walks off the elevator, enters our lobby, and is greeted cheerfully by our gracious reception staff, Demi Clark and Shirleen Yorke. They provide a welcoming atmosphere for our members and guests.

Our events are produced by our Events, Multimedia, and Continuing Legal Education department staff led by Tom Walsh. Events are presented with uncanny consistency, especially in view of the number of programs presented by our sections and committees as well as by LACBA itself. Imagine being an events specialist or supervisor responsible for programming for multiple sections, as well as for presenting programs and events for our committees and LACBA. Coordinating, marketing, arranging venues, preparing materials, insuring proper seating, selecting menus, and staffing the events are commonplace duties for our staff. Imagine also the time and effort we put into planning a home birthday party, or an anniversary celebration. Our events department does this again and again on a routine basis with remarkable results.

LACBA has recommitted to a new and energetic marketing plan with Lynz Floren who manages the Marketing and Business Development department. Lynz is working with our outside marketing agency to develop a new marketing strategy both for our LACBA membership and our community. LACBA does so many outstanding things that our members, the legal community, and the general public should be made aware. I know that Lynz has great plans for the near future.

Our Publications department has always been important to LACBA and continues to thrive with Editor-in-Chief Susan Pettit and Advertising Director Linda Bekas. We continue to be proud of Los Angeles Lawyer and our other publications and are grateful for the enthusiastic work of our staff.

Our Member Services department led by Phyllis Hauser is asked not only to maintain accurate membership records but also to accommodate changes in membership policies, procedures, and protocols without missing a beat. As I have maintained a keen focus on our membership changes and demographics, I have been amazed at her ability to provide me with what I need on short notice. We are grateful for the fine work we have come to expect from this department.

The Information Technology department directed by Michael Ossou keeps our systems operational under the most trying circumstances. Their role is vital to our continued success.

Our Web Services department led by Tom Horne has been busy facilitating our efforts to utilize ever changing technology in multiple phases of our operations. Have you noticed our social presence, tried the LACBA App, or participated in online CLE? These are but a few of the products from the exciting work of this department. We have come to expect constant change in this area mirroring the constant change in technology itself. We are fortunate to have such a talented and dedicated department to meet these challenges.

Financial and Personnel Management

Operating a complex organization such as LACBA requires significant accounting support. Our Finance department, led by Bruce Berra and Glenn Benitz, has played a significant role in helping us achieve financial stability for LACBA. We are grateful for the cooperation and dedication the entire accounting team has shown in working with the President’s Task Force on Financial Stability and Sustainability and with the board’s Finance Committee. With their help we found a way to achieve financial stability.

Managing the LACBA personnel is no small feat, and we are grateful for the fine work of our Human Resources department managed by Karen Benjamin. We appreciate her significant contribution in maintaining the smooth workflow of our operations.

Space does not allow me to single out every department and of Los Angeles Lawyer and our other publications and are grateful for the enthusiastic work of our staff.

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staff member, although far more are worthy of mention and praise. We continue to operate a robust Attorney-Client Mediation and Arbitration Services (ACMAS) ably directed by Sharron McLawyer. Seth Chavez likewise ably directs our active Lawyer Referral Service (LRS), which provides the public with referrals to affordable counsel, provides our members with client opportunities, and generates revenue for LACBA. We appreciate the continuing importance of ACMAS and LRS, and the fine work done by Sharron, Seth, and their staff.

We are also fortunate to have more than capable directing attorneys leading our Indigent Criminal Defense Appointments Program (Zeke Perlo) and our Independent Juvenile Defender Program (Cyn Yamashiro). We take pride that these programs also allow LACBA to help those in need of representation and assist lawyers in search of clients.

**Executive Director**

Last but certainly not least, we salute Executive Director Stan Bissey for his service during the past two years. Stan has done remarkably well in learning the intricacies of the LACBA operation and helping set an enthusiastic course for a vibrant future. Stan has stood his ground in difficult times and should be commended for his unwavering leadership. Anyone familiar with LACBA appreciates the incredible work of Executive Assistant and Corporate Governance Administrator Vanessa Villagomez. With her signature willingness to help wherever needed, Vanessa is the go-to person for Stan and for the president. I cannot say enough to thank Vanessa for her support throughout my term in office. Also, I offer a special thank you to Administrative Specialist Jazmine Ramirez for taking on Vanessa’s responsibilities last fall when Vanessa was on leave. Jazmine’s excellent work provides us needed depth in our executive administration both for the present and in the years ahead.

The LACBA staff is far more than an organizational flow chart. LACBA is filled with dedicated individuals who truly care about our association, our lawyer members, and the work that we do. They are proud to be a part of an energized, successful bar association. So, when the opportunity arises, show them how much you appreciate them. Don’t forget to acknowledge the many things that go right, not just the things that do not. After all, we are all part of this exceptional organization that has reestablished itself as the vibrant voice of the legal community in Los Angeles County. Join us.
Novel Approaches to Correcting the Gender Wage Gap

FEDERAL EQUAL PAY LEGISLATION in the United States has a history of major initiatives followed by years of inactivity. In 1963, Congress passed the Equal Pay Act,1 which prohibits sex-based wage discrimination between men and women who perform “equal work.” Then, for nearly 50 years, there was a dearth of federal legislative activity on equal pay until Congress passed the Lilly Ledbetter Fair Pay Act of 2009.2 This law clarified that liability for pay discrimination based on age, religion, national origin, race, sex, and disability will accrue each time an employee receives a discriminatory paycheck. There has not been a major federal equal pay statute since 2009, despite the persistence of an average gender wage gap of 85 cents per dollar in 2018, according to the Pew Research Center.3

In recent years Congress attempted unsuccessfully to pass the Paycheck Fairness Act,4 a comprehensive bill that, among other things, narrows employer defenses to sex-based wage discrimination and creates a nationwide ban on using salary history to justify pay decisions. However, in light of recent social movements highlighting wage inequality and high-profile pay discrimination lawsuits, it appears that federal inactivity on equal pay is becoming untenable. Into this void step individual states and localities, which have come up with novel, creative approaches to closing the wage gap. These initiatives include employer equal pay “safe harbors,” local and statewide salary history bans, and pay data reporting.

Equal Pay Audit
To obtain the benefit of a safe harbor, an equal pay audit must generally 1) be completed within a certain time frame prior to the filing of an equal pay complaint or administrative charge, 2) be completed in good faith, 3) be reasonable in detail and scope in light of the size of the employer’s operations, and 4) be related to the protected class asserted by the plaintiff.7 With some variance, the employer must also demonstrate reasonable progress toward eliminating unlawful gender-based wage differences revealed by the audit.8 By incentivizing employers to systematically review and adjust their pay practices, state governments have found a creative way to fill in the gaps left by federal legislative inactivity.

Salary History Bans
Salary history bans are another creative legislative approach to addressing persistent pay gaps. Salary history bans can take several forms but are generally aimed at preventing employers from capitalizing on the persistence of the wage gap in setting pay, thereby perpetuating the gap further.9 Salary history bans may prohibit employers from inquiring about an applicant’s prior history. They may also prohibit retaliation against employees who discuss their wages with their colleagues. Others may go further and make it impermissible for employers to base pay decisions on prior compensation. The website HRDive keeps a running list of the states and localities that have enacted salary history bans. As of October 31, 2019, the list includes 17 states (including California) and 19 localities (including San Francisco).10 Other states and localities may soon follow.

A third, novel approach to rectifying wage discrimination comes from across the pond. In April 2017, Great Britain began requiring certain employers with 250 or more employees to report and publish data on their institutions’ gender pay gaps (including bonuses).11 This data is publicly available and searchable on a government website.12 The pay data requirement can be thought of as an experiment in sunshine legislation—by obligating employers to publicize their compensation issues, industries will be pressured to align themselves with equal pay best practices.

New Jersey adapted this approach, requiring certain public contractors to submit an “equal pay report” to the government. Public contractors must report covered employees’ wages by pay bands that are disaggregated by sex, race, exempt status, and ethnicity.13

Nicholas Starkman is in-house counsel at Trusaic, a software company. He serves on the Barristers Networking Committee of the Los Angeles County Bar Association.
In California, lawmakers proposed, but were unsuccessful in passing, a pay data reporting obligation similar to that required by the U.S. Equal Employment Opportunity Commission in the controversial EEO-1 “Component 2” report, which is currently being litigated. California Senate Bill 171 would have required employers with 100 or more employees to submit a pay data report with data points for compensation, race, ethnicity, sex, and job type. Depending on the future of the EEO-1 Component 2, California and other states may try again to enact a pay data reporting requirement.

While there are many contributors to the persistent wage gap, states and localities increasingly view themselves as part of the solution. Without significant federal legislative activity on equal pay, state and local lawmakers likely will continue to act with creative and novel initiatives to equalize wages.

5 See Equal Pay Act, supra note 1, at §206(d)(1).
7 Id. at §652.235.
8 See, e.g., An Act to Establish Pay Equity, MASS. GEN. LAWS ch. 149, §105A(d) (2016).
9 See, e.g., Rizo v. Yovino, 887 F. 3d 453, 456 (9th Cir. 2018), cert. granted, judgment vacated, 139 S. Ct. 706 (2019).
The term “token” as applied to virtual assets encompasses a wide array of technologies and financial instruments. As the popularity of virtual assets grows (and shrinks and grows), questions regarding the application of securities regulations to the issuance and sale of tokens and other virtual assets become difficult to answer. The U.S. Securities and Exchange Commission (SEC) recently issued a framework elaborating how it analyzes token sales and has published several settlements of enforcement actions that are instructive and provide guidance on the application of federal securities laws to virtual currencies.

Despite an increasing yet, still unsettled body of guidance, many mistakenly believe that limiting a token sale to foreign purchasers shields them from the reach of U.S. law. This is not the case, and token issuers must recognize that this strategy poses potential long-term risks. Practitioners dealing with tokens must consider these risks and how foreign and U.S. token issuers may mitigate the prospect of noncompliance when selling tokens outside the United States.

Under the Securities Act of 1933, a company that offers or sells a security, regardless of the form of the offering, where it is located, or to whom it is sold, must either register its securities with the SEC or otherwise qualify for an exemption from registration. Two recent announcements by the SEC offer guidance on the application of federal securities laws to token sales. Under Section 2(a)(1) of the Securities Act, a security is:

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Unless a token represents an equity interest in a company, a note, any profit-sharing interest in a company, or another of the enumerated items set forth in the definition, the determination of whether the tokens are securities requires an analysis of whether the offer and sale of these tokens constitute an “investment contract” under Section 2(a)(1) as that term has been defined under case law, interpretative releases of the SEC, and prior no-action letters.

The term “investment contract” has been broadly construed by the courts to encompass a variety of financial activities. For example, the U.S. Supreme Court’s 1946 opinion in SEC v. Howey
determines whether a sale constitutes an investment contract that, if applied, might subject tokens to securities regulations and registration. These include determining whether there is 1) an investment of money 2) in a common enterprise 3) where the investor has an expectation of profits from the investment 4) and the expectant profits are derived from the efforts of the promoter or third party.

Thousands of judicial decisions analyze and apply the Howey factors to all sorts of investment contracts, but there is relatively little to no guidance analyzing how the Securities Act applies to the numerous and ever increasing types of virtual currencies. Notably, on April 3, 2019, the SEC issued its first no-action letter to a virtual currency issuer called TurnKey Jet, Inc., a U.S.-based air carrier and air taxi service. The letter stated that the

Justin S. Wales is senior counsel at Carlton Fields in Century City, California, and co-chair of the firm’s Blockchain and Digital Currency Practice. Farah Z. Alkayed is an associate at the firm whose practice focuses on corporate, real estate, and capital market transactions, including mergers and acquisitions, private equity investments, public finance, and cannabis investment projects.
SEC’s Division of Corporate Finance would not recommend an enforcement action if TurnKey sold its tokens without registering its offering with the SEC. The TurnKey no-action letter marks the first time the SEC has affirmatively stated that a token sale would not be deemed the sale of a “security” subject to SEC regulation and enforcement.

The facts provided by TurnKey to the SEC demonstrate that it intends to conduct a limited token sale that prevents the possibility of a secondary market for its token and that prevents the price of the token from increasing. Additionally, TurnKey’s platform would be fully functional and developed upon its token’s issuance, and no funds from the token sale would be used to build out the platform. Finally, TurnKey’s token would be marketed for its functionality as a token to purchase air charter service rather than the potential for increasing its market value in the future.

The SEC’s view that the TurnKey token is not a security is consistent with the SEC’s recently published Framework for Investment Contract Analysis of Digital Assets, which has been criticized as leaving much uncertainty to token issuers and potentially creating an impractical set of requirements that make it difficult to develop platforms more robust and less centralized than TurnKey that require a virtual currency to operate.3

Second No-action Letter

Almost four months after its first no-action letter and before expanding or clarifying its recent framework, the SEC issued a second no-action letter to Pocketful of Quarters (PoQ). Pocketful of Quarters is a cryptocurrency exchange for video game players (also known as gamers), which enables gamers to retain the Quarters they accumulate when they quit playing a certain game. In issuing its second no-action letter, the SEC focused on the same factors related to the TurnKey tokens, resulting in both the Quarters and TurnKey tokens falling outside the realm of an SEC-regulated “security.” Indeed, the PoQ Quarters, like the TurnKey tokens, will be sold at a fixed price. Also, both TurnKey tokens and Quarters are intended specifically for use within their respective platforms, restricting transfers to outside platforms or wallets. Additionally, Quarter owners can use the tokens immediately for online gaming once they are sold, like those of the TurnKey’s digital coins for air charter services. Finally, the Quarters, like the TurnKey tokens, will not be used to develop the respective platforms as both platforms are fully operational and developed. Hence, the limited use and restrictions rendered both Turnkey’s tokens and PoQ’s Quarters outside the scope of a security.

Notwithstanding the SEC’s brief no-action letters, the determination of whether a token sale is or is not the sale of a security necessarily requires an analysis of the particular facts and circumstances surrounding the sale and marketing of the token offering to determine whether it is an “investment contract” under the Securities Act. Although the virtual currency industry could certainly benefit from clearer guidance and the development of case law interpreting the application of U.S. federal securities regulations on token sales, issuers could attempt to shield their offerings from U.S. oversight by limiting their token sales to only foreign purchasers. While doing so potentially eases the issuers’ U.S. regulatory burden, it does not completely shield the issuer from U.S. jurisdiction and, if not done properly, may cause significant regulatory concerns for issuers who wish for their platforms to eventually have U.S. customers or users.

Registering the sale of a security with the SEC can be an impractically long and expensive process. Luckily, the Securities Act provides several registration exemptions that permit issuers to offer and sell securities without undertaking this burden. The most commonly used exemptions from registration (and most suitable for the sale of tokens that are, or could be, considered securities), are found in Rule 506(b) and 506(c) of Regulation D of the Securities Act and Regulation S of the Securities Act. Although the exemptions under Regulation D permit the sale of securities to individuals located in the United States, generally those individuals need to be “accredited investors.”4

Under Regulation D, if the sale is to be generally advertised to the public, the issuer has an obligation to verify that all purchasers are accredited by requiring them to provide documentation evidencing they qualify as such, which can be a costly and cumbersome process. Given the income or asset threshold for qualifying as an accredited investor and the costs associated with verification, a token sale that complies with this Regulation D safe harbor could severely restrict the pool of potential purchasers of the tokens.

For token issuers who wish to sell their token to nonaccredited investors, Regulation S provides a safe harbor from registration so long as the offer and sale of securities occur solely outside the United States (whether the buyers are U.S. or foreign investors).5 Otherwise, the issuers will be subject to SEC regulation and enforcement. Indeed, the SEC filed an emergency action and obtained a temporary restraining order against two offshore entities, Telegram Group Inc. and its wholly owned subsidiary TON Issuer Inc., which offer a cloud-based mobile and desktop messaging application, as well as media, chat, security options, and data encryption solutions.6

The SEC’s complaint provides that Telegram and TON conducted an alleged unregistered, ongoing digital token offering in the United States and overseas of its cryptocurrency, the Gram, at discounted prices to 171 initial purchasers, including more than one billion Grams to 39 U.S. purchasers.7 The SEC is now seeking injunctive reliefs and penalties against Telegram and TON for violation of the Securities Act.8

Regulation S Compliance

However, issuers can benefit from Regulation S by complying with two basic conditions. First, the offer and sale of the securities must be made in an offshore transaction, meaning, the offer to buy must not have been made to a person in the United States, and either the buyer is, or is reasonably believed to be, physically located outside the United States, or the transaction is executed on an offshore market. Second, there can be no “directed selling efforts” in or into the United States of the securities offered under Regulation S.9

To reasonably ensure that tokens are sold in offshore transactions and that no directed selling efforts in or into the United States are made, the issuer should restrict persons located in the United States from participating in the token sale and not market the tokens, or the platform in which they will be used, in the United States. It may also be good practice to prevent sales to investors registered, or that reside, in the United States, even if at the time of purchase those individuals were located outside the United States, in order to further ensure that the transactions occurred offshore.

For an offering to meet the requirements of the safe harbor of Regulation S, additional conditions also may need to be satisfied, depending on the status of the issuer, the type of securities offered, and the likelihood that the securities will flow into the United States. For a company with no public market for its securities on an exchange prior to the offering to comply with Regulation S, the company must take reasonable steps to restrict any resales of the security into the United States for a period of one year.10 Moreover, in order to reasonably ensure that the tokens do not flow into the United States within this one-year
period, the issuer should, where possible, create technical barriers that enforce applicable restrictions on transfers to U.S. wallet holders. Additionally, if the issuer lists the tokens on an exchange, a conservative approach would be to make sure the exchange does not accept U.S. accounts to prevent any resale into the United States.

Issuers of tokens sold outside the United States may be subject to federal securities laws if the token sale meets the SEC’s definition of an “investment contract.” Whether such a sale would be considered the sale of a security is a complicated question that often yields unclear answers. As a result of this uncertainty, issuers may be tempted to domesticate their sale offshore in order to comply with the foreign sale of securities registration exemption contained in Regulation S of the Securities Act.

These issuers should take the following steps to ensure that they are not in violation of U.S. rules: implement IP address restrictions to prevent potential purchasers located in the United States from purchasing the tokens and reject potential purchasers who use technology that would obscure their Internet Protocol addresses like TOR, proxy servers, virtual private networks, or anonymizing technology; do not market the token or the platform in the United States; prevent any sales to purchasers registered, or that reside, in the United States, even if at the time of purchase these individuals were located outside the United States, to further ensure that the transactions occurred offshore; create smart contracts or impose other mechanisms that restrict the sale of the tokens into the United States or to a U.S.-located person for a period of one year after issuance; and list only the tokens on an exchange that, pursuant to its terms of use and listing contract, does not accept any U.S. accounts or that can segregate U.S. accounts and U.S. persons from purchasers who are provided an opportunity to purchase tokens.

If the SEC determines that the issuer has taken sufficient steps to prevent a security sold in an offshore transaction from redomesticating to the United States, it will be deemed to have complied with the safe harbor provisions of Regulation S, and the sale would not be a violation of U.S. federal securities laws.

2 Id. at 298.
4 Accredited investors who are individuals must have a net worth, or joint net worth with that person’s spouse, that exceeds $1 million, or individual income in excess of $200,000 in each of the two most recent years, or joint income with that person’s spouse in excess of $300,000 in each of those years, and a reasonable expectation of reaching the same income level in the current year. 17 C.F.R. 230.501(a)(6) (2019).
5 The issuer must make sure the issuance is conducted in compliance with the laws and securities regulations of the country in which each of the purchasers of their tokens reside. The cost and burden of compliance with the laws of multiple countries may suggest limiting the scope of the foreign offering.
7 Id. at 2.
8 Id. at 29-30.
# 11th Annual Charity Golf Tournament & Networking Dinner

**Event Schedule**

- **9:00 AM** Registration, continental breakfast, putting contest, and all practice areas are open + tournament package sales.
- **11:00 AM** Shotgun start, lunch and on-course snacks.
- **4:30 PM** Networking dinner for golfers and guests.

## Sponsorship Opportunities

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## Networking Sponsorship $2500

- Putting Contest
- Breakfast Sponsor
- Beverage Sponsor
- Lunch Sponsor
- Happy Hour Reception Sponsor
- Many More Options
- Representative gets to draw raffle prize winners
- Million Dollar Hole-in-One Sponsor

Register at [www.LACBA.org/golf2020](http://www.LACBA.org/golf2020) or call Member Services 213.896.6560. For sponsorship purchase and information, please contact Hazel Gaitan at hgaitan@lacba.org or 213.896.6417.

Working together for a more just LA
Despite challenges that California’s gun violence restraining order laws threaten civil liberties, supporters say they will be a major combative force against the rise of gun violence and mass shootings.

Over the past several years, California has experienced several of the nation’s most horrific acts of gun violence and mass shootings. In 2014, a former Santa Barbara City College student used semiautomatic handguns and knives to kill six people and injure 14 more in Isla Vista. The following year a government health inspector and his wife used AR-15 style rifles, semiautomatic handguns, and pipe bombs to murder 14 people and injure 24 more at the Inland Regional Center in San Bernardino. Three years later, a U.S. Marine Corps veteran used a semiautomatic handgun and a knife to take 12 lives at the Borderline Bar and Grill in Thousand Oaks. Three individuals were killed in July 2019 when a 19-year-old opened fire at the Gilroy Garlic Festival with a semiautomatic rifle. Most recently, a high school student took the lives of two classmates at Saugus High School in Santa Clarita with a semiautomatic handgun, which has since been characterized as a “ghost gun.”

California is one of several states to adopt “red flag laws” that allow law enforcement agencies and family members to petition the courts for injunctive relief as a means to prevent volatile individuals from controlling, owning, purchasing, possessing, or receiving firearms. In California, this injunctive relief is known as a gun violence restraining order (GVRO).

**AB 1014**

The California Legislature enacted Assembly Bill 1014, which was signed into law by Governor Jerry Brown on September 30, 2014, in response to the Isla Vista mass shooting. In part, AB 1014 added sections 18100 et seq. to the Penal Code and thereby created the GVRO petition procedure.

A GVRO is a civil order that prohibits a subject individual from controlling, owning, purchasing, possessing, or receiving firearms or ammunition (or attempting the same) for the duration of the order.

**GVROs are similar to other types of civil restraining orders available in California, which include domestic violence restraining orders, civil harassment restraining orders, elder or dependent adult abuse restraining orders, and workplace violence restraining orders.** All of these restraining orders include provisions that prohibit the subject individual from owning, possessing, purchasing, or receiving a firearm for the duration of the order. They also require the subject individual to relinquish any firearm in his immediate possession or control.

Of course, there are instances in which volatile individuals, who should not have access to firearms, have neither committed an act that would subject them to a “conventional” restraining order nor committed a crime subjecting them to criminal prosecution. Until creation of the GVRO procedure, California had no legal mechanism to promote public safety by temporarily preventing such persons from accessing firearms. For example, when an adult with access to firearms makes comments online that he wants to “shoot up” a school or retaliate against someone who has slighted him, these are significant warning signs that the individual may commit violence.

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against himself or others with a firearm. Before AB 1014 was signed into law, if such an individual had not yet committed a crime or an act that would support the issuance of a domestic violence restraining order, civil harassment restraining order, elder or dependent adult abuse restraining order, or workplace violence restraining order, not much could be done to prevent him or her from controlling, owning, purchasing, possessing, or receiving firearms. Therein lies the purpose of the GVRO petition process.

Under AB 1014 three types of GVROs may be granted by the courts: a temporary emergency gun violence restraining order (Emergency GVRO), an ex parte gun violence restraining order (Ex Parte GVRO), and a gun violence restraining order after notice and hearing (GVRO).

**Emergency GVRO**

A law enforcement officer may request an Emergency GVRO from a judicial officer on an ex parte basis to prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same). In practice, a law enforcement officer will request an Emergency GVRO from the field (e.g., in response to a disturbance or request for assistance) by calling the court and speaking with a judge or commissioner.

To obtain an Emergency GVRO, a law enforcement officer must make two assertions. The first is that the subject individual poses an immediate and present danger of causing personal injury to himself or to someone else, by controlling, owning, purchasing, possessing, or receiving a firearm or ammunition. The second is that an Emergency GVRO is necessary to prevent personal injury to the subject individual or someone else “because less restrictive alternatives either have been tried and found to be ineffective or have been determined to be inadequate or inappropriate” under the circumstances.

If the judicial officer finds reasonable cause to believe that both assertions are true, the issued Emergency GVRO will remain in effect for 21 days. If an Emergency GVRO is issued pursuant to an oral request (e.g., made via a call from the field to the court), the law enforcement officer must sign a declaration under penalty of perjury reciting the oral statements provided and must memorialize the court’s order on the approved Judicial Council form (EPO-002). The law enforcement officer must then serve the subject individual (if he or she can be reasonably located), file a copy of the Emergency GVRO with the court as soon as practicable, and have the Emergency GVRO entered into the California Department of Justice’s computer database system for protective and restraining orders maintained.

Once the subject individual is served with an Emergency GVRO, he is prohibited from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for the duration of the order. The law enforcement officer who serves the subject individual with the Emergency GVRO must ask whether he has any firearm, ammunition, or magazine in his possession or under his custody or control.

In 2018, the legislature enacted Penal Code Section 18148, which requires that a hearing on issuance of a GVRO must be held within 21 days after issuance of an Emergency GVRO. In theory, Section 18148 should streamline the GVRO petition process so that the hearing is automatically scheduled once the Emergency GVRO is filed with the court. In practice, it should not be assumed that a hearing will be scheduled once the Emergency GVRO is filed. Even if an Emergency GVRO is issued, the law enforcement officer (or, practically speaking, the legal counsel for the law enforcement agency) should also request an Ex Parte GVRO.

**Ex Parte GVRO**

A law enforcement officer or an immediate family member of the subject individual may petition the court for an Ex Parte GVRO to prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same). The term “immediate family” includes any spouse, domestic partner, parent, child, or person related by consanguinity or affinity within the second degree to the subject individual, or who regularly resides in the same household as the subject individual, or who did so within the prior six months.

California Assembly Bills 12 and 61, which were signed into law by Governor Gavin Newsom on October 11, 2019, will soon amend Penal Code Section 18150 to expand the pool of individuals who may petition a court for an Ex Parte GVRO. In addition to law enforcement officers and immediate family members, the list of potential petitioners will include an employer of the subject individual, a coworker of the subject individual (if the coworker has had substantial and regular interactions with the subject individual for at least one year and has obtained the approval of the employer), and an employee or teacher of a secondary or post-secondary school that the subject individual has attended in the last six months (if the employee or teacher has obtained the approval of a school administrator or a school administration staff member with a supervisory role). These new laws go into effect on September 1, 2020.

To obtain an Ex Parte GVRO, the petitioner must establish that there is a substantial likelihood of two grounds. The first is that the subject individual poses a significant danger, in the near future, of causing personal injury to himself or herself, or to someone else, by controlling, owning, purchasing, possessing, or receiving a firearm. The second is that an Ex Parte GVRO is necessary to prevent personal injury to the subject individual or someone else “because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate” under the circumstances.

These two grounds must be supported by an affidavit, made in writing and signed by the petitioner under oath, which sets
forth the facts tending to establish the grounds of the petition or the reason for believing that they exist. 19

Whether the subject individual poses a “significant danger” of causing personal injury is determined by evaluating several evidentiary factors. 20 In determining whether to issue an Ex Parte GVRO, the court must consider all evidence of the following: a recent threat of violence or act of violence by the subject individual directed toward someone else or toward himself; a violation of an emergency protective order issued for either stalking or domestic violence that is presently in effect; a recent violation of an unexpired protective order; a conviction for any offense listed in Penal Code Section 29805; and a pattern of violent acts or violent threats within the past 12 months, including threats of violence or acts of violence by the subject individual directed toward himself, or toward someone else. 21

In determining whether to issue an Ex Parte GVRO, the court may also consider any other evidence of an “increased risk for violence.” This includes evidence of the following: the subject individual’s unlawful and reckless use, display, or brandishing of a firearm; the history of the subject individual’s use, attempted use, or threatened use of physical force against another person; the subject individual’s prior arrest for a felony offense; the subject individual’s history of violating an emergency protective order issued for either stalking or domestic violence; the subject individual’s history of violating an unexpired protective order; documentary evidence of either the subject individual’s recent criminal offenses that involve controlled substances or alcohol, or ongoing abuse of controlled substances or alcohol; and evidence of the subject individual’s recent acquisition of firearms, ammunition, or other deadly weapons. 22

Immediate Action

The court generally must act on a request for an Ex Parte GVRO on the same day that the petition is submitted. 23 However, if the petition is filed too late in the day, the request may be granted or denied on the next court day. 24

If the court determines that both grounds to issue an Ex Parte GVRO exist, then the order will be issued and will remain in effect for 21 days. 25 An issued Ex Parte GVRO must provide, in part, a statement of the grounds supporting the issuance of the order, the date and time the order expires, the address of the superior court in which any responsive pleading should be filed, and the date and time of the scheduled hearing. 26

A law enforcement officer or a person who is at least 18 years of age and not a party to the action must then serve the subject individual (if he can be reasonably located). 27 If a law enforcement officer serves the subject individual with the Ex Parte GVRO, the officer must ask whether he has any firearm, ammunition, or magazine in his possession or under his custody or control. 28

Upon being served with an Ex Parte GVRO, the subject individual is prohibited from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a period of one year (or, after September 1, 2020, for a period of one to five years). 29 If the court does not find by clear and convincing evidence that a GVRO should be issued, the court must dissolve any previously issued Emergency GVRO or Ex Parte GVRO. 30

An issued GVRO must provide, in part, a statement of the grounds supporting the issuance of the order, the date and time the order expires, and the address of the superior court of the jurisdiction in which the subject individual resides. 31

A subject individual may submit one written request for a hearing before the court to terminate the GVRO during the effective period. 32 The court must terminate the GVRO if, after the hearing, it finds that the grounds for issuance of the order are no longer supported by clear and convincing evidence. 33

A petitioner may request a hearing before the court to renew the GVRO at any time within three months before the GVRO expires. 34 The court may renew the GVRO if, after the hearing, it finds that the grounds for issuance of the order continue to be supported by clear and convincing evidence. 35 A renewed GVRO will prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a period of one year (or, after September 1, 2020, for a period of one to five years). 36 Once AB 12 and AB 61 go into effect, Penal Code Section 18170 will be amended to allow the courts to issue a GVRO for a period of one to five years. One of the stronger criticisms of the GVRO petition procedure has been that issued orders possess a lifespan of only one year (unless a request to renew is made). Comparatively, longer lifespans are available in other conventional restraining orders such as domestic violence restraining orders (up to five years), 37 civil harassment restraining orders (up to five years), 38 elder or dependent adult abuse restraining orders (up to five years), 39 and workplace violence restraining orders (up to three years). 40 The forthcoming amendments to Penal Code Section 18170 will address this criticism.

The petitioner of a GVRO must prove two elements by clear and convincing evidence: 1) the subject individual poses a significant danger of causing personal injury to himself or herself, or to someone else, by controlling, owning, purchasing, possessing, or receiving a firearm or ammunition; and 2) a GVRO is necessary to prevent personal injury to the subject individual or someone else “because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate” under the circumstances. 41 The evidentiary factors considered for this evaluation are the same as the factors considered for an Ex Parte GVRO petition. 42

If the court finds there is clear and convincing evidence for a GVRO, the order will be issued and will prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a period of one year (or, after September 1, 2020, for a period of one to five years). 43 The court must determine whether a GVRO should be issued. 44 A renewed GVRO will prohibit the subject individual from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a period of one year (or, after September 1, 2020, for a period of one to five years). 45 Once AB 12 and AB 61 go into effect on September 1, 2020, Penal Code Section 18190 will be amended to allow any law enforcement officer, immediate family member, employer, coworker, or employee or teacher of a secondary or postsecondary school to request a GVRO if, after the hearing, it finds that the grounds for issuance of the order are no longer supported by clear and convincing evidence. 46

Misdemeanor Offenses

A petitioner who files a petition for an Emergency GVRO, Ex Parte GVRO, or GVRO knowing the information in the petition is false, or who files the petition with the intent to harass the subject individual, is guilty of a misdemeanor. 47
Similarly, a person who owns or possesses a firearm or ammunition with knowledge that he or she is prohibited from doing so pursuant to an Emergency GVRO, Ex Parte GVRO, or GVRO is guilty of a misdemeanor.\(^42\) Further, such a person shall be prohibited from controlling, owning, purchasing, possessing, or receiving any firearms or ammunition (or attempting the same) for a five-year period, which begins on the date the existing Emergency GVRO, Ex Parte GVRO, or GVRO expires.\(^48\)

**Rarely Used Mechanism**

Although the GVRO petition procedure has been law for several years, it remains a rarely utilized mechanism to temporarily prohibit volatile individuals from controlling, owning, purchasing, possessing, or receiving firearms. According to data from the California Department of Justice,\(^49\) only 86 GVROs were issued in 2016. In 2017 and 2018, the number of issued GVROs increased slightly to 104 and 424, respectively. From 2016 to 2018, the counties of San Diego (203), Los Angeles (63), and San Bernardino (55) experienced the highest numbers of GVROs. More than a dozen counties have yet to issue a GVRO. The GVRO procedure is not without significant criticism. The National Rifle Association’s Institute for Legislative Action, for example, criticized the signing of AB 12 and AB 61 as the legislature’s “continuing the assault on our Second Amendment rights in the Golden State.”\(^50\) The American Civil Liberties Union also criticized the enactment, stating the laws pose “a significant threat to civil liberties.”\(^51\)

No law is perfect, and few legislative actions enjoy a position of universal consensus. Legal challenges to the GVRO procedure will continue (and will likely increase), especially after AB 12 and AB 61 become effective next fall. While, at present, no appeals have been filed in court, it is only a matter of time before constitutional and/or due process claims are alleged as to an issued GVRO as a case of first impression.

Time will tell whether the GVRO petition procedure will assist in combating the ever increasing instances of gun violence and mass shootings that plague our communities. Like many proactive measures, it is difficult to calculate how many tragedies will be avoided through effective law enforcement. However, a single instance of preventing a volatile individual from harming himself, herself, or others through the issuance of a GVRO is worth the effort.

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\(^1\) The term “ghost gun” usually refers to a firearm that is made by the owner using separately acquired parts. Because such a firearm has no serial number, the owner can effectively bypass registration requirements and background checks. See, e.g., Ben Christopher, How California got tough on guns, CalMatters (Nov. 14, 2019), https://calmatters.org/explainers/california-gun-laws-policy-explained and Brain Shatz, People Are Making Completely Untraceable Guns in Their Homes—Driving a New Kind of Crime, Mother Jones, Dec. 13, 2017, available at https://www.motherjones.com.


\(^3\) Fam. Code §6200 et seq.


\(^5\) Welf. & Inst. Code §15657.03.


\(^8\) Pen. Code §18125.

\(^9\) Id.

\(^10\) Id.


\(^12\) Id.

\(^13\) Pen. Code §18125.

\(^14\) Pen. Code §18135.

\(^15\) Pen. Code §18150.

\(^16\) Pen. Code §§18150, 422.4.

\(^17\) Id.

\(^18\) Pen. Code §18150.

\(^19\) Id.

\(^20\) Id.

\(^21\) Pen. Code §18155.

\(^22\) Id.

\(^23\) Pen. Code §18150.

\(^24\) Id.


\(^26\) Pen. Code §18160.

\(^27\) Id.

\(^28\) Id.

\(^29\) Pen. Code §18155.

\(^30\) Pen. Code §18165.

\(^31\) Pen. Code §18170.

\(^32\) Fam. Code §§6200 et seq.


\(^34\) Welf. & Inst. Code §15657.03.


\(^36\) Pen. Code §18175.

\(^37\) Pen. Code §18150.

\(^38\) Pen. Code §18175.

\(^39\) Id.

\(^40\) Pen. Code §18180.

\(^41\) Pen. Code §18185.

\(^42\) Pen. Code §§18185, 18175.

\(^43\) Pen. Code §18190.

\(^44\) Pen. Code §§18190, 18155.

\(^45\) Pen. Code §18190.

\(^46\) Pen. Code §18200.

\(^47\) Pen. Code §18205.

\(^48\) Pen. Code §18205.


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- Networking with judges, attorneys, and other legal professionals
- Discounts on products and services to run your business: insurance, financial solutions, case resources, and more!
An influencer is defined as “one who exerts influence: a person who inspires or guides the actions of others often, specifically: a person who is able to generate interest in something (such as a consumer product) by posting about it on social media.”¹ According to a recent study, 17 percent of children ages 11-16 want to be a social media influencer when they grow up, outranking teacher and veterinarian.² Who can blame them? Some of the more popular social media influencers such as Kylie Jenner, an influencer with 149 million Instagram followers—an audience larger than the population of all but the world’s eight most populous countries—can earn as much as $1 million from a single sponsored post.³ That’s right: $1 million per post.

Since an influencer can “generate interest” by merely posting on social media, a successful influencer then generates such interest usually by selling more products, driving more people to an event, and convincing other people to donate to a group. As such, the influencer needs a platform to easily communicate his or her message to a significant number of people. Of course, the platform is the Internet and the audience is an estimated 40 percent of the entire world.⁴

Having a platform and an audience, the influencer now needs a hook, a reason for fans to buy more products, go to that music festival, or donate to the influencer’s cause. Often, that hook is fame, i.e., the state of being recognized. The influencer’s “influence” is based on the public’s ability to recognize his or her name, image, or likeness. Generally, the more public recognition, the more influence, and because the Internet provides an enormous immediate audience, fame is now attainable in ways not possible 30 years ago.

Famous people, including movie stars, athletes, and musicians, are inherently influencers. A number of the top 10 influencers neatly fall within one of these categories. Selena Gomez, the second highest paid influencer,⁵ is a musician turned movie star. Cristiano Ronaldo, the third highest paid influencer,⁶ is a world famous soccer player. Beyoncé Knowles, the fourth highest paid influencer,⁷ is a famous pop musician, and Dwayne “The Rock” Johnson is not only the sixth highest paid influencer⁸ but also the highest paid movie star in the world.⁹

What about spots one and five? They belong to a pair of sisters: Kylie Jenner and Kim Kardashian, respectively, who are part of a new breed of influencers.¹⁰ Whereas The Rock became an

Oliver Bajracharya is a partner at Lewis Roca Rothgerber Christie in Glendale, California, who practices intellectual property law. Drew Wilson also is an attorney with the firm whose practice focuses on intellectual property litigation, as well as trademark portfolio maintenance and prosecution.
influencer after first becoming a movie star, and Beyoncé was a singer long before she was ever one of the queens of Instagram, Kylie Jenner became famous as an influencer first (“famous for being famous”), and then leveraged that fame into other markets such as beauty and makeup supplies.

One need not be a marketing juggernaut to earn a respectable living as an influencer. According to Forbes Magazine, an Instagram user with 100,000 followers can command $5,000 for a single post made in partnership with a company or brand. Influencers with a base of a million followers can command $50,000, while the seven million-plus follower club can expect $150,000 per post. These posts, while undoubtedly requiring some level of creativity, skill, and other professional hair, lighting, makeup, and photography, hardly involve the effort of shooting a television commercial, let alone a movie. Instagram posts are usually just single photos or a series of related photos.

**Rights of Publicity and Trademarks**

It is evident that fame—even, or particularly, “Internet fame”—sells, and that this fame is lucrative, which begs the question, “How can fame be legally protected?” Influencers primarily can take advantage of two different avenues to protect their name, image, and likeness: 1) via their rights of publicity and 2) via trademark rights.

The right of publicity generally protects the economic value, or “drawing power,” of one’s name, image, or likeness. Each person has a right of publicity, but such right for famous people, who are more publicly recognizable, has more value. Therefore, a third party using such right without permission could result in a claim for misappropriation of the right of publicity with significant monetary ramifications. Notably, there is no federal right of publicity statute, although some version of the right of publicity is recognized in 35 states (22 by statute and 11 by common law). A trademark is a word, name, or symbol used to identify and distinguish the goods or services of one party from the goods and services of another party and to indicate the source of the goods. There is a federal trademark statute protecting trademark rights, and trademarks may be registered with the U.S. Patent and Trademark Office (USPTO). Famous, i.e., well-recognized, brand names such as COCA-COLA, ROLEX, and GOOGLE are registered trademarks, and each mark likely immediately conjures a mental image that one associates with the products and services offered by each company. Personal names of a living person, such as Peyton Manning and Beyoncé, can be registered as trademarks if the person consents and if the public associates that name with the goods or services provided in connection with the name.

The right of publicity is the right that a person has to control his or her likeness (i.e. name, signature, image) when used for commercial purposes. Unlike trademark law that is codified in the federal Lanham Act as well as a wide variety of state registration systems, rights of publicity laws are state-specific, and can vary wildly from state to state, both in what rights are protected and the duration of the protection. Some states, like Delaware and Colorado, do not even recognize a right of publicity.

Rights of publicity have a number of advantages over trademark rights. Individuals inherently have such rights where they are recognized and will continue to have them for the term provided by law. In order for one to acquire a valid and protectable trademark, he or she must be using that mark for a particular good or service. One cannot simply “squat” on a trademark to keep others from using the mark. Failure to make ongoing use of a mark by the trademark owner in connection with the particular good or service can result in abandonment of the mark.

Similarly, trademarks are narrower in scope than a right of publicity. Under trademark law, someone can only prevent third-party use of a trademark on the same or related goods to those on which the owner of the mark is currently using the mark. For example, Tiger Woods has a trademark registration for “TIGER WOODS” for “entertainment in the nature of competitions in the field of golf; entertainment services, namely, personal appearances by a sports celebrity; providing a website on a global computer network featuring information about appearances, accomplishments, exploits and biography of a professional golfer.” With this registration, Tiger Woods could easily prevent a third party from creating the Tiger Woods golf tournament without his authorization. However, he might not be able to use this trademark registration to prevent Cadillac from branding one of its models of cars the “Tiger Woods” or using his image in television commercials for a car.

His rights of publicity, however, could do exactly that. Such rights prevent use of a third party’s likeness for commercial purposes regardless of whether the person had used his likeness in relation to a particular commercial purpose, which is a significantly broader protection than trademark rights offer in this respect.

**California Rights of Publicity**

The right of publicity in California is codified in California Civil Code Section 3344. It protects against the unauthorized use of another’s “name, voice, signature, photography or likeness” on products or merchandise for the purpose of advertising or promotion. The unauthorized use must be “knowing.” California also has a descendible postmortem right that lasts for the same duration as copyright: the lifetime of the person plus 70 years. The owner of a postmortem right of publicity must register that right with the California secretary of state and cannot recover damages for acts of infringement that occurred prior to registration.

In a right of publicity law suit, the prevailing plaintiff is entitled to his or her actual damages or $750 dollars (whichever is greater) and the profits resulting from the unauthorized use. Punitive damages and equitable relief may also be awarded, along with the potential for an award of attorney’s fees.

Despite the strength and longevity of the California right of publicity statute, there are also a number of codified defenses. For example, when the cause of action arises from the use of a plaintiff’s likeness as part of an image or motion picture, that person must be individually identifiable by the naked eye from that image or motion picture. If they are simply one of a number of people in a crowd, no cause of action exists.

When the plaintiff is an employee of the defendant and a photograph or likeness of the plaintiff is only incidental and not essential to the purpose of the publication in which it appears, there is a rebuttable presumption that the use was not a “knowing” use of the employee’s photograph or likeness.

Use of a likeness in connection with any news, public affairs, sports broadcast, or political campaign does not require consent.

The statue also protects the owners and employees of a broadcast medium, such as a newspaper, radio station, television station, and magazine publisher from liability for an advertisement that infringes a third party’s right of publicity, unless the owner or employee had knowledge of the unauthorized use of the person’s right of publicity.

**New York Rights of Publicity**

New York has codified its right of publicity law as part of its right of privacy statute,
### MCLE Test No. 296

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<th>Question</th>
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<td>1.</td>
<td>Influencers using the Internet as a platform can reach 40 percent of the entire world.</td>
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<td>2.</td>
<td>Rights of publicity are recognized in 35 states, including 22 by statute and 11 by common law.</td>
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<td>3.</td>
<td>California has a descendible postmortem right of publicity that lasts for the life of the person plus 90 years.</td>
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<td>4.</td>
<td>In California, use of a person’s likeness in connection with a political campaign requires consent.</td>
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<td>In New York, there is no postmortem right of publicity.</td>
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<td>A federally registered trademark can last forever, as long as the mark is actually being used.</td>
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<td>7.</td>
<td>In New York, the rights of publicity statute of limitations starts when the plaintiff discovers the use.</td>
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<td>8.</td>
<td>The same defenses are available for a rights of publicity cause of action as for trademarks under the Lanham Act.</td>
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<td>9.</td>
<td>In California, a rights of publicity cause of action only exists for use of a person’s likeness in an image or motion picture when that person can be identified by the naked eye.</td>
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<td>10.</td>
<td>Of the Polaroid factors, the Southern District of New York considers the degree of similarity between the marks to be a key factor in determining the likelihood of confusion.</td>
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<td>11.</td>
<td>Trademark rights only vest for the goods and/or services for which the mark was actually used.</td>
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<td>12.</td>
<td>Rights of publicity protect against the use of a person’s likeness even if he or she has never used his or her likeness in connection with a particular good or service.</td>
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<td>13.</td>
<td>An award of damages for infringing rights of publicity in California includes the infringer’s profits.</td>
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<td>14.</td>
<td>An award of the defendant’s profits in the Ninth Circuit for trademark infringement requires a showing of willfulness.</td>
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<td>15.</td>
<td>A person’s voice is one of his or her rights of publicity that can be misappropriated.</td>
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<td>16.</td>
<td>A company’s use of a robot that features notable and distinguishing elements of a celebrity can constitute misappropriation of that celebrity’s right of publicity.</td>
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<td>17.</td>
<td>One must be a celebrity to enforce a right of publicity.</td>
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<td>18.</td>
<td>California protects owners and employees of mediums of advertising from rights of publicity lawsuits unless it is established that such owners or employees had knowledge of the unauthorized use of the person’s likeness.</td>
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<td>19.</td>
<td>A person must elect to sue under his or her right of publicity or trademark rights but not both for the same use infringing use of the person’s name, voice, signature, photograph, or likeness.</td>
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<td>20.</td>
<td>One must have a federally registered trademark in order to sue for trademark infringement in federal court.</td>
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1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $25 testing fee ($35 for non-LACBA members) to:
   Los Angeles County Bar Association
   Attn: Los Angeles Lawyer Test
   P.O. Box 55020
   Los Angeles, CA 90055

Make checks payable to: Los Angeles County Bar Association

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**ANSWERS**

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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New York Civil Rights Law sections 50 (Right of Privacy), and 51 (Action for Injunction and Damages). The law allows any living person to prevent the unauthorized use of his or her name, picture, or voice for advertising purposes or the purposes of trade, without the written consent of the person. Unlike California, there is no postmortem right of publicity. Once a person dies, all rights disappear. This also differs from federal trademark rights, which continue after death, so long as they are being used.

A plaintiff in a right of publicity lawsuit does not need to have previously commercialized his or her identity in order to enforce associated rights of publicity. The statute of limitations is decidedly short: one year. Unlike many other torts, a cause of action based on the right of publicity does not follow the “discovery” rule. It begins to run from the date of the first publication that uses the plaintiff’s likeness rather than from when the plaintiff discovers the use. Remedies include equitable relief (such as an injunction) and actual damages. If the misappropriation was willful, the jury in its discretion may also award exemplary damages.

There are also a number of statutory defenses available under New York law. There is no cause of action if the work is an expressive, artistic work that does not meet the criteria for advertising or trade purposes. A biography or using famous figures in a historical context would be considered such a work. Photographers may show photographs that they have taken of people in their own gallery unless they receive actual written notice by the subject of the photo. There are a number of other minor exceptions.

Trademark Rights

The Lanham Act governs federal trademark law and was enacted to protect consumers from false designations and misrepresentations and to protect trademark owners from being associated with products they do not produce or endorse. The Lanham Act is not, however, particularly suited as a full substitute for a right of publicity. The Lanham Act may show photographs that they have taken of people in their own gallery unless they receive actual written notice by the subject of the photo. There are a number of other minor exceptions.

Trademark rights have two primary benefits over rights of publicity. First, trademark rights are homogenous nationwide. Because trademark rights are federally protected under the Lanham Act, each state generally will provide the same protections for a federally registered trademark as any other state. This differs drastically from rights of publicity as some states do not even acknowledge the existence of the right. In addition, the United States is a party to a number of international treaties, such as the Madrid Agreement Concerning the International Registration of Marks, that allow trademark owners to register their marks in foreign jurisdictions that might not even recognize rights of publicity.

Second, a trademark can last forever, as long as the mark is actually being used. On the other hand, the right of publicity in New York terminates on the death of the person, or in California, the rights extinguish after 70 years, like copyrights.

When a celebrity has registered his or her name as a trademark associated with particular goods and services, the Lanham Act can provide grounds to enforce such trademark via a trademark infringement claim. For example, Beyoncé Knowles-Carter (of course, more commonly known as simply Beyoncé) registered the trademark BEYONCÉ for various items of clothing including shirts and sweaters. Clothing bearing the BEYONCÉ mark was sold on her website, and t-shirts and sweatshirts retail for between about $35 and $70.

After Beyoncé registered her trademark, an entity called Feyoncé, Inc. began selling clothing items bearing the name FEYONCÉ (rhymes with “Beyoncé”). Beyoncé sued the entity in the Southern District of New York for trademark infringement, unfair competition, and trademark dilution and requested that the issues be resolved on summary judgment.

The court indicated that to prove trademark infringement under the Lanham Act, a plaintiff must show 1) that its mark is entitled to protection (of which a trademark registration constitutes prima facie evidence) and 2) that “defendant’s use of the mark is likely to cause consumers confusion as to the origin or sponsorship of the defendant’s goods.”

With respect to the likelihood of confusion, the court applied the so-called Polaroid factors, which evaluate the strength of the senior mark, the similarity of the marks, and the proximity of the products in the marketplace, among other factors. Of the listed factors, “[t]he degree of similarity between the marks is a key factor in determining likelihood of confusion.”

In this case, the court found the marks to be “extremely similar in text, font, and pronunciation” noting that “the difference between the two is the first letter, which in other cases was not enough to save an allegedly infringing junior mark from a finding of a likelihood of confusion as a matter of law.” However, the court further noted that “[b]y replacing the ‘B’ with an ‘F,’ Defendants have created a mark that sounds like ‘fiancé,’ i.e., a person who is engaged to be married. As a result, FEYONCÉ is a play on words, which could dispel consumer confusion that might otherwise arise due to its facial similarity to the BEYONCÉ mark.”

The court analogized the present case to another case in which the Seventh Circuit found that when deciding whether to buy clothing bearing the word MIKE with a swoosh logo instead of NIKE with a swoosh logo, consumers might understand the pun, but “the ‘ultimate question’ was
whether the pun was sufficient to dispel confusion among the consuming public. The court also noted that here the right of publicity cause of action essentially mirrored the trademark cause of action.

However, even the number one influencer in the world does not necessarily have an absolute right to her name, as Kylie Jenner found out some years ago. In 2015, Jenner filed three trademark applications, two for the word KYLIE for use in connection with 1) advertising and endorsement services and 2) entertainment services, and one for KYLIE COSMETICS for use with cosmetics. After learning of Jenner’s filings, Kylie Minogue, herself a celebrity singer who has sold over 70 million records worldwide, filed trademark oppositions to Jenner’s applications to attempt to prevent the USPTO from registering Jenner’s marks. Minogue is the owner of the mark KYLIE for education and entertainment services, jewelry, dolls, and various other goods as well as the owner of the mark KYLIE MINOGUE (and design) for perfume, skin moisturizers, and body lotions. Having used and registered her marks before Jenner, Minogue argued that if Jenner’s marks were allowed to be registered, the public would likely be confused as to Jenner’s products bearing the KYLIE marks as actually being Minogue’s, thereby resulting in harm to Minogue.

**Kardashians et al. Cases**

The Kardashians know how to maximize the protection of their persona and thus are the owners of a number of registered trademarks that consist of variations of their names in association with cosmetic products. The Kardashians license both their trademarks and publicity rights to companies that put out cosmetic products. Through a series of license acquisitions, Hillair Capital Management, LLC, eventually came to acquire a license to produce cosmetics in association with the Kardashians’ trademarks and publicity rights. After a period of time, the Kardashians revoked the license pursuant to a termination clause in the license agreement. Hillair had acquired. Despite the termination, Hillair continued to use the Kardashians’ trademarks and publicity rights in connection with the sale of cosmetics.

The Kardashians sued, bringing claims for both trademark infringement and misappropriation of their rights of publicity. In granting the Kardashians’ motion for a preliminary injunction, the court noted that “celebrities have unique property interests in their names, images, and likenesses.” Because of this unique interest, celebrities often cannot be adequately compensated by money damages for violations of their right of publicity, which strongly supported a preliminary injunction.

**Kylie and Kylie SettlementTerms**

After negotiations, Kylie and Kylie were able to agree on settlement terms that resulted in Minogue’s withdrawing her opposition, allowing Jenner’s marks to register in 2018. In mid-2019, Kylie Minogue launched her own line of beauty products, including eyeshadow, lip oil, glitter, and lip gloss, all branded with the KYLIE mark and available on Minogue’s website. Unless Jenner later objects, the previous history between the two parties suggests that part of the settlement terms may have included Minogue’s being able to launch a beauty product line using the KYLIE name without Jenner’s objecting to or otherwise preventing such use. It remains to be seen whether both Kylie can continue to use KYLIE as a trademark without causing actual consumer confusion.

This case also shows another subtle difference between trademark rights and rights of publicity. While both Kyliess are able concurrently to protect their personas, including their name, through rights of publicity, arguably only one of the Kyliess can control trademark rights in the mark KYLIE used with particular goods. To allow otherwise would risk consumer confusion. In the trademark context, the first user of a mark with goods has priority to that mark and can prevent later users from using a confusingly similar mark. Thus, influencers interested in protecting their names as trademarks will want to move promptly so as to be the senior user of their name as a trademark.

It should be noted that Kylie Jenner has filed about 60 trademark applications for various KYLIE marks for a number of goods and services over the last six months. As the most influential influencer, she clearly intends to protect her valuable persona to the fullest extent.

**Lanham Act Defenses**

Although the Lanham Act is not necessarily directed to protecting a person’s name, image, or likeness, claims for false endorsement and unfair competition are sometimes used as a substitute for a federal right of publicity claim. However, there are several defenses available under the Lanham Act that are not available for right of publicity claims, including statutory fair use, nominative fair use, and lack of likelihood of confusion.

Because rights of publicity automatically vest in many instances and do not exist in others, influencers should begin filing trademark applications for the services that they provide in order to secure some of their rights against those who would attempt to freeride on their goodwill. It is only through a combination of trademark rights and rights of publicity that an influencer can most effectively protect themselves from unauthorized third-party exploitation.

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5. Mejia, supra note 3.
6. Id.
7. Id.
8. Id.
10. Mejia, supra note 3.
Two states, Arizona and Louisiana, have a statutory right of publicity for soldiers only. Right of Publicity, Statutes & Interactive Map, https://rightofpublicity.com/statutes.


15 CIV. CODE §§3344(a), 3344.1(a).

16 Id.

17 CIV. CODE §3344.1(e)(3).

18 CIV. CODE §3344.1(f)(2).


20 Id.

21 CIV. CODE §3344.1(d).

22 CIV. CODE §3344.1(i).

23 CIV. CODE §3311(c).

24 CIV. CODE §3344.1(d).

25 N.Y. CIV. RIGHTS LAW §51.


28 ("New York courts apply the single publication rule to Section 51 claims, according to which the cause of action "accrues on the date the offending material is first published.")

29 N.Y. CIV. RIGHTS LAW §51.

30 Id.

31 Id.


34 Virgin Enterprises Ltd. v. Nawab, 335 F. 3d 141, 146 (2d Cir. 2003).

35 Polaroid Corp. v. Polarad Elecs. Corp., 287 F. 2d 492 (2d Cir. 1961) identifies eight nonexclusive factors that are relevant to a court's likelihood of confusion analysis: 1) strength of the senior user's mark, 2) similarity of the marks, 3) similarity of the products or services, 4) likelihood that the senior user will bridge the gap, 5) the junior user's intent in adopting the mark, 6) evidence of actual confusion, 7) sophistication of the buyers, and 8) quality of the junior user's products or services.


37 Knowles-Carter, 347 F. Supp. 3d at 225


40 Nike, Inc. v. “Just Did It” Enters., 6 F. 3d 1225, 1228 (7th Cir. 1995).

41 Knowles-Carter, 347 F. Supp. 3d at 226.

42 Id.


44 Id.

45 Id.

46 Id. at *3.

47 Id.

48 Id. at *8.

49 Id.

50 Id. at *10.


52 Id.

53 Id.

54 Id. at 8

The Chief: The Life and Turbulent Times of Chief Justice John Roberts

READERS WHO WANT TO dislike Chief Justice John Roberts should like The Chief. Those who want to learn about the U.S Supreme Court’s inner workings and the role of the chief justice will find this book enlightening. The Chief includes inside baseball accounts of how the Court reached its decisions in certain high-profile cases such as National Federation of Independent Business v. Sibelius, the decision that, surprisingly, upheld the individual mandate in the Obama administration’s health-care reform legislation, the Affordable Care Act (ACA). Unfortunately, however, readers who want to understand John Roberts, the jurist, are likely to be disappointed in The Chief.

Author Joan Biskupic is a seasoned Supreme Court journalist (currently a CNN legal analyst and Supreme Court biographer), and the best parts of this book reflect her Supreme Court expertise. For example, she succinctly summarizes the role of the chief justice and its importance: The chief justice is appointed for life, as are the eight associate justices. Like each of them, he is entitled to a single vote on cases. But the chief justice has special authority to oversee oral arguments and set the agenda for the justices’ private sessions. He regularly decides who writes the opinions that become the law of the land. As such, the chief justice has been called “the first among equals.” To appreciate the influence of a chief justice, one need only understand that while there have been forty-five presidents of the United States, there have been only seventeen chief justices [p.8].

Similarly, Biskupic concisely describes the lasting professional significance of judicial clerkships (Chief Justice Roberts served two clerkships, first for Second Circuit Court of Appeals Judge Henry Friendly and then for Justice William Rehnquist before he became chief justice): “Clerkships offer young lawyers a highly confidential inside view of how legal rulings are crafted as well as prestige in the profession. Clerks frequently identify themselves by the judges they serve, and former clerks of the same judge often band together in an enduring informal guild [p. 46].”

The Chief’s tracing of Roberts’s upbringing, education, and legal career prior to ascending the bench has some flaws and gaps. Biskupic attempts to paint Roberts as the silver-spoon scion of a wealthy family, but his forebears on both sides came from working-class roots. His paternal great-grandfather was an English coal miner who sailed to America with his family in steerage; his paternal grandfather rose to become a mine inspector. Roberts’s parents met in a western Pennsylvania coal and steel town where their families had settled. His mother’s family members “labored in the mines and also found whatever work they could in the hotels, taverns and pool halls” (p. 17). Roberts’s mother was forced to forgo her plans for a college education and foreign travel because her father died young, leaving her mother to raise three of the couple’s five children as a single parent. Readers might see Rosemary Roberts as a devoted wife, mother, and homemaker who made the best of her circumstances by encouraging her husband (a steel plant manager) and children—particularly the academically gifted young John—to succeed, but Biskupic uncharitably portrays Rosemary as a social climber.

The Chief’s characterization of Roberts as a hyper-achiever is indisputable. He wrote for his high school newspaper, participated in student government, sang in the choir, served as a chapel assistant, competed successfully on the wrestling and football teams, and graduated first in his class. Entering Harvard as a sophomore (by earning college-level credits in high school), Roberts won a scholarship for “outstanding scholastic ability and intellectual promise,” and prestigious writing awards (pp. 38-39). The book allocates less than two pages to Roberts’s time at Harvard Law School (pp. 44-46), which surely must have had some influence on his judicial philosophy and style, but there again he excelled, making law review and graduating magna cum laude.

Two Clerkships

Recounting Roberts’s two clerkships, Biskupic posits that the differences between his two judicial mentors may account for competing tendencies in his jurisprudence. Second Circuit Judge Henry Friendly was already on senior status and highly respected among both fellow judges and academics when Roberts clerked for him. Biskupic describes Friendly as “a model of intellectualism known for his modest judicial approach and respect for precedent” (p. 46).

Judge Friendly recommended Roberts to Justice William Rehnquist, whom The Chief characterizes as “a political insider whose service in the Nixon White House helped shape his hard-right outlook” (p. 46) as “a staunch defender of law enforcement
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and a consistent opponent of racial classifications” (p. 55). Toward the end of his Rehnquist clerkship, Roberts expressed interest in working for the Reagan administration. On Rehnquist’s recommendation, Roberts became the new Attorney General’s special assistant. Biskupic observes that executive branch service enabled Roberts to forge “important political connections” (p. 65). Roberts went on to work in the Justice Department, the White House counsel’s office, private practice as a renowned appellate advocate, and as Deputy Solicitor General, before being appointed to the D.C. Circuit in 2003, and then in a strange twist of events, to the Supreme Court as Chief Justice in 2005.

The Chief discusses several significant Roberts Court decisions, e.g., on school desegregation/affirmative action, voting rights, and most notably the ACA, providing accounts of tense horse-trading and reversals of positions. To uphold the ACA’s individual mandate, Roberts had to adopt the administration’s back-up legal theory that the mandate was a tax. In another about-face, he persuaded some colleagues that the Medicaid expansion as written impermissibly coerced the states. The details of how the startling decision evolved are absorbing.

Understanding Roberts

For readers who seek understanding of Roberts, however, The Chief offers no genuine insights. Biskupic apparently believes the Chief Justice’s views on virtually every key legal and social issue are perniciously wrong and disbelieves that reasonable minds might differ on how the Constitution and prior Supreme Court precedents apply in cases involving complex public policies.

Biskupic might have gleaned more than a superficial understanding of the principles underlying the conservatives’ votes from her interviews of Roberts, and the briefs, oral arguments, and opinions in the cases, to share with her readers. Instead, The Chief takes for granted that conservative justices reflexively favor the advantaged over everyone else and that dissenting liberal justices are always correct. This is no help to Supreme Court advocates or liberal justices who would seek to win over the current conservative majority—or at least find middle ground—when contentious issues such as abortion, race discrimination, immigration, free speech, voting rights, and consumer protection come before the Court. The book also indicates the Roberts Court has escalated the overturning of precedents—although commentators say the statistics show otherwise—and that the Court is no longer collegial—although the justices themselves publicly say otherwise.3 The Chief criticizes Roberts as ideological and political, but the biography invites the same criticism.

Biskupic does note that Roberts sometimes defies what one might expect of an inflexible right-wing ideologue, for example, by crafting with considerable difficulty the decision that preserved most of the ACA. She also acknowledges Roberts’s concern for the public’s confidence in the Court and perceptions of him as Chief Justice: Roberts understood that public regard was crucial to the Supreme Court’s stature in American life. He had studied the reputations of past chief justices and had worried, too, about what history would make of him. ‘You wonder if you’re going to be John Marshall or you’re going to be Roger Taney. The answer is, of course, you are certainly not going to be John Marshall. But you want to avoid the danger of being Roger Taney’ [pp. 9-10].

In the passages of the book most sympathetic to Roberts, The Chief quotes from Roberts’s commencement address to his son’s ninth-grade graduating class:

From time to time in the years to come, I hope you will be treated unfairly, so you will know the value of justice. I hope that you will suffer betrayal, because that will teach you the importance of loyalty... I hope you will be ignored, so you know the importance of listening to others. And I hope you will have just enough pain to learn compassion [p. 323].

Biskupic recognizes as well that John Roberts may be Chief for many years to come. Perhaps later books about him will eschew preconceived notions and consider some of the important questions left unanswered by The Chief, with the benefit of the additional information that future events and cases will provide.

3 See, e.g., Robert Barnes, Ginsburg gently pushes back on criticism of the Supreme Court and her fellow justices, WASHINGTON POST, Jul. 25, 2019 (quoting Justice Ginsburg’s remarks: “The court remains the most collegial place I have ever worked”; “I can say that my two newest colleagues [Justices Gorsuch and Kavanaugh] are very decent and very smart individuals”; and “there are a number of cases this term where we didn’t divide along so-called party lines”).
Networking Within a Sphere of Personal and Professional Influence

EVERYONE HAS HEARD THE SAGE ADVICE: “You need to network.” While no one disagrees with this wisdom, it tends to leave some nagging questions. What is networking? How and where can one network? Also, if one is introverted or reserved, the whole idea may be scary. Even the extroverted may be reluctant for various reasons: high annual fees for networking groups, lack of organizations in one’s profession, limited time, and many more such reasons.

It is important to understand that networking is more than a bunch of stuffy, overdressed business people getting together before the workday starts to exchange leads. Networking is of limited effectiveness when it is approached with the desire to find “leads.” It is most effective when focused on building relationships. Thus, “networking” can be defined as the process of affiliating and participating in various groups in which members get to know, like, and trust one another enough to form personal and professional bonds.

The word “personal” comes first because it is critical to form bonds that are prerequisite to professional bonds. The stronger these personal bonds, the better the results of the relationship. The most effective networking then occurs in groups in which strong personal relationships are formed. When the focus of networking is creating relationships, it is easy to see how networking opportunities arise anywhere and anytime there is a relationship-building opportunity.

There are traditional networking groups, e.g., Valley Bar Network™, Business Network International®, Provisors®, Women in Business Networking™, and the local Chamber of Commerce. Many professionals who participate in these groups have a “home” or “base” group. Although other groups and industry associations also provide an opportunity for fostering and creating relationships, networking relationships are not limited to such organizations.

Everyone has a sphere of personal and professional influence, or SPPI, which provides multiple opportunities to create networking relationships. The SPPI diagram demonstrates the possibilities.

Thus, many opportunities for networking exist beyond traditional groups. For example, fellow graduates of high school, college, and beyond have alumni groups where one can meet and interact with others. It should be noted that while connecting can be done in person and/or online, relationships fostered in person generally tend to grow deeper and faster.

Networking opportunities also exist through one’s children’s schools, often at school events. Closely related to networking through school-based relationships are opportunities that arise through activities such as kids’ clubs, sporting teams (e.g., American Youth Soccer Organization), and birthday parties.

Nonprofits offer another area of networking opportunities. Working on a board or doing volunteer work with others is a great way to form strong personal bonds that can blossom into professional relationships. Groups such as Rotary International®, the ACLU, local bar associations like the Los Angeles County Bar Association (which has created a new program of Structured Networking Groups), United Way, YMCA, St. Jude Children’s Research Hospital, and other nonprofit groups offer myriad ways to network.

Houses of worship and religious groups also provide opportunities for networking. Much like nonprofit work, participating in religious, community, and family events provides opportunities to not only create and foster relationships but also to demonstrate and observe good core values, not to mention that fellow worshipers may be a valuable source of referrals.

Finally, one should not overlook family and community (e.g., neighbors) as further opportunities for networking. Networking can occur almost anywhere, but the situation in which it occurs is less important than the attitude with which one approaches it. If networking is approached with the goal of swapping business cards, gaining names, and acquiring “leads,” it may prove to be stressful and unsatisfying. If, however, it is approached with the intention of forming relationships and expanding knowledge of fellow professionals, networking can be a rewarding and very effective use of one’s time.

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