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On The Fence

For the past several months, volunteers from La Raza Lawyers and the San Diego Legal Observer Coalition have closely monitored attempts by the so-called Minute-men to drive day laborers from the street corners where they congregate looking for work. These street corners—public areas where there is a right to engage in hiring-related speech—are the new front lines of the immigration battle. Never mind that many of the day laborers are in the country legally and that the Minute-men are also disrupting their work searches. Be that as it may, a day laborer at one of those street corners asked the $64,000 question: “¿Sin nosotros quién hará el trabajo de pico y pala?” (Without us, who will do the pick-and-shovel work?)

As I write this opinion piece, it is anyone’s guess what kind of an immigration bill can emerge from a conference committee. For example, will some form of legalization survive that process? But it is safe to bet that the conference will agree to double the number of Border Patrol agents within the next few years. And one way or another, the fence between the United States and Mexico will be extended by hundreds of miles. Even so, until we address the structural causes of migration, including how particular trade policies of ours help drive it, migrants from south of the border will continue to go over, under and mostly around a fence that collides with economic reality. The Senate’s scaled-down temporary worker proposal will not be enough to stop the undocumented foot traffic. Notwithstanding NAFTA, the wage differential is still the greatest of any two bordering countries in the world.

Smugglers will respond to the new agents and fencing by shifting to relatively unguarded points of entry. The circuitous routes will add days to what is already an awful trek. As a result, migrants from south of the border will most probably have the effect of funneling migrants to the Imperial Valley foothills. They are virtual deathtraps because of the rugged topography and extreme temperatures.

But coming back to San Diego’s street corners, the rhetoric there can get pretty ugly. Like all the other members of La Raza Lawyers Association, I worry about how all the vitriol will play out in a county that is no stranger to immigrant bashing of the literal sort.

Claudia Smith is a member of La Raza Lawyers and works for the California Rural Legal Assistance Foundation.
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The United States Constitution provides that we all are equal in the eyes of the law. Yet the Constitution is not a self-executing document. Lawyers ensure that we are equal in the eyes of the law. Lawyers cost money. Legal services are expensive, very expensive.

For criminal defendants, the right to counsel is a matter of constitutional protection. Not so for civil disputes, including family law and probate. People who face the threat of losing their property or their families often have no recourse, simply because they cannot afford the fight.

Whether to provide an attorney for civil litigants similar to the rights recognized by the U.S. Supreme Court in the Miranda case is a hot topic of debate. The economic impact could be staggering at a time when we cannot build consensus on providing health care to all citizens. It does not seem likely we will see that degree of access any time soon.

Presently in San Diego County, in some 80 percent of all family cases at least one party is representing him or herself. People simply cannot afford representation.

An increasing number of litigants are self-represented in general civil matters. This has become enough of an issue that San Diego Superior Court Presiding Judge Janis Sammartino is considering ways to assist pro per litigants by making the courts more user friendly to them. Such an approach will also greatly assist the judges who preside over pro per cases and even make it easier for those lawyers who find themselves litigating against unrepresented parties.

It is not just the poor who are impacted. How many of us who make a good living could afford to engage in protracted litigation? For those with even less financial wherewithal, access to the American civil justice system is simply illusory.

Organizations like the San Diego Volunteer Lawyers Program and the Legal Aid Society of San Diego help many thousands of people. Unfortunately, they cannot serve all who need their help. The trend has been away from publicly funded programs for civil litigants. Drastic losses in funding have forced legal aid organizations to turn away many people with serious legal problems.

A joint project of the American Bar Association, the American Association of Law Libraries, the National Legal Aid and Defender Association and American University’s Washington College of Law found that based on data compiled in 2002, industrial democracies other than the United States invest from two-and-a-half times as much of their GNP as the United States (France and Germany) to 17 times as much (England) to provide access to justice for their lower income population.

Whatever your political or philosophical feelings about access to justice may be, as lawyers the issue is of critical importance. Our ability to deliver affordable legal services is a significant market factor that will impact our professional and financial well-being.

The environment in which we practice is directly affected by the clients we represent. Will we be a profession who caters only to the very wealthy? Will our ability to effectively represent our clients be first and foremost a function of how much justice they can afford?

Access to justice is a challenge that we all must contend with for both selfish and altruistic reasons. What our profession looks like in the coming years has as much to do with the economics of legal services as any other single issue I can think of.

If I had the answers I would share them with you now. For now, my call to you is to continue the tremendous pro bono efforts that San Diego’s legal community is so well known for; and keep the idea of access to justice in your minds and in your hearts. Only by our continued awareness of the problem can we find solutions.
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CORRECTION: In the “Rewind” column of July/August 2006, it was stated that Clara Foltz was the first female DA. Foltz was the first public defender.

Kenneth G. Coveney
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LETTER TO THE EDITOR

Horse Trading

Ms. Logan and Ms. Ljungdahl [“The Trojan’s Horse: Beware of Clients Bearing Gifts,” July/August 2006] failed to mention Probate Code sections 21350 and following. Any document which Priam might draft to effect a donative transfer from Odysseus to Priam would be invalid. Of course, if Priam were to claim that the transfer was not a “donative” transfer, his remedy would be a creditor’s claim against the estate, if the estate were solvent!

Kenneth G. Coveney
Dostart Clapp Gordon & Coveney, LLP

San Diego Lawyer welcomes your comments. Send them to Editor, c/o SDCBA, 1333 Seventh Avenue, San Diego CA 92101. Or e-mail us at mkruming@aol.com. We reserve the right to edit submissions for clarity and space considerations.

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A Month to Remember

Gregory Knoll of the Legal Aid Society of San Diego Inc. won’t soon forget June 2006 for several reasons.

It was the month that the “heart and soul of the vision of the pro bono program” left to become an administrative law judge, an attorney who “trained at her hip” and is described as “young” and “wonderful” succeeded her, a fire damaged the two floors of the Legal Aid Society’s downtown offices, and Knoll himself celebrated 34 years as executive director.

Six years ago, Clare Maudsley went from being a Legal Aid board member for many years, including a stint as board president, to an employee when she started the pro bono program and became its only manager until the end of June. “It’s been such a fabulous relationship with Legal Aid,” she said. Maudsley grew up in England, studied law at Cambridge and became a barrister. Her father, Ronald, taught law at Oxford and in 1964 began a long relationship with the University of San Diego Law School. Maudsley came to San Diego in 1983 and worked at several firms as well as the AIDS Foundation before joining Legal Aid. She’s now an administrative law judge with the California Department of Social Services.

Succeeding her is Rebecca Nieman, whose first involvement with Legal Aid was as a student at DePaul Law School in Chicago, later becoming a Legal Aid staff attorney after moving to San Diego “on a whim” five years ago. The Spanish-speaking Nieman was born in Peru, where her parents spent two years as missionaries.

In the early morning of June 25, fire broke out in the five-story downtown building that houses Legal Aid’s pro bono program, causing extensive smoke and water damage. Fortunately, no one was injured. (See the story and photos on page 28.)

Three days later on June 28, Legal Aid held its Pro Bono Awards Luncheon at the Bar Center. “She [Nieman] went up [to the offices] to save the awards,” says Knoll. “They’re all fine.”

As for Knoll himself, he moved to San Diego from Newark, New Jersey, and took a job as a Legal Aid staff attorney in October 1973. When the then executive director left, Knoll offered to serve on an interim basis, telling the board, “You don’t know me, I don’t know you.” After a yearlong search, they offered this Rutgers Law School grad the position in June 1974. Today, Legal Aid has a staff of 82 with offices in Southeast San Diego and Oceanside, as well as at 1475 Sixth Avenue. The pro bono program now has about 1,000 volunteers.

District Attorney Bonnie Dumanis was elected to a three-year term representing San Diego and Imperial counties (District 9) on the State Bar Board of Governors. The final vote count was Dumanis (1,835); Steve Grebing of Wingert Grebing Brubaker & Goodwin (1,679) and City Attorney Mike Aguirre (489). Dumanis will be sworn in on Saturday, October 7, during the State Bar Annual Meeting in Monterey.

Two lines drew enthusiastic applause when city council president Scott Peterson addressed the national association of unemployment insurance appeals boards: Working to keep San Diego beaches clean and being from New Jersey.

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Techno Files

At any conference devoted to the legal industry, there are always sessions on “technology trends,” which typically forecast big, new, must-have applications. At this year’s Association of Legal Administrators conference in Montreal, the technology trends were less of the exciting new things coming down the pike and more the “shelter in place” concept of continuing to refine law firms’ technology investments. Experts estimate that we typically use just 10 percent of the capabilities of the software we have. This year will show more investment in training and more pressure on lawyers to justify new software purchases.

As lawyers are increasingly mobile and more often out of the office, the ability to capture time entries via handheld devices could be a valuable tool for keeping those traveling lawyers up to date on their time. Look for applications such as “Airtime Manager” to allow attorneys to enter their time from their handhelds, which the American Bar Association estimates could increase billings by 12 percent.

Electronic discovery is exploding. Firms must get on the bandwagon or find themselves seriously out of date. There are currently approximately 5,000 electronic discovery vendors, and the experts expect to see some consolidation. The good news for those overwhelmed at this concept is that electronic discovery isn’t really that different from paper—once you understand it.

The Internet will continue to expand its role in law firms through application service providers (ASPs), both for hosting applications and for disaster recovery and extranets, which allow clients and lawyers to securely share information on the client’s legal matters. Extranets have typically been used for litigation matters; look for them to aid in transactional practices via “deal rooms.”

PDF is becoming (or has become) the standard for filing, scanning and electronic discovery. PDF has many benefits, not the least of which are preventing editing by recipients and no metadata to discover. (“Metadata” refers to data about data; these data contain information you may not wish recipients of attachments to have, including who originated the document, who changed it, and what was changed.)

Document assembly has returned with bigger and better options. Tools such as Ixio, Exari and Deal Builder can be used to generate client and administrative documents. Also look for brainstorming software that assists lawyers in capturing ideas and putting first drafts together. Examples include CaseMap, NoteMap and MindManager.

While “blog” was the term for 2005, “RSS” and “podcast” may likely be the terms for 2006. RSS (Real Simple Syndication) is similar to an online clipping service. Web users can sign up to receive news on topics of interest. Law firms are beginning to use RSS as a means of communicating with clients. Previously, firms had to rely on clients to visit their web sites to get updated information; with RSS, clients are notified that new content has been posted (provided they’ve signed up for it).

Though the word “podcast” implies that it’s related to iPod, podcasts are not limited to Apple’s technology. You can download podcasts onto any device capable of handling digital files. Podcasts can be very short, brief bits of information, or they can be very lengthy. They offer yet another way to get information while on the go.

While experts agree this is not a time of exploding technology shifts in law firms, it’s also not a time to be complacent. Firms and their IT staff need to focus on getting the most out of what they have while keeping an eye on what’s new.

Patti Lane is director of administrative services for McKenna Long & Aldridge LLP, a certified legal manager, and a past president of the international Association of Legal Administrators. She may be reached at plane@mckennalong.com.
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In 2004, San Diego attorney Robert Lynn stood before the court of appeal to pop a balloon full of hot air and stale, bad breath. He was there to argue for his client, who was sexually abused by a government worker while working at a county children’s camp. The Fair Employment and Housing Act (FEHA) gave the teenager the right to sue but imposed a statute of limitations of one year, regardless of age. The act failed to incorporate Code of Civil Procedure section 352, which tolls the statute of limitations for minors until one year after they reach the age of majority. The courts previously reinforced this statutory anomaly in the case of Balloon v. Superior Court by holding C.C.P. 352 inapplicable to the government code’s FEHA.

Lynn, however, found this to be the quintessential “spurious result” of tolling provisions for minors. Why, he posited to the court, would there be a provision that tolls the statute of limitations for a sexual abuse claim brought by a boy attending a county camp but not a minor employee of the camp? He raised the backlog of arguments in support of minors’ difficulty assessing their legal rights until they reach the age of majority. Yet the Court of Appeal demurred, resting on the “clear” statutory language and “binding precedent” of the Balloon case. Its hands were tied. It was the legislature’s job to decide which statutory tolling provisions applied to which statutes. It was the legislature’s job to change the code.

“It was a fair decision technically, but equitably, they were way off base,” he says. “The whole molestation issue is a huge problem.”

Lynn returned to the drawing board. He drafted an amendment to the FEHA statute of limitations and presented it to the local delegation of the Conference of Delegates of California Bar Associations (CDCBA) as a proposed resolution. Just a few months after the conference approved the resolution, the California legislature enacted Lynn’s FEHA amendment.

For the past 70 years, volunteer attorneys from around the state congregate to discuss necessary changes to the California codes. Through the intricacies of the practice and firsthand experience with the law, attorneys know how Californians are affected by nonsensical, illogical and outdated laws. Attorneys then write proposals, or resolutions, for the conference. After extensive editing and debate, the CDCBA assigns priorities to approved resolutions and throws the weight of the organization behind lobbying efforts to find a legislator to author and introduce the resolution.
as a bill and ultimately enact the proposal.

According to San Diego attorney Stephen Marsh, a veteran with CDCBA and a partner with Luce, Forward, Hamilton & Scripps, LLP, attorneys serve as the eyes and ears of the legislature when it comes to assessing how laws are applied or misapplied across the state. “Unless it happens to someone,” he says, “nobody knows about it.”

In fact, the CDCBA originated as an arm of the State Bar of California in the 1930s to assist a then part-time legislature to draft bills. Since 1966, when the California legislature started full-time work, the CDCBA has continued to provide insight and bill-ready proposals for changes in the law from local attorneys’ perspectives.

CDCBA delegates assist legislators by fleshing out all aspects of a resolution before approving it and lobbying for an author in the Assembly or Senate. “We try to think through and intellectually vet everything,” says Marsh, who served as the first chair of the CDCBA after its separation from the State Bar of California. He refers to the CDCBA as an “equal opportunity organization” because before ap-

### How to Draft a Resolution

Maybe reading this article has got you thinking, and you’re ready to introduce your own resolution to the conference of delegates. Attorney Robert Lynn served on “rescom,” the Resolutions Committee of the CDCBA that extensively analyzes proposals, so he knew how to craft a resolution to survive scrutiny and withstand debate on the conference floor. Here are some tips for you to draft a resolution like a pro:

1. Visit [www.cdcba.org/about_guide.html](http://www.cdcba.org/about_guide.html) to download a handbook on resolution writing. It contains everything from font size and format to checklists for persuasive writing. Veterans like Stephen Marsh point newcomers to the guide as a starting point. CDCBA’s web site also archives current and past resolutions, if you want to browse other resolutions and research past proposals in your practice area.

2. Contact your local or specialty Bar association and the CDCBA to learn about their delegation’s deadlines for the upcoming conference.

3. Attorney James D. Snyder, a new conference participant, suggests taking a full inventory of your proposed change. Figure out if you are replacing the law or merely amending it. Bounce your idea off of other attorneys, including those not necessarily in your practice area, to anticipate opposition based on the doctrine of unintended consequences or how slight change in one law creates a ripple effect throughout other practice areas.

4. Stay open to suggestions. Rescom and other Bar associations will contact you with editorial commentary, and taking their concerns into account increases the resolution’s likelihood of success. Plus, if your resolution is not approved, these suggestions may be a starting point for redrafting your proposal and submitting it for debate in the future.

continued on page 18
proving resolutions, the attorney participants debate all sides of an issue from the perspective of all practice areas to ensure that the proposal does not “lean” any way or violate the “doctrine of unintended consequences.” By the time a resolution makes it to the desk of a California legislator, the work has already been done.

Lynn’s statute of limitations snag is not the only type of issue to come before the CDCBA. Attorney Sally Lorang, a civil actions investigator and advocate for the County of San Diego Department of Agriculture, Weights and Measures, turned to the CDCBA when she discovered that a section of the food and agriculture code governing plant quarantine laws did not include the enforcement provision found in similar pesticide regulatory laws. An enforcement provision would have allowed the department to easily obtain a judgment in small claims court against an international delivery company that did not pay a fine. Department officials encouraged her to draft a resolution to clean up the code, which was accepted and assigned a top priority by the conference.

“It was a practical problem, and it was the easiest way to do it,” she says, acknowledging the clout and effectiveness of the conference compared to other avenues. Currently, CDCBA lobbyists are shopping her resolution for a legislative author or seeking to include it as part of an omnibus bill.

Stephen Marsh has also submitted a proposal for an omnibus civil procedure bill by a resolution that would repeal C.C.P. 351, a statute of limitations holdover from the 1880s, which he claims serves as a “trap for the unwary” and should no longer be part of the code.

Not all resolutions seem as cut-and-dry as making tolling provisions or agricultural enforcement provisions consistent with other, current law. Last year, during a time when same-sex marriage was a hot-button issue in public discourse, the conference approved and assigned a top priority to a resolution amending the family code’s definition of marriage; the resolution conspicuously fails to mention anything about the sex of the persons to be married.

Local attorney, and the chair of this year’s
San Diego County Bar Association delegation, Amanda Benedict similarly faces the tension between legal issues and matters of policy. When she brought this year’s resolutions before the County Bar board of directors, she reminded them of the standard for approving or disapproving resolutions. “It’s not about whether [a resolution is] defense focused and plaintiffs’ attorneys don’t like it,” she says. “That’s not their job. It’s whether it’s an issue worthy of debate.”

CDCBA executive director Laura Goldin says that anything falling within the mission statement of the conference is game for a resolution. “We can each define what politics and policies are,” she says of the more controversial subjects. “We want issues that are helpful legislatively and give those a good priority.” Often they include matters of public controversy.

As to the conference itself, picture a modern-day “1776” or constitutional convention, the hall filled with rows and rows of attorneys, pulling up resolution drafts and spreadsheets on their laptops, horse trading in the hallways, breakfast and lunch caucuses yielding wheeling and dealing over resolution language and trading votes, bargaining and brainstorming. Jumbotron loom over the speaker’s microphone, casting the debate and challenges over resolutions for all to see. Attorneys spiritedly describe their experience with the conference. Some simply enjoy the challenge of drafting what is ultimately proposed legislation. Others enjoy networking with colleagues from around the state. Some claim the conference is more stimulating and challenging than arguing before the court and suggest it gives young associates a unique opportunity to refine their speaking and writing skills. Since attorneys propose resolutions on every area of the law, it broadens each participant’s legal education.

“No one has a client, so it is pure intellectual legal debate,” Lynn says.

Still others participating with the conference have become self-proclaimed junkies confessing only under the condition of anonymity), their bodies quivering under professional restraint and intense excitement, perhaps even desire, at mention of Roger’s Rules of Order, which gov-
This year the conference takes place October 7-9 in Monterey, the same weekend as the annual State Bar meeting, a throwback to the days when the conference was an arm of the State Bar. The San Diego County Bar will send approximately 70 delegates to the conference out of an expected attendance of 350 to 500 and is promoting at least 14 resolutions. The Bar Association of Northern San Diego County submitted three resolutions for debate.

Following conference debate, the delegates will either approve or disapprove of a resolution. The CDCBA board will assign a priority to each approved resolution depending on a variety of factors, including its likelihood of success in the legislature and whether special interest groups will line up to oppose any legislation resulting from the resolution, increasing the amount of money the CDCBA would have to spend to promote the resolution.

Lynn remembers the conference where his resolution was approved. “I came out of the conference with a high,” he says. Assembly member Judy Chu signed onto the resolution, introducing Assembly Bill 1669 in 2005. Through his own proactive measure, Lynn also persuaded Attorney General Bill Lockyer to support the bill as Chu shepherded it through the legislature.

Lynn’s next obstacle came from special interest opposition, including the chamber of commerce and the California Manufacturers & Technology Associations. The groups, representing employers, raised the prototypical statute of limitations concerns, including the effect of stale claims, expiration of evidence and the fading memory of witnesses.

Despite opposition, Governor Schwarzenegger signed the bill into law, and the new tolling provision took effect on January 1, 2006.

“If you ask me why I did it,” Lynn ponders the overtime advocacy for his client and others who could be in his client’s shoes, “it needed to be done.”

Emily Grant is an associate at English & Gloven, APC. She may be reached at emilyg123@cox.net.
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When it comes to sexual orientation discrimination, litigation and legislation regarding same-sex marriage have been dominating the national stage. Sexual orientation discrimination issues arise in a number of arenas other than the right to marry, however, and San Diego courts are playing a critical role in resolving some of these life-altering issues. In the same way that award-winning theatrical productions developed in San Diego travel to Broadway and receive national attention and acclaim, controversial San Diego cases may have a profound effect on the rights of gays and lesbians throughout the country. These cases include Donovan v. Poway Unified School District, Harper v. Poway Unified School District, Koebke v. Bernardo Heights Country Club and Benitez v. North Coast Women's Care Medical Group. These seemingly diverse cases are likely to shape the extent to which legal liability can be imposed for sexual orientation discrimination.
Donovan v. Poway Unified School District involves a school’s liability for failure to adequately address peer-on-peer sexual orientation harassment. A San Diego jury ordered the Poway Unified School District to pay two former students $300,000 based on its finding that the harassment the students suffered because of their sexual orientation denied them their right to an education. The students completed high school in a home-based study program after they suffered vandalism, shoving, pushing and name calling. The students claimed that the school had shown a repeated pattern of failing to adequately address complaints by gays and lesbians. Poway has appealed this ruling, and the case is just commencing in the Fourth District Court of Appeals.

Donovan is not the only decision involving the Poway School District and gay and lesbian harassment. Earlier this year, in Harper v. Poway Unified School District, the Ninth Circuit Court of Appeals, in a 2-1 ruling, allowed Poway to bar a student from wearing a T-shirt to school. The front of the shirt proclaimed, “Be Ashamed, Our School Embraced What God Has Condemned.” The back of the shirt stated, “Homosexuality Is Shameful.” The student claimed that the school had violated the First Amendment’s free speech, free exercise and establishment clause provisions. In free speech cases, courts typically find that the First Amendment requires society to tolerate speech that many would find highly offensive (for example, allowing the Nazis to march in Skokie). When the speech involves students in high school, however, courts are increasingly supporting restrictions on speech to promote a supportive learning environment. The divided Ninth Circuit decision found that public school students have a right to be free from verbal attacks on the basis of a core identifying characteristic, such as race, religion or sexual orientation. In striking a balance between the right to free speech and the right to learn in an environment free of discriminatory verbal attacks, two of the three judges decided that the right to speak must yield to the right to an education.

Koebke v. Bernardo Heights Country Club involved a different form of sexual orientation discrimination. In Koebke, the Bernardo Heights Country Club refused to grant the same privileges to a lesbian woman’s registered domestic partner as it granted to married members’ spouses. Koebke sued under the Unruh Civil Rights Act claiming marital status discrimination based on the club's differential treatment of registered domestic partners and married heterosexual couples. In addition, she claimed that during the time preceding her registration under the California domestic partnership law, the club impossibly discriminated against her based on her sexual orientation. Last year, the California Supreme Court agreed with both of these claims. It ruled that treating married persons differently from registered domestic partners constitutes unlawful marital status discrimination. In addition, if the club refused to grant Koebke the same privileges that it gave to unmarried heterosexual couples, the club engaged in impermissible sexual orientation discrimination.

The central issue in Benitez v. North Coast Women’s Care Medical Group also involves claims for marital status and sexual orientation discrimination. Guadalupe Benitez sought treatment for her infertility from the North Coast Women’s Care Medical Group. When she requested artificial insemination, she was informed that the group’s two doctors were unwilling to perform the procedure because of their religious beliefs. Benitez claims that the refusal was based on her sexual orientation, while the medical group has asserted that it refuses to perform insemination on all unmarried women, regardless of their sexual orientation. Last March, the Fourth District Court of Appeals ruled that the doctors’ constitutional right to the free exercise of religion could constitute an affirmative defense to Benitez’s sexual orientation discrimination claim. In addition, the court stated that if the facts at trial prove that the discrimination was based on marital status and not sexual orientation, the doctors’ refusal is not actionable because marital status was not a protected classification at the time that the events occurred. Earlier this summer, the California Supreme Court granted review of this appellate court ruling.

California has adopted some of the most progressive statutes protecting the rights of gays and lesbians, as well as other discriminated-against groups. Its domestic partnership

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We do not believe the Executive has, or should have, the inherent constitutional authority to violate the law or infringe the legal rights of Americans, whether it be a warrantless break-in into the home or office of an American, warrantless electronic surveillance, or a President’s authorization to the FBI to create a massive domestic security program based upon secret oral directives.”

—Final Report of the Church Committee, 1976

The revelation that President George W. Bush authorized the unlawful warrantless surveillance of Americans has resurrected the discussion of the proper balance to be struck between liberty and security. This discourse is not new in the United States. Benjamin Franklin warned, “They who would give up an essential liberty for temporary security, deserve neither liberty or security.” Franklin was prescient. Throughout our history, we have grappled with this apparent tension. Unfortunately, all too often we have lost our liberties—without becoming more secure. It has been primarily the executive branch that has overreached across the lines that separate the three branches of our government. In this post-9/11 world, under the guise of his “global war on terror,” George W. Bush has arrogated to himself a level of presidential authority that rivals any such usurpation in the past.

Surveillance in this country has been aimed at slaves, immigrants, political radicals, suspected lawbreakers, the poor, workers and anyone with a credit card or a computer. The government has frequently used it to suppress criticism of its policies. In 1798, the Federalist-led Congress, capitalizing on the fear of war, passed the four Alien and Sedition Acts to stifle dissent against the Federalist Party’s political agenda. The Naturalization Act extended the time necessary for immigrants to reside in the United States because most immigrants sympathized with the Republicans. The Alien Enemies Act provided for the arrest, detention and deportation of male citizens of any foreign nation at war with the United States. Many of the 25,000 French citizens living in the United States could have been expelled had France and America gone to war, but this law was never used. The Alien Friends Act authorized the deportation of any non-citizen suspected of endangering the security of the U.S. government; the law lasted only two years, and no one was deported under it.
The Sedition Act provided criminal penalties for any person who wrote, printed, published or spoke anything "false, scandalous and malicious" with the intent to hold the government in "contempt or disrepute." The Federalists argued it was necessary to suppress criticism of the government in time of war. The Republicans objected that the Sedition Act violated the First Amendment, which had become part of the Constitution seven years earlier. Employed exclusively against Republicans, the Sedition Act was used to target congressmen and newspaper editors who criticized President John Adams.

Subsequent examples of repressive legislation passed, and actions taken as a result of fear mongering during periods of xenophobia are the Espionage Act of 1917, the Sedition Act of 1918, the Red Scare following World War I, the forcible internment of people of Japanese descent during World War II and the Alien Registration Act of 1940 (the Smith Act).

During the McCarthy period of the 1950s, in an effort to eradicate the perceived threat of communism, the government engaged in widespread illegal surveillance to threaten and silence anyone who had an unorthodox political viewpoint. Many people were jailed, blacklisted and lost their jobs. Thousands of lives were shattered as the FBI engaged in "red baiting."

COINTELPRO (counter-intelligence program) was designed to "disrupt, misdirect and otherwise neutralize" political and activist groups. In the 1960s, the FBI targeted Dr. Martin Luther King Jr. in a program called "Racial Matters." King's campaign to register African-American voters in the South raised the hackles of FBI director J. Edgar Hoover, who disingenuously claimed King's organization was being infiltrated by communists. In fact, the FBI was really concerned that King's civil rights and anti–Vietnam War campaigns "represented a clear threat to the established order of the U.S." It went after King with a vengeance, wiretapping his telephones and securing personal information that it used to try to discredit him and drive him to divorce and suicide.

In response to the excesses of COINTELPRO, a congressional committee chaired by Senator Frank Church conducted an investigation of activities of the domestic intelligence agencies. The Church committee concluded, "[I]ntelligence activities have undermined the constitutional rights of citizens and ... they have done so prima-

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BY MARJORIE COHN
Constitution to assure accountability have not been applied.” The committee added, “In an era where the technological capability of Government relentlessly increases, we must be wary about the drift toward ‘big brother government.’ ... Here, there is no sovereign who stands above the law. Each of us, from presidents to the most disadvantaged citizen, must obey the law.” The committee stressed that the “advocacy of political ideas is not to be the basis for governmental surveillance.”

Congress established guidelines to regulate intelligence gathering by the FBI. Reacting against President Richard Nixon’s assertion of unchecked presidential power, Congress enacted the Foreign Intelligence Surveillance Act (FISA) in 1978 to regulate electronic surveillance while protecting national security.

FISA established a secret court to consider applications by the government for wiretap orders. It specifically created only one exception for the president to conduct electronic surveillance without a warrant. For that exception to apply, the attorney general must certify under oath that the communications to be monitored will be exclusively between foreign powers and that there is no substantial likelihood that a U.S. person will be overheard.

In 2002, in direct violation of FISA, Bush signed an executive order that authorizes the National Security Agency to wiretap people within the United States with no judicial review. It is estimated that the NSA has eavesdropped on thousands of private conversations in the past four years. Additionally, the NSA has combed through large volumes of telephone and Internet communications flowing into and out of the United States. It has collected vast personal information that has nothing to do with national security.

Electronic surveillance was first used during the Holocaust when IBM worked for the Nazi government organizing and analyzing its census data. Death camp bar codes—linked to computerized records—were tattooed onto prisoners’ forearms.

The advent of digital technology raised surveillance to a new level. Social Security numbers, credit cards, gym memberships, library cards, health insurance records, bar codes, GSM chips in cell phones, toll booths, hidden cameras, workplace identification badges and the Internet all provide the government with effective tools to keep track of our finances, our politics, our personal habits and our whereabouts through “data mining.” The Privacy Foundation determined in a 2001 survey that one-third of all American workers who use the Internet or e-mail on the job are under “constant surveillance” by employers.

One month after the terrorist attacks of September 11, 2001, United States Attorney General John Ashcroft rushed the USA Patriot Act through a timid Congress. The Patriot Act lowered the standards for government surveillance of telephone and computer communications and empowered the government to monitor books people read. It created a crime of domestic terrorism, aimed at political activists who protest government policies, and set forth an ideological test for entry into the United States.

In 1944, the Supreme Court upheld the legality of the Japanese internment in Korematsu v. United States. Justice Robert Jackson warned in his dissent that the ruling would “lie about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

That day came with the recent decision of a New York federal judge, dismissing a case that challenged the detention of hundreds of Arab and Muslim foreign nationals shortly after 9/11. None has been convicted of any crime involving terrorism. U.S. District Judge John Gleason ruled in Turkmen v. Ashcroft that the roundup and indefinite detention of foreign nationals on immigration charges based only on their race, religion or national origin do not violate equal protection or due process. This is not surprising in light of the anti-immigrant hysteria sweeping our country today.

In his 1928 dissent in Olmstead v. United States, Justice Louis Brandeis cautioned, “The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding.” Seventy-three years later, former White House spokesman Ari Fleischer, speaking for a zealous president, warned Americans that “they need to watch what they say, watch what they do.”

Milton Mayer described the escalation of surveillance that accompanied the rise of German fascism: “What happened was the gradual habituation of the people, little by little, to be governed by surprise, to receiving decisions deliberated in secret; to believe that the situation was so complicated that the government had to act on information which the people could not understand, or so dangerous that, even if people could understand it, it could not be released because of national security.”

We should heed his words. ■

Marjorie Cohn is a professor at Thomas Jefferson School of Law and president-elect of the National Lawyers Guild. She may be reached at Marjorie@tjsl.edu.
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“This only happens to other people—now I am one of the other people,” thought Hagar as he watched his property and work burn.
Russell Jellig, a sole practitioner, was returning to his office at 11 a.m. on December 14, 2005, when he noticed secretaries from adjacent offices running in the parking lot, carrying large boxes. “I did not think much of it until I entered my office and found the courtyard filled with people warning us to leave because the building was on fire,” he says.

Jellig grabbed his data disks, backup CDs and a trust file containing $175,000 of distribution checks, and he left. The checks were mailed to the beneficiaries that day in handwritten envelopes.

At first, Jellig saw only smoke coming from the roof. “Flames began to appear coming through the tiles on the roof—all this before the arrival of the fire department,” he recalls. “And I spent a rather emotional afternoon in the parking lot, watching the slow destruction of what had been my professional home for 27 years.”

By the end of the day, the first floor of the office complex suffered extensive water and smoke damage but little fire damage. The roof collapsed into the second floor, and the courtyard, and the second floor was completely destroyed by fire. Jellig had been one of the original professionals who built this structure, the Alta Vista Professional Building at 630 Alta Vista Drive in Vista.

Jellig saved much of his office furniture. Paper left in the open, such as discovery responses left on his desk and all of his law books, were lost to water damage. He turned his garage into a giant drying area for water-damaged files. “I actually had to bake some of my important files in my oven at 200 degrees to salvage the documents,” he recalls, “although I did receive some comments about ‘cooking the books.’”

Jellig offers these recommendations for protecting a law office from disaster:

• Inventory your office contents and keep a duplicate inventory offsite. Be realistic in your contents insurance policy coverage.
• If your office is a condominium, be sure your contents policy covers interior improvements and fixtures (interior walls, ceilings, light fixtures, etc.)
• Back up your hard drive and data files frequently. Keep the backup offsite.
• If you are charged with preserving clients’ original documents, keep them in an offsite, secure, fireproof facility. Fireproof safes and storage cabinets will not survive an intense fire.
• Contact your telephone and fax carriers immediately.
• Keep careful track of all expenses for insurance purposes.
• If you own your own office, file a Claim for Reassessment of Property Damaged by Misfortune or Calamity with the county tax assessor’s office. This filing requests that the assessor appraise your property after the fire and reduce your tax obligation until the building is usable again.

While Jellig would have preferred to avoid this experience, he feels it will help him streamline his practice in the future. His final caveat: If the disaster does occur, “Take it one day at a time.”

Jim Hagar was returning to his law office from an MCLE class at midday on December 14, 2005. The streets around his office were blocked off, and as he approached, he saw that it was his building that was on fire. “This only happens to other people—now I am one of the other people,” thought Hagar as he watched his property and work burn or “drown.”

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Pages 28 and 29: An early morning fire on June 25 damaged the downtown offices of the San Diego Legal Aid Society Inc. Much of the damage to the fourth and fifth floors, where the pro bono program and the Center for Health Education and Advocacy are located, was caused by smoke and water. Cleanup and repairs were expected to take upward of several weeks, during which time Legal Aid staff, including attorneys, worked out of the Southeast San Diego and Oceanside offices, and in some cases their homes. The damage “could have been much worse,” says Legal Aid executive director Gregory Knoll, adding that no confidential files were lost. The building at 1475 Sixth Avenue also housed the offices of sole practitioners.
Cary Cotten, Hagar’s partner, had shortly before been informed of smoke in the building. He grabbed a fire extinguisher and ran upstairs. Immediately, he determined that the situation was serious and started getting people out of the building.

Hagar and Cotten consider themselves relatively lucky because their office was on the first floor and the fire was concentrated on the second floor. “All electronic equipment and furniture left in the office was destroyed, mostly by water,” recalls Hagar. Loss was minimized by people taking their computers as they left the building and by the fire department throwing tarps over many things before they hit the building with water.

“Most importantly,” says Hagar, “out of this entire mess, no one was physically hurt.”

Hagar and Cotten offer these recommendations:

- Double-check your insurance policies. Does your insurance cover what you want covered?
- Reevaluate the amount of insurance coverage. Often your office is assembled in increments, so you underestimate the expense of replacing everything at once. Account for inflation.
- Add an insurance rider for salvaging paper, the “detox” process, so that it does not reduce the base coverage needed for furniture and electronic replacements.
- Have your building checked for fire dangers and compliance with current building codes. Hagar and Cotten found their older building did not have the number of firebreaks or the sprinkler system currently required by law.
- Put papers away each night. Only files that Hagar and Cotten left on desks were completely destroyed; those in filing cabinets, drawers and safes were wet but salvageable.
- Consider going to a paperless, all-electronic system with backup.
- Make sure all computers are routinely backed up offsite, including docket calendaring systems and billing programs.

The MCLE course Hagar attended the morning of December 14, 2005, emphasized the importance of offsite computer backup. As the MCLE presenter cautioned, “You never know when you’ll have a fire.”

Alice Solovay, a staff writer for San Diego Lawyer who practices law in Ocean Beach, welcomes story ideas. E-mail her at alice@solovay.net.
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Seth Skiles, a University of Minnesota law student, applied to nearly 50 law firms for a summer associate position this year, finally choosing Knobbe Martens Olson & Bear in San Diego. It was the perfect blend: 40 hours a week at the office, summarizing depositions, doing legal research and reviewing licensing agreements, plus all the other fun stuff, including a paragliding excursion, a dinner bay cruise, a weekend trip to Big Bear, a Padres game and Disneyland.

As students return to law school this fall, summer associates like Skiles are already thinking about next summer. Job applications are due as early as September, and campus visits from firms have already started. According to career services personnel at University of San Diego School of Law and California Western School of Law, about 60 percent of their students choose to work in private firms, while the remaining 40 percent find their way to government, nonprofit, corporate and academia jobs for the summer. Nearly 75 percent of Thomas Jefferson School of Law students work in private firms.

Firms go to great lengths to hire the most qualified applicants for their summer associate programs, hoping they will lead to lifelong careers. At USD Law School, 80 to 90 employers recruit on campus. Students who are interested in a firm that does not visit must send a resume and cover letter in hopes of setting up an interview. Competitive firms recruit at top law schools and will fly qualified candidates across the country for interviews. Class ranking and GPA are important, along with writing skills, school involvement, personality and previous experience.

Large, private firms attract top students with competitive pay and a broad lineup of social events. Cooley Godward, for instance, paid its summer associates $2,600 per week—comparable to law firms of similar size—and started the summer off with a weekend at a seaside resort for training and fun. At Piper Rudnick, summer associates enjoyed a weekend in Washington, D.C., which included lunch with former Defense Secretary William Cohen and private tours of Capitol Hill and the Supreme Court. Along with all the social events, law students kept busy with a variety of tasks, which included research, drafting pleadings and briefs, attending and preparing for depositions, and sitting in on client and firm meetings. Small firms offer many of the same tasks but do not provide comparable pay or perks.

Although the majority of summer internships at government agencies and non-profits don’t pay, they do provide plenty of experience. The U.S. Attorney’s Office in San Diego has close to 20 “law clerks” in the civil and criminal departments. In addition to trips to the Border Patrol, the Naval JAG Corps, prisons, the district attorney’s office and the local FBI office, there are also the Padres games and weekly happy hours.

The FBI office offers an internship for law students to work with special agents on a daily basis, pending an extensive background check—including a polygraph test—and a competitive interview process. Unlike most other government internships, the FBI pays its interns.

Many students also choose to extern for a judge over the summer or work in public interest law office. Like summer associates at private firms, judicial externs spend much of their summer doing research and writing assignments. Aaron Lavine, now a second-year law student at UCLA, returned home to San Diego after his first year to extern for a U.S. District Court judge. “Working in chambers was a great way to gain knowledge in a number of different areas of law, improve my writing skills, and see what sorts of arguments and styles persuade judges,” says Lavine.

Summer associate possibilities are endless. It’s all a matter of finding the right fit.

Tanis Leuthold graduated from the University of Colorado and is in her first year at UC Hastings College of the Law. She may be reached at tanisjl@gmail.com.
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law is one of the most comprehensive in the nation and grants same-sex domestic partners essentially identical rights to heterosexual married couples (except for the right to file joint tax returns). In addition, Unruh specifically protects sexual minorities, although most other state and federal anti-discrimination statutes fail to list sexual orientation as a protected class.

Despite California’s more comprehensive anti-discrimination statutes, the issues being litigated in California reflect the debates occurring throughout the nation in legislatures, courtrooms and the press. Central to these disputes is how to resolve the delicate balancing of competing constitutional and statutory claims. Does a school have the right to regulate one student’s speech to protect another student’s statutory right to an education? Do doctors, pharmacists and hospitals have the right to refuse medical treatment, including abortions, emergency contraceptive pills and artificial insemination, if such treatment would violate the provider’s religious beliefs?

Clashes between First Amendment rights and anti-discrimination legislation are not new. The U.S. Supreme Court has addressed the conflict between the freedom of association and anti-discrimination legislation in three recent cases. Similarly, courts, employment lawyers and constitutional scholars have debated for decades the constitutionality of employer restraints on speech to avoid liability for creating a hostile work environment. Now the spotlight is being focused on a third right protected by the First Amendment: the freedom of religion.

Advocates for greater protection of religious beliefs believe that their First Amendment right to freedom of religion should take precedence over another person’s right to be free from discriminatory conduct. Congress and most state legislatures are weighing in on the issue and passing contradictory legislation. Some jurisdictions have adopted laws specifically protecting pharmacists’ and doctors’ rights to refuse treatment to patients based on the providers’ religious beliefs, while others now have statutes specifically prohibiting such conduct. How this issue will ultimately play out in the U.S. Supreme Court is unclear, but regardless of how the issue is resolved, San Diego cases may dominate center stage.

Julie A. Greenberg is a professor at Thomas Jefferson School of Law and the 2006 recipient of the Tom Homann Friend of the Community Award. She may be reached at julieg@tjsl.edu.

1. Case number D047199 filed in the Fourth Appellate District, Division One.
2. 445 F.3d 1166 (9th Cir. 2006).
3. 36 Cal. 4th 824 (2005).
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In December 2005, the New York Times revealed that the president had, after the attacks of September 11, 2001, authorized the National Security Agency to intercept international calls and e-mails of persons in the United States.

The ensuing controversy over what the administration refers to as its “NSA activities” has exposed some unease on the part of Congress and the public about warrantless wiretapping. Unlike wiretapping conducted under federal statutory regimes—either the law known as Title III or the Foreign Intelligence Surveillance Act—the NSA activities have no judicial oversight.

The administration maintains that the NSA activities are constitutionally authorized by the president’s inherent authority and by Congress’s September 18, 2001, Authorization for the Use of Military Force and that those activities, although conducted without a warrant, are permissible under the Fourth Amendment based on the “special needs” of national security today.

Although the national debate over the NSA activities is a recent one, warrantless intrusions conducted in the name of national security are not new to residents of San Diego County. Because of the
In San Diego

by Robert S. Huie

region’s population and proximity to the international border, these intrusions, both at the border and in the interior, are a fact of life. But these activities, unlike the NSA activities, are subject to numerous institutional checks outside the executive branch.

Warrantless Border Searches

The “border search” is a long-established exception to the Fourth Amendment’s presumptive requirement of a warrant. The Supreme Court has held that warrantless border searches, authorized centuries ago by the First Congress, are permitted based on the right of a sovereign to protect its own borders.

Even though no warrant is required, the Fourth Amendment still dictates that border searches be reasonable. “Routine” border searches are deemed reasonable simply by virtue of the fact that they occur at the border, and the government can conduct such searches without any articulable suspicion. In contrast, “non-routine” border searches involving greater intrusions—for example, strip searches or body cavity searches—must be based on reasonable suspicion of smuggling or other illegal activity.

U.S. Customs and Border Protection (CBP), within the Department of Homeland Security, is responsible for policing the ports of entry into the United States. People arriving at these crossings—on foot, by car, or by bicycle—are subject to search. CBP is also authorized to conduct border searches at the “functional equivalent” of the border, including an airport where international flights land or a seaport where a ship docks after having been to a foreign port.

Warrantless Stops in the Interior

The Border Patrol, a unit within CBP, describes its mission as the detection of terrorists, illegal aliens and contraband smugglers between the ports of entry and inside the United States. The Border Patrol’s operations in the interior include, most visibly, roving patrols and traffic checkpoints. The limits of these tactics were established in the 1970s by the Supreme Court, largely in cases arising out of the San Diego area.

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Although the national debate over the NSA activities is a recent one, warrantless intrusions conducted in the name of national security are not new to residents of San Diego County.

Traffic checkpoints are either “permanent” (with fixed infrastructure) or “tactical” (temporary). Permanent checkpoints are established on major highways; tactical checkpoints are set up on secondary roads to intercept people trying to evade the permanent checkpoints. The location of tactical checkpoints can change daily, but the Border Patrol gives advance notice to motorists that a checkpoint has been set up, typically by using orange traffic cones and large signs.

The two Supreme Court decisions establishing the legality and limits of traffic checkpoints were both based on challenges to searches performed at the San Clemente checkpoint on Interstate 5, about 68 miles north of the border. In United States v. Ortiz, 422 U.S. 891 (1975), the Court held that full searches conducted at traffic checkpoints are constitutional only if based on probable cause or consent—again, akin to the standards for other law enforcement.

But the next year in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court held that the government may stop vehicles at permanent traffic checkpoints for brief questioning of the driver and passengers without probable cause or reasonable suspicion.

Lessons from San Diego
San Diego County residents have been dealing with warrantless...
intrusions for so long that such intrusions may seem like another price of living here, akin to the high cost of living. But not all residents bear the burden equally. Only those who actually cross the international border are subject to being questioned or searched at the border. And persons are probably more likely to be stopped in the interior if they appear, in the eyes of the Border Patrol, to have a “Hispanic appearance.”

Although border searches and traffic checkpoints do not involve a search warrant, they have other institutional checks. First, they are routinely subject to judicial scrutiny. In criminal cases, defendants seek to exclude evidence as unlawfully obtained, and courts have the opportunity to rule on the legality of the search (as, for example, in the Supreme Court and Ninth Circuit decisions discussed earlier). Second, these intrusions are performed pursuant to express and explicit congressional direction, authorizing CBP to conduct searches at ports of entry or within a reasonable distance of the border. Third, these intrusions are open rather than secret—you know when you’ve been stopped, and passing through the border or an immigration checkpoint is part of the daily or weekly routine of many residents.

The administration’s NSA activities have none of these institutional checks. They are performed by the executive branch according to its own standards. No court is asked to issue a warrant, and it appears that no court has had occasion to consider the legality of evidence obtained under these activities. There is no explicit statutory scheme authorizing the NSA activities; even if the Authorization for the Use of Military Force is read as authorizing the NSA activities, that resolution says nothing about searches or wiretaps specifically. The public has little or no information about the NSA activities, and the scope of disclosure to Congress is currently being debated.

The administration has argued that the NSA activities are permissible under the Fourth Amendment, based on “special needs” that go beyond a routine interest in law enforcement. But warrantless intrusions at the border and in the interior have for decades been based on the need for secure borders, striking a delicate balance between national security and civil liberties. In the name of the “war on terror,” the NSA activities strike an altogether different balance, in favor of unchecked (or at best, self-constrained) executive power.

Robert S. Huie is a litigation associate at Latham & Watkins LLP in San Diego.
So Shoe Me!
Lawyers: Rise and Shine .....Please!
Next time you’re in court, look at your opponent’s shoes. You may see something important there. Our shoes reveal something about us as legal practitioners.

Consider the prevalent role of shoes in the courtroom. A black robe can cover judicial indiscretions as to attire, but it cannot cover the judge’s shoes. Accordingly, as the judge enters the courtroom, the bailiff (sporting his own military-style shoeshine) jolts us into distraction (“All rise!”) just when we might have gained a discerning glance at the judge’s footwear for the day. Once this maneuver has been executed, the judge’s shoes are safely behind the bench, incapable of prejudicing the day’s proceedings.

Similarly, while lawyers are allowed to scrutinize jurors’ body language, jurors’ shoes are shielded by the jury box (which also keeps the jurors from kicking the lawyers). Looser standards apply to the shoes of clerks and visitors. Courtroom reporters, being so exposed, seem to do well with shoes, perhaps having been well educated in courtroom decorum.

Criminal defendants can change shoes before entering the courtroom, often swapping jailhouse flip-flops for ill-fitting Bass Weejuns. And should they end up shod in prison issue, they may still be one fashion step ahead of their lawyer.

Each witness, in addition to taking the stand, must expose his or her shoes to the jury while coming and going, so that witness credibility may be fully assessed. Trial consultants who teach the importance of primacy and recency would tell us it is the witness’s shoes the jury sees first and last. Police who testify in court understand the importance of proper footwear in overcoming the “gumshoe” and “flatfoot” stereotypes. And lawyers who hire expert witnesses beware: shoes among academics are only marginally better than those among lawyers. Prepare your expert’s footwear accordingly, being sure to get help from a non-lawyer.

The lawyer who is in court is actually “on the court” like an NBA star, relying professionally on shoes to help make points. Unfortunately, no big-name shoe company is there to ensure that the lawyer’s shoes will impress the crowd.

Lawyers can also be sabotaged by shoe problems while negotiating in chambers. There, the judge referees the contest with his or her shoes nestled impartially behind a desk. But the lawyers are placed surreptitiously in opposite sofas, which actually force their feet into the center of the room. Thus, the contest can begin, with each lawyer fielding a tag team of wingtips or pumps. Holes in soles or concomitant bad socks cannot be hidden in such a setting, and defeat can come swiftly. And the old “briefcase block” move cannot always save the lawyer whose opponent has already spotted his badly scuffed loafers.

Here are my four tips for shoe care, to keep lawyers in good standing:
1. Master the basic shine. Get professional help if needed. Get regular checkups.
2. Use shoetrees in your shoes at night to avoid that ripe banana look. Use aromatic cedar shoetrees to avoid smelling up the court (with your shoes anyway).
3. Use “sole dressing” (liquid polish for the edges of your soles). It adds a touch of class once you’ve mastered the basic shine.
4. Avoid the shoe fashion trap. Lawyers tend to stick with the shoe style they grew up with. I went to law school mid-career, and the young lawyers I interned with rescued me from my own shoe fashion trap. When you shop for shoes, stand at the rack in front of the shoes you like. Then take three steps sideways.

It’s been said, “Never associate with a rich salesman or a poor lawyer.” Poor lawyers—they never shine their shoes.

Dean Schiffman is a San Diego attorney and expert witness and may be reached at his web site, www.LAWandNUMBERS.com. Schiffman paid for college by selling and shining shoes.

TEXT AND PHOTOGRAPHY BY DEAN A. SCHIFFMAN
The Federalist Society in San Diego

Current president: Bradley A. Weinreb (past presidents: James S. Sweeney, Robert J. Gaglione, Mark S. Pulliam, Hon. Joseph P. Brannigan)
Membership: 150
Contact: Bradley Weinreb, president, 619-645-2290, bradley.weinreb@doj.ca.gov USD, Thomas Jefferson and California Western law schools each hosts a Federalist Society student organization
Recent debate topics and events: Breakfast event—Justice Antonin Scalia, the Second Amendment, “Ronald Reagan’s Leadership: Reviving the Rule of Law and the Presidency,” the war on terrorism, California Supreme Court Update (Chief Justice George), the media and movie industry and their treatment of corporations, the Constitution and the Boy Scouts, and domestic eavesdropping.

The Federalist Society Nationally

The Federalist Society for Law and Public Policy Studies describes itself as “a group of conservatives and libertarians interested in the current state of the legal order, … founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.”

Founded: 1982
National membership: 35,000
Student division: 5,000 students at 180 accredited law schools; lawyers division: 20,000 legal professionals; faculty division: established in 1999 to foster “traditional legal scholarship.” Local chapters in 60 major cities.
Activities: National Lawyers Convention, Federalist Society Speakers Bureau for organizing lectures and debates, and 15 practice groups. The Federalist Society Pro Bono Center matches lawyers nationwide with opportunities for pro bono service “in the cause of individual liberty, traditional values, limited government and the rule of law.”
Publications: Engage (journal format), State Court Docket Watch and ABA Watch
Web site: www.fed-soc.org
Established by Legal Conservatives, The Federalist Society Works Nationally and Locally to Foster Debate on Legal, Political and Social Issues

Our chapter networks with others across the nation to develop events with interesting topics and speakers. We have hosted local judges, national scholars, prominent elected officials, and justices from the California and United States Supreme Courts as speakers. The Federalist Society is a wealth of information on many issues, which helps our members to be better lawyers and business leaders. I am proud to be part of an organization that stimulates debate on important issues.

—Bradley A. Weinreb
Current President

In the 1990s, my colleague Jim Sweeney invited me to join him and other lawyers in forming our chapter. The purpose was to present prominent speakers to discuss and debate legal and public policy issues. Our first speaker was Ninth Circuit Court Chief Judge J. Clifford Wallace. Since then we have presented over 60 events, which included U.S. Supreme Court Justice Antonin Scalia, California Supreme Court Chief Justice Ron George, Veterans Affairs Secretary Anthony Principi and Independent Counsel Ken Starr.

—Robert J. Gaglione

The Federalist Society has a tradition of presenting real debates on legal issues. It doesn’t just give you the conservative side. The Federalist Society lets its members hear every side of an issue. The same can’t be said for a number of supposedly mainstream legal organizations.

—Gail Heriot

Our Federalist Society chapter is a fun and diverse group, with differing opinions. The programs present varying viewpoints, with one expert challenged by another. The free exchange of ideas allows the spectators to make up their own minds.

—Adam Van Susteren

I have been a member of the Federalist Society since 1983. I believe the society has chipped away at the political correctness in our profession, while remaining reasoned in approach and civil in tone. It thereby promotes vigorous freedom of speech.

—Michael Folz Wexler

Michael (newly relocated from New Orleans) and I are together from “womb to tomb,” including our involvement in the Federalist Society. His background is finance, and mine is economics. We both wound up in law school. We also agree with the society’s position that the judiciary should say what the law is, not what it should be.

—Shana J. Black
(and twin brother Michael B. Black)

After working on Judge Brannigan’s campaign, he suggested I join the Federalist Society. As a marketing professional, I often advise lawyers to be more friendly and approachable. I find the lawyers in the Federalist Society to be just that.

—Cheryl Mitchell

Dean Schiffman is a San Diego attorney and expert witness. He may be reached at his web site, www.LAWandNUMBERS.com.

Pictured at left are, left to right, first four: Robert J. Gaglione - Gaglione Law Group, Erin Pedersen, Cheryl Mitchell, Deputy Attorney General Bradley A. Weinreb - Department of Justice, State of California.

Front row, left to right: Deputy District Attorney Jill L. Schall, Maimon Schwarzschild, Karen L. Boudreau, Michael B. Black, Dirk T. Metzger, Professor Gail Heriot - University of San Diego School of Law, Shana J. Black.

Mastering the Unprecedented
An Interview with Ken Feinberg
Washington, D.C., lawyer Ken Feinberg served as special master of the 9/11 Victim Compensation Fund. San Diego Lawyer staff writer Richard Stevenson interviewed him in early June by phone about his experience administering the program.

San Diego Lawyer: Do you think having the 9/11 Victim Compensation Fund was a good idea?

Feinberg: Yes. I think it was an extraordinary idea. I think it was the right thing to do, a unique response by the American people to an unprecedented historical event, and I think it exhibited the best in the American character and the best in America’s heritage.

SDL: What were some of your greatest challenges in administering the fund?

Feinberg: The greatest challenge, undoubtedly, was overcoming the emotion of the moment. The 9/11 Fund was established 11 days after the attacks. No time, at all, for emotion to cool, for grieving families to move on. And it took literally years in my administration of the fund—over 33 months—to get over the hurdle of the emotional reaction of the survivors to what had transpired on 9/11.

In most times when you are a special master, you become involved in litigation where the litigation has been percolating for years. Here, the smoke had not yet cleared from the World Trade Center, the Pentagon and Shanksville when, already, there was this program and people were being asked to elect to participate.

SDL: What were some of the techniques you used to handle the stress and the emotions that all of this brought on in being the public lightning rod for the program?

Feinberg: There were really two steps we took which proved to be critically important in trying to blunt the impact of emotion. One was community town hall-type meetings where I would wade into the lion’s den—go to different locales, different towns and cities—and meet collectively in large auditoriums with scores of families, explaining to them the program and becoming the target of their venting. It was a very, very important part of this.

Secondly, I made a decision early on in the program to permit any family which wanted to, to see me privately, in confidence, for a one-on-one meeting. Those private sessions, filled with grief and sorrow, also provided the families an opportunity confidentially to vent and explain what a lost loved one or injured victim meant to them. It also helped in taking the steam out of the pressure cooker by allowing families the opportunity to meet with me, not some faceless, government bureaucrat, but a real person responsible for administering the program. And it worked.

SDL: In your past career experience, what would you point to as being the experience that best prepared you for dealing with this unprecedented program?

Feinberg: Nothing. There was no experience I had that ultimately proved particularly valuable. This was unique. The closest thing to it was when I was the special master administering the fund in the Agent Orange Vietnam Veterans products liability litigation for Judge Weinstein. But that was, still, seven years or eight years after the litigation had been filed. This 9/11 Fund was like nothing else I had ever done before.

SDL: What were some of your most rewarding moments or experiences as special master of the fund?

Feinberg: Ninety-seven percent of all the eligible claimants came into the fund voluntarily. At the end of my 33-month tenure, all but less than 100 families had entered the program. My greatest satisfaction was in distributing over $7 billion to approximately 5,300 eligible claimants. The program worked. The program, by all accounts, was ultimately a success.

SDL: I’ve been talking with some of the attorneys here in San Diego who participated in Trial Lawyers Care. Did you have an opportunity to work with any of the San Diego lawyers?

Feinberg: I worked closely with the San Diego lawyers. There was one fellow who was sort of coordinating the effort for Trial Lawyers Care out there—David Casey. I made a special trip to San Diego to attend and speak at a function honoring David Casey. And I recall vividly the extraordinary help and cooperation I received from the San Diego contingent of lawyers. Fabulous job.

Richard L. Stevenson is a sole practitioner in San Diego with an emphasis on bankruptcy, debt relief and estate planning. He may be reached at rls@rls-law.com.
San Diego Lawyers Care

The contribution of San Diego Lawyers to the largest pro bono project in United States history


Much as December 7, 1941, or November 22, 1963, this is one of those dates that will remain forever burned into our collective memory. As we approach the five-year anniversary of the unprecedented terrorist attacks that leveled the towers of the World Trade Center, damaged the Pentagon and caused a plane full of brave passengers to force United 93 into the ground in Shanksville, Pennsylvania, it is fitting not only to call to mind the grisly wake-up call those attacks presented, but also to remember the countless unsung heroes who gave aid and comfort to the families of the victims. Not many will forget the bravery of the rescue firefighters, police officers, emergency medical technicians and others who rushed to Ground Zero to do what they could, many of whom lost their own lives in the process. Yet what is less talked about and, perhaps, even less remembered is the extraordinary response by the American lawyers to stand up and do what they could to help the families of those who lost their lives on September 11, 2001. This is their story.

Trial Lawyers Care was organized in early 2002 by the American Trial Lawyers Association (ATLA) to provide pro bono legal assis-

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BY RICHARD L. STEVENSON
The San Diego County Bar Foundation is a not for profit foundation established to improve public awareness of the legal system in San Diego County, the administration of justice and the delivery of legal services through the distribution of its funds. Supported by voluntary contributions from the San Diego community, the Bar Foundation supports, funds and encourages the creation of public service programs which promote education, citizenship and the ideals of justice.

Since its inception, the Bar Foundation has granted over $1,000,000 to non-profit organizations throughout the county that provide law related public service programs. Bar Foundation grants help children, the elderly, the sick and disabled, victims of domestic violence, immigrants and asylum seekers throughout San Diego County.

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This list reflects contributions sponsoring the San Diego County Bar Foundation’s An Evening in La Jolla as of July 21, 2006. Contributions received after that date will be reflected in future publications.
tance for families seeking compensation under the 9/11 Victim Compensation Fund. Lawyers from across the nation volunteered their time and paid their own costs with the single goal of seeking as much compensation for their clients as possible under the fund. It was the largest pro bono project ever conducted in the history of the United States. Remarkably, the greatest number of volunteer lawyers, economists and other experts outside of the New York/New Jersey/Connecticut area came from right here in San Diego.

Challenges
The approximately 50 individuals from San Diego who donated their time, energy and resources to help the victims’ families faced significant challenges. As San Diego volunteer David S. Casey Jr., who was president of ATLA in 2004 and oversaw the conclusion of the 9/11 Fund explained, the lawyers who volunteered had no idea of the diversity they would face. There were victims from all over the country and all over the world. The airship laws of the different states and various countries had to be learned and applied. The administrative aspect was overwhelming.

The volunteer attorneys from San Diego made numerous trips to New York, meeting with families, going out to Ground Zero, making videotapes and putting their cases together—all the while trying to figure out the process and learning how to operate under the restrictions of the fund rules. As San Diego volunteer Ben Bunn, president of Consumer Attorneys of San Diego in 2002, explained, the challenge was not the distance involved but figuring out what could and could not be done within the maze of regulations.

There was, however, the opportunity to be creative. As volunteer Chris Hulburt, president of Consumer Attorneys of San Diego in 2004, related, working under the rules of the 9/11 Victim Compensation Fund was very different from working with the well-defined rules most familiar to those who are experienced in litigating serious personal injury or wrongful death cases. The 9/11 Fund did not have the same rules. Volunteer lawyers had to consider what really were all the economic losses involved and how to prove them. Volunteer Ken Turek explained that emotional damages were capped, so the challenge was to maximize the economic losses allowable while working with the restrictions of the fund rules.

Rewards
Ask any of the volunteers involved, and each one will tell you that participating in this project was the highlight of his or her professional career. It truly was a labor of love. The San Diego contingent donated from $10 million to $20 million worth of pro bono services and incurred out-of-pocket expenses in the six figures. But these volunteer attorneys were not motivated by prospects of publicity or self-promotion. No, these San Diego attorneys stood up, gave 1,000 percent and lent their time, talent and expertise to help a nation heal. In the end, the largest recoveries obtained for victims’ families, approximately $100 million overall, were recovered by San Diego lawyers. These San Diego lawyers exemplified the essence of what being a lawyer is all about—to help people. Giving, indeed, is its own reward.
The following are the San Diego lawyers and other professionals who donated their time and efforts to the Trial Lawyers Care program

**Lawyers**
- Andy Albert
- Lou Arnell
- Dan Bacal
- Vincent Bartolotta Jr.
- Jude Basile
- Gayle Blatt
- Bill Berman
- Kelly Berman
- Steve Boudreau
- Ben Bunn
- Roy Cannon
- David Casey Jr.
- Jill Cleary
- Robert Francavilla
- Robert Gagnone
- Chris Hallburn
- Ken LaFayette
- Mickey McGuire
- Bill Naumann
- David Noonan
- Steve Nunez
- Cathy Richardson
- Elise Sanguinetti
- Fred Schenk
- Dennise Schoville
- Eric Seiken
- Lisa Stepp
- Ken Turek
- Randy Walton
- Joel Whitley
- Deborah Wolfe
- Stephen Yunker

**Economists**
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- Connie Cotter
- Peter Formuzis
- Laura Fuchs
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- Roberta Spoon
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- Hannah Witteveen
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—Gail S. Goodman, Professor of Psychology, University of California, Davis

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Each jurist serves separately and independently of every other jurist listed. There is no sharing of fees or responses except for the cost of placement of this announcement.
Perilous Journey

Failure to Supervise Client Funds

“What do you mean, insufficient funds?” attorney Meri Lewis shouted into her cell phone.

“That’s what the letter says,” Bill Clark, her partner, responded sheepishly.

“What do we do about this?”

“The first thing we do is talk to that bookkeeper that you hired and find out what the hell happened!”

Clark trembled as he put the phone down. Everything had been going so well and now this. In the two years since he and Lewis had formed their partnership, just out of law school, they had come a long way and enjoyed success beyond anything they had expected. Through hard work, they had built up a lucrative personal injury practice. They had started small, just the two of them working out of a tiny executive suite. Now they had more work than they could handle, impressive offices, and

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a staff that consisted of two secretaries, three paralegals and, for the past four months, a bookkeeper, Clark's niece, Sacagawea.

Clark looked at the letter from the State Bar. "Under the authority of section 6091.1 of the Business and Professions Code, your bank has notified the State Bar of the following insufficient funds activity in your client trust account." A check written to a medical provider had been paid against insufficient funds. "We request your written explanation of the reported insufficient funds by July 1, 2006, enclosing any supporting documents. Thank you for your anticipated cooperation."

Clark put the letter down and went to Sacagawea's cubicle. She worked part-time, 15 hours a week while attending community college. Although she had no training in bookkeeping, she was a relative and had been willing to work for just a little above minimum wage. Clark's mood did not improve when she saw her workstation. Papers were piled everywhere around her cubicle, and Clark saw several unopened envelopes from the firm's bank sitting in her in-box.

He remembered how they had sat down after she was hired. He had patiently explained the firm's procedures for managing the client trust account that he had devised. Clark had shown her the written ledgers that he had set up for each client and the written journal for each bank account; he had shown her how to prepare a written reconciliation for each month's bank statement and the written journal for client funds received, as required by the record-keeping standards of California Rule of Professional Conduct 4-100(c). He had given her the State Bar's Handbook on Client Trust Accounting and told her to read it. She was bright and seemed to grasp it all. He trusted her; he had convinced Lewis, skeptical about hiring Sacagawea, to trust her. He had even provided her with a signature stamp with his name so she could sign checks when he and Lewis were out of the office.

With a start, he realized that he had not sat down with Sacagawea in the past six weeks to review her work; he had been caught up in the Charbonneau wrongful death trial for four weeks and then spent two weeks playing catchup on everything else.

Clark pawed through the chaos of papers in the cubicle and found the ledgers. Nothing had been updated in the past month. Grim faced, he strode to his office. Closing the door, he thought, just how deep are we?

He logged on the firm's online research provider. The answers he found were not reassuring. An attorney's complete failure to supervise staff to ensure proper handling of client trust account funds was a violation of the duty of competence under Rule Prof. Conduct 3-110(A), In the Matter of Robins (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr 708, 712-714. An attorney's responsibility for safety of funds held in a client trust account is a non-delegable duty. While an attorney cannot be held responsible for every detail of office procedure, the attorney has a duty to supervise the work of subordinates and staff, In the Matter of Malik-Yonan (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr 627, 634-635. A chill ran through him as he read how Malek-Yonan's office staff had used the signature stamp to steal $1.4 million from her clients. Suddenly he became afraid to open those envelopes from the bank.

For a long time, Clark stared out the window at the beautiful view of San Diego Bay. What was the name of that attorney who handled State Bar matters? It would not come to him. The only thing that ran through his mind was the thought that the road ahead had suddenly taken a dark and dangerous turn.

David Cameron Carr is a sole practitioner and a member of the San Diego County Bar Association Legal Ethics Committee. The opinions are his alone. He may be reached at dccarr@ethics-lawyer.com
1. United States v. Montero-Camargo, 208 F.3d 1122, 1135 (2000), established the Border Patrol’s roving agents authority to conduct searches of vehicles when there is “reasonable suspicion” that the motorist or passengers are of “Hispanic heritage.”

   True □   False □

2. In order to inspect a vehicle after being stopped at a traffic checkpoint, Border Patrol agents must show probable cause and receive consent prior to commencing with an inspection.

   True □   False □

3. The Border Patrol, a unit within the U.S. Customs and Border Protection (CBP), describes its mission as the detection of illegal aliens, contraband smugglers and terrorists, between the ports of entry and inside the United States.

   True □   False □

4. Because of Congress’s September 18, 2001, “Authorization for the Use of Military Force,” most of the activities conducted by the NSA have been deemed permissible under the Fourth Amendment based on the “special needs” of national security.

   True □   False □

5. The Supreme Court has held that the authorization of “border searches” is based on a long-held exception to the Fourth Amendment’s presumptive requirement of a warrant.

   True □   False □

6. The U.S. Customs and Border Protection, operating within the Department of the Interior, is responsible for policing the major ports of entry into the United States.

   True □   False □

7. CBP is authorized to conduct border searches at what is defined as the “functional equivalent” of the border, such as airports where international flights land and seaports where ships dock after having been to a foreign port.

   True □   False □

8. The San Diego sector of the Border Patrol operates four full-time, permanent traffic checkpoints.

   True □   False □

9. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court held that only those individuals who actually cross an international border are subject to being questioned or searched at the border.

   True □   False □

10. The Ninth Circuit has held that a motorist’s U-turn while approaching a traffic checkpoint may, combined with other factors, constitute reasonable suspicion supporting a stop.

    True □   False □

11. “Non-routine” border searches involving greater intrusions are permitted based on the right of a sovereign to protect its own borders.

    True □   False □

12. In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the Court held that the Fourth Amendment prevented a roving patrol from stopping a vehicle to question its occupants about their citizenship unless the agent’s observations led him to reasonably suspect that the vehicle contained illegal aliens.

    True □   False □

13. “Permanent checkpoints” can only be established on major freeways and highways connected directly to an international border crossing, within 25 to 75 miles of that port of entry.

    True □   False □

14. In United States v. Ortiz, 422 U.S. 891 (1975), the Court held that full searches conducted at traffic checkpoints are constitutional only if based on probable cause or consent.

    True □   False □

15. The Border Patrol’s “selective referral” of motorists to secondary inspection areas for questioning is permissible whether there is “reasonable suspicion” or not.

    True □   False □

16. The current administration has argued that ongoing NSA activities are permissible under the Fourth Amendment, based on “special needs” that go beyond a routine interest in law enforcement.

    True □   False □

17. Unlike wiretapping conducted under federal statutory regimes, including the law known as Title III and the Domestic Intelligence and Security Act, the phone and e-mail interception and other wiretapping activities of the National Security Agency have no judicial oversight.

    True □   False □

18. Although border searches and traffic checkpoints do not involve a search warrant, they have other institutional checks including judicial scrutiny, express and explicit congressional direction, and a non-secretive forum.

    True □   False □

19. “Routine” border searches are deemed reasonable simply by virtue of the fact that they occur at the border, and the government can conduct such searches without any articulable suspicion.

    True □   False □

20. Because of the unique nature of the Border Patrol’s roving agents national security responsibilities, they are exempt from the same standards of reasonable suspicion and probable cause imposed on other law enforcement agencies.

    True □   False □

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Spanish explorer Pedro Fages, Kit Carson, the Mormon Battalion and travelers along the Southern Trail all found refuge and comfort at the springs and pasture surrounding Vallecito. After weeks crossing the desert, it was the first greenery they saw. Tucked in at the base of Storm Canyon, it was the perfect place to build a stage station where weary westbound travelers could rest before the climb over the mountains and down into San Diego in the 1850s.

A sod building was built in 1852 by the military as a sub-depot for military supplies and later enlarged to serve as a stage stop. By 1854 it was part of a mail route between San Diego and Yuma. Then, in 1857, James E. Birch was awarded the first transcontinental mail route from San Antonio, Texas, to San Diego. Mules were used on various parts of the route, and it became known as the “Jackass Mail.” The route was taken over by John Butterfield, and Vallecito became a stage stop on the Overland Stage Route.

The stages ran from 1854 to 1860 to and from San Antonio. Passengers were carried along with the mail. A ticket to San Antonio cost $200; a trip to Yuma was $40. Passengers were encouraged to carry firearms to aid against robberies and Indian attacks. Gentlemen were advised not to smoke cigars or pipes, as that would be offensive to the women traveling. However, chewing tobacco was acceptable, provided they spat with, and not into, the wind.

There were the occasional robberies or attempts. Some have become legendary. On one such robbery, the stage was held up. Two robbers were killed, but two others got away with the loot. The treasure was buried, and the robbers went to the stage station and had a few drinks. In their “liquored up” condition, they got into an argument and shot and killed each other. The strong box is still out there, somewhere.

Another legend attached to the Vallecito Stage Station concerns the story of a young lady who was traveling to San Francisco to be married. She became ill and died at the Vallecito station. She was buried there, in a white dress intended to be her wedding gown that was found in her luggage. Some say that on moonlit nights she appears in her white dress, seeking her fiancé. When the stage station was reconstructed in 1934, the San Diego Union reported that one of the workmen on the job actually quit, claiming he had seen her ghost.

With the advent of the railroad and the beginning of the Civil War, the southern overland mail route was discontinued. There were still stages between San Diego and Yuma, now run by Wells Fargo. Some of the stages carried the gold from Julian to San Francisco. By 1877, the Vallecito Stage Station was abandoned.

In 1934, the old stage station was reconstructed, using materials that were salvaged from the old station. Today the station is part of a San Diego County Park. The rebuilt stage station and the mesquite trees around it still provide a welcome break from the heat and wind of the desert.

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