

It's 2018. Do you know where your documents are?

JAN 08, 2018

BY ROBERT ROSBOROUGH

Welcome to a new year of the Marin Lawyer. I hope everyone had a wonderful holiday season with some relaxing time off with family and friends. I love to see the festive decorations around town and to stay in and enjoy my own Christmas trees (yes, that plural is not a mistake!) At the same time, I know that many lawyers have year-end crunches and I hope all of you are taking a break for yourself soon. Since one of the main things I do in addition to editing this very publication is mediate family conflict, you can imagine the holidays are not idle for me!

Onward to 2018: When you hear the word, "security," what comes to mind? The line at Civic Center? A well-funded IRA? President Trump's bigger nuclear button? Who would have thought that we would be legitimately concerned about nuclear war in 2018? But nuclear security is not the only thing North Korea is disrupting. Last month, the U.S. officially blamed North Korea for the "wannacry" cybersecurity attack that affected over 150 countries. With Russian hacking, the Equifax breach just one of many, cybersecurity is much in the news.

Has all of this news translated to any action to improve your own cybersecurity? If you heard Lucasfilm Deputy Chief Counsel Rhonda Hjort speak at our membership meeting last summer, you know what a massive undertaking cybersecurity is for businesses—and the law firms they hire. This month, Michael Overly gives a few tips to get you and your clients started on improving your cybersecurity. I would like this to be a theme for 2018 and if you have advice about it or just want to share the good practices you take, please consider sharing it through the Marin Lawyer. What do you tell your clients about the insecurity of email? How secure is the cloud service you use to share documents? I think most of us could still learn a lot about cybersecurity.

Jaime Dorenbaum comes at cybersecurity from a different angle: his article paints a disturbing portrait of the potential reach of the Computer Fraud and Abuse Act. Have you considered that you could be subject to criminal prosecution for simply using the “delete” key on your work computer? He makes clear that the law could use an improved approach to cybersecurity itself.

I would like to thank our guest editor this month, Tom Brown, who also happens to be MCBA’s new President. He is starting the year as a prolific author, including his welcoming President’s Message, a profile of Marie Barnes, one of MCBA’s new Directors, and an inspiring article about the Canal Baseball Academy.

Please join me in welcoming Tom into office at MCBA’s annual Installation Dinner, coming up soon on January 20th. You can sign up to attend (<https://marinbar.org/events/?type=event&id=165>) here.

Gratitude and Resolutions

JAN 07, 2018

BY THOMAS BROWN

Greetings, members of the MCBA: How are those New Year's resolutions going so far? Is everyone returning client phone calls within 24 hours, sending sincere meet and confer letters to opposing counsel, and drafting concise and to the point motions in limine. Wait, what's a motion in limine? Oh, that's for another time.

Notes of Appreciation

For my initial President's Message, I would like to begin by thanking our out-going President, Dorothy Chou Proudfoot. I first met Dorothy about fifteen years ago when she came to the Marin County District Attorney's Office by way of Boalt Hall and the Cal Marching Band. We worked together for several years as prosecutors and I knew right away that DCP was a special attorney, someone who was devoted to her work and to providing the best advocacy on behalf of her clients, the People of the State of California. We can all agree that Dorothy has worked tirelessly to advocate on behalf of the Marin legal community during her time at the District Attorney's Office, on the Board of Directors and especially this past year as President. She has presided over an active Board which has seen an increase in membership in the MCBA by both attorneys and non-attorneys. She has been an excellent ambassador for the Bar. Please join me in congratulating Dorothy on a great job and wishing her well in her new position as an Administrative Law Judge (and recovering prosecutor) for the San Francisco City Rent Board.

I also wish to acknowledge those Board directors who are leaving the Board (but not the MCBA), having provided years of invaluable service. James Sell, Dotty LeMieux, Rodrigo Dias, Patricia Conway, Romy Taubman, and Marlene Getchell (Five-Year Past President) have all contributed to the success of the MCBA over the past few years. Finally, let's welcome our new directors: Marie Barnes (profiled in this

issue), Michael Wear, Nestor Schnasse, Greg Brockbank, Clayton Greene, and Jessica Karner (Five-Year Past President). I look forward to working with the new directors and the entire Board this coming year.

Resolutions for 2018

A few months ago, Past President Wanden Treanor candidly asked me what my goals were for the upcoming year. As a trial attorney, prone to thinking on his feet, I deftly dodged the question by offering up a vague comment about wanting to provide meaningful services to the membership. Turns out Wanden was not the only one who was interested in what I was focused on for 2018, as members of the bar who approached me at the MCLE Fair, the Holiday Mixer and other events over the past few months made similar inquiries.

Looking forward to 2018, this is both an exciting and challenging time to be an attorney. On a national scale, an investigation of the executive branch by special counsel Robert Mueller is ongoing, major constitutional issues such as immigration, gun rights, and technology challenges under the Fourth Amendment will be heard by the Supreme Court, sexual harassment investigations and litigation concerning well known individuals across all industries are occurring on a daily basis, and high stakes intellectual property battles between technology titans such as Uber and Waymo continue to be fought. Closer to home, our local courts and government attorneys are facing budgetary challenges, several significant criminal cases are working their way through the judicial system, and the devastating fires in Sonoma and Napa Counties will have lasting legal effects on our community.

In thinking of goals or resolutions for 2018, I'm reminded of the Marin County Bar Association's Mission Statement: (1) To involve, encourage, and support Bar Association members; (2) To serve as a liaison to the Marin County courts; and (3) to educate the community and enhance access to legal services. To meet our Mission, I pledge to continue to provide innovative and interesting speakers to our membership and am thrilled to have enlisted Tom McNerney and Susan Feder to act as co-chairs of the Program Committee. Our first speaker for 2018 will be Dan Mogulof, Vice Chancellor at UC Berkeley who will address the membership on the many political and legal challenges facing the nation's leading public university system. In the coming months, we will present speakers on other topical issues, including a candidate forum for our own upcoming District Attorney election.

We are continuing to develop a vibrant relationship with the Bench and will be having regular meetings with Presiding Judge Paul Haakenson and Court Executive Officer James Kim to discuss ways the Bar can further integrate with the Bench. Expect to see articles from the judges in The Marin Lawyer and updates from our Bench Bar Committee in the near future. Finally, through our Pro Bono Committee (chaired by Nestor Schnasse and Tim Nardell) and Public Outreach Committee (chaired by Anna Pletcher), the Board will continue to promote and support the very successful Lawyers in the Library Program, the annual Mock Trial competition and the Teens and the Law Programs that benefit so many members of Marin County.

In closing, I welcome all members to reach out to me directly with any comments or suggestions on ways to get involved and support the MCBA's Mission Statement and I look forward to working with an engaged Board and membership in 2018. It's a privilege to serve as President of the Marin County Bar Association.

Six Resolutions for a Secure New Year: Actions to Increase Your Cybersecurity

JAN 06, 2018

BY MICHAEL OVERLY

It's that time of year again. As we begin 2018, businesses, including law firms, should be considering potential resolutions for improving their security practices in the year ahead. Here are six action items that have the potential to substantially increase overall cybersecurity. I am not suggesting that every client or firm pursue each action item, but everyone should at least consider efforts in these areas.

1. Take inventory of information assets

While it seems entirely fundamental, very few businesses, regardless of size and sophistication, have an accurate map or inventory of their information assets. Unfortunately, without an accurate inventory, it is impossible to be confident that assets are adequately protected. That is, you cannot protect assets if you don't know where they exist, or if they exist at all. Take time this year to create or update your inventory, at least of your key information assets, and then review existing security protocols, procedures and policies to ensure those assets are protected.

2. Improve employee training

The old adage of "an ounce of prevention..." could not be more appropriate when it comes to

employee cybersecurity training. It is generally agreed upon that employee training is one of the best means of improving overall security for an organization. It is also generally agreed upon, particularly in light of the numerous breaches that have occurred over the past year, that user errors are one of the primary sources of compromises. In the year ahead, think of quality, not quantity, of training. Explore means of better communicating cybersecurity issues to your personnel. Take a look at my blog post that discusses possible approaches to employee training (<https://www.csoonline.com/article/3237949/security-awareness/employee-training-remains-the-best-first-line-of-defense-against-cybersecurity-breaches.html>) here.

3. Tune up vendor and business partner agreement practices

The likelihood of a cybersecurity breach by “insiders” to the business cannot be overstated. Business partners and vendors who have access to company systems and their data, particularly cloud providers, present one of the greatest risks to information security. Take time to assess your current contracting practices to ensure your form agreements include appropriate, detailed provisions regarding information security and legal compliance. Ensure those provisions are supplemented with pre-contract due diligence to ensure the business partners’ and vendors’ security practices are consistent with your own, that the partners and vendors have not had prior breaches, that they train their own personnel well, that they have well-documented security policies, etc.

4. Revisit existing vendor and business partner agreements

Identify your key existing vendor and business partner agreements, assess the risks presented by those contracts and consider appropriate action to take when those agreements become eligible for renewal. Renegotiate problematic contracts to provide better data protections. If the vendor or business partner is unwilling to offer those protections, look for potential replacement vendors or identify other means of mitigating risk (e.g., the use of encryption).

5. Review and update security policies

If you have not assessed the currency of your security policies in the last year, plan a full review for this year. An assessment of existing policies is particularly useful following an inventory of information assets, as discussed above. In any event, facilities and systems change, industry practices evolve and new legal requirements may have issued. Review and update your security policies to ensure they keep pace with these changes.

6. Conduct an audit or update existing audits

Finally, if you have not conducted a third-party audit of your systems and facilities in the last year, consider this year as the perfect time to conduct your first audit or an update to your last audit. Audits can help reset security programs by identifying new vulnerabilities and, potentially, previously known vulnerabilities that have not been mitigated. Audit results are also very useful in updating corporate security policies.

Including one or more of the foregoing action items in your plans for the new year will achieve several ends. First and foremost, they are proven means for increasing overall information security. Second, they will decrease potential liability. Third, if a breach should occur, these efforts are extremely effective in showing you have acted reasonably to protect your data and systems, which is what governmental regulators first look for when assessing whether to pursue actions against businesses.

This article was originally published in substantially similar form on CSOOnline.com on December 14, 2017. Read that version (<https://www.csoonline.com/article/3242810/data-protection/6-resolutions-for-a-secure-new-year.html>) here.

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Press Delete, Go Directly to Jail? The Scope of the Computer Fraud and Abuse Act's Damage Provision

JAN 05, 2018

BY JAIME DORENBAUM

Can deleting information, even personal information, from your work computer land you in prison? That was the central question posed in *USA v. Zeng*, Case No. 4:16-cr-00172 in the Northern District of California.

Mr. Zeng is a former employee of gaming company Machine Zone, Inc., a Silicon Valley company famous for its "Game of War: Fire Age" video game and its commercials featuring supermodel Kate Upton and former Governor Arnold Schwarzenegger. He was charged with one felony count of "damaging" his company-issued laptop under the Computer Fraud and Abuse Act ("CFAA").

Mr. Zeng was arrested by the FBI in August 2015, after being accused of stealing trade secrets from Machine Zone. The FBI alleged that Mr. Zeng was attempting to use the purportedly stolen trade secrets in China. The arrest and the subsequent arraignment were widely covered in the media.

After more than a year of legal motions and negotiations, the prosecution dismissed most of the charges, including the allegations of trade secret theft. However, the government maintained a single felony charge under the damage provision of the CFAA, which prohibits, "knowingly caus[ing] the transmission of a program, information, code, or command, and as a result of such conduct, intentionally caus[ing]

(https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-U

SC-1339126929-692694678&term_occur=1&term_src=title:18:part:I:chapter:47:section:1030) damage without authorization, to a
(https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-695191731-692694672&term_occur=3&term_src=title:18:part:I:chapter:47:section:1030) protected computer." (18 U.S.C. § 1030 (a)(5)).

Codified in 1986, the CFAA targets hackers. It contains various subsections that impose civil penalties and make it a crime to do such acts as accessing or deleting electronic information without authorization. The law, however, has come under widespread criticism in the media for its overbreadth. Critics claim that the law gives corporations and federal prosecutors unchecked power to prosecute employees for almost any conduct they commit on their work machines, even deleting personal files temporarily saved on a work computer.

The popular criticism of the CFAA has spread into the Courts. There, most of the litigation has focused on what employees are authorized to do on their work computers and what corporate outsiders are allowed to do with publicly viewable information on social media websites. For example, is an employee who has access to a certain database for technical purposes allowed to actually view it, even for a non-work purpose? Can a company scrape publicly viewable data on Facebook and make use of it? The answer to these questions depends largely on the scope of the authorization that the employee or the visitor to the Facebook page has.

Mr. Zeng's case, however, focused on a different aspect of the CFAA, namely, what constitutes damage to a computer? In a federal criminal trial before the Honorable Judge James Donato held in July, the federal government argued that the deletion of any information, no matter whether the deletion was permanent, or whether the information deleted was valuable to Mr. Zeng's employer, qualified as damage under the CFAA so long as it could prove Mr. Zeng intended to delete the information. In other words, intentionally pressing the "Delete" key constituted the transmission of a command that damaged a protected computer. Indeed, since Mr. Zeng had admittedly erased the contents of the laptop before returning it to the company, the government's proposed interpretation of the CFAA was breathtakingly broad.

Conversely, Mr. Zeng presented several arguments that would limit the scope of the CFAA's damage

provision. He argued, based on case law from other jurisdictions, that the deletion had to occur via an external transmission. He also argued that the government had to prove that the company could not access the deleted information via an alternative source. Judge Donato tested both sides' arguments but appeared particularly troubled by the broad scope of the government's argument. During the government's closing argument, Judge Donato asked the government's lawyer whether it made her queasy that an employee, in a dyspeptic moment, could erase files from his or her computer and be guilty of a federal felony? The lawyer responded with an argument that in this case Mr. Zeng's conduct exhibited more than a mere dyspeptic moment but dodged the Court's more generalized fear.

Ultimately, Judge Donato demonstrated that this thought at least made him queasy. On December 5, Judge Donato found Mr. Zeng not guilty without providing further explanation. In case you're wondering, he did not need to provide an explanation for his decision. Of course, this was great news for Mr. Zeng, who had endured criminal prosecution for over two years. However, without the benefit of Judge Donato's reasoning, the scope of the CFAA's damage provision remains nebulous.

Unless you have been living in a bunker for at least the past year, you know that hacking is one of the central topics facing corporations and law enforcement these days. Beyond the news of Russia's state-sponsored hack of the 2016 U.S. Presidential election, there have been other high-profile hacks such as the Equifax data breach in 2017. These well-known hacks underscore the danger posed by failures in cybersecurity as technology becomes more ubiquitous in everyday life. However, the laws we have to fight these hacks, such as the CFAA, are antiquated and, as in Mr. Zeng's case, can target innocent people. Cases like Mr. Zeng's make clear that in addressing the critical need for cybersecurity, we must update the laws that enforce it to ensure that we protect the public safety without compromising the freedoms we value so dearly.

Marie Barnes

JAN 03, 2018

BY THOMAS BROWN

Get to know Marie Barnes, one of the newest members of the Marin County Bar Association Board of Directors. The Marin Lawyer recently sat down with Marie to find out a little more about her practice and interests.

Describe your practice and do you have a particular emphasis?

Like many Marin County attorneys, I have my own practice in San Rafael, specializing in Criminal Defense and Family Law. I have represented defendants charged with DUI; theft offenses; domestic violence; assault & battery; sex offenses; property offenses; white collar crimes; and juvenile offenses. In the area of Family Law, I primarily focus on issues of domestic violence and how it affects either divorce or child custody. I have represented both sides in disputes involving domestic violence, representing both the aggressor and the victim(s).

Why did you decide to become a lawyer?

Since I was in high school I have known that I would become a lawyer. I wanted to become a lawyer to help people, especially those who do not have access to the courts for various reasons.

Why do you live in Marin?

My husband and I met in Marin and he is a San Rafael native and he always had great memories to share with me about his childhood growing up in Marin and we wanted that for our boys. We love what Marin has to offer and feel very fortunate to be in a county that has such outdoor beauty within minutes.

What do you love to do when you're not busy practicing law?

When I'm not practicing law, I love traveling with my family. We load up our truck and hit the road.

Tell us about your family.

I am married and have two [Editor's Note: adorable] sons ages five and two.

If you could pursue any other career besides law, what would it be and why?

If I could pursue any other career it would be in nursing, but pediatric nursing. I think the medical field is so rewarding and I love children and consider myself a nurturing person.

Why did you join MCBA?

Not being from Marin County, I quickly realized that Marin has a tightly knit legal community. So, I joined MCBA to get to know people and to get involved in the community I now live and work in. I am also a member of the Association of Latino Marin Attorneys (ALMA) as well as the Alameda County Bar Association.

Why did you become a Director?

I became a director because I wanted to make MCBA more accessible to attorneys new to Marin like myself and I really enjoy the programs and I want to be part of that.

If you had to pick a single highlight of your career, what would it be?

Working on a cold case murder that ultimately got dismissed.

Let's Play Ball: The Canal Baseball Academy Expands Opportunity for Marin Youth

JAN 02, 2018

BY THOMAS BROWN

At press time, the Major League Baseball winter meetings had just concluded and highlights included the New York Yankees purchase of Giancarlo Stanton from the Miami Marlins' fire-sale, the Los Angeles Angels winning the Shohei Ohtani sweepstakes, and the signing of Evan Longoria by the SF Giants. In a short few months, America's pastime will be in full swing again and while Major League executives have been busy improving their teams in the off season, the Canal Baseball Academy, one of Marin County's local non-profit baseball organizations, has spent the hot stove league also getting ready for the upcoming season.

Founded in 2013 by Kevin Loughlin, a transportation consultant and former baseball star at San Rafael High School, the CBA is a non-profit, co-ed baseball program for underserved boys and girls in San Rafael's Canal neighborhood. Kevin has been involved in the Marin baseball community since he was old enough to swing a bat. In addition to playing baseball at San Rafael High School, Kevin has coached at multiple youth levels, from the San Rafael Little League to his alma mater and Terra Linda High School.

The vision behind the CBA arose out of Kevin's experience at San Quentin State Prison, where, while playing in a men's baseball game against a team of inmates several years ago, Kevin was so impressed with the experience that when he was asked to coach the San Quentin Giants, he immediately accepted. The caliber of competition was very high and Kevin coached the SQ Giants for several years, playing games against junior colleges and men's league teams. Many inmates expressed the positive

impact youth sports can have on young men and women as they lamented to Kevin that if, "I had stayed with youth sports, I might never have ended up...[in prison]." This positive experience prompted Kevin to seek out other ways he could give back to the local community and inspired him to develop a baseball program in the Canal neighborhood of San Rafael.

The Canal is home to more than one thousand boys and girls between the ages of five and twelve, but the neighborhood had always been underrepresented in San Rafael Little League. Before the CBA was founded, there were no more than four kids from the Canal playing little league at any given time, virtually none of them girls. Many of the kids were from single-parent families where transportation to the games and practice was a challenge.

Kevin partnered with San Rafael Little League and the SF Giants "Junior Giants" Program to break down barriers by offering reduced or free registration to kids to participate in the CBA. The Junior Giants, T&B Sports and Linedrive Baseball donated equipment. He developed a ride-sharing program to get kids to games and practices. For coaches, he recruited local high school players and this past summer, players from Drake, Marin Catholic, Terra Linda, San Rafael and Redwood high schools all participated in the program by coaching the various teams at the CBA, giving them an opportunity to give back to the community. The entire Loughlin family got involved in the program as Kevin's three sons, Ryan, Sean and Conner, have all coached and his wife, Suzy, a teacher at Drake High School, handles the administrative side of the organization.

A critical component of the program's success has been the focus not only on the fundamentals, but also on encouraging the boys and girls from the Canal to participate in San Rafael Little League and to build new friendships, both in their community and beyond. The CBA provides meaningful opportunities for the kids to learn valuable life lessons like self-esteem, teamwork and respect. Now with about forty to fifty kids, including approximately ten girls, in the San Rafael Little League program, the program is diverse and thriving.

Moreover, graduates from the CBA have gone on to play high school baseball and softball and one of Kevin's rewarding experiences is to attend a local high school game and see kids he coached in the Canal a few years ago wearing a high school uniform. This year, Kevin expects to see about ten players from the CBA on San Rafael and Terra Linda's high school teams. The San Francisco Giants have

acknowledged the CBA as one of the most successful programs in the Junior Giants community program, citing it as a model program for underserved youth.

Kevin fondly recounts a recent story illustrating the positive impact of the program. In the minor league championship game this past year, young Kevin Ochoa, a reserved and quiet kid, who two years ago had never been exposed to baseball, hit a two-run double to win the league championship and was carried off the field by his teammates. "The moment sent chills down my spine and is something that young man will never forget."

Looking forward, the CBA hopes to obtain its own dedicated field. As Kevin noted, "There is no greater feeling than walking out on to a real baseball field for the first time."

The Gossip According to Matthew

JAN 01, 2018

BY MATT WHITE

Dorothy Proudfoot, 2017 MCBA president, has abandoned the DA's office (and all of us) for differently colored pastures. Dorothy has accepted an administrative law judge position in San Francisco, hearing matters before the Rent Board. We'll miss you, Madame President.

Speaking of comings and goings:

Also on the outbound train, much to your correspondent's dismay, is the lovely and talented Karen Howard, MCBA's membership and events coordinator, who will return to her roots in the pharmaceutical industry (the legal one). Taking over her desk will be Kiersten Ross, M.B.A, until recently COO of Office Playground, "the leading online provider of office fun, stress relievers, and toys for your desk."

ADR section co-chair Susan Feder, a mediator with Judicate West, was prominently featured in a recent Daily Journal article. Bay Area attorneys gave Susan very high points for her empathy and listening skills. Check it out

(https://2n7vd2497fas1hftfy108q49-wpengine.netdna-ssl.com/wp-content/uploads/2017/12/Judicate-West_Susan-Feder-Mediation_DJ-11-24-17.pdf) here.

Richard Kalish is on his eighth year of teaching "business ethics" (don't all shout "oxymoron" at once) at Dominican U in San Rafael. Catalina Lozano has been an adjunct professor at Hastings for 35 years (impossible!); this year, she teaches Moot Court. Judge Beverly Wood and Matt White (that's me!) co-teach mediation at USF Law. Also at USF Law: Retired Marin judge (and past

MCBA president) Lynn Duryee, who instructs in two levels of civil procedure. Past MCBA president Mary McLain is an adjunct professor at Hult International Business School (headquartered in MA), following professorship stints at UC Hastings and The Law School Formerly Known as Boalt. Eileen Barker has taught conflict resolution at Berkeley Law, Hastings, JFK University, and Sonoma State University.

Rob Rosborough, editor-in-chief of this very publication, teaches conflict resolution at USF's Fromm Institute. Mill Valley lawyer Francine Ward teaches IP at the California Desert Trial Academy in Indio, CA. Edward Villanueva teaches real estate law at City College of San Francisco. Anna Pletcher educated students at Hastings and Santa Clara law schools before her current position at Berkeley Law. Recently retired Ninth Circuit Court of Appeals mediator Pete Sherwood has been teaching negotiation at Golden Gate University law school since before your correspondent was born.

Young Deborah Breiner has entered her 25th year of law practice. For those who care about the math, that's a quarter of a century. My, how time flies!

Lawyers in the News Dept: Some Marin residents, angry over the County's purchase of the San Geronimo Golf Course, hired Riley F. Hurd III to file suit. Riley is a partner at Ragghianti Freitas.

Public service notice: You know those cute Facebook posts that ask you about something from your past? Who was your favorite high school teacher? What was the first concert you attended? Some say those questions are posed by fraudsters, seeking answers to your online security questions. Is this advice borne of paranoia or of wisdom? That's for you to decide, dear reader.

(<https://www.usatoday.com/story/tech/talkingtech/2017/04/29/careful-before-posting-your-10-concerts/101078214/>) Be sure to check out this article.