

Facebook Lives On, Even When You Don't

Many Americans use some form of social media, including Facebook, Twitter, LinkedIn and Instagram. What happens to an individual's social media accounts after death, however, varies greatly among the different types of social media because the accounts are subject to the companies' respective agreements or terms of service. Facebook, for example, has now given its users new options on what will happen to their accounts when they die.

Generally, when a person with a Facebook account dies, the Facebook terms of service agreement does not allow anyone else to access or log in to the decedent's account. In 2009, Facebook allowed accounts to be "memorialized" upon the death of an account holder. Memorializing an account essentially freezes the deceased user's account and in certain circumstances, people could share memories on the memorialized timeline. Family members or friends could request that Facebook memorialize the decedent's account by notifying Facebook of the death. However, even when

an account was memorialized, others were not allowed to manage the account and nothing could be changed in the account.

Facebook's recent changes allow users to decide if they want their account permanently deleted or memorialized upon their death. Further, if the account is memorialized, a user can select a "legacy contact." A legacy contact is someone the user chooses to look after the user's account if it is memorialized. A legacy contact will be able to do things such as write a pinned post for your profile, respond to new friend requests, and update your profile picture and cover photo. A user can also allow the legacy contact to download an archive of the photos, posts and profile information shared on Facebook. The legacy contact, however, still will not be able to log in as the deceased individual or see the decedent's private messages.

While the laws regarding fiduciary access to social media accounts are scarce and the terms of service agreements generally restrict access to the

accounts, Facebook has taken a step in the right direction for its users.

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Drones: Fun and Convenient Or Threat to Airspace Safety and Privacy Rights?

Drones delivering an order from an online retailer, drones checking whether a backyard complies with applicable HOA restrictions, or drones examining my property for county standing water violations—each example is an element of a fascinating spectrum as the law seeks to deal with the proliferation of easily flown, relatively inexpensive, and robustly equipped drones, also known by the legal name of unmanned aircraft systems (UAS).

Long in use at the military level—almost



completely outside the United States—drone usage has begun to proliferate domestically in law enforcement. There also appears to be a strong desire for their more robust use in commercial, research and hobbyist circles. This national buzz about drones and their usefulness in a variety of settings has policy makers playing catch-up. Entrepreneurs and interested parties see the technology as ready for prime time, but officials at the Federal Aviation Administration (FAA)—charged with the protection of the safety of our national airspace system—have been slow to define the parameters of safe usage.

To address that safe usage, the FAA has released a proposed rule on small drone use. It suggests a variety of regulations related to the safe use of small drones, defined as those under 55 pounds,

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Texting While Driving: What's the Law?

To text or not to text while driving? Safety demands that the answer should be a resounding “No.” Legally, however, the answer in Arizona depends on what city or county one happens to be driving through at the time.

Arizona is one of a handful of states that has yet to enact a statewide ban on texting while driving. However, some municipalities across the state have chosen to adopt ordinances that prohibit drivers from texting in their jurisdiction. The cities of Phoenix, Tucson and Flagstaff, along with Coconino County, all have some form of a texting ban in place.

Phoenix drivers are prohibited from using a wireless electronic communication device to send or receive a written message while operating a motor vehicle. Advocates of texting bans have identified a flaw in the breadth and enforcement reach of the Phoenix ordinance because, while it prohibits receiving messages, it does not prohibit the reading of a text message.

In Tucson or Flagstaff, any form of texting is banned. Those ordinances prohibit drivers from using a handheld wireless device to compose manually, send or read a written message while driving. Tucson specifically lists texting, emailing, and instant messaging as prohibited acts. In addition to the texting ban for drivers, Flagstaff also prohibits cyclists from texting while riding a bicycle.

Lastly, if you happen to drive through Coconino County, which includes Sedona, Flagstaff, Page, Tuba City and Grand Canyon National Park, you are prohibited from texting and typing while

driving but you are allowed to use a hands-free mobile device for listening and talking while driving.

For several years, Arizona legislators have attempted to adopt a statewide ban on texting. During the 2015 legislative session, three bills aimed at regulating texting while driving were introduced, although the session adjourned on April 3 without any of the bills passing. HB 2343 would have prohibited teenage drivers from using a wireless device while driving; HB 2370 was similar to the Tucson ordinance and would have prohibited drivers from using a mobile device to manually write, send or read a written message while driving; and SB 1102 would have prohibited a driver from sending or receiving a written message while operating a motor vehicle.

SB 1102 had the most traction, although proponents of a statewide texting ban had concerns with its language, as it did not prohibit a driver from reading a text message while driving.

There is no doubt that texting and driving is a dangerous combination that affects the health and safety of all drivers. We can anticipate other municipalities moving forward and adopting ordinances that prohibit texting in their jurisdictions, as the Arizona Legislature has again failed to enact a texting ban.

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including limiting usage to daylight-only operations, confined areas of operation, visual line-of-sight requirements, and authorization for a variety of commercial and research uses. The comment period on the proposed rule ends as we are going to publication. This rule will be the first significant step in general authorized use of such drones in our national airspace system.

Safe usage of drones is only part of the policy puzzle. Drones are and could become an even more effective tool in law enforcement. This, of course, raises significant constitutional questions related to privacy and search and seizure protections we all share under our constitution and laws. The technology potentially makes it far more cost effective and efficient for law enforcement to “investigate” what is going on in and around our homes. The law is notoriously slow to react to emerging technology, and it is likely that the courts will be confronted with this issue in the coming years. There is, however, case law that addresses law enforcement use of helicopters and other

technology that allows law enforcement to peer into our homes. The leap from that case law to address drone usage might be a short one.

In addition, while not a constitutional issue, but certainly a personal privacy issue, the use of drones equipped with camera or video equipment raises the specter of our neighbors or random operators flying a drone to peek over our walls and into our homes. Is a drone viewing our yard and home a step too far, or simply the technological equivalent of our neighbors in their two- or three-story house peering out their window into our backyard or bedroom window? Expectations of privacy and the protections in the law for those expectations are sure to be a key part of private drone usage and regulation moving forward.

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Chris practices in the area of government law as well as technology and cybersecurity/privacy issues.

Firm Announces Five Newly Elected Capital Members

Gust Rosenfeld PLC announces that five attorneys were elected capital members of the firm effective January 1, 2015. The new capital members are **Raul Abad, James T. Giel, James W. Kaucher, Barbara U. Rodriguez-Pashkowski** and **Susan Plimpton Segal**.

Raul Abad (Phoenix office) practices in the firm's Real Estate practice area and focuses on sophisticated commercial real estate transactions, including the negotiation and preparation of all relevant documents such as leases; purchase agreements; joint development agreements; covenants, conditions, and restrictions; easements and financing documents.

James T. Giel (Phoenix office) practices in the Public Finance practice area and has represented municipalities, school districts, charter schools, community facilities districts, nonprofits, industrial development authorities and other entities. He has served as bond counsel, issuer's counsel, borrower's counsel and underwriter's counsel.

James W. Kaucher (Tucson office) practices in the Litigation and Labor and Employment practice areas, primarily in defending members of the health care industry on a wide variety of issues. His experience also includes general commercial litigation.

Barbara U. Rodriguez-Pashkowski (Phoenix office) is Chair of the firm's Diversity Committee and practices in the Environmental Law practice area. She advises federal, state, and local governmental entities and private companies on a broad range of environmental and natural resources issues including environmental due diligence, Underground Storage Tank compliance and appeals, air quality and water quality permitting, Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and other regulatory compliance.

Susan Plimpton Segal (Phoenix office) practices in the Public Law, Education Law and Employment Law practice areas and is a recognized expert in government procurement laws and regulations. She advises public and private sector clients and has served as lead counsel in complex litigation regarding public education financing, as well as predatory lending practices.

PERSONAL NOTES



Scott A. Malm recently handled two cases resulting in favorable published appellate decisions involving real estate issues. Scott also participated in an invitation only roundtable discussion with all Division 2 Court of Appeals judges to discuss improving court procedures. In February, he was a featured speaker for a National Business Institute seminar on Legal Descriptions and Title Insurance.

Nicholle Harris was profiled in the January-February 2015 issue of AZ Business Magazine as one of the Forty Arizona Business Leaders under the age of 40.

Christopher A. Schmaltz presented on Cybersecurity and Privacy at the Arizona Association of School Business Officials 2015 Winter Conference. His topic was on federal and state laws that impact school computer networks and the information they hold, and what to do in the event of a breach and loss of data.

Chas Wirken spoke to the Arizona State University Alumni Law Group, the law college's teaching law firm, about trial practices that will increase success on appeal.

Public Records Requests: Defining 'Reasonably Prompt'

Public entities facing onerous public records requests received good news in December 2014 with the decision in *McKee v. Peoria Unified School District*. In this case, a teacher filed a public records request with his former employer, a school district. The statute does not specify what determines a prompt response, so when the plaintiff did not receive a response 11 days later, he filed a lawsuit. The trial court said the school district's response to the records request was not reasonably prompt under A.R.S. §39-121.01 and awarded \$67,500 in attorneys' fees.

The Court of Appeals reversed and vacated the award, finding the district acted reasonably. The court pointed out that the teacher asked for information that had to be gathered from several departments and redacted before disclosure. In addition, the district produced records on a rolling basis and immediately produced documents when it discovered they had been inadvertently omitted. This decision is currently on appeal to the Arizona Supreme Court. As a result, the Court of Appeals' favorable ruling could be short-lived.

Stay up-to-date with this case and others by asking any of the firm's public law attorneys to sign you up for Gust Rosenfeld's public law email alerts.

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Arizona Consumer Fraud Act Ruling: Prescription Drugs are Merchandise

The Arizona Court of Appeals recently held that consumers can sue drug companies for consumer fraud, rejecting the argument that prescription drugs are not merchandise under the Arizona Consumer Fraud Act (ACFA).

This case was a private cause of action for consumer fraud. Although the Arizona Attorney General, who also has jurisdiction under the ACFA, has obtained consent judgments against drug manufacturers, *Watts v. Medicis Pharmaceutical Corporation* is the first reported decision in Arizona directly holding that prescription drugs are merchandise under the ACFA. Courts in other jurisdictions, such as New York and Illinois, have reached contrary conclusions.

In *Watts v. Medicis Pharmaceutical Corporation*, the plaintiff sued Medicis, the manufacturer of the acne drug Solodyn, for injuries she suffered after taking the medication and developing drug-induced hepatitis and lupus. The informational publications that the plaintiff received when the drug was prescribed did not specifically warn of the possibility of side effects such as lupus or hepatitis, although the company's full prescribing information given to physicians did include that information. The court held that Medicis could be liable under the ACFA and refused to apply the learned intermediary doctrine to bar the plaintiff's products liability claim against the drug manufacturer.

The ACFA proscribes "any deception, deceptive or unfair act or practice, fraud, false promise, [or] misrepresentation" in the "sale or advertisement of any merchandise." "Merchandise" is defined under the ACFA to include "objects, wares, goods, commodities, [or] intangibles[.]" Medicis argued that a drug prescribed by a physician should not be treated as merchandise under the ACFA because it was not a merchant-to-consumer transaction and that prescription drugs were not included in the definition of merchandise. The court disagreed, noting that a prescription drug is a "tangible good available for purchase in the marketplace," which is "often advertised and sold to consumers in a manner similar to other consumer goods, implicating the need for protection" under the ACFA.

The court also held that the common law learned intermediary doctrine did not bar the plaintiff's products liability claim because it is inconsistent with Arizona's Uniform Contribution Among Tortfeasors Act (UCATA). The learned intermediary doctrine would bar a claim for products liability against the manufacturer of a prescription drug, so long as it provides a proper and adequate disclosure and warning to the physician who prescribes the drug. The UCATA establishes comparative fault, holding multiple defendants liable only for their respective percentage of fault. Because the learned intermediary doctrine would result in

the physician bearing all the liability for an inadequate drug warning and does not allow for a "fair allocation of fault," the court held that the doctrine was not compatible with the UCATA. In reaching this result, the court acknowledged that it had rejected prior rulings of the court.

It is anticipated that Medicis will file a petition for review by the Arizona Supreme Court.

Editor's note: Susan Plimpton Segal served as the Chief Counsel of the Public Advocacy Division at the Office of the Arizona Attorney General from 2005-2011.

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ET·Y·MOL·O·GY COR·NER



DRONE

In the insect world, a drone is a male bee that does no work, and thus a lazy worker (Old English, 1520). In the 1940s the pilotless German V-1, or buzz bomb, was referred to as a drone. Today, modern pilotless drones are used in the war against terror, for surveillance of borders, and soon to deliver merchandise—but I drone on.

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Rick, our etymologist, practices in the areas of commercial law and litigation.

NEW FACES



DANIELLE J.K. CONSTANT

Danielle J.K. Constant joined the firm in September 2014. Her practice concentrates on litigation and employment law.

Constant joins Gust Rosenfeld after working for 12 years in the Pima County Attorney's Office where she handled more than 40 felony jury trials, including victim and non-victim crimes in vehicular, violent, and homicide offenses. She also appeared in Justice and Superior Courts on more than 1,000 occasions for bench trials, evidentiary and restitution hearings, and calendaring matters. She has also negotiated thousands of resolutions of difficult felony cases in the Case Evaluation System.

Constant is a graduate of Dordt College, Iowa, and received her J.D. from the University of Arizona's James E. Rogers College of Law.



ZACHARY D. SAKAS

Zachary D. Sakas joined the firm in February 2015. His practice concentrates on public finance, municipal law, and real estate finance. Sakas received his J.D. from the University of Texas, graduating with honors and completing additional MBA coursework regarding real estate development

and financial modeling. He holds an undergraduate degree, summa cum laude, from the University of Arizona. Currently Sakas serves on the board of the Phoenix Art Museum Men's Art Council; he also is a member of the University of Arizona Honors College Advisory Board.



WILLIAM S. SOWDERS

William S. Sowders joined Gust Rosenfeld in March 2015. Sowders' practice is concentrated on litigation, specifically in the areas of products liability, medical malpractice and healthcare, transportation, and accident and personal injury.

He received his J.D. from The Catholic University of America, Columbus School of Law, and completed his B.S. degree at Northern Arizona University. In 2012 and 2013, Sowders was honored as a Super Lawyers® Rising Star. He has been published in several professional

journals and conducted a webinar on "Medical Records Review and Analysis." Sowders is a member of the State Bar of Arizona, the State Bar of California, and the Maricopa County Bar Association.



MINA CERIMAGIC

Mina Cerimagic joined the firm in March 2015; she concentrates her practice on litigation, specifically in the area of real estate litigation.

Cerimagic received her J.D. from the Sandra Day O'Connor College of Law at Arizona State University, where she was a Pedrick Scholar. Prior to starting her legal career, she worked for the Arizona Justice Project. Mina is active in her profession and is a member of the Scottsdale Bar Association, Arizona Women Lawyers Association, and the Real Property Section of the State Bar of Arizona.



CAROL M. ROMANO

Carol M. Romano is an accomplished trial attorney who has practiced in many areas of civil litigation, including medical malpractice, products liability, general insurance defense, employment law and toxic torts. Carol joined the firm in March 2015. She has litigated and tried cases with multi-million dollar exposure for insurance carriers, corporate entities and individuals.

Carol is AV® Preeminent™ rated by Martindale-Hubbell®, representing the highest rating in legal ability and ethical standards.

She is an adjunct professor at Arizona Summit Law School and a frequent speaker at seminars and conferences.



KELLI K. WILLIAMS

Kelli K. Williams joined Gust Rosenfeld in March 2015 in the litigation department. She previously worked in nursing home defense, toxic tort litigation, legal malpractice and appeals. She is a 2001 graduate of the Southwestern University School of Law in Los Angeles and is also a graduate of the University of California at Berkeley (1997).

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Tom Chauncey II	Corporate Law	Jennifer MacLennan	Education Law; Labor and Employment Law
Mark Collins	Litigation—Real Estate; Real Estate Law	Christina M. Noyes	Franchise Law
Peter Collins Jr.	Commercial Litigation; Insurance Law; Personal Injury Litigation—Plaintiffs	Sean P. O'Brien	Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
Robert D. Haws	Education Law; Employment Law—Management; Litigation—Labor and Employment	Gerard R. O'Meara	Trusts and Estates
John L. Hay	Franchise Law	Frederick H. Rosenfeld	Corporate Law; Municipal Law; Public Finance Law
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