

Los Angeles Lawyer

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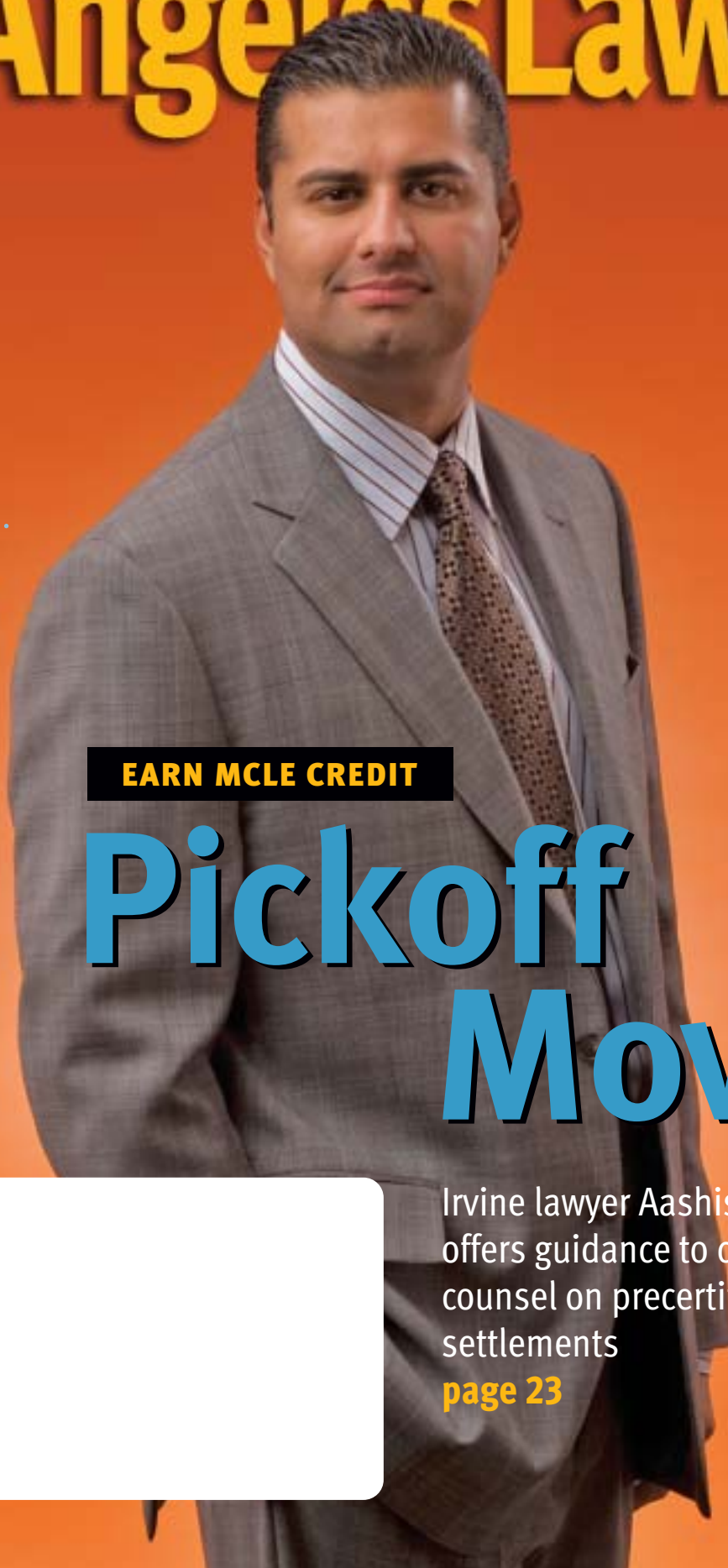
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Los Angeles Lawyer
the magazine of
the Los Angeles County
Bar Association
September 2009
Volume 32, No. 6

COVER PHOTO: TOM KELLER

LOS ANGELES LAWYER (ISSN 0162-2900) is published monthly, except for a combined issue in July/August, by the Los Angeles County Bar Association, 1055 West 7th Street, Suite 2700, Los Angeles, CA 90017 (213) 896-6503. Periodicals postage paid at Los Angeles, CA, and additional mailing offices. Annual subscription price of \$14 included in the Association membership dues. Nonmember subscriptions: \$28 annually; single copy price: \$4 plus handling. Address changes must be submitted six weeks in advance of next issue date. POSTMASTER: Address Service Requested. Send address changes to Los Angeles Lawyer, P. O. Box 55020, Los Angeles CA 90055.

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WHERE ON EARTH?

GPS tracking devices raise Fourth Amendment issues for civil and criminal law practitioners alike

BUCKMINSTER FULLER once said that humanity is acquiring all the right technology for all the wrong reasons. Today, dramatic advances in Global Positioning System (GPS) technology may lead attorneys to risk liability by using it for the wrong reasons.

GPS technology can track persons and property through the transmission of electronic impulses. Using GPS devices, transportation companies now track cargo via satellite. Employers can monitor the movements of employees. Ankle bracelets with GPS technology allow law enforcement personnel to surveil those convicted of domestic violence and sexual abuse as well as perpetrators of other crimes. GPS devices are used to track Alzheimer's patients. The uses of GPS technology by civil government include the production of maps for the study of soil, agriculture, and utilities. Commercial applications include nav-

igation, inventory control, fleet management, and perimeter security. GPS devices can not only be attached to vehicles but also placed into sneakers, embedded in plastic cards, and injected under the skin.

GPS technology has evolved so rapidly that the critical legal issues it raises are yet to be fully addressed by U.S. federal and state courts, which have developed very little case law in this area.¹ Certain incidents in recent years suggest not only the wide range of GPS applications but also the inevitable legal issues that will emerge in civil and criminal courtrooms:

- A Utah man, accused of illegally trapping bobcats, was tracked as he visited trap lines in the northern part of the state. Game wardens attached a GPS device to his truck, tracked his movements, and then raided his home. Lawyers for the defendant claimed

that the attachment of a GPS device to their client's pickup truck was illegal.²

- A Vail, Colorado, private investigator, Dave Alan Stark, was arrested and charged with criminal tampering after he installed a GPS device on an SUV in connection with a divorce case and, by doing so, triggered a bomb scare.³

- A Southern California woman reported to a private investigative agency that a former lover was stalking her. Police had agreed to take a felony stalking report but could not promise any follow-up by overburdened detectives. The investigative agency, through careful examination of the woman's vehicle,

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found a GPS device hard-wired to one of the engine components. A temporary restraining order, and prosecution for electronic stalking, resulted.⁴

- In Connecticut, one car rental agency warned in its rental contract of a possible \$150 fee for “excessive wear and tear” if the renter drove over 79 miles per hour. What was not so prominent in the contract was the fact that each vehicle was equipped with a GPS device. The Connecticut Supreme Court found the penalty fees to be a violation of the state’s Unfair Trade Practices Act and not, as the rental car company argued, simple liquidation of damages.⁵

- A Commerce, California, man was convicted of assault with a deadly weapon after Los Angeles County Sheriff’s deputies, suspecting him in a robbery, planted a GPS device in his vehicle.⁶

- High-profile homicide investigations in several states have included the use of tracking devices. The technology was partly credited, to cite one example, for the conviction of Scott Peterson in the murder of his wife and unborn son.⁷

- According to published reports, Joumana Kidd planted electronic devices on vehicles operated by her husband, NBA star Jason Kidd, to help prove charges of infidelity in their high-profile divorce case.⁸

Attorneys contemplating the use of GPS technology in any context should educate themselves on how the technology actually works, the best way it can be deployed to aid in resolving legal matters, and whether they face liability for using it. To address these issues effectively, attorneys learning about the technology must also become familiar with the constitutional framework within which future cases will be decided. They can do so by examining the guidance that can be extrapolated from the existing case law that emerged as courts addressed older, related technology. Attorneys who use, or allow their agents to use, GPS technology must particularly weigh and consider its implications regarding the issues of search and seizure and reasonable expectations of privacy.

How GPS Devices Work

GPS technology involves global satellites and radio navigation.⁹ With breathtaking accuracy, it answers the fundamental question, “Where on the earth am I?” It does so by using three components: space satellites, a control center, and a user device. The space component consists of 24 satellites, with four equally spaced satellites in six separate orbital planes. These satellites orbit the earth twice daily, transmitting signal information to earth.

The control component, headquartered at Schriever Air Force Base, Colorado, measures incoming signals from the satellites and

then uploads precise orbital transmission data back to the satellites. The data may be sent in subsets to GPS receivers (the user component) in the form of radio signals.

The GPS user component consists of the devices that receive the data and covert it (through triangulation) to indicators of position and time. Basically, the receiver unit calculates how far it is from three satellites by comparing the time a signal is sent with the time it is received. The time difference indicates the distance of the receiver from the satellite. By comparing the distances of the three satellites, the GPS receiver can map precisely where the user is and display the location electronically. Depending upon the type of the receiver and its sophistication, GPS technology can provide a location with accuracy to less than three meters (just under 10 feet).

Clearly, GPS technology can deliver precise data. It also leaves a credible, recoverable record of the specific movement, in time and space, of the object being tracked. This raises a tangled skein of critical issues that courts will have to address, including who owns the data.

Because GPS technology—with its capability of allowing a person to monitor someone else’s precise movements for weeks, or even months, at a time—represents a significant departure from previous technologies, it raises, as never before, decisive concerns about threats to personal privacy. “Where on the earth am I?” is an acceptable question, but GPS technology can answer questions such as “Where on the earth is my husband?” “Where on earth is my employee?” or, “Where on earth is the person or contraband that is the subject of this criminal investigation?”

What the California Penal Code, the U.S. Constitution, and judgments in criminal matters all demonstrate is that law enforcement agencies, attorneys, their clients, and their agents should be very cautious when employing GPS devices to track people or property. To avoid potential liability, careful consideration must be given to Fourth Amendment protections and to reasonable expectations of privacy.

In devising state and federal criminal statutes in this area, legislators generally have been guided by concerns over the privacy of citizens. In California, the Penal Code is clear regarding what is, and is not, permissible when installing GPS devices on automobiles for non-law enforcement purposes.

Section 637.7 of the California Penal Code states:

(a) No Person or entity in this state shall use an electronic tracking device to determine the location or movement of a person. (b) This section shall not apply when the registered owner,

the lessor, or lessee of a vehicle has consented to the use of the electronic tracking device with respect to that vehicle. (c) This section shall not apply to the lawful use of an electronic tracking device by a law enforcement agency. (d) As used in this section, “electronic tracking device” means any device attached to a vehicle or other movable thing that reveals its location or movement by the transmission of electronic signals.

Section 637.7(f) has particular relevance to attorneys and the agents they hire:

A violation of this section by a person, business, firm, company, association, partnership, or corporation licensed under Division 3...of the Business and Professions Code shall constitute grounds for revocation of the license issued to that person, business, firm, company, association, partnership, or corporation....

When attorneys instruct investigators during the course of civil litigation, they must be adamant that when it comes to electronic tracking devices, no wiggle room exists regarding the specific language in the criminal statute. The installation of GPS technology on a vehicle is legal only when it is undertaken with the permission of the vehicle’s owner or with the approval of law enforcement.

Constitutional Implications

The protection provided by the U.S. Constitution’s Fourth Amendment “against unreasonable searches and seizures” extends to an individual’s property and effects as well as his or her person. Attorneys seeking guidance for conducting investigations in connection with civil litigation will find that case law involving the use of GPS devices in civil matters is virtually nonexistent. Therefore, counsel must rely upon the larger analytical framework provided by criminal statutes and court findings in criminal matters involving GPS and its predecessor technology.

When the U.S. Constitution was written, the most likely search and seizure would have taken place under the color of military authority and upon suspicion of criminal activity. Those arguing that a search was warranted probably would have offered proof of its reasonableness with evidence from informants and personal observation.

Evolving technologies added more effectiveness to the arsenal of law enforcement but also raised myriad questions regarding the applicability of the Fourth Amendment to the newer crime fighting tools. In the early twentieth century, authorities found their activities evolving from trailing a suspicious buggy on horseback to tracking automobiles

using a battery-powered radio transmitter or beeper. A beeper device, clandestinely attached to a suspect's car, would periodically emit a radio signal. Although the transmission distance was limited, radio beepers allowed law enforcement to monitor the strength of the signal and judge the distance of the vehicle being monitored. The benefits of beepers as an aid to vehicle surveillance by law enforcement were clear. Even if a suspect was "lost" during surveillance, as long as the transmitter continued sending a signal, law enforcement could calculate its distance from the subject vehicle and reestablish visual observation.

A large body of case law developed over the implications of beeper technology and Fourth Amendment rights. Federal courts struggled with whether attaching a beeper to someone's vehicle constituted a seizure, or whether monitoring a beeper could be considered a search. They grappled with defining a person's reasonable expectation of privacy for his or her vehicle when it is parked, or when it is operating, on a public street. When courts ruled on Fourth Amendment issues regarding beeper technology, they addressed two distinctly different issues: the installation of a device, and tracking a subject vehicle. The principles extracted from these criminal law cases provide an analytical foundation for assessing how courts will apply constitutional principles to the use of GPS technology.

In 1967, in *Katz v. United States*, the U.S. Supreme Court considered the appeal of a California man who placed telephone calls from a Los Angeles public phone booth to Boston and Miami.¹⁰ FBI agents had placed a listening and recording device on the outside top of the booth. This device yielded information that was admitted at the defendant's trial in the U.S. District Court for the Southern District of California, and he was convicted on charges of transmitting wagering information. The court of appeals affirmed the conviction, finding that no Fourth Amendment right had been violated because the installation of the device involved "no physical entrance" to the space occupied by the defendant.

The Supreme Court reversed the conviction, holding that government agents had violated the privacy on which the defendant relied. Further, the Court ruled that the eavesdropping activities constituted search and seizure. Noting that the Fourth Amendment covered not just the seizure of goods but of oral statements as well, the Court found that "the Fourth Amendment protects people rather than places [and] its reach cannot turn on the presence or absence of a physical intrusion into any given enclosure." Justice Harlan's concurring opinion in *Katz* conveys

his understanding of "a two-fold requirement" in determining whether a privacy protection applies to an individual: 1) "a person [must] have exhibited an actual (subjective) expectation of privacy," and 2) "the expectation [must] be one that society is prepared to recognize as 'reasonable.'"

The Supreme Court directly addressed the issue of whether monitoring beeper signals constitutes illegal search and seizure in *United States v. Knotts*.¹¹ In this 1983 case, Minnesota law enforcement officers, believ-

seizure had occurred. "The beeper surveillance," the Court found, "amounted principally to following an automobile on public streets and highways. A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements." Furthermore, it held that "[n]othing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with such enhancement as science and technology afforded them in this case."

The next year, in *United States v. Karo*, a



ing that a suspect was involved in the manufacture of illegal drugs, arranged for the placement of a radio transmitter in a container of chloroform that was later sold to him. Using the beeper signals transmitted by the device, police tracked the defendant to a secluded Wisconsin cabin. After several days of visual surveillance, police secured a search warrant, searched the cabin, and found a drug laboratory. The beeper, however, was installed without a warrant. The defendant was convicted in federal district court for conspiring to manufacture controlled substances, but the court of appeals reversed the conviction, finding that monitoring the beeper signal violated the Fourth Amendment.

Looking back, in part, to its findings in *Katz* in 1967, the Supreme Court held that monitoring beeper signals did not violate any legitimate privacy expectation on the part of the defendant, and therefore no search or

Drug Enforcement Administration (DEA) agent learned through a government informant that three defendants had ordered 50 gallons of ether, which they intended to use in extracting cocaine from imported garments.¹² The DEA obtained court authorization to install a beeper in one of the containers holding the ether. When Karo, one of the defendants, picked up the containers from the informant, DEA agents, following the radio signals, pursued the vehicle back to his residence. Subsequently, the monitored container was moved to four more locations, the last of which was a locker—jointly rented by two defendants in the case—in a commercial storage facility. Ultimately, the container was taken to the home of one of the defendants, a warrant was executed, cocaine found, and the defendants arrested for a variety of offenses related to the production and sale of cocaine. The defendants filed a pretrial

motion to suppress the seized evidence as the fruit of the unauthorized installation and monitoring of beeper radio signals. The district court granted the motion to suppress, and the court of appeals affirmed the district court finding for all but one of the several defendants.

In its ruling, the Supreme Court reversed both the district and appeals courts, holding that installation of the beeper did not transgress the Fourth Amendment. Monitoring the beeper, however, did violate the defendants' Fourth Amendment rights. The concealed beeper provided information from the defendant's private residence that could not otherwise be obtained through visual surveillance. Nevertheless, the Court concluded that the evidence was not tainted and should not have been suppressed because ample evidence—apart from the information derived from the beeper transmissions—established probable cause to search the defendant's dwelling.

A later case from the Ninth Circuit that was not reviewed by the Supreme Court addressed the warrantless installation of a GPS device.¹³ In *United States v. McIver*, the court of appeals in 1999 reviewed the convictions of Christopher McIver and Brian Eberle, who were found guilty in the U. S. District Court for the District of Montana of conspiracy to manufacture marijuana. After U.S. Forest Service officers found marijuana plants being cultivated in a remote section of the Koonai National Forest, law enforcement authorities installed concealed, motion-activated surveillance cameras. The tapes from the cameras revealed several unidentified suspects, two of whom were later identified as McIver and Eberle.

Two law enforcement agents affixed a magnetized GPS device and a magnetized beeper to the undercarriage of McIver's vehicle while it was parked in his driveway. The two men were later videotaped harvesting the plants and followed back to their joint residence. Agents arrested the men while they were unloading the contraband. In appealing their convictions, McIver and Eberle asserted a violation of their Fourth Amendment rights.

Citing the Supreme Court's decision in *Katz*, the Ninth District found that the defendants had no reasonable expectation of privacy while cultivating their plants on public land in open view. Moreover, contrary to the defendants' contention, the use of unmanned, motion-activated cameras did not violate their Fourth Amendment rights since, according to the court (citing *Knotts*), "We have never equated police efficiency with unconstitutionality, and we decline to do so now."

More recently, in 2007, the Seventh Circuit in *United States v. Garcia* confronted whether

the use of a concealed GPS device constitutes an illegal search.¹⁴ After serving prison time for methamphetamine offenses, Bernardo Garcia brought the drug to a husband and wife and indicated to them that he wanted to resume his involvement in the business of manufacturing methamphetamine. The wife reported this to police officers, who augmented their investigation with additional informant testimony and a security video of Garcia purchasing ingredients used in manufacturing methamphetamine. The officers found the vehicle that Garcia was driving and—without a warrant—affixed a GPS device under the rear bumper while the car was parked on a public street. They used the GPS device to track the vehicle to various locations, for which search warrants were obtained. At these sites they discovered materials used to manufacture methamphetamine. The defendant himself showed up during one of the searches and was arrested.

Garcia, convicted of drug offenses in the U.S. District Court for the Western District of Wisconsin, appealed to the Seventh Circuit, claiming that the attachment of the tracking device constituted a seizure of the vehicle. The court first noted that the Supreme Court in *Knotts* found that tracking vehicles on public streets by means of a beeper does not constitute a search. However, the Seventh Circuit observed that the higher court "left open the question whether installing the device in the vehicle converted the subsequent tracking into a search...."¹⁵ The Seventh Circuit, after reviewing an array of conflicting opinions from appellate courts on the issue, concluded that installing a tracking device on private property did not constitute a search.

Still, it offered a sober warning regarding the future possibility of "wholesale surveillance" by law enforcement relying on new technologies:

Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive. Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues... Should government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.¹⁶

On May 7, 2009, the Wisconsin Court of Appeals, in rejecting an appeal of a conviction for aggravated stalking,¹⁷ issued its own stern assessment regarding the broader implications of GPS technology on Fourth Amend-



Anita Rae Shapiro

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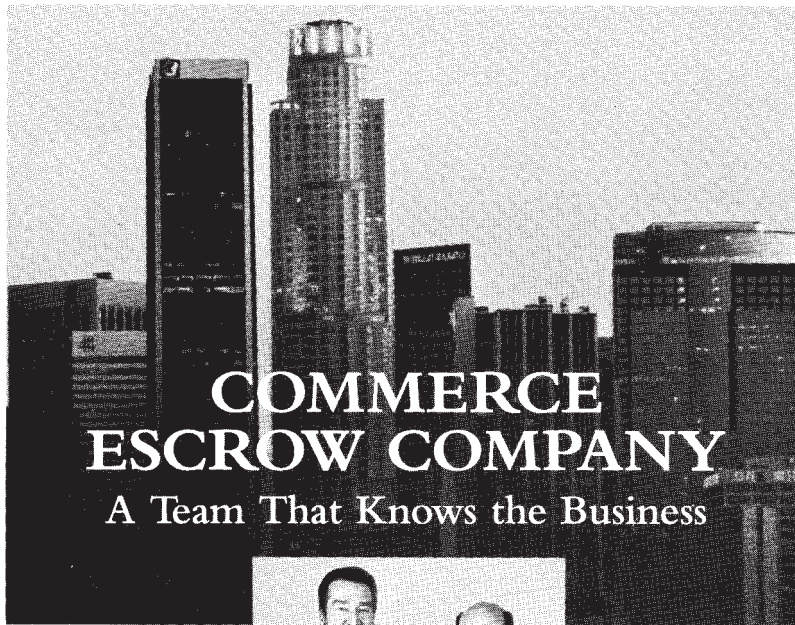
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ment and privacy rights.¹⁸ The case involved Michael Sveum, who had been convicted in 1996 of stalking his girlfriend, Jamie Johnson, and was imprisoned until 2002. In 2003, Johnson advised police that Sveum was stalking her again. Based upon Sveum's previous stalking conviction as well as information implicating his sister in assisting him while he was in prison in stalking Johnson, police successfully sought a warrant authorizing use of a battery-powered GPS device. They fastened the device with duct tape and a magnet to the undercarriage of Sveum's vehicle while it was parked in his driveway. For five weeks police tracked the whereabouts of his vehicle, including when it was parked in his residence garage and at his place of employment. The detailed tracking information provided by the GPS device was used to obtain a warrant to search his home and vehicle. This information, along with evidence seized through the warrant, led to Sveum's conviction and a prison sentence of seven and one-half years.

In his appeal, Sveum argued that the GPS tracking information should not have been admitted due to the "overly broad" warrant. The prosecution responded that no search or seizure occurred in violation of the Fourth Amendment. Sveum conceded that monitoring his vehicle on public roadways did not implicate the Fourth Amendment; however, he argued that information regarding the location of his vehicle while it was out of public view—in his garage and his employer's garage—should have been suppressed.

The appellate court, citing *Knotts* and *Karo*, affirmed Sveum's conviction:

The State responds that no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view. We agree with the State. At the same time, we urge the legislature to consider regulating both police and private use of GPS tracking technology.¹⁹

Relying upon *Garcia*, the court further stated, "We also agree with the State that the police action of attaching the GPS device to Sveum's car, either by itself or in combination with subsequent tracking, does not constitute a search or seizure."

The court underscored its larger concern regarding future uses of GPS devices:

So far as we can tell, existing law does not limit the government's use of tracking devices to investigations of legitimate criminal suspects. If there is no Fourth Amendment search and seizure, police are seemingly free to secretly track anyone's public movements with

a GPS device....We are also concerned about the private use of GPS surveillance devices....Although there are obviously legitimate private uses, such as a trucking company monitoring the location of its trucks, there are also many private uses that most reasonable people would agree should be prohibited.²⁰

Federal courts have redefined and arguably reduced the scope of Fourth Amendment protection with the advent of each new technological tool of law enforcement surveillance. The evolution of GPS technology and its accelerating applications ensure that competing interests will continue to collide and spill over into courtrooms. While state laws nationwide vary widely on the issue of GPS devices in dissolution matters, in California the Penal Code offers a decisive restriction: No person may be tracked or monitored via a GPS tracking device, including inside his or her vehicle, unless the owner of that vehicle has consented to the monitoring.

For now, with regard to jointly owned vehicles—and with the guidance of criminal case law, since the issue has not yet been tested in civil courts—the permission of only one owner is sufficient. However, it is safe to predict that courts will soon be asked to rule whether, in the case of a joint owner installing

a GPS device, the unsuspecting spouse has a reasonable expectation of privacy. Similarly, an employer who uses a GPS device to monitor the movements of an employee in his or her vehicle without notice to the employee—even if the employee does not own the vehicle—is arguably violating the employee's reasonable expectation of privacy.

GPS technology is too valuable a tool to be ignored by attorneys advocating for their clients, who should be advised of its potential benefits as an investigative tool. They should also be educated to look for indicators that this technology is being used against them by a spouse or a business competitor. At the same time, however, attorneys need to ensure that the use of GPS devices by their clients or agents does not create liabilities under federal law or California's criminal statutes. ■

¹ See *Kyllo v. United States*, 533 U.S. 27 (2001), in which the U.S. Supreme Court addressed the uses of thermal imaging by law enforcement, and Rob Cerullo, *GPS Tracking Devices and the Constitution*, THE POLICE CHIEF (Mar. 2009). See also Andre A. Moenssen, *Attaching a GPS Locator System to a Car*, <http://www.Forensic-Evidence.com> (Apr. 7, 2006) and JEFF WELTY, *GPS TRACKING DEVICES AND THE FOURTH AMENDMENT* (reviewing *United States v. Jones*, 451 F. Supp. 2d 71 (D.D.C. 2006)).

² *Game Wardens Snared Utah Poacher with GPS Device*, STANDARD-EXAMINER (Ogden, Utah), Mar.

14, 2009.

³ *Private Eye Arrested after Vail Bomb Scare*, SUMMIT DAILY NEWS (Frisco, Colo.), Mar. 7, 2008.

⁴ See *Electronic Stalking Investigations*, Aug. 13, 2008, <http://hi-caliber.blogspot.com>.

⁵ Anita Ramasastry, *Tracking Every Move You Make: Can Car Rental Companies Use Technology to Monitor Our Driving?* FindLaw Legal Commentary, Aug. 23, 2005, <http://writ.news.findlaw.com>.

⁶ Carol J. Williams, *GPS Technology Doubles as Crime-Fighting Tool*, L.A. TIMES, Nov. 25, 2008.

⁷ *Judge Allows GPS Evidence in Peterson Case*, CNN.com, Feb. 17, 2004. Cf. Brendan Lyons, *Police Don't Need Warrant for GPS*, TIMES UNION (Albany, N.Y.), Jan. 11, 2005.

⁸ Theodore Sliwinski, *Spying on Your Spouse*, <http://divorcesource.com>; see also Abdul Hafiz, *Fury of Sports Wives*, THE STRAITS TIMES, June 17, 2007.

⁹ See *What is GPS?*, Southern California Integrated GPS Network Educational Module, available at <http://scign.jpl.nasa.gov>. Cf. the GPS tutorial at <http://trimble.com>.

¹⁰ *Katz v. United States*, 389 U.S. 347 (1967).

¹¹ *United States v. Knotts*, 460 U.S. 276 (1983).

¹² *United States v. Karo*, 468 U.S. 705 (1984).

¹³ *United States v. McIver*, 186 F. 3d 1119 (9th Cir. 1999).

¹⁴ *United States v. Garcia*, 474 F. 3d 994 (7th Cir. 2007).

¹⁵ *Id.* at 996-97.

¹⁶ *Id.* 998-99.

¹⁷ *State of Wisconsin v. Michael A. Sveum*, Circuit Court No. 2003CF1783 (May 7, 2009) (convicted by jury on Oct. 9, 1996; sentenced to three years in prison on Nov. 5, 1996).

¹⁸ *Id.* at 1-26.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 10.