The Public Lawyer

STATE BAR OF NEVADA

Public Lawyers Section

August 2009

Nevada Supreme Court Cases

Zamora v. Price, 125 Nev. Adv. Op. No. 32 (August 6, 2009). "In this appeal, we consider the constitutionality of NRS 38.259(2), which requires that, when a party requests a new trial at the conclusion of mandatory nonbinding arbitration proceedings in a short trial matter, the arbitrator's findings must be admitted during the new trial. Specifically, we address whether the admission of this arbitration award deprives a party of the constitutional right to a jury trial and whether it violates equal protection rights. For the reasons set forth below, we conclude that NRS 38.259(2)'s requirement that the arbitration award be admitted at the new trial does not violate a party's constitutional right to a jury trial or a party's right to equal protection under the law."

Clark County School Dist. v. Virtual Educ., Inc., 125 Nev. Adv. Op. No. 31 (August 6, 2009).
"In this appeal, we consider two issues of first impression in a business defamation action. First, we consider whether the absolute privilege applies to defamatory communications made by a nonlawyer in anticipation of a judicial proceeding. Second, we consider whether allegedly defamatory statements made about a business's product provide a basis for defamation per se or for business disparagement.

We conclude that the absolute privilege affords parties to litigation the same protection from liability that exists for an attorney for defamatory statements made during, or in anticipation of, judicial proceedings. Additionally, we conclude that when allegedly defamatory statements concern a business's product and the plaintiff seeks to redress injury to economic interest, the claim is one for business disparagement, not defamation per se.

Grosjean v. Imperial Palace, Inc., 125 Nev. Adv. Op. No. 30 (July 30, 2009). "In this appeal and cross-appeal, we address whether qualified immunity can extend to shield private actors from civil liability in a 42

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U.S.C. § 1983 action and, if not, whether alleged evidentiary errors and attorney misconduct that occurred during trial on the § 1983 claim warrant a new trial. In addition to the qualified immunity and alleged trial error issues, we decide whether punitive damages were properly presented to the jury and, if so, whether its subsequent award was supported by the evidence. Finally, we determine whether previously dismissed state law claims should be reinstated against the same private actors against whom a judgment was entered on the § 1983 cause of action, when both the state law- and federal law-based claims were grounded on the same conduct, an allegedly illegal detention.

First, with regard to the private actor cross-appellants' assertion that the § 1983 claim against them should have been dismissed on qualified immunity grounds, after examining policy considerations underlying the qualified immunity doctrine on the disputed facts, we are not persuaded that such immunity extends to protect private actors. Thus, the district court properly refused to dismiss those claims.

Next, addressing cross-appellants' concern that allegedly erroneous evidentiary rulings and attorney misconduct led to the jury's verdict against them, we conclude that the evidentiary rulings in question were within the district court's considerable discretion and that the attorney misconduct in this case, while prevalent, did not override the jury's verdict, which was based on substantial evidence in the damages phase of the trial.

As for the argument on cross-appeal that the district court improperly allowed the punitive damages request to be presented to the jury, even though the punitive damages request was grounded on a state statute and all of the pertinent state law claims had been dismissed, we conclude that the district court properly allowed the request to go forward, as the state standard conforms to federal law requirements governing punitive damage awards in § 1983 actions. With regard to the punitive damages awarded, we conclude that the jury's $500,000 award was a result of continued attorney misconduct, including a "golden rule" violation and improper emotional arguments, such that a new trial is warranted as to punitive damages.

Finally, addressing the appeal, which challenges the dismissal of certain state law claims, because appellant already recovered damages for identical conduct under § 1983, he is precluded from recovering additional damages for that injury under state law-based theories. In particular, because the common law torts for which he seeks to recover coincide substantially with the § 1983 action that he was allowed to maintain and for which a money judgment was entered in his favor, he may not again recover damages for that conduct, and thus we need not further review the district court's decision to dismiss the state law claims against Imperial Palace. Accordingly, we affirm the compensatory damages portion of the district court's judgment, reverse the punitive damages portion, and remand for a new trial on punitive damages only.

Chavez v. State, 125 Nev. Adv. Op. No. 29 (July 30, 2009). "In this appeal, we consider whether the preliminary hearing testimony of an unavailable witness may be admitted into evidence at trial without violating the Sixth Amendment Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36 (2004). We hold that it can. We conclude that this issue, along with the other issues that appellant James Chavez raises on appeal, does not warrant reversal of Chavez's con-

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viction and sentence. Therefore, we affirm."

Allstate Insurance Co. v. Miller, 125 Nev. Adv. Op. No. 28 (July 30, 2009). "In this appeal, we address an insurer's duties under the implied covenant of good faith and fair dealing and its duty to defend. Specifically, we address an insurer's duty to inform an insured regarding settlement opportunities and its duties regarding interpleading funds and stipulated judgments. We also address the standards that govern our review of a district court's refusal to give special interrogatories when requested by a party in a civil case.

Because a primary insurer's duty to defend includes settlement duties and an insurer must give equal consideration to the insured's interest, we hold that the covenant of good faith and fair dealing includes a duty to adequately inform the insured of settlement offers. This includes reasonable offers in excess of the policy limits. Failure to adequately inform an insured is a factor to consider in a bad-faith claim and, if established, can be a proximate cause of any resulting damages. We conclude that whether Allstate violated its duty to adequately inform Miller of the settlement opportunities that existed in this case presented a question of fact for the jury. Therefore, the district court did not abuse its discretion when it submitted the failure-to-inform theory of bad faith to the jury.

Miller's two alternative theories of bad faith fail. Unless the policy says otherwise, an insurer does not have an independent duty to file an interpleader action on behalf of an insured. Nor is an insurer required to agree to a proposed stipulated judgment between the insured and the claimant if that stipulated judgment is beyond the policy limits. As a result, we conclude that the district court erred when it submitted these issues to the jury.

Finally, we hold that the district court abused its discretion in refusing without explanation to give the jury the special interrogatories that Allstate proposed."

Commission on Ethics v. Hardy, 125 Nev. Adv. Op. No. 27 (July 30, 2009). "Based on our review of the Nevada Constitution and relevant legal authority, we conclude that to the extent that a legislator's conduct, resulting in a disciplinary proceeding, involves a core legislative function such as voting and, by extension, disclosure of potential conflicts of interest prior to voting, any discipline of the legislator is a function constitutionally committed to each house of the Legislature by Article 4, Section 6 of the Nevada Constitution, and that this power cannot be delegated to another branch of government. We further hold that the Commission is an agency of the executive branch, and thus, any delegation to the Commission of each house of the Legislature's power to discipline its members for disorderly conduct involving core legislative function activities runs afoul of the separation of powers doctrine and is therefore unconstitutional. Finally, we hold that the Legislature cannot waive constitutionally based structural protections such as the separation of powers doctrine. As a result, we affirm the district court's decision and conclude that the Commission is barred from conducting any further proceedings against Senator Hardy."

Berry v. State, 125 Nev. Adv. Op. No. 26 (July 30, 2009). "We conclude that, for purposes of Berry's burglary-while-in-possession-of-a-deadly-weapon and robbery-with-use-of-a-deadly-weapon charges, the district court did not err by using NRS 202.265(5)(b)'s and NRS 202.253(2)'s definitions of 'firearm' to instruct the jury on the meaning of 'deadly weapon.' In

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particular, NRS 193.165(6)(c) specifically refers to weapons defined under NRS 202.265 as deadly weapons and, under NRS 193.165(6)(a), a 'firearm' as defined under NRS 202.253(2) is also a 'deadly weapon.' Further, after reexamining this court's holdings in Allen and Anderson, we overrule those cases to the extent that they suggest that a weapon that is likely to produce fear or a deadly reaction is a deadly weapon. Rather, a weapon must meet one of the definitions set forth in NRS 193.165(6) to qualify as a deadly weapon for enhancement purposes.

However, regarding Berry's deadly weapon convictions, we conclude that the State failed to present sufficient evidence to support a finding of a deadly weapon under NRS 193.165(6). While Detective Spiotto testified that pellet guns are designed to fire projectiles (normally due to the sealed-to-cartridge spring mechanism) and that the gun in this case could possibly fire a metal projectile, the State failed to demonstrate beyond a reasonable doubt that the weapon was designed to be capable of firing a metal projectile, as required under NRS 202.265(5)(b).

Finally, we conclude that NRS 201.210, the open and gross lewdness statute, is not unconstitutionally vague. Each of the terms set forth in the statute—'open,' 'gross,' and 'lewdness'—all have generally accepted meanings that impart sufficient notice on the average person of what conduct the statute proscribes. And, considering the common law definition of 'open lewdness' and the ordinary meanings of NRS 201.210's terms, we are persuaded that the jury could have convicted Berry under NRS 201.210. Thus, any error made by the district court in giving the instruction does not rise to plain error."

Funderburk v. State, 125 Nev. Adv. Op. No. 25 (July 30, 2009). "In this appeal, we address an issue of first impression: whether the definitions of 'deadly weapon' set forth in NRS 193.165(6) are instructive on what constitutes a 'deadly weapon' for burglary while in possession of a deadly weapon under NRS 205.060(4). Because the Legislature intended the definition of 'deadly weapon' to be broad for purposes of NRS 205.060(4), we conclude that NRS 193.165(6)'s definitions are instructive for determining whether a weapon is a 'deadly weapon' for purposes of NRS 205.060(4). Therefore, we determine that the district court did not err by instructing the jury that a BB gun constitutes a 'firearm,' as defined in NRS 202.265(5)(b),[1] a statute referenced in NRS 193.165(6)(c)."

McConnell v. State, 125 Nev. Adv. Op. No. 24 (July 23, 2009). "The primary issue in this appeal is whether the constitutionality of Nevada's lethal injection protocol may be challenged in a post-conviction petition for a writ of habeas corpus. We hold that the claim is not cognizable in a post-conviction petition for a writ of habeas corpus under NRS Chapter 34 because it involves a challenge to the manner in which the death sentence will be carried out rather than the validity of the judgment of conviction or sentence.

Law.com

And Now, a Viral Video for Divorce Lawyers

If you haven't seen Jill and Kevin's wedding dance video, you've either been in a self-induced post-bar exam coma or off on vacation on a remote island with no Internet access. Yes, the video went viral, as no one, it seemed, could resist watching the about-to-be-hitched couple and their wedding party/posse boogie down the aisle in a break -- or a break dance -- from the traditional wedding processional.

"At this wedding, the party got started well before any vows, rings, and kisses were exchanged. Here the entrance of the wedding party turned into a wedding partay, a cakewalk down the aisle, a processional gone phenomenal," wrote Sarah Kaufman of *The Washington Post* (via Boston.com). "No wonder it migrated around the world."

Well, lest any divorce lawyers out there fear that this celebration of marriage gave short shrift to marriage's other side, they now have a viral video they can call their own. The JK Divorce Entrance Dance takes place in a courtroom, not a church, and features hip-hopping lawyers in dark suits and shades, leg-kicking law clerks, a jumping judge, a couple of court officers who know to boogie, and of course the now-disgruntled bride and groom. The video, which you can see below, was produced by New York Video company Indigo Productions.

A New Low in Ambulance Chasing

Lawyers are commonly portrayed as ambulance chasers but it appears some don't even have the dignity to stop when the ambulance arrives at the hospital. The FBI in Miami says a lawyer there bought stolen hospital records and used them to solicit clients, later kicking back a percentage of any lawsuit proceeds to the man who sold the records.

The lawyer involved in the scheme was not identified but is reported to be under investigation, the *Miami Herald* reports. The FBI has charged another man, Ruben E. Rodriguez, 61, with conspiring to sell confidential patient information, computer fraud, wrongful disclosure of medical records and aggravated identity theft.

The report says that Rodriguez allegedly paid $1,000 a month to a technician employed at Jackson Memorial Hospital in Miami. The technician provided the hospital records of hundreds of patients treated for slip-and-fall accidents, car-crash injuries, gunshot wounds and other injuries, the FBI says. Rodriguez then sold the information about the patients and their injuries to the lawyer.

“Whatever the low-water mark would be, this is it,” South Florida personal-injury attorney Stuart Z. Grossman told the Miami Herald. “I don't know what would be worse, other than staging an accident.” Adds the blog South Florida Lawyers, “Also, last I checked, you were not supposed to share fees with non-lawyers, or is that also one of those ancient and 'dated' rules like the Geneva Convention?”

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United States v. Monghur, No. 08-10351 (August 11, 2009). "Brandon Monghur appeals the district court's denial of his suppression motion, following which he entered a conditional guilty plea to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). In denying the motion, the district court concluded that Monghur waived his expectation of privacy in the closed container within which federal law enforcement discovered the revolver in question. We must decide whether the container search, conducted without a warrant, violated the Fourth Amendment's prohibition of unreasonable searches and seizures. We have jurisdiction pursuant to 28 U.S.C. § 1291 and conclude that the search was unlawful."

"Nothing about his jailhouse conversations with Bousley, which law enforcement later overheard, operates as a 'direct and explicit' waiver of an expectation of privacy in a container hidden elsewhere. *Cardona-Rivera*, 904 F.2d at 1156. Monghur's efforts to conceal the subject matter based on what he said on the phone demonstrate both an objective and subjective intention to preserve privacy—not to relinquish it. We therefore reject the Government's position that Monghur waived his expectation of privacy in the closed container through his statements on the telephone."

Richter v. Hickman, No. 06-15614 (August 10, 2009) "To . . . not prepare is the greatest of crimes; to be prepared beforehand for any contingency is the greatest of virtues. — Sun Tzu, *The Art of War* 83 (Samuel B. Griffith trans., Oxford University Press 1963)

At the heart of an effective defense is an adequate investigation. Without sufficient investigation, a defense attorney, no matter how intelligent or persuasive in court, renders deficient performance and jeopardizes his client's defense.

Here, counsel did not meet his basic obligation to his client. Much was riding on his performance in this case: his client, Joshua Richter, was accused of murder, among other charges, and faced life imprisonment without parole. Yet, counsel failed to undertake the most elementary task that a responsible defense attorney would perform in a case of this nature, and consequently provided representation that fell well below a reasonable standard of professional competence. Although it was apparent that an issue critical to the outcome could best be resolved through the presentation of forensic evidence, counsel failed at each stage of the case to consult with a forensic expert of any type and thus failed to conduct the rudimentary investigation necessary in order to (1) decide upon the nature of the defense to be presented, (2) determine before trial what evidence he should offer, (3) prepare in advance how to counter damaging expert testimony that might be introduced by the prosecution, and (4) effectively cross examine and rebut the prosecution's expert witnesses once they did testify during the course of the trial. There was in fact no strategic reason for counsel's failure to do so. As it turned out, these repeated failures to investigate were prejudicial: available forensic testimony would have contradicted the prosecution's explanation of the events that transpired and would have strongly supported the defense's version.

We conclude that, singly and collectively, counsel's failures rise to the level of ineffective assistance of counsel under the Sixth Amendment. There is nothing novel about our holding. Rather, we arrive at the only reasonable conclusion that can be reached, given the facts of the case and the well established applicable law. We therefore reverse the district court and

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remand with directions to grant the writ of habeas corpus."

Mueller v. Rogers, No. 07-35554 (August 10, 2009). Detective Dale Rogers made a decision permitted by Idaho law to remove temporarily a sick infant from the custody of her parents in order to secure a medical diagnostic test and prophylactic treatment, procedures which pediatric doctors advised Rogers were both necessary and within the standard of care for the infant's situation. At the time, the child had been taken to St. Luke's hospital in Boise, Idaho, by her mother, while her father, Eric Mueller, remained at home to care for the couple's other child. Detective Rogers intervened at the behest of hospital doctors after the child's mother, Corissa Mueller, refused to consent to the recommended procedures. Eric Mueller was not given pre- deprivation notice of the detective's intentions or post-deprivation notice by Detective Rogers, and the Muellers's child received a medical test and treatment in Eric Mueller's absence.

No one is surprised that Corissa Mueller and her husband have taken umbrage at the State's decision to override their parental concerns. For them, this was a terrible and distressing event. But, to render Detective Rogers accountable in this lawsuit for a difficult discretionary decision would only deter other officers similarly situated in the future from making any decision at all, a situation which would be unacceptable and which is precisely what qualified immunity is designed to avoid. In no way can Detective Rogers be said to have been either 'plainly incompetent,' to have acted in bad faith, or to have 'knowingly violate[d] the law.' *Malley*, 475 U.S. at 34l. Our conclusion regrettably will come as no consolation to the Mueller family, but it is required by law based upon the need to allow government officials to make reasonable decisions, even when the concerns driving those decisions turn out — happily in this case — to be unsubstantiated. Fortunately for all concerned, Taige has emerged from this episode in good health."

Boyd v. City and County of San Francisco, No. 07-16993 (August 7, 2009). "Plaintiffs-Appellants Marylon Marie Boyd, Isabel Gonzales, and Kanani Boyd, who are the mother and daughters of Cammerin Boyd, appeal the district court's judgment in favor of Defendants-Appellees, the City and County of San Francisco and police officers James O'Malley and Timothy Paine. The Boyd Family alleges that the district court's erroneous admission of irrelevant and prejudicial evidence tainted the jury's verdict such that reversal is warranted. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The Boyd Family challenges the admission of the following evidence: (1) testimony of the 1993 high-speed chase precipitating the loss of Cammerin's legs; (2) testimony of Cammerin's criminal history, including the kidnapping attempts and the likely term of incarceration he would have faced had he survived; (3) testimony regarding Cammerin's Oakland arrest, including his statements to police; (4) evidence that Cammerin had drugs in his system at the time he was shot; (5) evidence of prior lawsuits filed by Cammerin or by his mother on his behalf against law enforcement agencies; (6) evidence of the rap music lyrics and newspaper clipping found in Cammerin's car; and (7) Dr. Keram's expert testimony regarding the suicide by cop theory.

California v. United States Dep't of Agriculture, No. 07-15613 (August 5, 2009). "We

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agree with the plaintiffs that the promulgation of the State Petitions Rule effected a repeal of the Roadless Rule, which we previously found to afford greater protections to the nation's roadless areas than those the individual forest plans provide. The Forest Service's use of a categorical exemption to repeal the nationwide protections of the Roadless Rule and to invite States to pursue varying rules for roadless area management was unreasonable. It was likewise unreasonable for the Forest Service to assert that the environment, listed species, and their critical habitats would be unaffected by this regulatory change.

We affirm the district court's order permanently enjoining the implementation of the State Petitions Rule because the Forest Service violated the National Environmental Policy Act and the Endangered Species Act when it promulgated the State Petitions Rule. We further conclude that the district court did not abuse its discretion in ordering the Forest Service to comply with the Roadless Rule as a remedy for these procedural shortcomings."

Bressi v. Ford, No. 07-15931(August 4, 2009). "In order to permit tribal officers to exercise their legitimate tribal authority, therefore, it has been held not to violate a non-Indian's rights when tribal officers stop him or her long enough to ascertain that he or she is, in fact, not an Indian. *See Schmuck*, 850 P.2d at 1337. If the violator turns out to be a non-Indian, the tribal officer may detain the violator and deliver him or her to state or federal authorities. *Id.*; *see Strate*, 520 U.S. at 456 n.11.

This rule permitting tribal authority over non-Indians on a public right-of-way is thus a concession to the need for legitimate tribal law enforcement against Indians in Indian country, including the state highways. The amount of intrusion or inconvenience to the non-Indian motorist is relatively minor, and is justified by the tribal law enforcement interest. Ordinarily, there must be some suspicion that a tribal law is being violated, probably by erratic driving or speeding, to cause a stop, and the amount of time it takes to determine that the violator is not an Indian is not great. If it is apparent that a state or federal law has been violated, the officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities."

"The intrusion and inconvenience becomes significantly greater, however, when a roadblock is placed across a state highway. The tribe has no general power of exclusion on the right-of-way. *All* vehicles are stopped, with no suspicion required. The likelihood is substantial that a great proportion of those stopped will be non-Indians not subject to tribal criminal jurisdiction. Yet the tribe does have a legitimate purpose in stopping all vehicles with Indian operators to check for violations of tribal drunken-driving and safety laws, and other violations for which roadblocks are authorized by tribal law.

We conclude that a roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are not

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authorized on purely tribal authority in the case of non-Indians.

Applying this analysis to the present record, we reverse the summary judgment in favor of the Officers on the § 1983 claim. The record indicates that the Officers realized quickly that Bressi was not impaired. It is not clear from the record exactly when or how the Officers determined that Bressi was not an Indian. There is no dispute in the evidence, however, that the Officers, after stopping Bressi, did not confine themselves to inquiring whether he was or was not an Indian. Their general request for identification was permissible as part of that determination, but they specifically requested Bressi to show his drivers' license and immediately treated his refusal as a violation of state law. Once they departed from, or went beyond, the inquiry to establish that Bressi was not an Indian, they were acting under color of state law. These actions established, beyond any dispute of fact, that the roadblock functioned not merely as a tribal exercise, but also as an instrument for the enforcement of state law."

Magnum v. Action Collection Servs., Inc., No. 08-35191 (August 4, 2009). "Mangum, who issued dozens of bad checks, asserts that her constitutional rights were violated when the city police department, where she worked, obtained copies of the checks from those who were seeking to collect upon them. We hold that no constitutional right of hers was violated. Similarly, the City did not violate any right she had under FCRA or FDCPA. Thus, we affirm the judgment for the City and for Captain Furu, who conducted the City's investigation."

Sanchez v. Canales, No. 06-55584 (July 30, 2009). "The sole question on appeal is, assuming the Plaintiffs were detained during a legal search of their home, was the detention a violation of their clearly established constitutional rights? We conclude it was not and therefore reverse and remand.

We hold, pursuant to *Muehler v. Mena*, 544 U.S. 93 (2005), that officers may constitutionally detain the occupants of a home during a parole or probation compliance search. Accordingly—assuming without deciding, as we must, that the officers had probable cause to believe Oscar was at home and the Plaintiffs were detained during the search—we conclude that any such detention was not a violation of the Plaintiffs' clearly established constitutional rights."

Conn v. City of Reno, No. 07-15572 (July 24, 2009). "While transporting Clustka to civil protective custody, two Reno police officers witnessed her wrap a seatbelt around her neck in an apparent attempt to choke herself and then scream that they should kill her or else she would kill herself. The officers failed to report the incident to jail personnel or take her to a hospital. Clustka was released from protective custody a few hours later. The next day, she was again detained on a misdemeanor charge. During this second detention, less than 48 hours after the suicide threats, Clustka hanged herself in her cell.

When an individual is taken into custody and thereby deprived of her liberty, the officials who hold her against her will are constitutionally obligated to respond if a serious medical need should arise. If, with deliberate indifference, these officials fail to respond appropriately and instead act in a manner that will foreseeably result in harm, they violate her due process rights. The same is true when a municipality, with deliberate indifference, fails to train

its law enforcement officers or fails to adopt and implement policies when it is highly predictable that such inaction will result in constitutional violations.

We hold that, on the facts presented, a reasonable jury could find that the defendant police officers are liable under 42 U.S.C. § 1983 for their deliberate indifference to Clustka's serious medical need, and that their actions were a cause in fact and a proximate cause of her suicide. Likewise, a jury could find the City of Reno liable for its failure to train its law enforcement officers or to implement policies on suicide prevention and reporting."

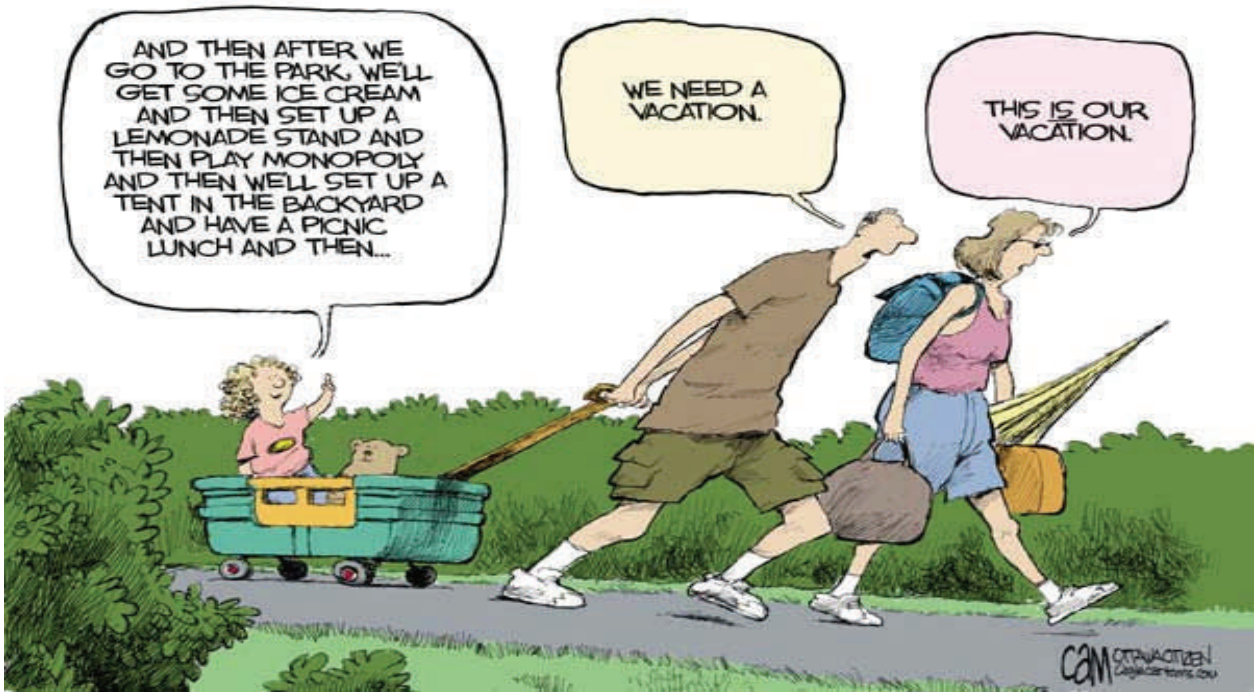
Huppert v. City of Pittsburg, No. 06-17362 (July 21, 2009). "Our holding does not imply that a police officer might never be protected if he speaks on issues such as corruption, for we recognize that '[e]xposing governmental inefficiency and misconduct is a matter of considerable significance.' *Ceballos*, 547 U.S. at 425. Even though we find that, under California law, testimony such as Huppert's is within the duties of a police officer, speech outside one's official duties remains protected by the First Amendment."

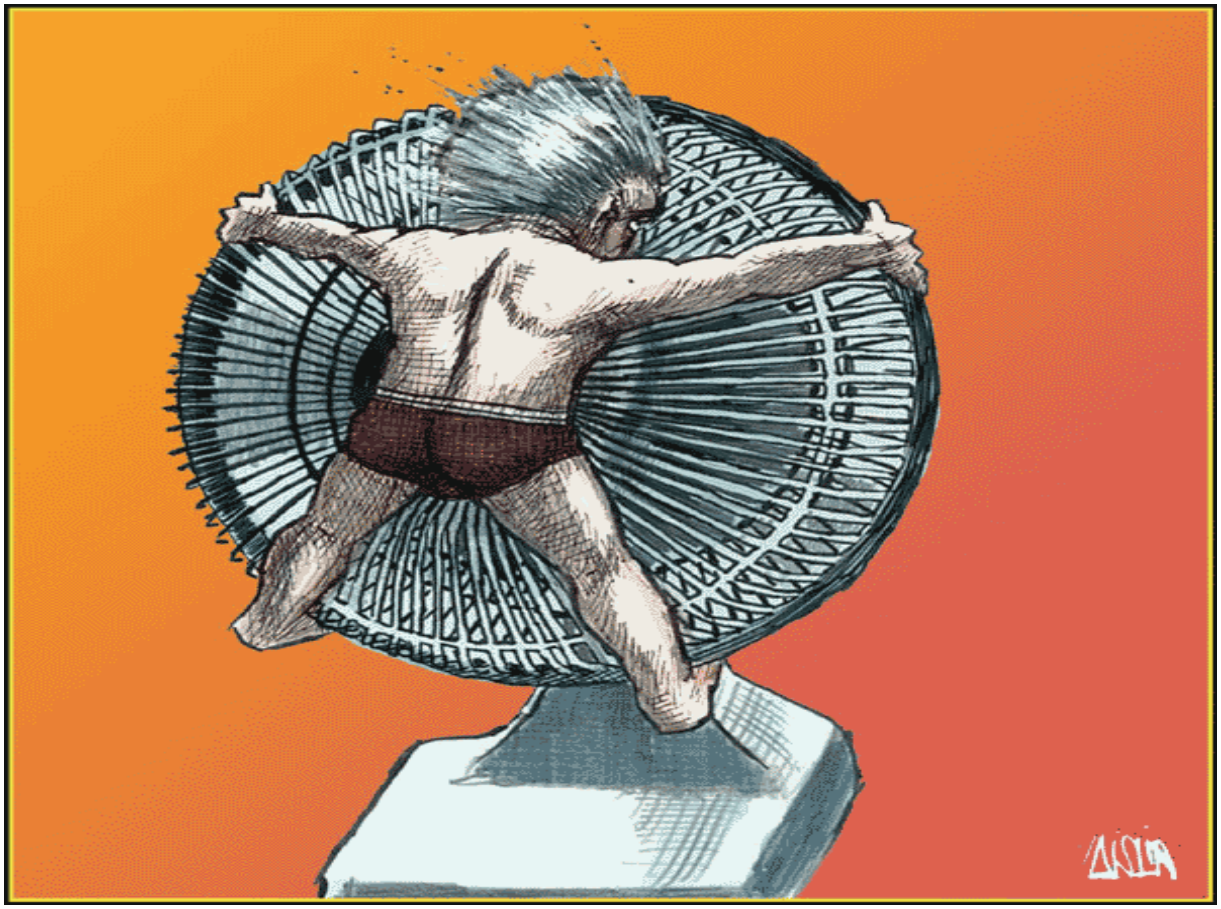
T-Mobile USA, Inc. v. City of Anacortes, No. 08-35493 (July 20, 2009). "The City of Anacortes appeals the district court's determination that the City's denial of an application by T-Mobile USA, Inc. to erect a 116-foot monopole antenna at a particular location violates a provision of the Telecommunications Act of 1996, 47 U.S.C. 9208 § 332(c)(7)(B). The district court found that T-Mobile's proposal was the least intrusive means to close a significant gap in its wireless service in the City, and that the City's denial was not supported by substantial evidence. We determine that, although the district court did not have the benefit of our opinion in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc) ("*Sprint II*"), and therefore failed to recognize that the City's denial of the application was supported by substantial evidence, the district court nevertheless properly concluded that the City's denial of the application violated § 332(c)(7)(B) because the City failed to rebut T-Mobile's showing that the denial of the application amounted to an effective prohibition of wireless services."

Hopkins v. Bonvicino, No. 07-15102 (July 16, 2009). "On August 22, 2003, two San Carlos Police Officers broke into Bruce Hopkins' home. They did not have a warrant, nor did they have probable cause. All that they had was a statement from a third-party that Hopkins had been involved in an extremely minor traffic incident, an incident so minor that it did not cause as much as a scratch on either of the vehicles involved, and that he appeared to have been drinking. Based on this information, the officers broke into Hopkins' home with their flashlights shining and their guns drawn. When they found Hopkins, they handcuffed him, removed him from his house, and placed him under arrest. The officers' explanation for their warrantless entry is both simple and audacious: They claim that, after hearing that Hopkins had the smell of alcohol on his breath, they feared he was on the brink of a diabetic coma and broke into his house in order to offer medical assistance. According to one officer's deposition testimony, they entered with their guns drawn because individuals suffering from diabetic emergencies 'may sometimes be confused' and can be 'combative.' Apparently, in the officer's view, someone suffering from such a medical emergency may need to be deterred by deadly force. Hopkins, however, was neither confused nor combative because he was not suffering from a

from diabetic emergencies 'may sometimes be confused' and can be 'combative.' Apparently, in the officer's view, someone suffering from such a medical emergency may need to be deterred by deadly force. Hopkins, however, was neither confused nor combative because he was not suffering from a diabetic emergency — he was lying in his bedroom watching television, which is where the officers found him. Yet, after the officers discovered that he was perfectly healthy and non-comatose, they did not say 'we're glad to see that you are safe, sir; we'll be on our way now.' They did not say, 'Sorry for the disturbance and for damaging your property.' No, instead they handcuffed Hopkins at gunpoint, removed him from his home, placed him under arrest, and brought him to the San Mateo County jail for the final chapter in the case of the nonexistent diabetes.

Hopkins sued the two officers who broke into his house, their colleague who waited outside, and the City of San Carlos under 42 U.S.C. § 1983. He asserts three causes of action: unlawful warrantless entry of a home, unlawful arrest without probable cause, and excessive use of force. The defendants jointly moved for summary judgment on all counts — the officers asserting a qualified immunity defense and the City arguing that it should not be held liable under *Monell v. N.Y. City Department of Social Services*, 436 U.S. 658 (1978). The district court denied the motion, and the defendant-officers now appeal. Because 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,' *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972)), and because the officers' conduct here unequivocally violated Hopkins' clearly established constitutional rights, we affirm the denial of summary judgment with respect to Officers Bonvicino and Buelow."






A GUIDE TO SUMMER FANS:
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FOOTBALL TRAINING CAMP BEGINS
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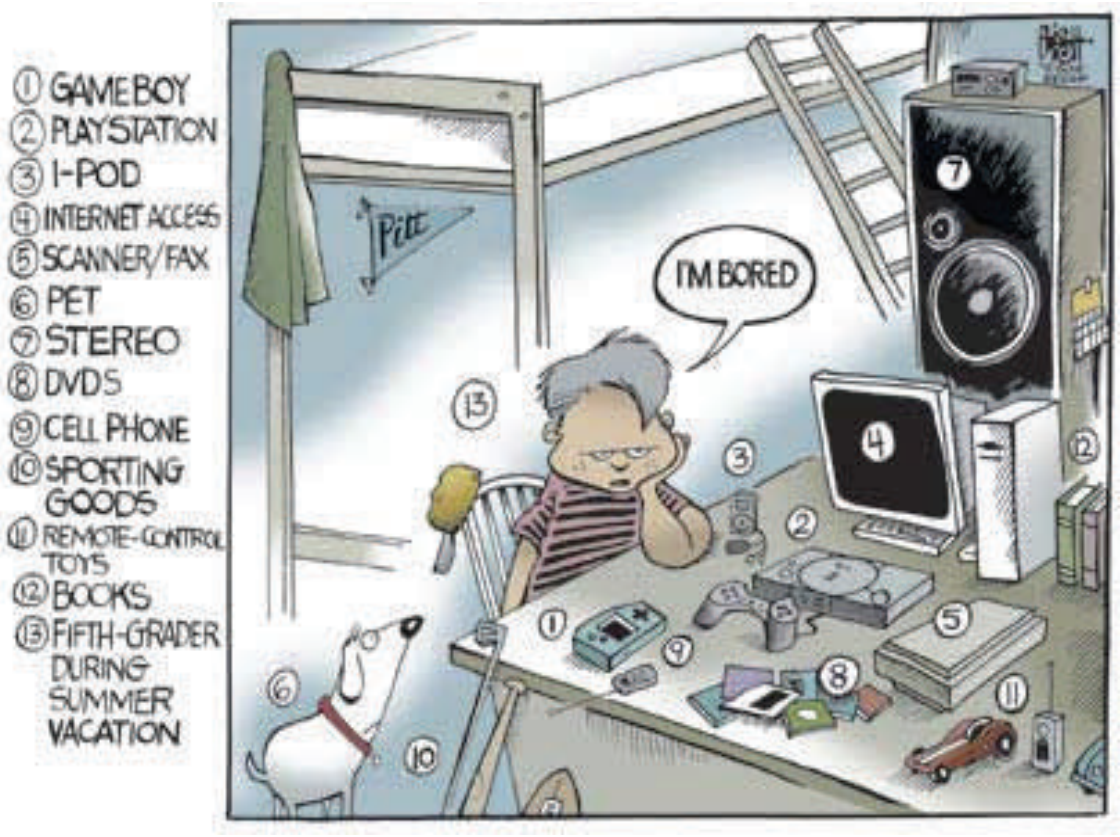
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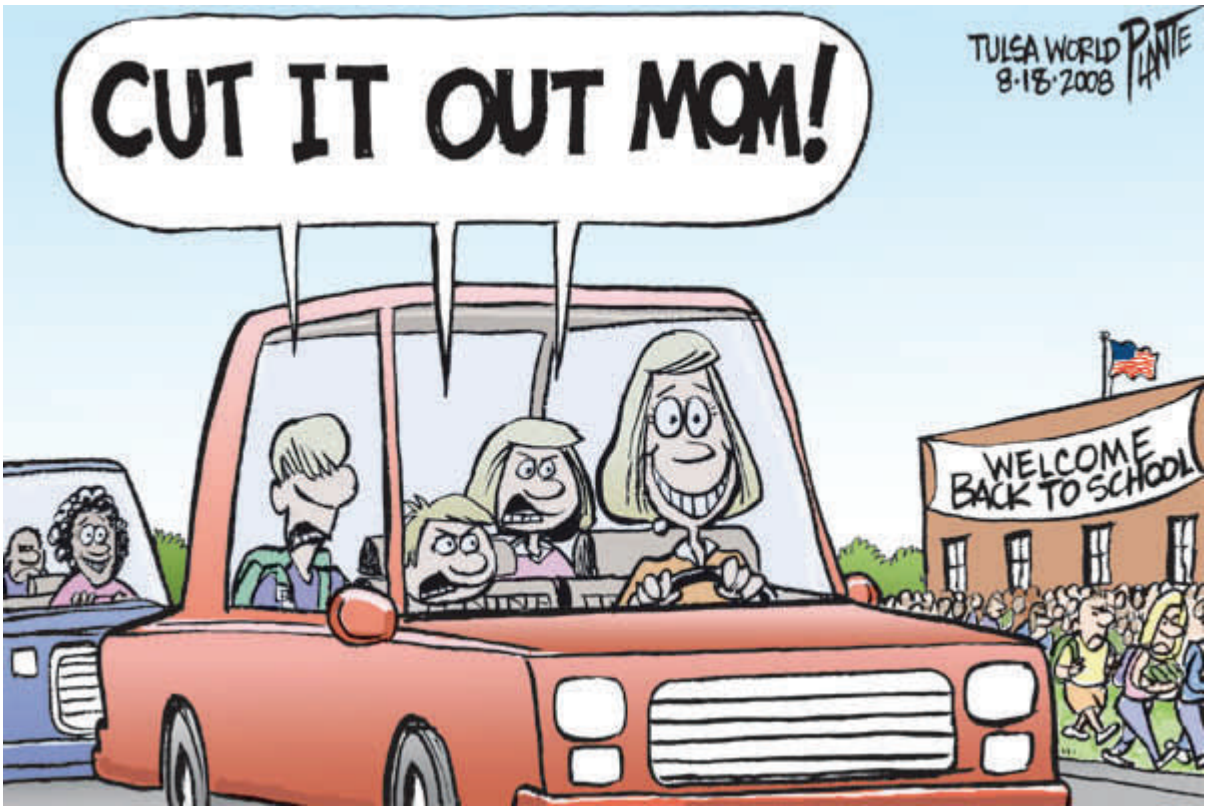
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Dewey, Cheatem & Howe Makes Appearance in Loan Fraud Case

"Do we cheat them, and how!" may have been the motto of the two former Mitsubishi dealership employees recently sentenced to prison for a massive fraud in which unsophisticated customers with poor credit were extended usurious car loans they had no hope of repaying. But the employees could have been a bit more subtle about their intentions.

According to the *New Haven Independent*, Richard Dominguez, one of the salesman who accepted a plea, interviewed a customer for a car loan who told him she was unemployed. Ever resourceful, Dominguez filled out a credit application, listing her employer as "DEWEY CHITAM & HOWE," and claiming a monthly gross salary of $3,500 per month for a position in "management." Based on this information on the credit application, Mitsubishi Credit extended financing to Matthews to purchase her car.

Is It Lawful to Use Twitter for Emergency Messages?

We already know what the law has to say about shouting "fire" in a crowded theater. But can you shout "fire" on a crowded Twitter? TechRadium, a Texas-based emergency alert provider, says no. As *The National Law Journal* reports, TechRadium is suing Twitter for alleged patent infringement for allowing municipalities, companies and government agencies to use its site as an emergency notification system.

TechRadium claims that Twitter's "core functionality" falls within the range of technology covered by TechRadium's patents. When organizations tweet about road closures, fires or bad weather, the company claims its patent rights are being violated. And that's happening more frequently, as municipalities and large corporations are using Twitter to alert the public about fires, hurricanes, road closures and other emergencies.

One of the patent lawyers quoted in the story picked up on an inconsistency in the lawsuit that had me puzzled. E. Leonard Rubin, an intellectual property attorney at Chicago's Querrey & Harrow, asked:

"Why is the use of Twitter's function in a normal way not infringing on TechRadium's patents, but it is called infringing when it's used as an emergency notification system?"

"The TechRadium patents are not labeled as for "emergency notification systems," Rubin said. "An issued patent may have a presumption of validity, but all that means is that an accused infringer has to show why it is invalid, and that's happened many times."

But TechRadium has been aggressive in asserting its patent rights. In June, the company settled a similar lawsuit with Blackboard Inc., an online educational company that also had a system in place enabling school officials to alert parents about school closings or other emergency information. The settlement agreement calls for the companies to cross-license their patents so that

both can use the technology.

Presumably, Twitter will fight harder than Blackboard, given that digital notification is the core of Twitter's business, whereas for Blackboard it was an ancillary service. Moreover, there's a greater public issue at stake. After all, if Twitter shuts down, how will Oprah and I know if the roads are shut down?

Does Working on the Phone but off the Clock Require Overtime Pay?

These days, leaving the office doesn't necessarily mean leaving work behind. Between e-mail and smartphones, workers are finding themselves engaged in work long after they've punched out of the office. But should taking calls or returning e-mail after hours be considered activity that is off-the-clock or paid?

That's the question at the heart of a lawsuit recently filed by employees of T-Mobile, who allege that they should have been paid for responding to work messages after hours. According to *The Wall Street Journal*, the employees were told that they should expect to work extra hours as part of T-Mobile's "standard business practices."

Although technology enables employees to work after hours, suits like the one against T-Mobile are cropping up more frequently because of the recession. As Proskauer Rose partner Greg Rasin explained to the WSJ, companies are trying to do the same amount of work with fewer people, and this can result in hours-creep.

There's additional discussion of the WSJ story by Jacqui Cheng at Ars Technica.

A Courtroom With a View

Unlike federal district court judges, federal magistrates don't have lifetime tenure. But one lucky federal magistrate gets an even better perk -- a courtroom with a view. *The New York Times* reports on what's perhaps one of the greatest job openings in the legal profession these days: a federal magistrate position at a tiny federal courthouse in Yosemite National Park, with an annual salary of $160,000. The court handles misdemeanors originating in the park, such as biking while intoxicated or without headlamps, or minor drug and gun charges and an array of other lesser offenses. Felony cases are transferred to federal court in Fresno, Calif.

For those who represent clients at the courthouse, life is not nearly as idyllic. Since only the judge and essential personnel can live within the park, according to the NYT, those who work at the courthouse must endure grueling commutes, particularly in the summer when they compete with long lines of tourists for admission to the park. In winter, storms, blizzards and mudslides cause traffic delays.

The courthouse draws some unusual visitors, though. In addition to backpackers who pass the courthouse, coyotes, bobcats and even bears show up on occasion. And it might just be the only spot in the 750,000-acre park where visitors can catch a glimpse of a shark.