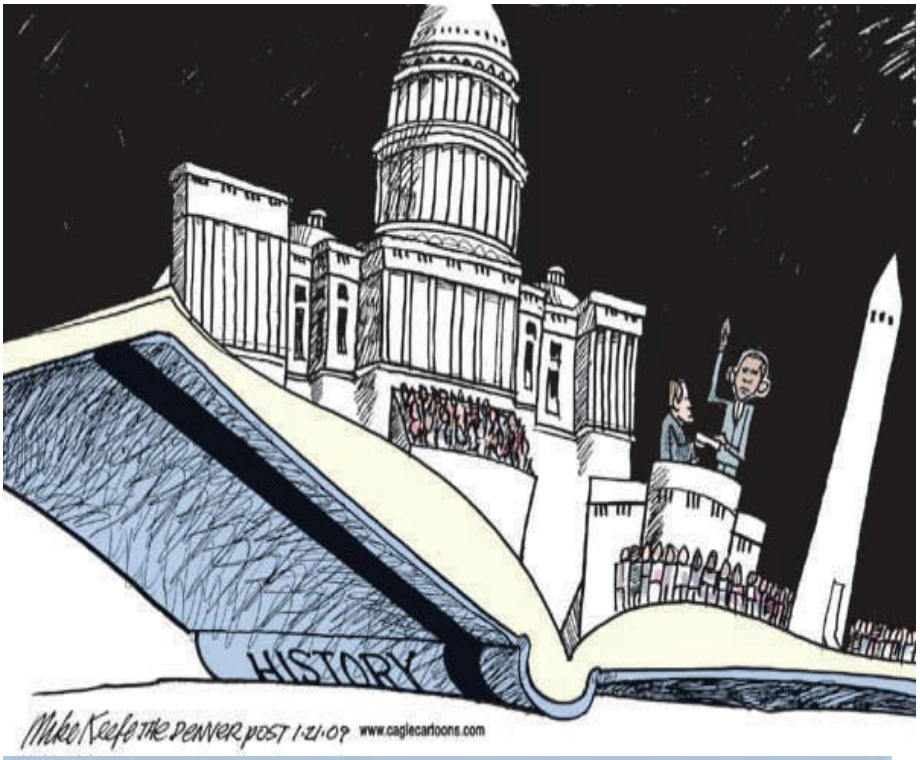
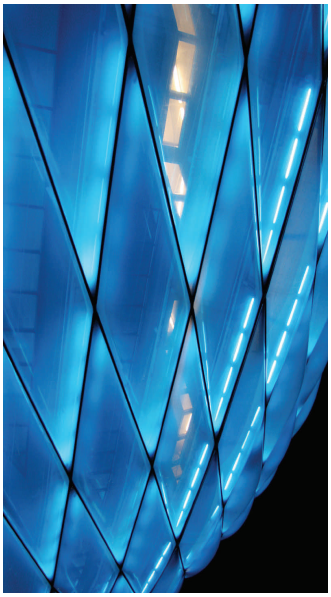
The Public Lawyer

STATE BAR OF NEVADA



Public Lawyers Section

January 2009



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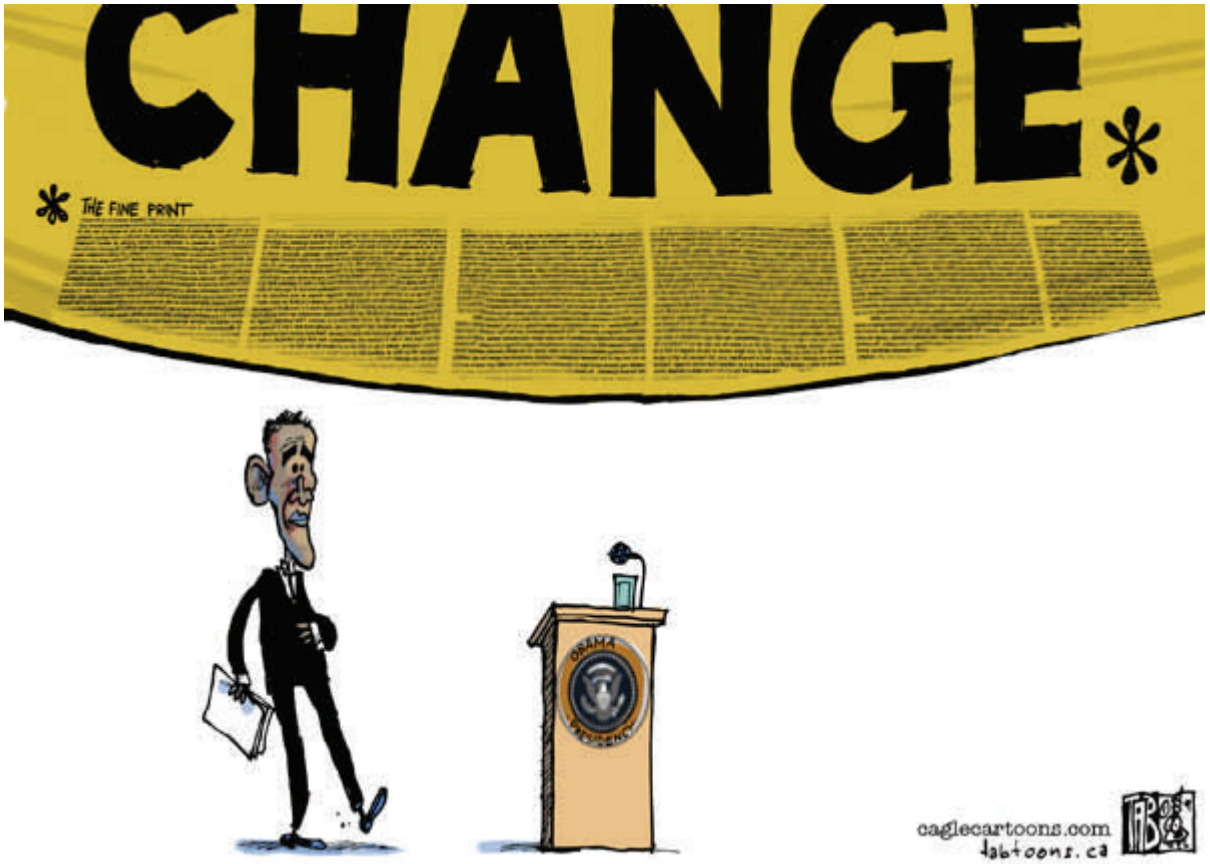
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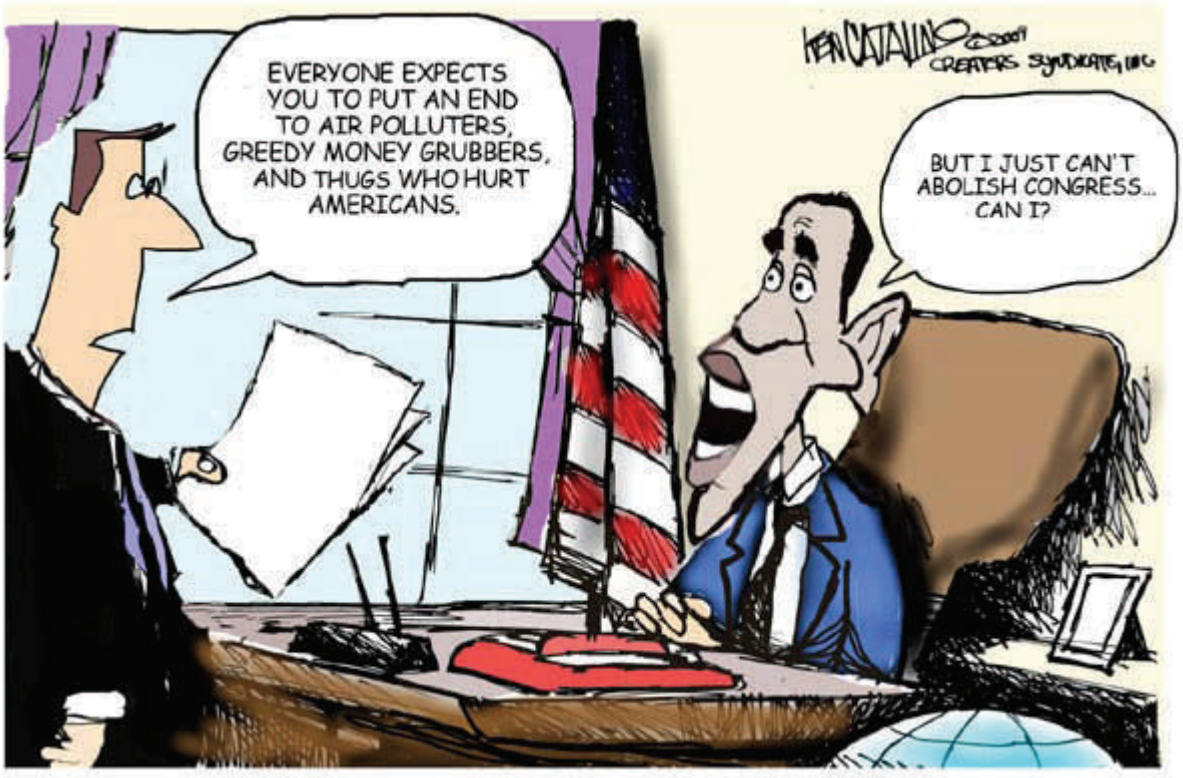
EVERYONE EXPECTS YOU TO PUT AN END TO AIR POLLUTERS, GREEDY MONEY GRUBBERS, AND THUGS WHO HURT AMERICANS.
BUT I JUST CAN'T ABOLISH CONGRESS... CAN I?
KEN CATALINO
CREATORS SYNDICATE, INC.

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Nika v. State, 124 Nev. Adv. Op. No. 103 (December 31, 2008) "The primary issue in this appeal concerns a jury instruction defining premeditation, commonly referred to as the *Kazalyn* instruction, and our decision in *Byford v. State*, which addressed specific concerns about that instruction. Appellant Avram Nika challenges our subsequent decisions that *Byford* announced a new rule with prospective affect.[3] In considering his argument, we re-examine whether our decision in *Byford* constituted a clarification of existing law or a change in the law respecting the meaning of the mens rea for first-degree murder. We hold that *Byford* announced a change in state law that applies prospectively to murder convictions that were not final when *Byford* was decided. Nika's conviction was final before was decided. Consequently, we conclude that Nika's trial and appellate counsel were not ineffective for failing to challenge the *Kazalyn* instruction as that instruction was a correct statement of the law at the time of his trial.

Nika raises several other issues on appeal, none of which we conclude warrant relief. Accordingly, we affirm the district court's order dismissing Nika's post-conviction petition for a writ of habeas corpus."

Nellis Motors v. State, DMV, 124 Nev. Adv. Op. No. 102 (December 24, 2008) "In this appeal, we address whether the required evidentiary standard for administratively revoking emission-inspector and emission-station licenses is by clear and convincing evidence or preponderance of the evidence. We conclude that the standard is preponderance of the evidence. In light of our conclusion, we further conclude that there was substantial evidence in this matter to revoke appellants' licenses."

Sheriff v. Burcham, 124 Nev. Adv. Op. No. 101 (December 24, 2008) "Respondent Daniel J. Burcham was charged with felony driving under the influence (DUI) pursuant to NRS 484.3795(1)(a) and (b) following an accident that caused the death of another driver. The State appeals the district court's order granting Burcham's pretrial habeas petition and dismissing the felony DUI charge.

We primarily consider whether the definition of 'under the influence,' set forth in this court's 1987 decision, *Cotter v. State*, applies to the current version of NRS 484.3795(1)(a). In 1995, the Legislature amended NRS 484.3795, delineating the various acts that may constitute violations of the statute into separate paragraphs. Although we acknowledge that these amendments impact the analysis in *Cotter* with respect to NRS 484.3795(1), we nevertheless conclude that the standard set forth in *Cotter* is still appropriate for determining whether a defendant is "under the influence." To find someone "under the influence," a fact-finder must determine that the driver was impaired "to a degree which renders him incapable of driving safely." We further conclude that because the State's burden at a grand jury proceeding is to present slight or marginal evidence to support a reasonable inference that the defendant committed the crime charged, the State presented sufficient evidence that Burcham was under the influence of alcohol.

Second, we consider whether the State must use expert testimony or explain retrograde extrapolation to a grand jury when a charge under NRS 484.3795(1)(b) is based on evidence that the defendant's blood-alcohol concentration (BAC) was tested twice within a reasonable time after the collision, was lower in the second test, and was

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below 0.08. We conclude that expert testimony regarding retrograde extrapolation or an explanation by the State is not required in grand jury proceedings under these circumstances.

Therefore, we reverse the district court's order granting Burcham's pretrial petition for a writ of habeas corpus on the felony DUI charge, and we remand this matter for further proceedings."

In re Lerner, 124 Nev. Adv. Op. No. 100 (December 24, 2008) "In this case, we engage in an automatic de novo review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Glen Lerner receive a public reprimand for violating Nevada Rule of Professional Conduct (RPC) 5.5, which prohibits a lawyer from assisting in the unauthorized practice of law. The violation was based on certain activities by Lerner's employee, who was a licensed attorney in Arizona but not in Nevada. In deciding whether clear and convincing evidence supports this violation, we are primarily concerned with the issue of whether the employee engaged in the 'practice of law.'

Our prior precedent and authority from other jurisdictions support the conclusion that what constitutes the practice of law must be determined on a case-by-case basis, bearing in mind the overarching principle that the practice of law is involved when the activity requires the exercise of judgment in applying general legal knowledge to a client's specific problem. When the person engaged in the activity is a lawyer licensed in another state, we must also consider whether that activity may be permissible under Nevada's limited exceptions for multijurisdictional practice, when the activity is limited and incidental to the lawyer's representation of clients in his home state.

Here, consideration of the key principle—exercise of legal judgment on a client's behalf, together with ample authority from other jurisdictions faced with similar facts, demonstrates that Lerner's employee without doubt engaged in the practice of law. Also, the employee worked in Lerner's Las Vegas office for Nevada clients, so he was not engaged in limited, incidental, multijurisdictional practice related to his representation of clients in Arizona, where he is licensed. Consequently, the employee's practice of law was unauthorized. The employee's activities were further performed as part of his regular duties, in conformity with the policies and practices of Lerner's firm, and thus, Lerner assisted in the unauthorized practice of law. We therefore conclude that clear and convincing evidence supports the violation of RPC 5.5. We further agree with the hearing panel's recommendation of a public reprimand as the appropriate discipline.

Howell v. State Engineer, 124 Nev. Adv. Op. No. 99 (December 24, 2008) "This appeal arises from a district court order that denied appellants' petition for a writ of mandamus or judicial review, challenging the State Engineer's refusal to adjudicate title to certain water rights. In resolving this case, we consider what constitutes a State Engineer decision subject to review and whether a petition for extraordinary relief is the proper procedural mechanism to review such decisions. Additionally, we consider whether the State Engineer has authority to adjudicate title to water rights.

Because NRS 533.450(1) provides review for 'any order or decision' of the State Engineer that affects a person's interests 'when the order or decision relates to the administration of determined rights,' we conclude that so long as the

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decision affects a person's interests concerning the rights, and is a final written determination of the issue, it is reviewable.

We further determine that extraordinary writ relief is not available to review a State Engineer's decision. Writ relief is generally available only in the absence of an alternative adequate and speedy legal remedy. Because a State Engineer's decision may be challenged through a petition for judicial review, as set forth in NRS 533.450(1), an adequate and speedy legal remedy precluding writ relief exists.

With regard to whether the State Engineer has authority to adjudicate title to water rights, NRS Chapter 533 governs adjudication of water rights. Nothing in its provisions empowers the State Engineer to adjudicate title to water rights. Instead, NRS 533.024(2) recognizes that only "a court of competent jurisdiction" may adjudicate title to water rights.

Finally, in light of those determinations, we conclude that the district court properly denied appellants' petition for judicial review. As the State Engineer cannot adjudicate questions of title, a district court quiet title action is the appropriate mechanism to resolve the issues in this matter. Therefore, the district court properly denied the petition."

Settelmeyer & Sons v. Smith & Harmer, 124 Nev. Adv. Op. No. 98 (December 24, 2008) "These consolidated matters arise from an action in which a law firm sought to recover attorney fees incurred for its representation of a corporation in a separate receivership and dissolution action. The district court awarded the requested fees; approved the law firm's garnishment and directed the corporation's receiver to pay the firm out of the receivership funds; and awarded the firm additional fees under the offer of judgment protocol. The corporation has appealed from the attorney fees judgment and post-judgment order, and the receiver has appealed from the court's order on garnishment.

As a threshold matter, the firm challenges this court's jurisdiction to consider the receiver's appeal, asserting that the receiver was not a party below and that he was not aggrieved by the district court's order on garnishment. Having considered the parties' jurisdictional arguments, we conclude that we have jurisdiction over the receiver's appeal because the court's order constituted a final judgment in the garnishment proceeding, and since the order was rendered against the receiver, who was the garnishee defendant in that proceeding, he is an aggrieved party entitled to appeal.

As for the merits of the parties' appeals, we address whether the failure to pursue a claim under the receivership claims process necessarily precludes the recovery of attorney fees outside of the receivership court. We also address whether fees are appropriate when a firm represents both the corporation and its majority shareholder and president, as well as whether the firm can recover fees for representing itself in the separate attorney fees action.

We conclude that claims for attorney fees incurred in a receivership and dissolution action can be liquidated in a separate action. The court in that separate action, however, has no jurisdiction to levy on receivership funds without the receivership court's permission. Accordingly, as we conclude that no conflict of interest barred recovery here, we affirm the district court's judgment liquidating the firm's attorney fees. We reverse, however, the district court's orders concerning

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garnishment and disbursement of receivership funds. Finally, we conclude that a law firm cannot recover fees for representing itself, and we therefore reverse the post-judgment order awarding attorney fees."

law.com legal blog watch

A Gallery of Juror Art

Is it a conceit to call the doodles and snapshots of bored jury members "art"? I might have thought so, until I visited The American Gallery of Juror Art. Wisconsin trial lawyer Anne Reed maintains the gallery as part of her blog about juries and jury trials, Deliberations. I have visited her blog countless times and follow her RSS feed, but somehow managed never to notice the gallery until it was mentioned this week on Boing Boing.

The drawings and photographs Reed has collected range from literal to abstract, but all share a common denominator: They represent work done by actual jurors while on actual jury duty. Some of the contributions come from jurors whose day jobs are illustration or photography. Others suggest the kind of back-of-the-envelope doodling one might expect of a juror, but with surprising insight. An example of the latter is David Salvia. As the Chicago jury on which he served deliberated, he sketched his fellow panel members, adding notes about their comments and behavior. "More so than the actual civil case itself, or the lawyers' performances, it was the surprising and illuminating behavior of the jury that I was most eager to document," he writes in a note accompanying his sketch. Others document, in drawings, sketches and photographs, scenes from the jury room and around the courthouse.

As curator of this virtual exhibit, Reed finds some of the art through Google and Flickr, while some of the art finds her. Salvia's sketches ended up on the site after his wife came to it accidentally while searching for something else. She remembered that her husband had made his sketches a decade earlier and put him in touch with Reed. He even agreed to supplement the original sketch with a more legible, typeset version. Thanks to his wife's fortuitous discovery of Reed's gallery, we can read Salvia's impressions of fellow juors, such as the "very scary suburban mom of 2" and the man with the unpronouncable name who was "basically ignoring the sworn testimony in favor of his imagined version."

ACLU Challenges County Speech Plan

By SONYA ANGELICA DIEHN

TUCSON (CN) - The ACLU claims that Pima County has proposed an unconstitutional policy that chills free speech. The proposal - that county employees must act "in a manner that will not bring discredit or embarrassment to the county" - came after a protest at which county legal defender Isabel Garcia held up the head of a piñata of Maricopa County Sheriff Joe Arpaio to a cheering crowd after youths had whacked away the effigy's body.

Garcia, an attorney, is a longtime advocate for immigrants' rights.

Sherriff Arpaio has garnered national coverage for his harsh treatment of inmates, and for using his state powers to crack down on immigrants in the Phoenix area.

The ALCU wrote to the Pima County Board of Supervisors on Monday that the policy change, which would allow the county to punish or fire employees deemed to have engaged in embarrassing behavior, is unconstitutionally vague and violates rights to free expression.

"When public employees act on their own time on topics unrelated to their employment, their expressions may only be curtailed by governmental justification 'far greater than mere speculation,'" wrote Dan Pochoda of the Arizona ACLU.

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Phillip Morris USA, Inc. v. King Mountain Tobacco Co., No. 06-36066 (January 20, 2009) "This case is yet another of the difficult Indian jurisdiction cases considered by this court. The precise question presented is whether there is colorable tribal court jurisdiction over a nonmember's federal trademark and related state law claims against tribal defendants for alleged passing off of cigarettes on the Internet, on the reservation of another tribe, and elsewhere.

Philip Morris USA, Inc. manufactures and markets Marlboro cigarettes, one of the most recognized brands in the United States. King Mountain Tobacco Company, Inc., a tribal corporation on the Yakama Indian Reservation, along with Delbert L. Wheeler, Sr. and Richard 'Kip' Ramsey, company founders and members of the tribe, sell King Mountain cigarettes in packaging that Philip Morris claims infringes and dilutes its trademarks and trade dress.

We are faced with dueling lawsuits. Philip Morris sued King Mountain in federal court, alleging various federal and state law claims and seeking, among other things, injunctive relief against King Mountain's continued sale of its products. King Mountain followed with an action for declaratory relief against Philip Morris in Yakama Tribal Court, which prompted Philip Morris to seek an injunction in federal court against the tribal proceedings. King Mountain asked the district court to stay its proceedings pending the Tribal Court's determination of its jurisdiction.

The district court granted King Mountain's requested stay, concluding there was a colorable claim to tribal court jurisdiction under the formulations found in *Montana v. United States*, 450 U.S. 544 (1981), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Nevada v. Hicks*, 533 U.S. 353 (2001).

We agree that these cases provide the foundation for our analysis, but we disagree that they point to a colorable claim of jurisdiction. Rather, we conclude that the Tribal Court does not have colorable jurisdiction over nonmember Philip Morris's federal and state claims for trademark infringement on the Internet and beyond the reservation.

David Eng v. County of Los Angeles, No. 07-56-055 (January 14, 2009) "We must determine whether Steve Cooley, Steven Sowders, Curt Livesay, Anthony Patchett, and Curtis Hazell are entitled in their individual capacities to qualified immunity in this § 1983 First Amendment retaliation case. Resolving this question involves, in part, David Eng's claim that he was retaliated against by the Defendants for an interview given by his lawyer on his behalf to the press. Concluding that we lack jurisdiction to address whether Eng has third party standing to vindicate the constitutional rights of his lawyer, but that he may nevertheless claim a personal First Amendment interest in his lawyer's advocacy on his behalf, we affirm the district court's partial denial of qualified immunity."

"Eng, a Los Angeles County Deputy District Attorney, was assigned to the Belmont Task Force to investigate allegations of fraud and environmental crimes related to the planning and construction of the Los Angeles Unified School District's Belmont Learning Complex . The Task Force was established by newly-elected District Attorney Steve Cooley, who had campaigned on a promise to reform the Belmont project. The Task Force was headed by Special Assistant Anthony Patchett, who emphasized from the beginning that the Task Force

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would deliver 'slam dunk' indictments against prominent individuals involved with the Belmont project.

Following an extensive seven-month investigation, the Task Force concluded that the building site was and had always been environmentally safe and that no indictments should issue. Hours before the Task Force presented its findings and recommendations to Cooley and his executive staff, Eng briefed Patchett about the report. Patchett threatened Eng with 'severe [personal] consequences' if the Task Force didnot say what Patchett believed Cooley 'wanted to hear.' Eng nevertheless presented his report recommending that no criminal charges be brought. Following Eng's discussion of the Task Force's findings, Patchett made his own presentation opposing Eng's report and distributed proposed indictments against several prominent individuals. Cooley's executive staff considered both recommendations and declined to adopt Patchett's.

In the same meeting, the Task Force also discussed a Los Angeles Times article reporting that the Los Angeles Unified School District's lease-purchase agreements used to finance the Belmont project were being canceled and that the School District would have to refinance the project at a substantially higher interest rate. According to Eng, the agreements were cancelled because Patchett had improperly leaked to the IRS that the School District had committed fraud in purchasing the Belmont property. Eng argued that the lease-purchase agreements had been legal and that Patchett's contrary report to the IRS was 'wrong and should be rectified.' Cooley, who had become angry with Eng, told him to 'shut up.'

Over the next several months, Cooley and members of his staff met frequently to discuss 'a method of forcing David Eng out of the District Attorney's Office.' First, a few months after the presentation, John Zajeck (who replaced Patchett as head of the Task Force) informed Eng that he was under investigation for sexual harassment of a Task Force law clerk with whom Eng had previously engaged in a consensual 'private relationship.' The relationship was not unusual and was not in violation of any office policy. Patchett and Zajeck had approached the law clerk earlier to inquire about the relationship. She told the pair that Eng had not sexually harassed her, nor had she told anyone he had. After learning that Zajeck had initiated a sexual harassment investigation against Eng, moreover, she expressly advised the department that Eng had not sexually harassed her. The investigation nevertheless proceeded without the law clerk's knowledge or participation. Eng was told to work from home until further notice and not permitted to return to work until the following month.

Next, in what Eng asserts was a 'clear demotion,' Cooley reassigned him to the Pomona Juvenile Division, even though Eng was a senior attorney in the office, and the Juvenile Division is "considered to be the first stop for beginning attorneys." (Eng had served in the Juvenile Division in the mid- 1980s.) Eng was also interviewed by three District Attorney investigators regarding the alleged sexual harassment charge. During the interview, the investigators falsely claimed that the law clerk had not disavowed the alleged harassment. No harassment charges were ever brought against Eng.

About five months later, Eng was suspended with pay and instructed not to return to work without further notice, at which time he re-

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tained attorney Mark Geragos. Eng was subsequently served with a Notice of Intent to Suspend, which stated that misdemeanor charges had been filed against him for using an office computer to access private information. Head Deputy Steven Sowders subsequently informed Eng that he was being suspended without pay. Eng and Geragos argued that, because the allegations were baseless, his suspension should be with pay. That request was denied. Sowders terminated Eng's pay and benefits and also refused to allow him to 'cash out' his vacation time, as was ordinarily allowed.

When the misdemeanor charges against Eng went to trial some two months later, they were dismissed when the only potential witness against Eng invoked his Fifth Amendment right to remain silent, evidently having misused office computers himself. Sowders still refused to allow Eng to return to work. Eng and Geragos appealed to the County Civil Service Commission, which ordered that Eng be allowed to return to work and that his lost pay and benefits be restored. Sowders refused to follow the order and extended Eng's suspension without pay for an additional thirty days.

Around the same time, the Los Angeles Times published a prominent article on Eng's case, titled 'D.A. Accused of Payback Prosecution.' The article, which included an interview with Geragos, detailed Eng's allegations that he had been prosecuted because he refused to file criminal charges against individuals involved in the Belmont School project, and because he complained that it was improper for members of the Task Force to contact the IRS. Shortly after the article went to press, Sowders informed Eng and Geragos that Eng would 'never be allowed to come back' to the District Attorney's Office and that 'they would come up with additional things to charge Eng with so that he would remain on suspension or be terminated.' Ironically, the day after the article was published, the District Attorney's office released the final Belmont Report, which mirrored the conclusions originally presented by Eng. Two weeks after the Los Angeles Times article appeared, Sowders met with Eng and served him with a second Notice of Intent to Suspend, realleging the same facts as in the original notice and recounting additional allegations 'stemm[ing] from acts which purportedly occurred years prior.' During the meeting, Sowders asked Eng why he had allowed Geragos to give an interview to the Los Angeles Times. In a subsequent meeting among Eng, Geragos, Sowders, and Chief Deputy District Attorney Curt Livesay, Sowders offered to 'resolve matters' if Eng agreed to 'tell the Los Angeles Times that Geragos's comments were unauthorized and inaccurate, and if he would publicly apologize to Cooley.' Without agreeing to the retraction, Eng returned to work one week later at the Padrinos Juvenile Court.

The following week, however, the District Attorney's office issued a second Notice of Suspension without Pay, evidently again ignoring the Civil Service Commission's order and the dismissal of the criminal charges against Eng. In a second hearing before the Civil Service Commission, the Commission resolved all outstanding allegations in Eng's favor, including the sexual harassment charges. Eng later returned to work once again but discovered that he was not receiving full benefits. He has since been passed over for promotion."

Eng filed suit under 42 U.S.C. § 1983 asserting, in addition to a range of state law claims, that the Defendants had retaliated against him for exercising his First Amendment right to com-

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ment on the Belmont School Project and the leaks to the IRS, and to speak through his attorney to the press, in violation of the First and Fourteenth Amendments.

United States v. Kaczynski, No. 06-10514 (January 9, 2009) "Appellant Theodore John Kaczynski, also known as the 'Unabomber,' appeals the district court's order approving the plan developed, following an earlier remand by this court, to sell or to dispose of Kaczynski's personal property that was seized during the underlying criminal investigation into his bombings. Kaczynski contends: (1) the restitution lien statute, 18 U.S.C. § 3613, is facially unconstitutional and violates the First Amendment; (2) the Plan violates the First Amendment as applied by impinging his freedom of expression and restricting information from the public; and (3) the Plan impermissibly allows credit bids from the victims and allows destruction of 'bomb-making materials' instead of returning them to his designee. For the reasons that follow, we affirm the district court's order approving the Plan."

In July 2006, the government submitted a plan to the district court that provided for the sale or disposal of Kaczynski's personal property. *United States v. Kaczynski*, 446 F. Supp. 2d 1146 (E.D. Cal. 2006) ("*Kaczynski IV*"). Specifically, the government would conduct a well-publicized internet sale of Kaczynski's seized property, including personal items, books owned by Kaczynski, and his own writings. At the Named Victims' request, the writings would be redacted to exclude all information that could be used to identify the actual and intended victims and families. In addition, the government proposed that Kaczynski's weapons be sold to the Named Victims for a credit bid of $300. Finally, the government would dispose of the instructions and materials for making bombs.

Over Kaczynski's objections to various aspects of the Plan, the district court approved the government's plan with the exception that the instructions, including recipes and diagrams for making a bomb, were to be returned to Kaczynski's designated recipient. Kaczynski timely appealed. Kaczynski was initially represented by counsel on appeal, but later sought and obtained permission to represent himself."
The lien statute and the court's order approving the Plan for enforcement of that lien further the important governmental interest of providing compensation to crime victims without further invasion of their privacy or harm to the public; the government's interest is unrelated to the restriction of free expression, and the incidental effect on expression from selling redacted originals but providing the author with complete copies is no greater than essential to further that interest because he is not otherwise precluded from communicating the ideas expressed therein. We therefore hold that the lien statute, as applied here through the approved Plan, does not violate Kaczynski's First Amendment rights.

We cannot say that the district court committed legal error or otherwise abused its discretion in approving the Plan. We therefore affirm the district court's order."

State of Oregon v. Legal Services Corporation, No. 06-36012 (January 8, 2009) "Plaintiff-Appellant the State of Oregon (Oregon) appeals the district court's dismissal of its claims under Federal Rule of Civil Procedure 12(b)(6). Oregon brought suit against the Legal Services Corporation (LSC) for an alleged violation of its rights under the Tenth Amendment to the United States Constitution. LSC has required

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the recipients of its funding to maintain legal, physical, and financial separation from organizations that engage in certain prohibited activities. Oregon alleges that this restriction has effectively thwarted its ability to regulate the practice of law in the State of Oregon and to provide legal services to its citizens. The district court dismissed the suit on the basis that Oregon's allegations of injury were not recoverable, and Oregon appealed. Because we conclude that Oregon lacks standing, we vacate the district court's dismissal of this action on the merits and remand with instructions that the action be dismissed for lack of subject matter jurisdiction.

Metro Lights, LLC v. City of Los Angeles, No. 07-55179 (January 6, 2009) "We must determine whether a city violates the First Amendment by prohibiting most offsite commercial advertising while simultaneously contracting with a private party to permit sale of such advertising at city-owned transit stops.

In *Central Hudson*, the Supreme Court announced a four-part test for assessing the constitutionality of a restriction on commercial speech: (1) if 'the communication is neither misleading nor related to unlawful activity,' then it merits First Amendment scrutiny as a threshold matter; in order for the restriction to withstand such scrutiny, (2) '[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech;' (3) 'the restriction must directly advance the state interest involved;' and (4) it must not be 'more extensive than is necessary to serve that interest.' No one argues that this test should not apply here; since we are dealing with a regulation on commercial speech, *Central Hudson* plainly controls."

It appears to us, therefore, that the slogan Metro Lights has advanced, that 'First Amendment rights are not for sale,' simply misses the point. Certainly the government cannot silence one speaker but not another because the latter has paid a tax, even though it could constitutionally silence both. But that doesn't mean the City cannot silence speakers in general but permit them to bid for the right to speak on City-owned land, assuming that the speakers on City-owned land do not undermine the goal of the City's general prohibition. As we have explained, the City has not done that in this case because the SFA does not 'ensure[ ] that the [Sign Ordinance] will fail to achieve [its] end,' or so undermine it that it cannot 'materially advance its aim.'

For the foregoing reasons, we reverse the district court's grant of summary judgment for Metro Lights and its denial of summary judgment for the City with respect to Metro Lights' First Amendment claims and remand with instructions to dismiss. We dismiss as moot Metro Lights' cross-appeal of the district court's grant of summary judgment for the City with respect to damages. REVERSED."

McCown v. City of Fontana, No. 07-55896 (December 24, 2008) "Plaintiff-Appellee Ian McCown sued Defendants-Appellants City of Fontana, City of Fontana Police Department, Jorge Rodriguez and David Maxson alleging violations of 42 U.S.C. § 1983, including wrongful detention, false arrest, and use of excessive force in connection with McCown's arrest. After most of McCown's claims were dismissed on summary judgment, the two parties settled McCown's remaining claim for $20,000, not including attorney's fees. The parties stipulated in the settlement agreement that McCown was the prevailing party

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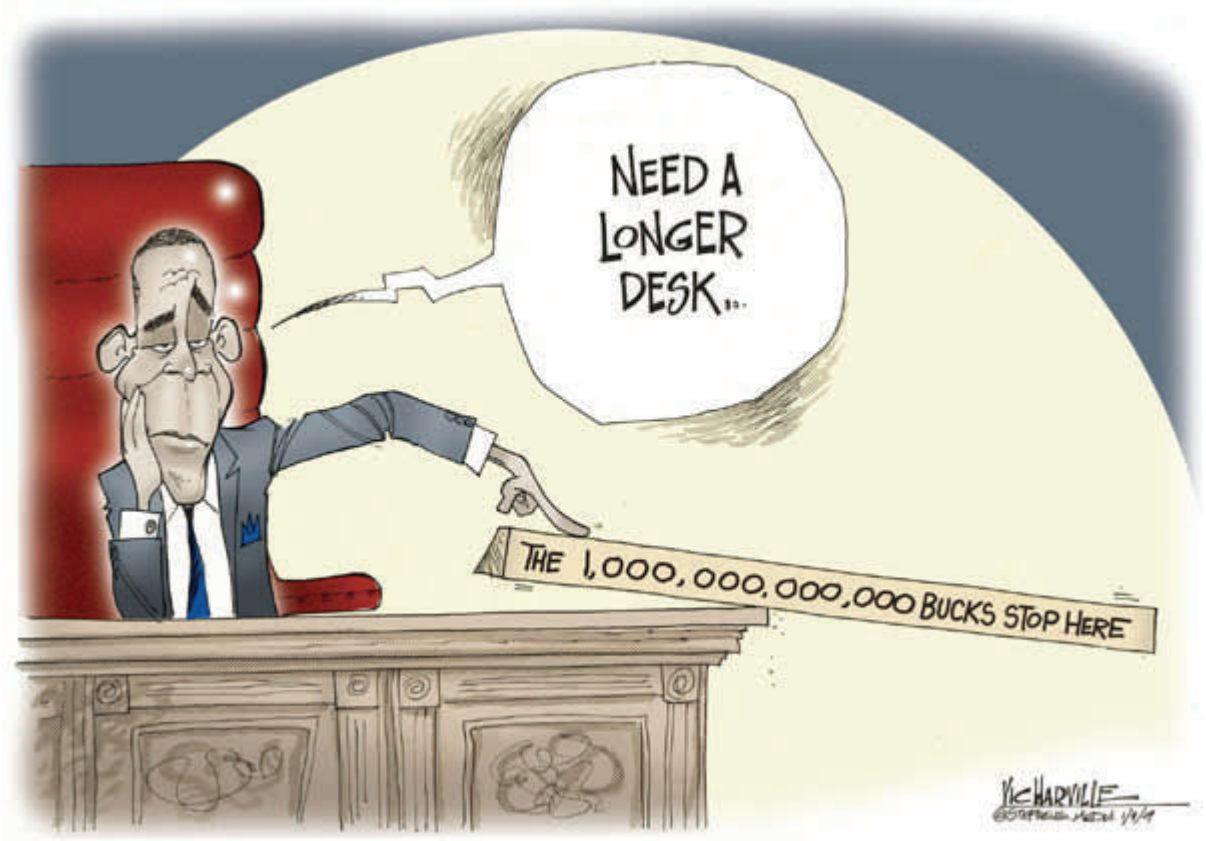
under 42 U.S.C. § 1988, and that the district court would determine the appropriate amount of fees and costs. The district court granted McCown attorney's fees in the amount of $200,000, plus $15,034.10 in costs. The City appealed the award. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand to the district court."

McCown argues that his attorney's fees should be granted in full because, while his monetary success was limited, he achieved an 'excellent result' because his success conferred a benefit on the public. We disagree.

We have previously noted that results may not be measured solely in terms of damages, and 'in determining a reasonable fee award on remand, the district court should consider not only the monetary results but also the significant non-monetary results [the plaintiff] achieved for himself and other members of society.' *Morales v. City of San Rafael*, 96 F.3d 359, 365 (9th Cir. 1996). Such a nonmonetary victory may constitute 'excellent results' for the purpose of calculating attorney's fees. The Supreme Court has likewise indicated that when a decision has 'served the public interest by vindicating important constitutional rights' an award of attorney's fees that is disproportionate to the actual damages may be appropriate. *Rivera*, 477 U.S. at 572.

However, we find this line of cases to be inopposite to McCown's situation. This particular claim was brought against two police officers, not the entire Fontana Police Department or the City of Fontana itself. Moreover, in both *Morales* and *Rivera*, the plaintiffs were members of a minority group that was subject to systematic mistreatment by members of the police force. In both cases, the plaintiffs' victories established a deterrent and resulted in a change of policy. In contrast, McCown did not allege, and has not established, any animus within the Fontana Police Department against him or others like him, nor has his settlement resulted in any change in policy by the Fontana Police Department. McCown argues that his settlement benefits the public by providing an affirmative defense to those at risk of being sued by the individual police officers named in this suit. Such an attenuated 'public benefit' cannot transform McCown's limited success into an 'excellent result.'

We conclude that the district court erred, both in failing to adequately explain its reasons for the award it granted to McCown, and in granting excessive attorney's fees and costs in light of McCown's limited success. We reverse and remand to the district court for reconsideration of the issue of attorney's fees and costs consistent with this opinion."


NEED A LONGER DESK...
THE 1,000,000,000,000 BUCKS STOP HERE
VIC HARVILLE


ARIAL
WELL, IT'S OFFICIAL — WE'RE IN A RECESSION...
DO TELL.

HERRING v. UNITED STATES

HERRING v. UNITED STATES , N0. 07-513 (January 14, 2009)

Officers in Coffee County arrested petitioner Herring based on a warrant listed in neighboring Dale County's database. A search incident to that arrest yielded drugs and a gun. It was then revealed that the warrant had been recalled months earlier, though this information had never been entered into the database. Herring was indicted on federal gun and drug possession charges and moved to suppress the evidence on the ground that his initial arrest had been illegal. Assuming that there was a Fourth Amendment violation, the District Court concluded that the exclusionary rule did not apply and denied the motion to suppress. The Eleventh Circuit affirmed, finding that the arresting officers were innocent of any wrongdoing, and that Dale County's failure to update the records was merely negligent. The court therefore concluded that the benefit of suppression would be marginal or nonexistent and that the evidence was admissible under the good-faith rule of *United States* v. *Leon*, 468 U. S. 897.

Held: When police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply.

(a) The fact that a search or arrest was unreasonable does not necessarily mean that the exclusionary rule applies.. The rule is not an individual right and applies only where its deterrent effect outweighs the substantial cost of letting guilty and possibly dangerous defendants go free. For example, it does not apply if police acted "in objectively reasonable reliance" on an invalid warrant.. In applying *Leon*'s good-faith rule to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding, the Court left unresolved the issue confronted here: whether evidence should be suppressed if the police committed the error.

(b) The extent to which the exclusionary rule is justified by its deterrent effect varies with the degree of law enforcement culpability. Indeed, the abuses that gave rise to the rule featured intentional conduct that was patently unconstitutional. An error arising from nonrecurring and attenuated negligence is far removed from the core concerns that led to the rule's adoption.

(c) To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. The pertinent analysis is objective, not an inquiry into the arresting officers' subjective awareness.

(d) The conduct here was not so objectively culpable as to require exclusion. The marginal benefits that might follow from suppressingevidence obtained in these circumstances cannot justify the substantial costs of exclusion.

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Practice Points: Year In Review: Courts Unsympathetic to Electronic Discovery Ignorance or Misconduct

This past year highlighted a major trend in cases concerning issues involving the exchange of electronically stored data: an increase in judicial unwillingness to display compassion or tolerance for negligent e-discovery blunders. Courts are increasingly imposing sanctions for discovery misconduct and for the failure to properly preserve and produce electronically stored information (ESI). In fact, of the approximately 138 reported electronic discovery opinions issued from Jan. 1, 2008 to Oct. 31, 2008, over half addressed court-ordered sanctions, data production, and preservation and spoliation issues. A rough breakdown of the issues

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involved in these cases is as follows:

- 25% of cases addressed sanctions
- 20% of cases addressed various production considerations
- 13% of cases addressed preservation and spoliation issues
- 12% of cases addressed computer forensics protocols and experts
- 11% of cases addressed discoverability and admissibility issues
- 7% of cases addressed privilege considerations and waivers
- 7% of cases addressed various procedural issues
- 6% of cases addressed cost considerations

Courts are also becoming increasingly educated in the technical issues involved in e-discovery matters, a fact that is reflected in the numerous influential e-discovery opinions issued in 2008. There were several cases in 2008 that received significant attention within the legal community and helped provide more structure and shape to what may be viewed as an amorphous concept of e-discovery. Narrowing down these cases was no easy task, but the top five most significant cases from 2008 that summarized the above issues included (in no particular order):

Court Imposes Sanctions for "Egregious" E-Discovery Misconduct

Keithley v. Homestore.com, Inc., 2008 WL 3833384 (N.D.Cal. Aug. 12, 2008). In this patent infringement litigation, the defendants' failure to issue a written document retention policy well after its
preservation duty arose led the court to label the discovery misconduct "among the most egregious this court has seen." The court ordered the defendants to pay over $250,000 in fees and costs associated with prior and future motion practice and expert fees, deferring additional amounts until actual fees can be determined, while also imposing an adverse jury instruction against the defendants.

Court Orders Forensic Examination and Denies Cost Shifting, Citing Producing Party's Discovery Misconduct

Peskoff v. Faber, 2008 WL 2649506 (D.D.C. July 7, 2008). In this ongoing contract dispute, the court followed up on its previous holding that it was appropriate to ascertain the cost of a forensic examination to determine if the cost was justified. The court found the defendant's inadequate search efforts, failure to preserve electronically stored information and overall unwillingness to take "discovery obligations seriously" caused the need for a forensic examination. Since the problem was one of the defendant's "own making," the court refused to shift costs.

Court Orders Production of Text Messages

Flagg v. City of Detroit, 2008 WL 3895470 (E.D.Mich. Aug. 22, 2008). In this ongoing wrongful death action, the defendants argued the court's previous order that established a protocol for the production of text messages violated Stored Communications Act. The court was willing to modify the means of production and ordered the plaintiff to file a Fed.R.Civ.P. 34 production request, finding a third-party subpoena unnecessary.

Magistrate Orders Parties to Cooperate in Production and Advised Expert Testimony May be Needed for Judicial Review of Search Methods

United States v. O'Keefe, 2008 WL 449729 (D.D.C. Feb. 18, 2008). In this criminal prosecution, the co-defendant filed a motion to compel

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claiming the government did not fulfill discovery obligations. Applying the Federal Rules of Civil Procedure to this criminal action, Magistrate Judge John M. Facciola ordered the parties to participate in a good faith attempt to reach an agreement on production. The court also suggested that judicial review of search methods may require expert testimony, since for lawyers and judges to make search term effectiveness, judgments are to go "where angels fear to tread." See also United States v. O'Keefe, 2008 WL 3850658 (D.D.C. Aug. 19, 2008).

Court Denies Motion to Retract Privileged Documents Finding Lack of Reasonable Precautions Taken

Victor Stanley, Inc. v. Creative Pipe, Inc., 2008 WL 2221841 (D. Md. May 29, 2008). In this copyright infringement case, the plaintiff sought a ruling that 165 electronic attorney-client privileged and work-product protected documents produced in discovery were discoverable. Determining the defendants did not take reasonable precautions by relying on an insufficient keyword search to prevent inadvertent disclosure, the court found the defendants waived their privilege. The court noted several measures could have helped prevent this waiver, including a clawback (or other non-waiver) agreement the defendants voluntarily abandoned and/or complying with the Sedona Conference Best Practices for use of search and information retrieval.

The above cases, combined with many additional 2008 cases involving ESI, reveal an increased focus on the legal and technical issues involved in the collection, review and production of ESI. Recent cases reveal that attorneys and legal teams are becoming more technologically savvy and judges are expecting early and comprehensive collaboration amongst parties. Future decisions will likely continue to reveal increased understanding of the legal and logistical issues involved in e-discovery, as well as advances in technology designed to increase the efficiency of the process.

Court Refuses to Allow Party to "Thumb through Non-Party's Electronic File Drawer" to Seek Relevant Documents

Integrated Serv. Solutions, Inc. v. Rodman, 2008 WL 4791654 (E.D.Pa. Nov. 3, 2008). In this ongoing litigation, the plaintiff sought production of responsive electronic data contained on computers owned by a non-party. The parties to this dispute agreed to retain a vendor to perform a search of the laptop in question, to determine whether it contained, or once contained, any documents responsive to the subpoena. The plaintiff also sought the vendor report detailing the inspection, claiming there was an understanding between the parties that such a report would be provided. The non-party argued against production asserting the search terms were overbroad and likely to reach competitive information that was irrelevant to the litigation at hand and that there was no agreement to provide the vendor report. Accepting the non-party's assertions of non-responsiveness, the court denied the plaintiff's motion to compel. The court stated it would not require the non-party to allow the plaintiff, a competitor, to "thumb through an electronic file drawer" to double-check document review for relevance. However, the court found evidence of an understanding that the plaintiff would receive a written vendor report and allowed the plaintiff the option to seek the report at its own expense.

State Supreme Court Finds Willfulness Not Required to Impose Sanctions

Barnett v. Simmons, 2008 WL 4853360 (Okla. Nov. 10, 2008). In this breach of contract case,

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the trial court required willfulness for the imposition of sanctions and the plaintiffs appealed. The Court of Civil Appeals affirmed the trial court's ruling, but remanded for consideration of whether sanctions could be imposed for mere negligence. Both sides petitioned for writs of certiorari. In the underlying dispute, the plaintiff sought unpaid royalties on an oil lease and the defendant filed a motion to compel production of certain files on the plaintiff's computer. Defendant's motion to compel was granted by the trial court. Subsequently, the plaintiff enlisted the help of several computer experts to remove alleged viruses, neglecting to mention that the hard drive was the subject of a court order. During the expert analysis, several files were deleted as a result of the use of numerous data wiping programs. Citing Oklahoma's discovery code §3237 (B)(2) (which mirrors Fed.R.Civ.Pro. 37(b)(2) and authorizes sanctions for the failure to comply with a court order) the Court held that the trial court erred as a matter of law in determining that sanctions could be imposed only upon a showing of willful conduct. The Court determined that willfulness is relevant to the severity of sanctions imposed, but not to whether sanctions should be imposed. Accordingly, the Court reversed and remanded for reconsideration of the defendants' motion for sanctions.

Court Rules Printed Government Webpages are Self-Authenticating

Williams v. Long, 2008 WL 4848362 (D.Md. Nov. 7, 2008). In this employment compensation dispute, the plaintiffs filed for conditional class action certification and submitted several affidavits and printed web pages from official web sites, consisting of case search results and a copy of a similar complaint in support of the motion. Citing Lorraine v. Markel Am. Ins. Co., Magistrate Judge Paul W. Grimm stated that accepting electronically stored information as evidence implicates a series of "evidentiary hurdles" that must be cleared, including relevancy and authenticity. Magistrate Judge Grimm held that since the web pages were printed from government web sites, they were self-authenticating, "official publications," and thus clear the authentication hurdle. Finding the webpages authentic and relevant to the issue of class certification, the court turned to the issue of hearsay. Finding that the requirements for the hearsay exception for public records were met, the court granted the plaintiffs motion to conditionally certify the class.

Court Provides In-Depth Analysis of the Discoverability of Metadata

Aguilar v. Immigration & Customs Enforcement Divis. of United States Dept. of Homeland Security, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008). In this civil rights class action alleging unlawful searches of homes, the plaintiffs sought production of metadata from various types of ESI including e-mail, word and excel documents and databases. Noting that the production of metadata should have been discussed at the Fed.R.Civ.P. 26(f) conference, the court went on to consider the various metadata production requests. Regarding e-mails and backup tapes, the court found the plaintiffs' requests untimely and too costly for the little benefit potentially gained. The court then discussed Word documents and PowerPoint presentations and ordered the production of metadata if the plaintiffs were willing to bear all costs associated with its production; despite finding the metadata sought was marginally relevant, not critical to pretrial presentation and was untimely requested. Additionally, declining to find production unduly burdensome for Excel spreadsheets, the court granted production of the metadata as requested from Excel files.