The Public Lawyer

STATE BAR OF NEVADA

Public Lawyers Section

October 2009

Nevada Supreme Court Cases

Rodriguez v. Primadonna Company, 125 Nev. Adv. Op. No. 45 (October 1, 2009). "Fabian Santiago, then 17 years old, and his two adult step-uncles Manuel and Daniel Garibay, were asked to leave a hotel property after an evening of drinking and disorderly behavior. Manuel drove the three from the hotel parking lot. Mistaking a frontage road for the freeway, Manuel rolled the vehicle while driving at approximately 80 miles per hour. Fabian suffered severe spinal injuries in the accident. His guardian brought suit in district court alleging that the hotel acted negligently when it evicted Fabian and his step-uncles from the property by allowing or directing Fabian to be a passenger in a motorized vehicle driven by an intoxicated driver.

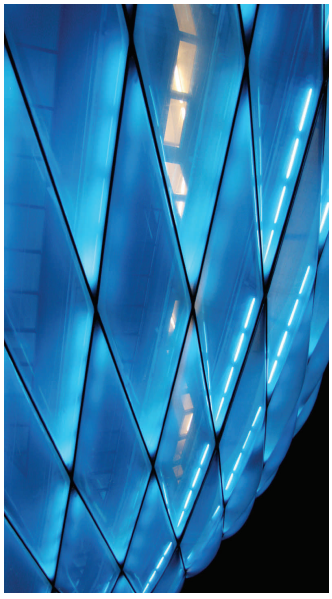
In this appeal, we consider

Husk v. Clark County School Dist.

Daniel L. O'Brien, Senior Assistant General Counsel with the Clark County School District, says that the Supreme Court entered an unpublished Order in this case On September 28, 2009. The full Order is in the accompanying PDF file in your email.

There are only two published decisions dealing with the effect of the Coverdell Teacher Protection Act of 2001, which protects teachers from acts or omissions (negligence) while attempting to maintain order and control at school. This Order applies the Act exactly as it was intended to be applied. Unfortunately, few people seem to know about the Act or how it applies.

He is considering seeking publication of the Order. If you would like to contact him or offer your support, he can be reached at (702) 799-5373 or obriedl@InterAct.ccsd.net



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whether the district court properly entered summary judgment in favor of the respondent hotel corporations, dismissing appellant's negligence claim. Appellant's claim was grounded, in part, on allegations that respondents' security personnel acted unreasonably when they evicted an intoxicated minor patron, who was injured in a motor vehicle accident. We conclude that the eviction was reasonable as a matter of law. We further conclude that Nevada's rejection of dram-shop liability applies to a claim for damages made by an intoxicated patron that occur after the patron is reasonably evicted."

Delgado v. American Family Ins. Group, 125 Nev. Adv. Op. No. 44 (October 1, 2009). "We conclude that a passenger who is injured by two concurrently negligent drivers may recover from both the permissive driver's single insurance policy liability benefits based on the permissive driver's negligence and underinsured motorist benefits based on the other driver's underinsured status. In so doing, we clarify that Peterson and Baker are not determinative on this issue. The antistacking rule set forth in Peterson and Baker is not implicated when a passenger, whose injuries are attributable to two jointly negligent drivers, exhausts the liability limits of the permissive driver's policy without satisfying his or her damages, and seeks recovery under the permissive driver's underinsured motorist policy based on the other driver's underinsured status. Accordingly, we reverse the district court's grant of summary judgment."

Ozawa v. Vision Airlines, 125 Nev. Adv. Op. No. 43 (October 1, 2009). "In these consolidated appeals, we consider two issues. First, we are asked to recognize a new exception to the at-will employment doctrine and to allow a claim for tortious discharge related to an employee's termination for attempting to organize his fellow employees. Because we conclude that the appellant had an available statutory remedy, we decline to recognize this claim for tortious discharge and we affirm the district court's order granting summary judgment on this claim. Second, we review whether the district court abused its discretion in its resolution of respondents' request for attorney fees and costs. Although we affirm the district court's denial of respondents' motion for attorney fees based on our conclusion that the district court properly weighed the relevant factors, we reverse in part the district court's costs award that attempts to provide compensation for a previously dismissed cause of action."

In re Estate of Miller, 125 Nev. Adv. Op. No. 42 (September 24, 2009). "This appeal presents three narrow but previously undecided issues concerning offer of judgment practice under NRCP 68 and NRS 17.115. Reversing, we hold that (1) a judgment obtained on or after appeal can qualify as a "more favorable judgment" for purposes of the fee-shifting provisions of NRCP 68 and NRS 17.115, (2) appellate fees are recoverable, and (3) an unrepresented party who serves an offer of judgment may recover fees later paid to a lawyer hired to prosecute or defend the case."

Zana v. State, 125 Nev. Adv. Op. No. 41 (September 24, 2009). "This appeal presents three main issues. First, we consider whether testimony regarding prior bad acts is admissible when the resulting court proceedings were sealed or expunged. Second, we address whether the jury committed misconduct in this case, and if so, whether such misconduct warranted a new trial. Third, we discuss whether the district court erred in denying the motion to sever the lewdness counts from the child por-

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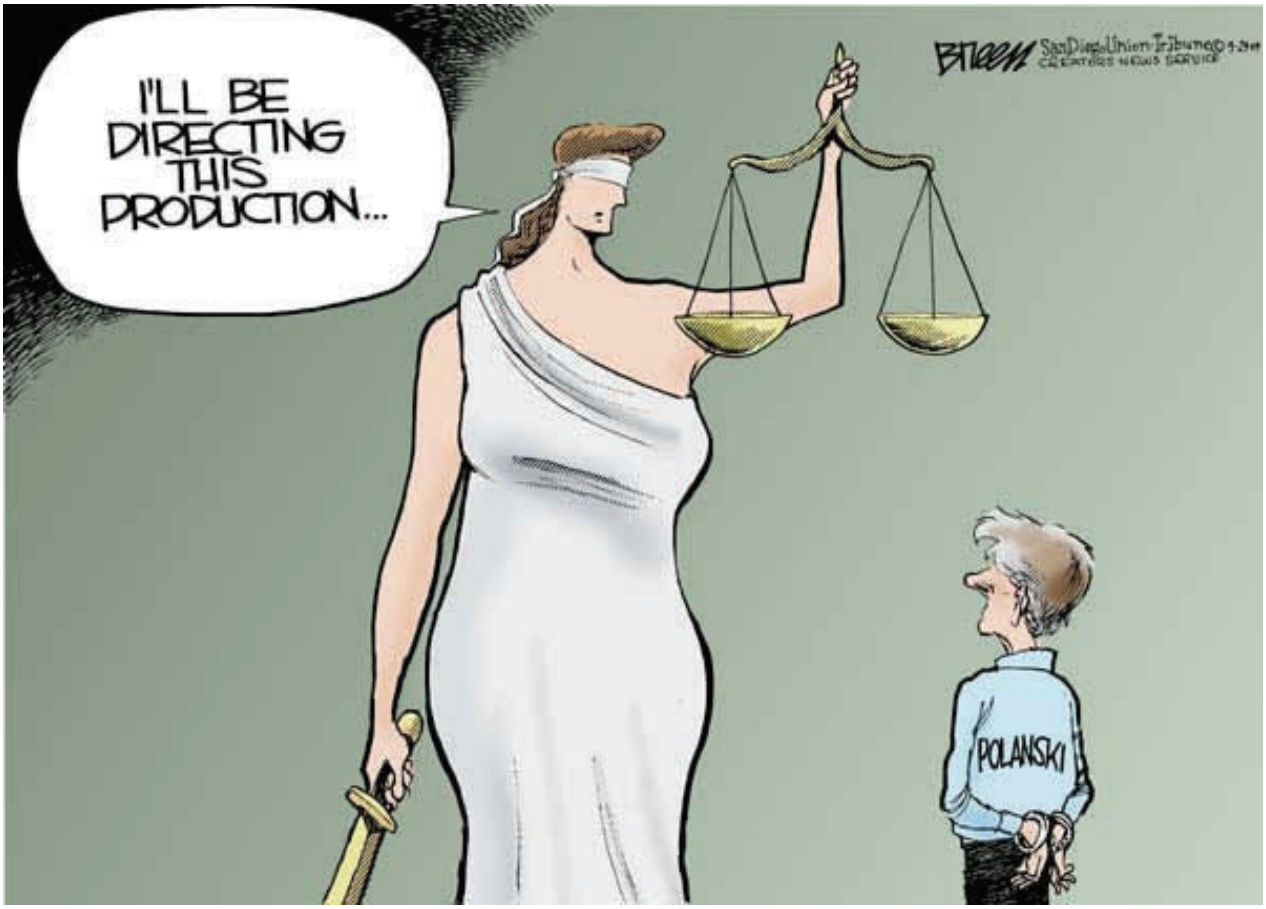
nography counts.[1]

We conclude that the district court may permit testimony that is confined to a witness's personal experiences so long as the witness does not rely on the previously sealed or expunged court proceedings and does not indicate that such proceedings took place. Next, we conclude that any jury misconduct that occurred in this case did not prejudice the verdict, and thus, a new trial was not warranted. Finally, we conclude that the district court did not abuse its discretion by denying the motion to sever the lewdness counts from the pornography counts because the evidence presented in each case was admissible in the other case. We therefore affirm appellant Mark R. Zana's conviction.

Argentena Consol. Mining Co. v. Jolley Urga, 125 Nev. Adv. Op. No. 40 (September 24, 2009). "This appeal arises out of a district court's order adjudicating an attorney-client fee dispute between appellant Argentena Consolidated Mining Company and its former law firm respondent Jolley Urga Wirth Woodbury & Standish. Jolley Urga defended Argentena in the underlying personal injury action between Argentena and an injured plaintiff. In this opinion, we must determine whether, in the absence of an enforceable charging lien or the client's request or consent to the district court's adjudication of a retaining lien, and in light of the client's legal malpractice alle-



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gation, a district court has jurisdiction to adjudicate an attorney-client fee dispute in the underlying action in which the attorney's services were rendered.

We conclude that absent an enforceable charging lien or the client's request or consent to the district court's adjudication of a retaining lien, the district court is without jurisdiction to adjudicate an attorney-client fee dispute in the underlying action. We further conclude that when the client asserts legal malpractice as a defense against the attorney's claim for fees, it is particularly inappropriate to summarily adjudicate the fee dispute in the underlying action. We instruct that when the district court lacks jurisdiction to adjudicate the fee dispute or the client objects to the court's adjudication of the dispute based on its legal malpractice claim against the attorney, the attorney seeking to recover fees should file a separate action to do so.

Flamingo Paradise Gaming v. Att'y General, 125 Nev. Adv. Op. No. 39 (September 24, 2009). "This appeal involves a facial challenge to the constitutionality of Nevada's Clean Indoor Air Act (NCIAA), which was passed as a ballot measure in 2006 and codified in NRS 202.2483. The NCIAA prohibits smoking in schools and "indoor places of employment" but provides exceptions for gaming areas in casinos, stand-alone bars, and strip clubs. In an action for injunctive and declaratory relief, appellants challenged the constitutional validity of the statute. The district court ruled that the statute was unconstitutionally vague for criminal enforcement purposes but not for civil enforcement purposes, and as a result, it severed from the statute the portion permitting the imposition of criminal penalties. In reaching this conclusion, the district court found that several terms within the statute were vague and the statute lacked a criminal intent requirement necessary to provide sufficient guidance for criminal enforcement of the statute. But the district court also found that the statute was not too vague for civil enforcement based on its conclusion that the test for constitutional vagueness is less strict for civil enforcement than criminal enforcement.

We conclude that the district court correctly ruled that under a facial challenge the statute is constitutional for civil enforcement but unconstitutionally vague for criminal enforcement. A statute containing a criminal penalty is facially vague when vagueness permeates the text of the statute, while a statute that only involves civil penalties is only facially vague if it is void in all its applications. As vagueness permeates the text of the NCIAA, it is unconstitutionally vague for criminal enforcement. We further conclude that the district court properly severed the criminal enforcement provision from the statute because the statute, after severance, can be legally enforced and it was the intent of the proponents of the statute that the act remain in effect if a portion was severed. A review of the NCIAA, after severance, indicates that the statute survives a facial vagueness challenge, as it is not vague in all its applications. While we recognize that the NCIAA contains numerous defects that may potentially be subject to as-applied challenges, here, the civil enforcement of the statute does not violate constitutional due process rights for vagueness under the minimal requirements for surviving a facial challenge. Finally, we conclude that the statute does not violate equal protection, nor does it effect an unconstitutional government taking of private property. Accordingly, we affirm the district court's order upholding the civil enforcement of the statute and severing the statute's criminal enforcement provision as unconstitutional."

IN THE NEWS

Police Residency Rule On Way Out In Chicago Suburb
From The Southtown Star, September 27

CHICAGO HEIGHTS, IL – The residency requirement that has kept Chicago Heights police officers living in the city since 1954 may soon be ending.

An arbitrator ruled last week that all new police officers must live in Chicago Heights for their first five years in the department. But after that, they can move as far as 20 miles away as long as they live in Illinois.

Police officers who have already spent five years in Chicago Heights are now free to move away under the same ruling, but are required to notify Chicago Heights Police Chief Michael Camilli 45 days before their move.

Negotiations on salary and residency between the city and the police union have been ongoing since the police union's contract expired April 30, 2008.

At the end of May, representatives from the city and the union met with an arbitrator to try to settle the issue.

In August, the arbitrator ruled in favor of the union on the issue of pay, but sent both parties back to the bargaining table on residency.

The city council is expected to vote on the ruling in October.

"If it were the city's decision, the residency rule would be intact as it has been since 1954," Chicago Heights chief of staff Matt Fares said.

"Both sides win a little bit but that little bit we won doesn't make me want to throw a party. If you are getting paid by city and taxpayers, you should be a part of the city. Plain and simple."

Ald. Joseph Faso (4th) also disagreed with the ruling.

"I still would like to see them stay," Faso said. "I recommended (they stay) 10 years and then let them move within a certain distance. They ended up getting five years. At least they didn't all move away."

Facebook Claims Another Officer's Job
From Policeone.com, September 30

CHILTON, WI – One eastern Wisconsin sheriff's deputy has resigned and another has been demoted after a video on Facebook showed them and others burning a dummy in a department uniform.

The video taken last month shows the deputies burning a uniformed effigy propped against a small cross. A woman at one point says the burning cross has a "KKK aspect to it." Calumet County Sheriff Jerry Pagel said Tuesday that Deputy Jennifer Bass resigned and Wendy Schmitz has been demoted to dispatcher. Bass had been a jailer and Schmitz had been an investigative sergeant.

The sheriff says both women called the burning a "stress reliever." Notes bearing names of the sheriff and other officers were affixed to the dummy.

Bass' phone number isn't listed. A telephone message left for Schmitz wasn't returned.

IN THE NEWS

Police Union Loses Liquor License For A Day
From The Providence Journal, September 30

PROVIDENCE, RI – The city's Board of Licenses turned off the taps at the police union hall for one day on Monday because of a brawl at the drinking establishment earlier this month that led to the arrest of a state trooper on a charge of punching a Providence police sergeant.

A police investigation found that the hall was serving liquor at 3:30 a.m., well past the 1 a.m. closing time.

The board, in a 6-to-0 vote, decided the bar will be closed Friday night.

Board Chairman Andrew J. Annaldo and member Paul Ragosta questioned why the hall was not punished for the fight on Sept. 5 that left Providence police Sgt. Bernard "Teddy" Gannon with a broken nose.

Edward J. Stenovitch, an off-duty state trooper, has been charged with the assault that the Providence police claim was unprovoked.

Assistant City Solicitor Max Foster told the board that the case dealt exclusively with serving alcohol after closing.

"What troubles me about this, is that it's a unique club," Ragosta said. "There are patrons that carry firearms. This could've gotten much more serious than it was."

Representatives from the police union and police administration reached an agreement on the one-day suspension before the board met on Monday.

A few days after the brawl, Police Chief Dean M. Esserman met with union leaders and told them that the department would be taking action against the union hall.

The fight broke out in the final hours of a fund-raiser to raise money for the widow of Peter Rocchio, a Providence police officer who died last summer .

The officers bought $20 tickets for a buffet dinner, drinks and a night of music with karaoke and off-duty officers performing with their own bands.

Stenovitch and his wife dropped in about 3 a.m. A few minutes later, the police allege that the trooper punched Gannon in the face.

NINTH CIRCUIT CASES

Los Altos El Granatas Investors v. City of Capitola, No. 07-16888 (October 6, 2009). "Despite clear language from the Supreme Court establishing that 'a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts,' *England v. La. State Bd.of Med. Exam'rs*, 375 U.S. 411, 417 (1964), two California courts determined that this right to a federal forum was 'irrelevant' and struck appellant's clear reservation of its federal claims from its complaint. The district court then determined that the actions of the California courts should be given preclusive effect in federal court. Although we agree that we must give full faith and credit to the state court's decision to strike the *England* reservation from the complaint, we conclude that doing so has no effect on the validity of appellant's reservation of federal claims. We thus reverse the judgment of the district court."

"The complicated procedural history of this case reveals the sisyphean task that the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), has created for plaintiffs who seek to have their federal takings claims adjudicated in federal court. After a full complement of administrative appeals, three California Superior Court decisions, a California Court of Appeal decision, three federal district court decisions, and one prior federal appellate court decision, the plaintiff in this case assumed that it had properly exhausted its state law causes of action in state court and would be entitled to present its unadjudicated federal claims in federal court. Yet, the district court decided that in the process of exhausting its state law causes of action the plaintiff had created a bar to any subsequent assertion of federal claims in federal court. The protracted legal struggle that is the basis for this appeal began on March 9, 2000, when appellant Los Altos El Granada Investors, owner of a mobile home park, 'Castle Mobile Estates,' located in the City of Capitola, petitioned the City for license to increase rents on its mobile home pads from $200 to $500 per month. A 1970s-era mobile home rent control ordinance provides that mobile home rents can be increased in only two situations. First, a '"automatic increase' occurs in the event of an increase in the Consumer Price Index, and in such a case rent can be increased by no more than 60 percent of the increase in the Consumer Price Index. Second, mobile home park owners may effect a 'discretionary increase' in rent to pass through increased operating costs, capital expenses, and capital improvements. This process requires that park owners work with mobile home owners and an arbitrator to determine the amount of the increase.
Los Altos submitted evidence to the City indicating that the rent control ordinance was permitting mobile home owners to sell their homes at a significant premium, essentially transferring wealth from mobile home park owners to mobile home tenants."

Klein v. City of San Clemente, No. 08-55015 (October 2, 2009) "The City of San Clemente flatly prohibits the leafleting of unoccupied vehicles parked on city streets. We conclude that petitioners are likely to succeed in demonstrating that the City's justification for its prohibition is insufficient and that they have otherwise met the requirements for obtaining a preliminary injunction enjoining enforcement of the prohibition. We therefore reverse the district court's order denying petitioners' motion for a preliminary injunction and remand for further proceedings consistent with this

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opinion."

"In sum, the City has not provided any evidence that placing leaflets on parked cars results in any litter, much less a more-than-minimal amount of additional litter. The district court thus clearly erred in concluding that the ordinance was narrowly tailored to advance the City's significant interest in preventing litter."

"In sum, just as the protection of private property is not a sufficiently substantial government interest to justify an across-the-board ban on door-to-door solicitation, so that interest cannot suffice to justify an across-the-board ban on placing leaflets on the windshields of empty vehicles parked on public streets."

"In this case, the City's ordinance prohibits any potential speaker from placing leaflets on unoccupied parked vehicles, regardless of the type of leaflet or the would be recipients' willingness to receive the speech. The ordinance thus infringes on the free speech rights not only of Klein, but also of anyone seeking to express their views in this manner in the City of San Clemente. The balance of equities and the public interest thus tip sharply in favor of enjoining the ordinance."

Guggenheim v. City of Goleta, No. 06-56306 (September 28, 2009) "Daniel Guggenheim and others bring a facial challenge to the City of Goleta's mobile home rent control ordinance. Guggenheim argues that the ordinance, which effects a transfer of nearly 90 percent of the property value from mobile home park owners to mobile home tenants, constitutes a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)."

"The district court did not address either the standing or ripeness questions due to the unusual procedural history of the case, but implicitly found the case was properly brought. The district court found that no taking had occurred. For the reasons explained below, we agree with the district court that this case is properly brought and ripe for decision, but we disagree with the district court on the merits of the takings claim. Because we find that a taking has occurred, we reverse and remand to the district court to determine what compensation is due. We affirm the district court's judgment on the due process and equal protection claims."

Indergard v. Georgia-Pacific Corp., No. 08-35278 (September 28, 2009) (O'Scannlain. J., dissenting) "The essential distinction between a medical examination and a physical fitness or agility test, for the purposes of the Americans with Disabilities Act, is that the former is designed to reveal disability, while the latter is designed to determine whether an employee can perform her job. I cannot conclude that the evaluation Kris Indergard underwent on her return to work at Georgia-Pacific was a medical examination under 42 U.S.C. § 12112(d)(4)(A), for it was not designed to reveal disability. Furthermore, even assuming that there were any 'medical' aspects of the physical capacity evaluation ('PCE'), they were merely incidental to the physical agility aspects and did not in any way cause the harms that Indergard alleges. Therefore, I must respectfully dissent."

United States v. Watson, No. 08-10385 (September 23, 2009) "Deandre Watson, who pled guilty to carjacking pursuant to a plea agreement containing a waiver of the right to appeal, challenges a condition of his supervised release barring him from entering San

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Francisco without the prior approval of his probation officer. He argues that the district court did not provide the necessary notice before issuing this condition and that the condition itself violates his 'constitutional rights to travel and move, to freedom of association, to intimate association with his family and related rights.'"

United States v. Lemus, No. 08-50403 (September 22, 2009) "Juan Hernan Lemus appeals the district court's denial of his motion to suppress incriminating evidence discovered during a warrantless search of his apartment following his arrest. Even assuming that there were no articulable facts which would warrant a

"A waiver of the right to appeal does not bar a defendant from challenging an illegal sentence. We conclude, however, that the disputed supervised release condition directing Watson to stay out of San Francisco during the term of his supervised release unless he obtains permission from his probation officer is not unlawful. It is reasonably tied to the court's stated aims of rehabilitation and deterrence and is no more restrictive than reasonably necessary to serve those purposes. Nor do we find here any of the other circumstances that cause a waiver of appeal to be ineffective. The language of Watson's plea agreement waiver encompasses this appeal and the waiver was knowingly and voluntarily made given the circumstances surrounding the agreement. We accordingly dismiss the appeal."

reasonably prudent police officer to believe that Lemus's apartment harbored an individual posing a danger to those on the arrest scene, we nevertheless affirm the district court's denial of the suppression motion. Because the area in which the police officers discovered the incriminating evidence 'immediately adjoin[ed] the place of arrest,' the officers were justified in conducting a search of that area without either probable cause or reasonable suspicion, *Maryland v. Buie*, 494 U.S. 325, 334 (1990), and anything in plain view that they discovered in the course of that search could be seized without violating the Fourth Amendment."

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The Employment Lawyer's Worst Nightmare

Whoever came up with the idea for the "That's What She Said" law blog is a genius. This blog, from the labor and employment law firm Ford & Harrison, breaks down each new episode of the TV show "The Office" and analyzes the never-ending stream of employment law violations committed by Michael Scott and company. I'm not sure what the blog does during "rerun season," but this time of year it has a constant stream of entertaining material in its practice area to analyze. Brilliant concept, kudos to Ford & Harrison for conceiving of this, executing on the idea and sticking with it since 2006.

In a post today, Brian Kurtz writes that this week's episode provided examples of no fewer than five Dunder Mifflin employees that the company should discharge if it wants to minimize potential liability:

- **Dwight. Fantasized about placing Jim in a "triangle choke hold," then tried to enlist his coworkers to "drag [Jim] out of his office." Kurtz says that "just about every company not named Dunder Mifflin would have let Dwight go that day."**
- **Michael and Jim. Drank gin in Jim's office while trying to make important compensation decisions.**
- **Ryan and Pam. Ryan is apparently running a sports book out of the Scranton branch, and Pam is a customer.**

The blog even identifies the author of each post with a Dunder Mifflin-like name badge. Love the whole concept, great stuff!

Pint Glass Injuries Cause British Government to Leap Into Action

Writing on his "Lowering the Bar" blog, Kevin Underhill brings us news of the latest effort to make life difficult for personal injury lawyers. On the heels of its ill-fated effort to control stabbings by banning knives that have a point on the end, the British government is now seeking a new design for pint glasses that it hopes will reduce the number of incidents in which people use them to attack each other. For whatever reason, the British Home Office, which is the lead government department for immigration and passports, drugs policy, counter-terrorism, police, and science and research, has taken a keen interest in the 5,500 people who are attacked with glasses and bottles every year in England and Wales.

The Home Office has reportedly commissioned a new design in an attempt to stop glasses being used as weapons and is looking hard at a plastic glass. The British Beer and Pub Association, however, is strongly against the idea of mandatory plastic glasses:
For the drinker, the pint glass feels better, it has a nice weight and the drink coats the glass nicely. That's why people go out for a drink, to have a nice experience. I would ask, is it necessary to replace the much-loved pint glass for safety reasons in the vast majority of pubs where there is no problem?
Underhill writes that "somebody who would otherwise be stabbing you with a broken pint glass is probably going to be enterprising enough to find something else, like maybe a pewter tankard, to attack you with." Based on accident data provided by The Royal Society for the Prevention of Accidents ("RoSPA"),

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Underhill also identifies some other public health risks that may require some sort of urgent governmental action in England.

- **1,000 accident cases recorded under the category "Cardigan sweater"**
- **943 cases of injury due to "fairground punch machines"**
- **656 cases involving "sex or marital aids"**
- **615 injuries from gravestones or headstones**
- **308 magnet injuries**
- **205 "pie or tart" injuries**
- **82 injuries from chopsticks**
- **18 injuries from capes. ("What are we doing to make our capes safer?" Underhill demands).**

Underhill's "Lowering the Bar" blog is quite funny. Read his "about the author" bio **here**: if you like that, as I did, you'll probably find the rest of the blog funny, too.

Indiana Grandmother Jailed After Buying One Box Too Many of Cold Medicine

Ultimately, it was the box of Mucinex-D that Sally Harpold purchased for her daughter in March 2009 at a Clinton, Indiana, drugstore that got her thrown in jail. Because it came on the heels of a purchase of a box of Zyrtec-D cold medicine that she had already dared to pick up for her husband earlier that week, Harpold, a grandmother of triplets, was awoken by police officers banging on the front door of her home on July 30 (four months after the purchases) and taken in handcuffs to the Clinton Police Department. She was questioned about her cold medicine purchases, and then sent to jail until her husband posted $300 bail. Later, her police mug shot appeared on the front page of her local newspaper in an article entitled, "17 Arrested in Drug Sweep."

As discussed in the **Crime and Federalism blog**, Indiana police arrested Harpold because her two purchases meant that she was technically in violation of a statute that restricts the sale of ephedrine and pseudoephedrine products to no more than 3.0 grams within any seven-day period. The statute is intended to help fight the problem of methamphetamine production in the area, as pseudoephedrine can be used to manufacture "meth." As Vermillion County Prosecutor Nina Alexander notes, however, the law does not require that the purchase must be made with the intent to make meth. Alexander told the **local press** that the public has the responsibility to know what is legal and what is not, and ignorance of the law is no excuse. "I'm simply enforcing the law as it was written," Alexander said.

Maybe it's time for a new kind of warning on the side of the decongestant box?

LAW.COM

Want Dignitary Status? Bring Your Own Shovel

See anything wrong in this picture? No? Then you're clearly not from Texas, where the law bloggers are having all kinds of fun with the recent prank by attorney and party-crasher George Lobb (white hard hat above).

On Sept. 2, officials and dignitaries were on hand to break ground for a new federal courthouse **in Austin, Texas**. Also there, with his own shovel, was the uninvited Mr. Lobb, who somehow managed to get into the official photograph commemorating the event. In fact, the **Tex Parte blog writes** that when Lobb "joined the dignitaries picked to be in the photo, the General Services Administration spokeswoman who coordinated the event gave Lobb one of the gold painted ceremonial shovels."

Court officials are miffed, **Austin Legal reports**:

"We had an interloper," said U.S. Magistrate Judge Andy Austin, who said local federal judges were not amused. "It was almost like this Forrest Gump thing."

"The night after the groundbreaking, I was watching the news and I saw a shot of the group. I was like, 'What the hell was he doing in there?'" Austin said.

Lobb is a May 2008 law school graduate who Magistrate Austin said has been court-appointed on a handful of criminal cases in federal court.

"This guy had nothing to do with the courthouse," Austin said.

KROLLONTRACK.COM

Court Imposes Sanctions for Litigation Hold Failure, Orders Funding of E-Discovery Seminar on Proper Preservation

Pinstripe, Inc. v. Manpower, Inc., 2009 WL 2252131 (N.D. Okla. July 29, 2009). In this litigation, the plaintiff sought default judgment or adverse inference sanctions claiming the defendants failed to preserve and destroyed relevant documents, and also sought punitive monetary sanctions. The defendants' attorneys drafted a litigation hold, which the defendants failed to issue, and subsequently hired an outside vendor to recover deleted e-mails after the defendants' internal information technology (IT) department failed to recover the documents. Finding the defendants' local counsel had little to do with discovery responses, and that the other firm drafted the litigation hold policy and made efforts to confirm client compliance, the court declined to sanction the attorneys. Addressing the defendants' conduct, the court held that while the defendants failed to meet preservation obligations by failing to issue the litigation hold, the conduct was not intentional and therefore did not warrant imposition of a default judgment or an adverse inference. However, the court determined some sanctions were appropriate and awarded future deposition costs, excluding attorneys' fees, to the plaintiff. Additionally, if the plaintiff discovered a specific, relevant e-mail had not been produced, it would be allowed to petition the court for further relief. Finally, the defendants were ordered to pay $2,500 to the Tulsa County Bar Association to fund a seminar on litigation holds and preservation of electronic data.

Court Declines to Impose Sanctions for Spoliation, Citing Lack of Showing of Bad Faith or the Destruction of Crucial Evidence

Se. Mech. Servs., Inc., v. Brody, 2009 WL 2242395 (M.D. Fla. July 24, 2009). In this computer fraud and abuse litigation, the defendants sought adverse inference and preclusion sanctions striking allegations in the plaintiff's complaint and barring plaintiff testimony regarding alleged spoliation by the defendants for the plaintiff's failure to issue a litigation hold and subsequent destruction of data. The defendants contended the only evidence related to the plaintiff's claim that the defendants improperly deleted data was lost because the plaintiff did not put a litigation hold into place to halt the automatic overwriting of its backup tapes. The plaintiff argued sanctions were inappropriate because the defendants' request came too late to preserve the relevant data from automatic overwriting and its failure to implement a litigation hold was not in bad faith. The court found that the plaintiff had a duty to preserve evidence and should have initiated a litigation hold that would suspend the routine overwriting of its backup tapes at the time it sent the defendants a demand letter. Despite the finding of spoliation, the court denied the defendants' motion to impose sanctions against the plaintiff because it found the plaintiff did not act in bad faith and the defendants failed to show that any "crucial evidence" existed on the destroyed backup tapes.

Court Finds Party's Cost Estimations Exaggerated, Orders Production of ESI

Spieker v. Quest Cherokee, LLC, 2009 WL 2168892 (D. Kan. July 21, 2009). In this dispute over royalty payments, the plaintiffs renewed their motion to compel production of electronically stored information, addressing relevance, cost and accessibility. Previously the court recommended the parties consider conducting searches using the

defendant's software and in-house IT staff and Rule 502 to minimize expenses of a detailed privileged review. The defendant argued the software was untested and that in-house IT staff had no experience producing ESI. Addressing relevance, the court determined the plaintiffs' arguments demonstrated that the requested ESI was relevant to class certification issues and that the defendant failed to timely oppose the requested discovery. Finding the defendant's arguments regarding the court's previous recommendations unpersuasive, the court noted it was not aware of any case where a party was excused from producing discovery because it had not been previously asked to do so. The court also found the defendant's estimate of $250,000 for a privilege review "greatly exaggerated" and found the defendant failed to prove the data were not reasonably accessible. Finally, the court held the defendant did not show the discovery was duplicative or that the information could be more efficiently obtained through depositions, and therefore granted the plaintiffs' motion to compel.

Court Grants Adverse Inference Sanction for Destruction of Laptop, Failure to Preserve E-Mails

Goodman v. Praxair Servs., Inc., 2009 WL 1955805 (D. Md. July 7, 2009). In this breach of contract dispute, the plaintiff, a pro se litigant, sought spoliation sanctions alleging the defendant failed to issue litigation holds and preserve relevant evidence, destroyed employees' computers and failed to search disaster recovery tapes. The defendant argued a litigation hold was properly issued, there was no duty to preserve employees' computers, the plaintiff's motion was untimely and the plaintiff failed to provide proof regarding the disaster recovery tapes claim. Despite finding the plaintiff brought his motion for spoliation more than five months after discovery's conclusion, the court denied the defendant's argument that the motion was untimely because the dispositive motions had not yet been ruled on. The court then determined that the duty to preserve arose when the plaintiff sent a letter informing the defendant that he had consulted attorneys regarding the matter. Next, the court held that the defendant failed to issue litigation holds to key players and, as a result, three computers were discarded in violation of the preservation duty. The court determined that, while the defendant did not act in bad faith, it acted willfully when it intentionally destroyed the computers and e-mails. Finding only one of the destroyed computers contained relevant evidence, the court issued an adverse jury instruction for the evidence contained on that particular computer. Finally, the court allowed the plaintiff to compile a list of expenses incurred in filing the instant motion, excluding attorney's fees because the plaintiff was pro se.

Court Issues Adverse Inference Sanction for Failure to Implement a Litigation Hold

KCH Servs., Inc. v. Vanaire, Inc., 2009 WL 2216601 (W.D.Ky. July 22, 2009). In this copyright infringement action, the plaintiff moved for sanctions in the form of a default judgment or, in the alternative, an adverse inference instruction for spoliation. The court found that an October 2005 phone call from the plaintiff and the November 2005 filing of a complaint were both notice of litigation, and that the defendant subsequently failed to preserve potentially discoverable e-mails by continuing to delete and overwrite data even after the receipt of a preservation letter. The court held that the defendant's deletion of data and failure to implement a litigation hold fell beyond the scope of the routine, good faith operation of an electronic

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information system and constituted spoliation. Finding that an adverse inference instruction would redress the spoliation, the court granted the motion for adverse inference sanctions but denied awarding default judgment.

Lawyers Must Learn to Search

For as long as there has been civil discovery in lawsuits, litigators have had responsibility for the task of figuring out how to search for the documents responsive to an adversary's requests. As the amount of information available to companies and people explodes, however, that task has become more challenging. Last week, Steven C. Bennett, a partner with Jones Day who also teaches electronic discovery at Rutgers and New York Law School, wrote on tech news site Internet Revolution that despite numerous advances in conceptual and artificial intelligence methods for search, the legal community has to a large extent ignored these developments.

Bennett offers several reasons for this disconnect. Among other things he reminds us that, historically, discovery in litigation was conducted exclusively on paper, with documents reviewed by hand for relevance. He also notes that "the only search mechanisms generally taught in law school concern closed sets of materials, i.e., judicial opinions and other materials gathered by large publishing companies such as Westlaw or LexisNexis."

Bennett argues that those days may be gone, however, as courts have now suggested that expert assistance is required to formulate reasonable searches for purposes of discovery in litigation. Indeed, he cites U.S. District Judge Judge Facciola of the District of Columbia, who wrote last year that:

"Whether search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman..." United States v. O'Keefe, 537 F.Supp.2d 14, 24 (D.D.C. 2008).

If there are law schools that have not yet begun to teach advanced search and information retrieval techniques, now may be the time to start.

Tax Court Writes Off Lawyer's Deduction for Prostitutes

A veteran New York tax lawyer has lost his legal battle to claim tax deductions for more than $100,000 he spent on prostitutes and pornography. But, hey, you can't blame a guy for trying.

William G. Halby, a tax lawyer first admitted to practice in New York in 1956, claimed the deductions as medical expenses. His visits to prostitutes and his purchases of books and magazines constituted sex therapy, he contended. Over two years, he claimed deductions for $108,086 spent on prostitutes and $7,373 on books, magazines, videos and pornographic materials.

But in a decision issued this week, the U.S. Tax Court ruled that Halby's sex therapy was not an allowable deduction.

Petitioner's payments to various prostitutes were personal expenses not prescribed by a doctor and not intended to treat a medical condition. Petitioner is not entitled to deductions for these amounts.

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Petitioner is likewise not entitled to deductions for amounts paid for books and magazines on sex therapy and pornography. The purchases were not for the treatment of a medical condition but were instead personal items.

At least it can be said that Halby was meticulous in claiming these deductions. The Tax Court said that he kept track of his visits to prostitutes in a journal. "The journal included the date, the name of the 'service provider,' and the amount." He did not, however, ask the "service providers" for receipts.

Not only did Halby lose the deduction and have to make up some $21,000 in tax deficiencies, but he was also ordered to pay a penalty of $4,298 for claiming deductions without any reasonable basis in the tax law. As an attorney who specialized in tax law for more than 40 years, the court said, Halby "should have known that his visits to prostitutes in New York were illegal and that section 213 [of the tax code], the regulations thereunder, and caselaw do not support his claimed deductions."

Halby's Martindale-Hubbell profile shows him as being of counsel to a law firm in Larchmont, N.Y., but the firm's Web site does not list him anywhere. Halby had already lost a state tax case involving these same deductions, with the N.Y. Division of Tax Appeals concluding that "permitting the deductions would be counter to public policy."

When Is It OK to Use Technology to Evade the Police?

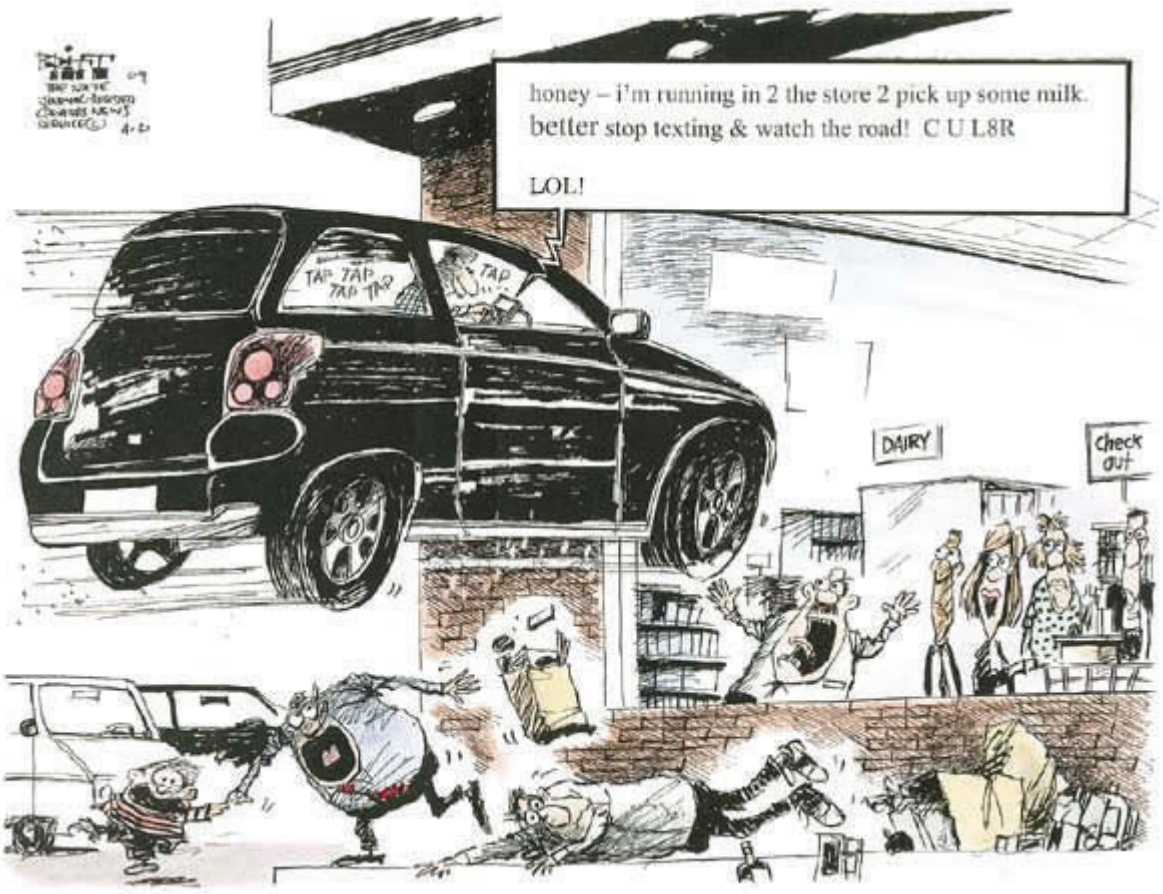
Modern technology is obviously invaluable to law enforcement's efforts to apprehend criminals, but the latest confluence of mobile technology and social media is also becoming a powerful tool for avoiding the police.

On his blog, law professor Jonathan Turley highlights the case of Elliot Madison, who he notes is now the subject of an intriguing constitutional fight with both federal and state authorities. Madison, "a self-described anarchist," was arrested during the recent G20 summit for using Twitter to send messages on the location of police during the G20 protests.

Madison claims that he was arrested because his tweets were helping people evade the police. Turley writes that "arresting someone for communications based on public observations is an abuse of authority and a violation of the Constitution." He points out that charging Madison for assisting criminal conduct based on his tweets would gut the First Amendment and create a chilling effect on citizen communications.

The police apparently do not have the same reaction, however, to another technology that is arguably geared toward helping people evade police on the road. TechCrunch reports that a new iPhone and BlackBerry application called Trapster helps users avoid speed traps (a funnier but "R-rated" description of Trapster is available here). Not unlike the Madison case, Trapster relies on users to report speed traps when they see them, allowing other users to avoid tickets.

Interestingly, the police response to Trapster is not to complain that it assists criminal conduct (speeding) as in Madison's case. Rather, the police have reportedly endorsed Trapster under the theory that “if someone slows down because of (Trapster), it's accomplishing the same goal of trying to get people to obey the speed limit.” That's one theory. Then there's the way Paul Carr thinks of it in that "R-rated" review of his in The Guardian: "Trapster: the mobile distraction for when driving at high speed isn't f**king dangerous enough."



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