# The Public Lawyer

STATE BAR OF NEVADA

Public Lawyers Section

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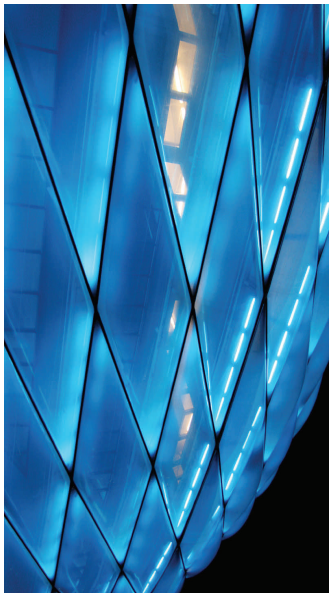
## Nevada Supreme Court Cases

*Sonia F. v. Eighth Judicial Dist. Court,125* Nev. Adv. Op. No. 38 (September 10, 2009) "In this petition for extraordinary relief, we exercise our discretion to consider an issue of first impression; namely, whether Nevada's rape shield law, which restricts the admissibility of evidence concerning a sexual assault victim's history of sexual conduct, applies in civil cases.

We conclude that Nevada's rape shield law, codified under NRS 50.090, is plain and unambiguous, and applies only to criminal proceedings and not civil cases. We further conclude, however, that the district court may limit the discovery of an alleged victim's sexual history under NRCP 26, if necessary to protect the victim's interests."

*Bower v. Harrah's Laughlin Hotel and Casino*, 125 Nev. Adv. Op. No. 37 (September 10, 2009) "This case arises out of a brawl between two biker gangs, the Hell's Angels and the Mongols. The gangs brawled at Harrah's casino in Laughlin, Nevada, during its annual River Run event in 2002. Several people were killed, and many were injured. As a result, several groups of plaintiffs, who were not directly involved in the brawl, sued Harrah's under various negligence theories. These suits proceeded in California state court, Nevada state court, and Nevada federal court."

"We conclude that the district court properly reheard Harrah's summary judgment motion regarding Bower. We also conclude that issue preclusion does not bar appellants' claims based on federal or state law. Further, the district court properly granted Harrah's summary judgment regarding the merits of Garcia and Lewis' claims. Finally, the district court erred in granting Harrah's attorney fees and erred in awarding Harrah's costs as to all appellants except Garcia and Lewis. Accordingly, we reverse and remand to the district court for proceedings consistent with this opinion.



Inside this issue:

*Dobron v. Bunch*, 125 Nev. Adv. Op. No. 36 (September 10, 2009) "This appeal raises the issue of whether a guarantor to a loan may be held liable for attorney fees incurred by the lender in defending a usury action brought by the borrowers. We have previously held that a guarantor's obligation to a lender under a guaranty agreement should be strictly construed and will not require a guarantor to be responsible for obligations beyond those specified in the guaranty agreement. But we have also recognized a distinction between a surety who is compensated and one who is not and eliminated the strict construction rule in favor of the surety when the surety is compensated. While our prior precedent is unclear as to the application of this distinction to guaranty agreements, we nevertheless conclude that such a distinction is no longer necessary. Consequently, when interpreting a guaranty agreement, whether a guarantor is compensated is not relevant, and rather than apply a strict rule of construction, we will apply general contract construction rules.

In this case, the guaranty agreements stated that an obligation to pay attorney fees exists only in 'collecting or compromising any such indebtedness' or in the enforcement of the guaranty agreement against the guarantor. Under general contract rules, specifically the rule that an attorney fees provision will not be interpreted more broadly than written, we conclude that the guarantor was not liable for attorney fees incurred by the lender in defending a usury action that did not include any affirmative effort on the part of the lender to collect any of the underlying loans. Accordingly, we reverse the district court's judgment awarding attorney fees to respondents."

*D.R. Horton v. Eighth Judicial Dist. Court*, 125 Nev. Adv. Op. No. 35 (September 3, 2009) "In this petition for extraordinary writ relief, we resolve whether a homeowners' association has standing to pursue constructional defect claims on behalf of its members with respect to alleged defects in individual units in a common-interest community. Because the provisions of NRS Chapter 116, among other sources, demonstrate that a common-interest community includes individual units, we conclude that under NRS 116.3102(1)(d), a homeowners' association has standing to file a representative action on behalf of its members for constructional defects in individual units of a common-interest community. However, because such actions are filed by a homeowners' association in a representative capacity for individual units, the claims must be analyzed according to class action principles set forth in NRCP 23 and Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 854-57, 124 P.3d 530, 542-44 (2005)."

*Rivero v. Rivero*, 125 Nev. Adv. Op. No. 34 (August 27, 2009) "We will consider rehearing when we have overlooked or misapprehended material facts or questions of law or when we have overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal. NRAP 40(c)(2). Having considered the petition and answers thereto in light of this standard, we conclude that rehearing is not warranted. Therefore, we deny the petition for rehearing. Although we deny rehearing, we withdraw our October 30, 2008, opinion and issue this opinion in its place."

"Initially, to address the definition of joint physical custody, we define legal custody, including sole legal custody and joint legal custody. We then define physical custody, including joint physical custody and primary physical custody. In defining joint physical custody, we adopt a definition that focuses on minor children having frequent associations and a continuing relationship with both parents and parents sharing the rights and responsibilities of child rearing. Consistent with the recommendation of the Family Law Section, this joint physical custody definition requires that each party have physical custody of the child at least 40 percent

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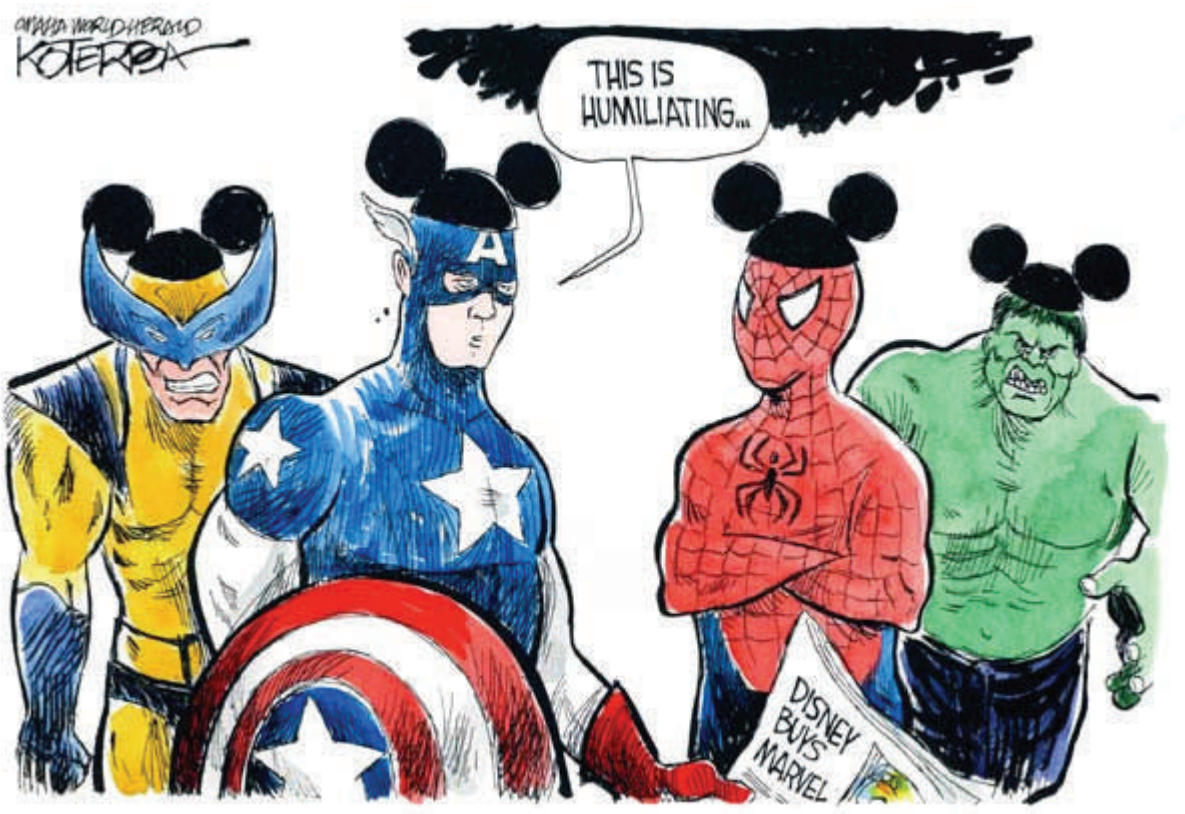
of the time. We then address the district court's rulings."

*Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. Adv. Op. No. 33 (August 20, 2009) "Petition for rehearing of Boulder Oaks Cmty. Ass'n v. B & J Andrews, 169 P.3d 1155 (2007) (opinion withdrawn April 18, 2008)."




"On appeal, the primary questions we resolve are (1) whether Andrews is a 'declarant' and (2) whether section 9.04(a) of the CC&Rs contravenes NRS 116.2107(4), which prohibits units from constituting a class for the purposes of voting merely because they are owned by a declarant. We conclude that Andrews is a declarant. Further, we conclude that CC&R section 9.04(a) violates NRS 116.2107(4) by creating an improper voting class in the declarant, making this part of section 9.04 void. Thus, the Association was not required to obtain Andrews' consent before amending the CC&Rs. We also conclude that it was proper for the Association to vote on the proposed amendment by mail, as opposed to voting at a meeting. Therefore, because the record demonstrates that the Association received the requisite number of votes to amend the CC&Rs, we conclude that Andrews does not have a reasonable likelihood of success on the merits in the case below. Our conclusion illustrates that the amendment was proper and the Association should not have been enjoined from enforcing it. Accordingly, we reverse the district court's grant of the preliminary injunction."

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### Lawyer, Trivia Whiz

Did you know that Daniel Boone, that iconic American hero, was once put on trial for treason? Did you know that Lizzie Borden, the woman who the rhyme says "gave her mother forty whacks," was actually acquitted by a jury of any wrongdoing?

These are just a couple of the little-known facts presented in the **Famous Trials** section of the Web site **Awesome Stories**. Awesome Stories is an awesome site, full of the backstories behind famous people and events from history, sports, cinema, religion and, yes, law. And the entire site is written and edited by a 60-year-old trial lawyer, poet and trivia buff, **Carole D. Bos**, a partner in the Grand Rapids, Mich., firm **Bos & Glazier**.

A profile of Bos published this weekend in **The Grand Rapids Press** describes her as a "knowledge junkie" and says her Web site is used as a teaching tool by 45,000 schools in 73 countries. Not only that, but Bos has published two books of poetry, both of which have sold out their press runs of 10,000 copies.She can speak Dutch and German and can read Russian.

With all that going on, surely she must be slacking as a lawyer, right? Wrong. She is a successful trial attorney who has helped settle major cases all over the country. From *The Grand Rapids Press*:

She's known as a troubleshooter. She was brought in as lead counsel to resolve the controversial Love Canal (N.Y.) environmental contamination case. She settled the case -- pending for 16 years -- within 16 months.

U.S. District Judge Robert Holmes Bell tells how Colt's Manufacturing, the firearms maker, hired Bos when there were lawsuits over shooting deaths.

"Those lawsuits were terribly ugly, highly litigious," says Bell, who has known Bos for years. "She disarms people with her pleasantness."

Bos, a 1981 graduate of Thomas M. Cooley Law School, makes no money from her Awesome Stories Web site. She hopes at some point to attract corporate sponsors so that she can hire staff and build out the site. For now, the site is a labor of love, and the fruit of her far-ranging knowledge of trivia.

### DA Hopeful Shows He's Tough on ... Himself

Michael Untermeyer, a Republican candidate for district attorney in Philadelphia, believes the city could save millions of dollars by moving nonviolent defendants out of prison and keeping track of them by way of electronic monitoring bracelets.

To underscore his point, Untermeyer is demonstrating the effectiveness of GPS ankle bracelets -- by slapping one on himself. Throughout September, Untermeyer will wear an ankle bracelet 24/7. Anyone can track his whereabouts by going to his **campaign Web site** and following the **Find Mike** link.

It is actually kind of fun to do as a lesson in how police use these things. The link takes you to the **officer login** page of a company called SenTrak, whose tag line is "Offender management solutions that work for you." After you log in (using Untermeyer as the name and password), you come to the "officer control module." From there, you make your way to another screen displaying the "client status." There you click on "locate" and, at last, a map opens with a red star

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showing his location. With another click, you can get a map showing the history of his locations over a period of time.

[If you are tempted to try this yourself, note that the map feature did not work for me in Firefox. You may need to use Internet Explorer.]

According to **Associated Press**, Untermeyer says it costs $98 a day to keep someone locked up but just $8 a day to monitor the person electronically. His Democratic opponent, Seth Williams, told AP that Untermeyer's bracelet is just a gimmick and that there is no quick fix for prison overcrowding.

Whether the ankle bracelet will help Untermeyer get his foot in the door of the DA's office, I can't say. But I would advise Untermeyer that, if this DA thing doesn't work out, he should send a resume to the folks at **Google latitude**.

**Mobile Devices Significantly Expand the 40-Hour Work Week**

A few weeks ago I posted about two recent lawsuits by employees seeking overtime pay for responding to work messages on company-issued smart phones after hours. These types of lawsuits are on the rise, not only because of technology advancements, but also the present recessionary climate, with layoffs forcing employers to squeeze more work out of fewer people.

But just how much overtime are we talking about here? You'd be surprised. The U.K.'s *Birmingham Post* reports on a recent employee survey by Manchester-based employment law firm Peninsula, which found that employees who use devices like BlackBerrys on the job work an extra 15 hours a week.

Are mobile devices really extending the work week by as much as 15 hours? And is that time productive or are the returns diminishing because employees aren't getting enough of a break?

## Ninth Circuit Cases

*Equal Employment Opportunity Comm'n v. Go Daddy Software, Inc.*, No. 07-16190 (September 10, 2009) "A Rule 50(b) motion for judgment as a matter of law is not a freestanding motion. Rather, it is a renewed Rule 50(a) motion. Under Rule 50, a party must make a Rule 50(a) motion for judgment as a matter of law before a case is submitted to the jury. If the judge denies or defers ruling on the motion, and if the jury then returns a verdict against the moving party, the party may renew its motion under Rule 50(b). Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the predeliberation Rule 50(a) motion. Thus, a party cannot properly '"raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion."'"

*United States v. Juvenile Male*, No. 07-30290 (September 10, 2009) "We must decide as a matter of first impression — in our court and in any other circuit court — whether the retroactive application of SORNA's provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses before SORNA's passage violates the Ex Post Facto Clause of the United States Constitution. In light of the pervasive and severe new and additional disadvantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law enforcement au-

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thorities every 90 days for 25 years, and in light of the confidentiality that has historically attached to juvenile proceedings, we conclude that the retroactive application of SORNA's provisions to former juvenile offenders is punitive and, therefore, unconstitutional."

*Jackson v. Rent-A-Center West, Inc.*, No. 07-16164 (September 9, 2009) "The threshold question before us is whether a court or an arbitrator is to decide whether an arbitration agreement was unconscionable and hence unenforceable."

"Whether court or arbitrator is to determine arbitrability is more straightforward in this case than it was in *Nagrampa*, a case involving a challenge to arbitration provisions located within a larger 'container contract.' Jackson's merits dispute with the Employer does not arise out of a contract between them, but is rather based in federal statutory discrimination law. Jackson challenges the freestanding Agreement to Arbitrate he signed, contending that the Agreement is unconscionable and that he cannot be compelled to arbitrate his statutory discrimination claims.

"In sum, we conclude that a court must decide the threshold question of arbitrability when a plaintiff challenges an arbitration agreement as unconscionable, but the agreement provides that the enforceability of the arbitration agreement is itself an issue to be resolved through arbitration."

*City of Los Angeles v. County of Kern*, No. 07-56564 (September 9, 2009) "We must decide whether recyclers challenging a local ordinance that bans a particular method of waste disposal have prudential standing to raise its constitutionality under the dormant Commerce Clause.

In 2006, voters in Kern County, California, adopted a local ordinance by ballot initiative that makes it 'unlawful for any person to Land Apply Biosolids to property within the unincorporated area of the County.' Violation of the Ordinance is a misdemeanor punishable by 'a fine of not more than $500 or by imprisonment of not more than six months.' By its terms, the Ordinance applies to both in-county and out-of-county waste generators. In practical effect, however, because Kern does not currently apply its biosolids to land within the county, Measure E does not directly impact Kern's own waste disposal programs.

Prior to the Ordinance, in-state waste generators frequently disposed of their biosolids by land application at various farms throughout the unincorporated area of Kern County. For example, the City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County ship large amounts of waste generated by their residents to Green Acres, Honey Bucket Farms, and Tule Ranch. If these generators were precluded from land applying their biosolids in Kern County, they would be required to find alternative locations to dispose of their sludge. They have submitted declarations pointing to Arizona as a probable destination, and asserting that this site change would result in increased transportation costs."

"The interest the recyclers seek to secure is their ability to exploit a portion of the *intra*state waste market—they want to be able to ship their waste from one portion of California to another. But as we have said, the 'chief purpose underlying [the dormant Commerce] Clause is to limit the power of States to erect barriers against *inter*state trade.' *Washoe County*, 110 F.3d at 703. Nothing in Measure

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E hampers the recyclers' ability to ship waste out of state. Likewise, no recycler claims to apply out-of-state waste to land in Kern County. In short, Measure E in no way burdens the recyclers' protected interest in the interstate waste market. We decline to expand the zone of interests protected by the Clause to purely intrastate disputes."

*Smith v. Curry*, No. 07-16875 (September 8, 2009) "Supreme Court precedent spanning more than a century permits a trial judge to instruct a deadlocked jury about its duty to deliberate, but bars the judge from trying to force or coerce a verdict. *See Allen v. United States*, 164 U.S. 492 (1896); *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam). The district court in this case granted the writ of habeas corpus, because the district court concluded the state trial court violated that rule when the trial judge, having learned who the holdout juror was and the specific evidence that was troubling that juror, instructed the jury to focus on particular evidence supporting conviction. We reach the same conclusion as the district court, and we affirm the grant of habeas relief. We hold that the Court of Appeal's decision upholding the instruction was an unreasonable application of established Supreme Court law."

*Nurre v. Whitehead*, No. 07-35867 (September 8, 2009) "Once again we enter the legal labyrinth of a student's First Amendment right to free speech. There exists a delicate balance between protecting a student's right to speak freely and necessary actions taken by school administrators to avoid collision with the Establishment Clause. While finding our way is never easy, we here endeavor to provide guidance to assist both school districts and their students.

Kathryn Nurre sought to perform an instrumental version of 'Ave Maria' at her public high school's graduation ceremony. Dr. Carol Whitehead, superintendent of Everett School District No. 2, in which Nurre's high school is located, declared that the piece could not be played at the ceremony because it could be seen as endorsing religion. Nurre subsequently sued Whitehead in both her individual and official capacities for alleged violations of Nurre's First and Fourteenth Amendment rights.

Nurre now appeals dismissal of her civil rights claims brought under 42 U.S.C. § 1983. Supreme Court precedent and the law of our circuit counsel us to find that there was no violation of Nurre's constitutional rights. Therefore, we affirm the ruling of the district judge."

*United States v. Inzunza*, No. 05-50902 (September 1, 2009) "In 2000, the San Diego City Council enacted an ordinance banning touching between exotic dancers and patrons: the so called No-Touch ordinance. This ordinance replaced another provision banning only 'lewd and lascivious' conduct at clubs. The bright line aspect of the No-Touch ordinance made for easier law enforcement and eliminated the need to spend public funds on lap dances for undercover police officers. It also put a damper on strip club profits.

Michael Galardi owned several strip clubs in Las Vegas and the all-nude 'Cheetahs' club in San Diego. Unhappy with his business prospects under the No-Touch ordinance, he sought ways to get rid of it. He obtained the help of his friend Lance Malone, a former Las Vegas county commissioner, to work toward the ordinance's repeal. In May 2001, Malone began his mission."

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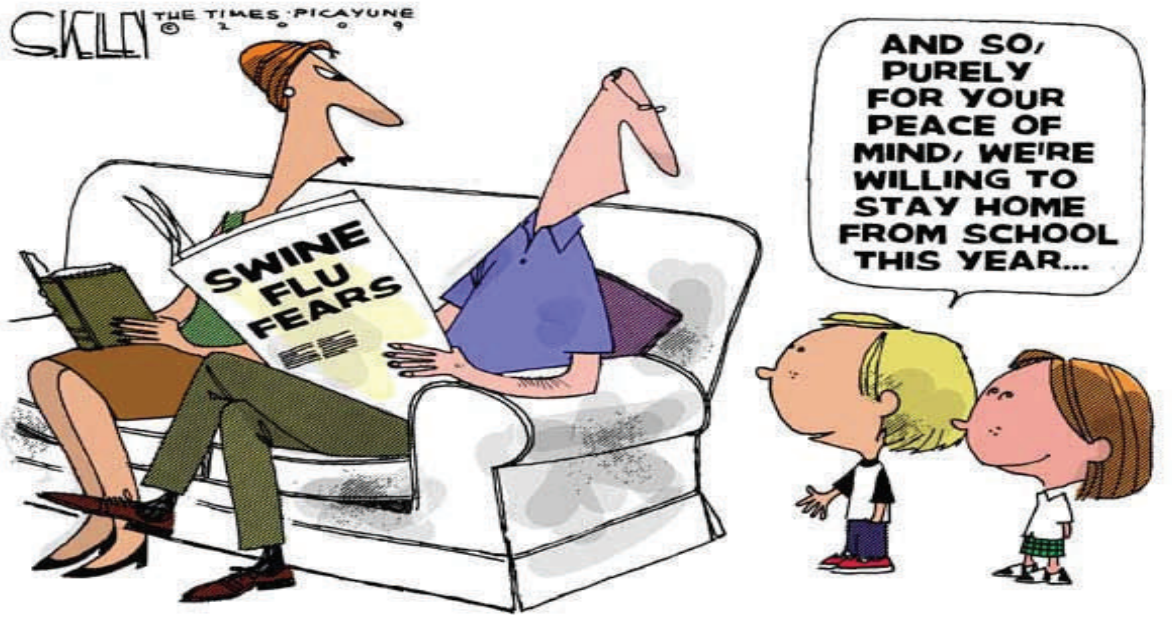
*Hilton v. Hallmark Cards*, No. 08-55443 (August 31, 2009) "We must decide whether California law allows a celebrity to sue a greeting card company for using her image and catchphrase in a birthday card without her permission.

Paris Hilton is a controversial celebrity known for her lifestyle as a flamboyant heiress. As the saying goes, she is 'famous for being famous.' She is also famous for starring in 'The Simple Life,' a so called reality television program. The show places her and fellow heiress Nicole Ritchie in situations for which, the audience is to assume, their privileged upbringings have not prepared them. For example, work. In an episode called 'Sonic Burger Shenanigans,' Hilton is employed as a waitress in a 'fast food joint.' As in most episodes, Hilton says, 'that's hot,' whenever she finds something interesting or amusing. She has registered the phrase as a trademark with the United States Patent & Trademark Office.

Hallmark Cards is a major national purveyor of greeting cards for various occasions. This case is about one of its birthday cards. The front cover of the card contains a picture above a caption that reads, 'Paris's First Day as a Waitress.' The picture depicts a cartoon waitress, complete with apron, serving a plate of food to a restaurant patron. An oversized photograph of Hilton's head is super-imposed on the cartoon waitress's body. Hilton says to the customer, 'Don't touch that, it's hot.' The customer asks, 'what's hot?' Hilton replies, 'That's hot.' The inside of the card reads, 'Have a smokin' hot birthday.'"




*United States v. Comprehensive Drug Testing, Inc.*, No. 05-10067 (August 26, 2009) "This case is about a federal investigation into steroid use by professional baseball players. More generally, however, it's about the procedures and safeguards that federal courts must observe in issuing and administering search warrants and subpoenas for electronically stored information."

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## Why Lawyers Hate E-Discovery

Via **EDD Update**, I was directed to an epic post by lawyer and electronic discovery guru Ralph Losey, entitled **Plato's Cave: Why most lawyers love paper and hate e-discovery and what this means for legal education**. Losey begins with the allegory of Plato's Cave, the story of prisoners who have been held captive in a cave all of their lives. They can only see shadows on the wall and come to believe that the shadows are people and objects. One of the prisoners escapes from the cave and discovers that shadows are merely illusory, and people are real. But when the prisoner is returned to the cave and tries to share his new knowledge with the other cave dwellers, they don't believe him and he is ridiculed, because life in the cave is all they've known.

Losey says the allegory works for lawyers, too. Growing up reading paper books and educated on paper in law school, lawyers come to fear e-discovery because it is a new world, just as life outside the cave was for the cave dwellers. As Losey puts it:

> Just like the prisoners in Plato's Cave, [lawyers] do not know that their beloved papers are shadows, mere print outs of a greater electronic reality.

In practice, lawyers sometimes cling to paper even to the detriment of their clients. In one recent case, ***Bray & Gillespie v. Lexington Insurance Co.***, 2009 WL 2407754 (M.D.Fla. August 3, 2009), plaintiff's lawyers' lack of familiarity with electronic record keeping resulted in severe sanctions. The plaintiff had been ordered to produce guest records from a hotel, but did not realize that the records could be accessed electronically. So, the plaintiff's paper lawyers only looked for these records in warehouses full of papers, and made selective disclosures which were eventually discovered. But as Losey points out, the entire matter could have been avoided simply by producing the records electronically -- though plaintiff's lawyers did not seem to realize that was possible.

Because many lawyers don't understand e-discovery, they criticize it as too expensive or a passing trend. They're threatened by it, so they remain entrenched in their ways.

Because law schools rely so heavily on the use of paper in teaching, Losey believes that the only solution is to train lawyers online to make them more comfortable with computers and e-discovery. And he's hopeful for future generations, which will come of age in an online world.

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**Feature Article: To Tiff or Not to Tiff– Judicial Intervention in Production Disputes**

Like all categories of expense, the corporate litigation budget is under continual scrutiny. The collection, processing and review of electronically stored information (ESI) in civil disputes can be an enormous expense, and in the current economy, companies persistently search for ways to cut costs and increase efficiency. There are numerous pitfalls within the e-discovery process that could add to the expense of corporate litigation if due care is not exercised. One such pitfall is the failure to properly execute and respond to production requests.

A party's failure to "follow the rules" when producing ESI may – and most likely will – lead to judicial intervention. As reported in Kroll Ontrack's 2008 Year in Review, production issues

were discussed in approximately 20% of the 138 most important e-discovery cases of 2008. Based on opinions issued thus far in 2009, this percentage certainly seems to be holding steady – if not increasing. Production is an important part of the e-discovery process, and as illustrated below in recent problematic production cases, the failure to manage production effectively may lead to costly repercussions.

**Re-Production Requests**

One of the most problematic and common issues involving production requests is whether documents are produced in compliance with the Federal Rules of Civil Procedure. Fed.R.Civ.P. Rule 34(b) provides the producing party the option of organizing documents produced to correspond to the requests to which they are responsive, or producing the documents "as they are kept in the usual course of business." The failure to produce documents in either of these formats may result in a court order to re-produce. For example, in a recent case from the Western District of Washington, the court determined the defendant's production of an Internet link containing more than 7,000 pages of raw code listing e-mails did not constitute a reasonably usable format and ordered the re-production of the e-mails indicating which e-mails responded to which request. *Quinstreet, Inc. v. Ferguson*, 2009 WL 1789433 (W.D. Wash. June 22, 2009). Production can be costly the first time around, and being on the losing end of a court order requiring a re-production is not what any litigant wants. Therefore, the litigation team responsible for production should exercise due care, ensuring production is organized and in a compliant format.

The Eastern District of Kentucky also addressed the issue of re-production in *In re Classicstar Mare Lease Litig.*, 2009 WL 260954 (E.D. Ky. Feb. 2, 2009). In that case, the defendant previously produced 273,000 pages in TIFF format and claimed the plaintiffs' request for re-production in native format would be extremely burdensome. The court cited a previous exchange in which the parties agreed on native format and ordered the defendant to re-produce the data according to the agreement. This case demonstrates the importance of discussing production formats early on as those agreements will influence later party objections and issues. Without that agreement, the court may not have ordered re-production because it found the defendant had appropriately complied with production obligations in the original production.

Courts may not require a re-production if the requesting party does not demonstrate that the new format would make the documents "reasonably usable," as exhibited in *Dahl v. Bain Capital Partners, LLC*, 2009 WL 1748526 (D. Mass. June 22, 2009). In that case, the court held the defendants did not have to incur costs to change production format of already produced documents because the plaintiffs failed to show that translating the documents to another format was necessary.

In addition, making a timely objection to questionable production format is essential. In *Ford Motor Co. v. Edgewood Properties, Inc.*, 2009 WL 1416223 (D.N.J. May 19, 2009), the court denied the defendant's motion for re-production in native format of the plaintiffs' entire ESI production, finding the defendant waived its objection to production format by waiting eight months to first object and an additional two months before bringing the matter to the court's attention. Thus even if a party has a valid production format objection, the court may deny re-production requests if it considers the objec-

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tion untimely.

**Document Dumping**

Another common scenario that gives rise to court intervention is a party's decision to "document dump." Document dumping occurs when a party does not produce the requested documents in a clearly organized fashion, but rather sends the data to the requesting party in an incoherent lump. Courts have been quick to chastise document dumpers, as demonstrated in *SEC v. Collins & Aikman Corp*., 2009 WL 94311 (S.D.N.Y. Jan. 13, 2009). Here, the defendant objected to the SEC's production of 1.7 million documents as an unorganized "document dump." The court did not buy the SEC's argument that the documents were produced how they were maintained in the usual course of business and ordered the SEC to reproduce the documents in an organized manner that responded specifically to each of the defendant's requests.

However, the party requesting a re-production based on an alleged "document dump" bears the uphill battle of demonstrating how the production fails to meet Rule 34(b)'s requirements. In *Valeo Elec. Sys., Inc. v. Cleveland Die & Mfg. Co.*, 2009 WL 1803216 (E.D. Mich. June 17, 2009), the court found the plaintiff produced documents as they were kept in the ordinary course of business despite the defendant's argument that it was required to manually open and review each file, which were given "innocuous" names in order to frustrate the review.

**Gamesmanship**

Courts have also intervened when it is clear that a party is attempting to "play games" with production, as shown in *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 2009 WL 546429 (M.D.Fla. Mar. 4, 2009). In this case, the plaintiffs produced the requested documents (after five discovery orders) as TIFF images without metadata, despite the defendants' original production request that explicitly sought native format with metadata. Based on several examples of gamesmanship on the part of the plaintiffs and attorneys, the court found that if they believed the production format was substantially justified, they would not have concealed information and made material misrepresentations. The court ordered the plaintiffs to bear all costs related to the production of its database and sanctioned a lead plaintiff attorney, ordering him to pay reasonable attorneys' fees, costs and expenses incurred by the defendants. The law firm was also found responsible for the discovery misconduct and was jointly and severally liable with the lead attorney to pay the defendants' expenses.

Similar to *Bray & Gillespie Mgmt. LLC*, the court ordered the imposition of sanctions in *Doppes v. Bentley Motors, Inc*., 94 Cal. Rptr. 3d 802 (Cal. App. 4 Dist. 2009). In *Doppe*s, the defendant failed to produce documents and repeatedly violated discovery orders. The court determined the defendant had stonewalled in producing highly relevant documents resulting in severe prejudice to the plaintiff, and that the defendant's repeated egregious violations of discovery laws threatened the integrity of the judicial process. Thus the court found default judgment sanctions to be appropriate and awarded $402,187 in attorneys' fees to the plaintiff.

As these cases illustrate, litigation teams must discuss production format up front, avoiding any urge to "hide the ball" regarding documents and production capabilities. This will allow litigants

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to avoid committing common production pitfalls, potentially preventing them from suffering severe economic and time consequences. Compliance with the Federal Rules of Civil Procedure and effectively planning ahead will provide the litigation team with the best chance of successfully navigating the production process.

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### Lawyers Responsible for a Key Internet Milestone: Spam

Later this week the Internet will celebrate its 30th birthday, and to mark the occasion the **Associated Press** rounds up some of the key milestones in Web history. Not surprisingly, engineers and scientists are primarily responsible for the technological developments that helped the Internet grow from a primitive interconnection between two computers into a global, publicly accessible system. But lawyers, too, have played a key role in shaping the Internet that we know today -- by introducing the world to spam.

That's right. Back in 1994, the husband-and-wife law firm of **Canter & Siegel** came up with what was then a novel approach to advertising their firm's immigration services. They contracted with a computer developer to create a program to generate advertising for the firm's Green Card Lottery service and to spread it to 6,000 **Usenet** discussion groups. Users rebelled, sending so many complaints to Canter & Siegel's Internet Service Provider that the company's servers crashed, leading the ISP to terminate Canter & Siegel's account and the Tennessee Board of Professional Responsibility to open an investigation of the pair.

The firm remained unrepentant, claiming that their low cost ad generated 1,000 new clients and $100,000 in revenue.
But at what cost? Fifteen years later, spam remains a substantial problem for the Internet.

Meanwhile, lawyers have gone on to advertise online in other, less intrusive ways through Web sites, blogs and now **social media**. Many of these new online marketing tools help level the playing field for solo and small firm lawyers, while providing valuable information at no cost to consumers, both of which are benefits in my view. I'm no fan of spam, but perhaps the Canter & Siegel legacy isn't entirely negative.

Serial Anti-Spam Lawsuit Filer Loses Appeal... And His Possessions

**from the *time-to-get-a-job* dept**

Back when CAN SPAM was passed, one of the (many) parts that annoyed anti-spam fighters was that the law was quite clearly limited in who could bring lawsuits. It was basically designed so that only the government or ISPs could bring lawsuits -- not individuals. This was done on purpose, as lots of marketing companies freaked out that they'd end up dealing with constant spam lawsuits from people upset about receiving their marketing messages. However, some anti-spammers worked on ways to get around this by setting themselves up as "ISPs," though only for the purpose of trying to sue spammers. This strategy backfired. A couple of years ago, one of the most fervent supporters of using this trick (his only "job" was filing these lawsuits against spammers) **lost** his case, and the court even told him to **pay $110k** to the firm he had sued.

He appealed, and the appeals court **came down even harder on the guy for clearly abusing the law**, pointing out that he was clearly a professional litigant, and not someone running a real ISP. But, perhaps even more fascinating is that

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the guy, James Gordon, didn't just lose the lawsuit, it appears he **lost most of his possessions as well**. Remember that ruling telling him to pay the $110k to Virtumundo? He refused. The company sent the debt to a collections agency, but told Gordon they'd call off the collections agency if he dropped the appeal. Gordon didn't:

*When Virtumundo's collections lawyer showed up at Gordon's house with a moving van and a sheriff, Virtumundo again offered to stop its pursuit of Gordon's assets if he would drop his appeal, and he refused again, according to Newman.*

*Virtumundo's collections agency then cleared out Gordon's house, according to Newman.*

*He added that after seizing the contents of Gordon's home, Virtumundo offered to return Gordon's belongings if he would drop his appeal and again, Gordon refused.*

As much as I thank anti-spam activists for trying to stomp out spam, that doesn't mean they get to ignore what the law allows, and set up what was effectively a professional anti-spam litigation service.