

# The Public Lawyer



STATE BAR OF NEVADA

## Nevada Supreme Court Cases

*Baldonado v. Wynn Las Vegas*  
No. 48831 (October 9, 2008)  
“This opinion addresses several issues arising in the context of Nevada’s employment law. We primarily focus, however, on three important and novel questions: (1) whether NRS 608.160, which prohibits employers from taking employee tips, implies a private cause of action to enforce its terms; (2) whether, in the event that no private cause of action exists, declaratory relief is nonetheless available to employees who allege that the statute’s terms were violated by an employment policy; and (3) whether those employees asserted a viable breach of contract claim based on the employer’s unilateral modification to the employment policy.

Appellants are table game dealers employed at a Las Vegas, Nevada, casino. In 2006, the casino modified its employment policy to require the dealers to share customer tips with persons in certain lower-level management positions. Appellants, believing that the modified policy

violated Nevada labor laws, including NRS 608.160, sought relief in the district court.

The district court determined that no private cause of action existed by which appellants could pursue their claims for statutory violations and concluded that appellants’ at-will employee status precluded any challenge to the employment policy on breach-of-contract grounds. Consequently, the court ruled against the dealers, in favor of the casino. Thereafter, the court denied the casino’s motion for attorney fees under NRS 18.010(2)(b) (frivolous claims). Appellants have appealed from the district court’s written decision ruling in the casino’s favor, and the casino has appealed from the order denying it attorney fees.

After considering the parties’ arguments, we conclude the following. First, the Nevada Labor Commissioner, who is entrusted with the responsibility of enforcing Nevada’s labor laws, generally must adminis-

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October 2008



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tratively hear and decide complaints that arise under those laws. Accordingly, we will imply no private cause of action to enforce NRS 608.160, or the other labor statutes at issue here, in the district courts in the first instance. Second, since declaratory relief is not available when an adequate statutory remedy exists, appellants lacked standing to seek such relief. Third, since appellants are at-will employees, the employment terms of whom are generally subject to unilateral prospective modification by the employer, and because as a matter of law they had no enforceable contract concerning the future distribution of their tips, they failed to demonstrate a genuine dispute with respect to whether the employment policy modifications constituted a breach of contract. Accordingly, after determining that the district court did not abuse its discretion in denying attorney fees, we affirm the district court's decision and order denying attorney fees."

*Winchell v. Schiff* No. 47067 (October 9, 2008) "In this appeal and cross-appeal, we primarily consider whether actual losses resulting from the conversion of inventory include the value of a lost business. We conclude that full recovery for actual losses includes not only the converted inventory, but also resulting damages such as the value of a lost business."

"We conclude that substantial evidence supports Winchell's claim for conversion and the jury's award of actual damages for the resulting loss of inventory and business. We also conclude that Winchell failed to allege facts demonstrating claims for breach of the covenant of quiet enjoyment, and trespass, and to show that punitive damages were appropriate. Further, additur is not warranted in this case because Schiff's evidence as to additional damages was sufficiently undermined during trial. However, the jury's award of damages for Winchell's

actual losses should have been offset by \$33,084, the amount Winchell recovered under the insurance policy. Finally, we conclude that a new trial is not warranted here. Accordingly, we affirm the judgment of the district court in part, reverse in part, and remand for proceedings consistent with this opinion."

*Knipes v. State* No. 49663 (October 2, 2008) "In this appeal, we consider whether hearings to determine the admissibility of juror questions should be conducted on the record as part of the procedural safeguards that were prescribed in *Flores v. State* and whether the failure to comply with these safeguards is reviewable for harmless error. For the reasons set forth below, we require hearings regarding the admissibility of juror questions to be conducted on the record. We also conclude that the failure to properly administer the required procedural safeguards for juror questioning amounts to nonconstitutional trial error, and as such is subject to harmless-error review under NRS 178.598.

In this case, the district court permitted jurors to ask witnesses a number of questions but routinely resolved objections to those questions in unrecorded bench conferences held within the jury's presence. On an isolated occasion, the district court also asked four juror questions without first conducting one of these unrecorded hearings. Although the district court entertained juror questions improperly in these respects, we conclude that asking the improperly vetted questions at trial was harmless since none of the questions elicited testimony that prejudicially impacted the jury's verdict. Accordingly, we affirm the district court's judgment of conviction."

*Cox v. Dist. Ct.* No. 50118 (October 2, 2008) "This original proceeding stems from an appeal

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in a case concerning a complaint for partition or sale of certain Clark County real property. In that case, this court reversed the district court's judgment transferring the property from petitioners to real parties in interest through a judicial sale and remanded the matter to the district court for further proceedings. When petitioners took steps to undo the judicial sale in light of the court's order, real parties in interest obtained a temporary restraining order from a different district court department, barring petitioners from further challenging the judicial sale. The temporary restraining order was premised on the general principle that valid judicial sales to bona fide purchasers survive appellate reversals. Petitioners are seeking a writ of mandamus directing the district court to vacate its temporary restraining order, allowing them to continue with their efforts to reacquire the property.

In considering this petition, we clarify that bona fide purchasers at judicial sales are not protected under the general principle that judicial sales survive appellate reversals if the district court lacked jurisdiction to order the sale. In this situation, judicial sales may be challenged collaterally or in remanded proceedings in the original action.

Here, before ordering petitioners' property sold in the partition action, the district court improperly denied petitioners' motion to dismiss the action pursuant to NRCPC 41(e)'s requirement that an action be brought to trial within five years from the date that a complaint is filed. After the five-year deadline for bringing the case to trial expired, dismissal was mandatory under that rule. Thus, we conclude that the district court lacked jurisdiction to take the partition action to judgment and order the judi-

cial sale of petitioners' real property. Accordingly, the judicial sale is void, and we grant this petition."

*M.C. Multi-Family Dev. v. Crestdale Assocs.* No. 48347 (October 2, 2008) "In this case, we primarily consider whether intangible property, in particular a contractor's license, can be the subject of a claim in tort for conversion. In doing so, we adopt the California definition of "property rights" and the Restatement (Second) of Torts rule defining conversion of "intangible personal property," and expressly reject the notion that personal property must be tangible in order to give rise to a conversion claim. We therefore conclude in this case that the mere fact that one's use of a contractor's license does not physically prevent others from using the same license does not preclude a plaintiff in a conversion action concerning alleged unauthorized use of the license from presenting the claim for determination by a trial jury. Instead, we hold that the exercise of a right that belongs to another may constitute an act inconsistent with the titleholder's rights and may therefore satisfy the "wrongful dominion" element of conversion. Accordingly, we conclude that the use of a corporate contractor's license by an individual for independent projects, without the permission of the entity named in the license, may constitute a conversion when the license is the exclusive property of the individual or entity to which it is issued."

*Davidson v. State* No. 48421 (October 2, 2008) "In this appeal, we consider whether the district court can change a jury's verdict from not guilty to guilty for a criminal charge based on a purported clerical error after the jury has been discharged. We also address a clerical error in the judgment of conviction that precludes habitual criminal sentencing on one of the battery convic-

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tions.

Regarding the verdict, we conclude that the Double Jeopardy Clause prohibits the district court from changing the jury's verdict from not guilty to guilty for a criminal charge after the jury has been discharged, even if the change is only to correct a purported clerical error. Therefore, the district court in this case erred by changing the verdict for the robbery charge at issue from not guilty to guilty. Consequently, we reverse one of the robbery convictions.

Regarding the judgment and sentence for battery, we conclude that the judgment of conviction erroneously treats one of the battery convictions (count four) as a felony when the jury returned a finding of guilt for a misdemeanor on that count. As a result, the district court erred in imposing a habitual criminal sentence for that count because NRS 207.010 authorizes a habitual criminal sentencing enhancement for convictions of crimes involving fraud or intent to defraud, of petit larceny, or of a felony. We therefore remand for the district court to amend the judgment of conviction to show that count four is a misdemeanor and to impose a lawful sentence for that count.”

*We the People Nevada v. Secretary of State* No. 51735 (September 25, 2008) “ The primary issue raised in this original petition is whether the current version of NRS 295.056(3), which requires initiative petitions that propose constitutional amendments to be submitted for signature verification “not later than the third Tuesday in May,” is constitutional in light of Article 19, Sections 2(4) and 3(2) of the Nevada Constitution. Article 19, Section 2(4) requires that initiatives proposing to amend the constitution must be filed with the Secretary of State within a certain period of time before a general election. Under

Article 19, Section 3(2), additional time may be added to what is otherwise provided for in Article 19 for the enactment of a submission deadline, which is the deadline reflected in NRS 295.056(3). Thus, to determine whether NRS 295.056(3) is constitutional, we must interpret Article 19, Sections 2(4)'s and 3(2)'s language.

When Section 2(4) is read in conjunction with Section 3(2), Section 2(4)'s language is rendered ambiguous because there appears to be more than one reasonable interpretation of Section 2(4)'s language. One reasonable interpretation of Section 2(4) creates a fixed filing deadline, but a second equally reasonable interpretation allows for a flexible filing deadline. Since the constitutional provision's language is ambiguous, we review the legislative history of each constitutional provision and the statutory provision at issue, as well as Article 19's constitutional scheme, in an effort to harmonize Sections 2(4) and 3(2) to give Section 2(4)'s language its proper interpretation and effect.

In light of the legislative history and considering Article 19's constitutional scheme as a whole, we determine that Section 2(4)'s language establishes a fixed filing deadline. Thus, the time period stated in Section 3(2) may be added to the fixed filing deadline under Section 2(4) to give the Legislature a specific block of time within which it may establish a submission deadline for signature verification.

Accordingly, we conclude that NRS 295.056(3) impermissibly restricts the powers reserved to the people under Article 19 by establishing a submission deadline earlier than what is otherwise permitted by Article 19, Sections 2(4) and 3(2) of Nevada's Constitution and thereby directly inhibiting the initiative process. NRS

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295.056(3) is therefore unconstitutional, and we grant the petition for a writ of mandamus.”

*ANSE, Inc. v. Dist. Ct.* No. 51049 (September 25, 2008) “The constructional defect action underlying this original writ proceeding, in which we clarify the scope of NRS Chapter 40, concerns approximately 1,200 residences in the Sun City Summerlin community in Las Vegas, Nevada. Petitioners moved the district court for partial summary judgment with respect to approximately 700 of those residences, arguing that they did not constitute “new residences” for constructional defect purposes under NRS 40.615, which limits NRS Chapter 40 “constructional defect” remedies to “new residence[s].”

In asserting that certain residences at issue in this case did not constitute “new residence[s]” under NRS 40.615, petitioners primarily relied on our decision in *Westpark Owners’ Ass’n v. District Court*, in which we defined “new residence” for constructional defect purposes as “a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of sale.” According to petitioners, because approximately 700 of the residences at issue below were occupied as dwellings before the residences’ subsequent owners obtained title to the homes, the residences did not constitute “new” residences within the scope of NRS 40.615 and therefore were not subject to constructional defect actions under NRS Chapter 40. Petitioners thus contended that they were entitled to summary judgment as to their NRS Chapter 40 liability on claims related to those residences. The district court ultimately denied the summary judgment motion, noting that it was unconvinced that sub-

sequent purchasers of recently constructed homes were precluded from the remedies that NRS Chapter 40 provides, and this original petition for a writ of mandamus followed.

In this original proceeding, then, we clarify whether our definition of “new residence” in *Westpark* precludes a homeowner who is not the home’s first purchaser from seeking the remedies available under NRS Chapter 40 for constructional defects in the home. It does not. To conclude otherwise undermines NRS Chapter 40’s purposes to provide an expansive remedy for homeowners and protection for developers and leads to disparate treatment among otherwise similarly situated homeowners. Instead, any home that is a product of original construction, unoccupied as a dwelling from the completion of its construction until the point of its original sale, constitutes a “new residence” for NRS Chapter 40 purposes, and thus, subsequent owners may bring an NRS Chapter 40 action, so long as it is instituted within the limitation period provided by the applicable statute of repose.”

*Ransdell v. Clark County* No. 48592 (September 25, 2008) “ This appeal raises the issue of whether sovereign immunity principles apply to shield a county from civil liability in an action to recover damages following abatement of a nuisance. Although Nevada has waived its sovereign immunity by statute, exceptions to the waiver apply, including one that protects political subdivisions of the state from liability for their discretionary acts. As we recently adopted in *Martinez v. Maruszczak* the federal two-part test for determining whether the discretionary-function exception to the general waiver of sovereign immunity applies to protect a government entity from liability, we use the test here to determine if a county’s actions in abating a property of a nuisance are im-

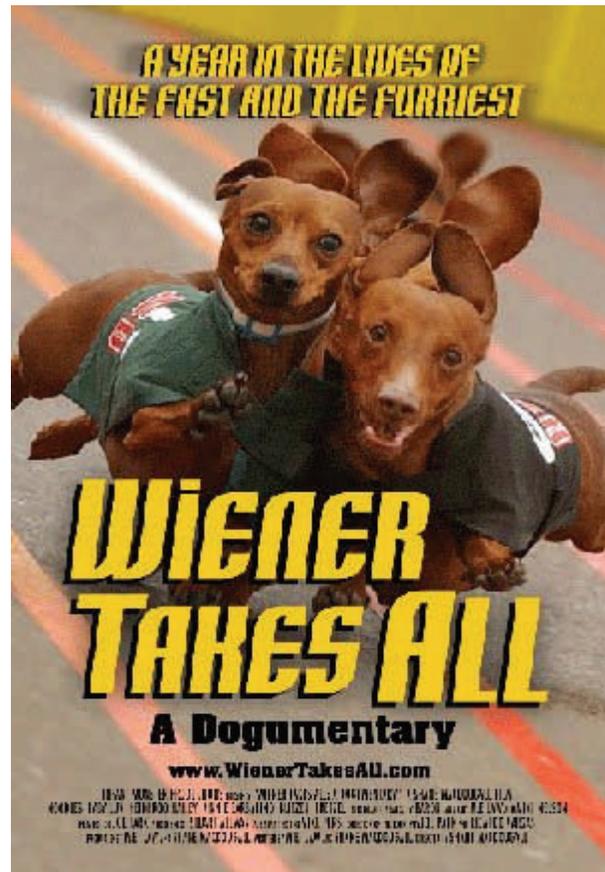
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immune from civil liability. Because a county's actions in abating a nuisance satisfy both criteria of the test, we conclude that immunity applies to shield the County from liability here and, therefore, the district court properly entered judgment in favor of the County."

*Canyon Villas v. State* No. 47994 (September 25, 2008) "In this appeal, we consider the appropriate method for assessing the taxable value of income-producing real property when the property's improvements contain constructional defects. This case arises from respondent the State Board of Equalization's determination with respect to the 2004-2005 tax assessment of appellants' properties. Each appellant owns a property containing an apartment complex. According to appellants, the 2004-2005 tax assessment of their properties did not properly account for constructional defects present in their apartment complexes. The State Board of Equalization asserts that the constructional defects were properly accounted for in determining the full cash value of appellants' properties by adjusting the capitalization rates in the income capitalization method used under NRS 361.227(5)(c) to determine the properties' full cash value.

In general, the income capitalization method for valuing property evaluates the following two factors to determine a property's full cash value: (1) the annual income that a hypothetical buyer expects to receive from the property, and (2) the rate at which the buyer expects a return on his investment in the property or the capitalization rate. Because those two factors account for the income a property is expected to generate and the condition of improvements on the property, including any constructional defects, the income capitalization method is an appropriate method for assessing the full cash value of income-generating property that

contains constructional defects in its improvements. The record in this case demonstrates that the State Board of Equalization exercised its best judgment in raising the capitalization rate to assess appellants' property values in light of the complexes' constructional defects. We thus affirm the district court's order denying judicial review of the State Board of Equalization's decision."



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*Porter v. Osborn* No. 07-35974 (October 20, 2008) “This case raises the question of the appropriate standard of culpability to apply to a police officer who kills a suspect in the course of investigating a suspicious car parked alongside an Alaska highway, under circumstances that suggest the officer may have helped to create an emergency situation by his own excessive actions. It comes in the context of a lawsuit brought by the parents of the victim, claiming the officer violated their Fourteenth Amendment substantive due process right of familial association with their deceased son. They contend the officer’s actions were so outrageous as to shock the conscience. The district court found that the parents presented sufficient evidence that the officer’s conduct violated their constitutional rights to warrant a jury trial, but we are compelled to conclude it did so by applying an incorrect standard of culpability to the officer’s actions. We therefore reverse and remand for reconsideration of the officer’s culpability under the proper standard and whether he is entitled to qualified immunity on summary judgment.

“The plaintiffs and appellees are Arthur J. and Christie L. Porter (collectively ‘the Porters’), who brought this suit after their adult son, Casey Porter, was fatally shot in a brief but tragic confrontation with two Alaska State Troopers. Among several federal and state claims, the Porters principally claimed that their Fourteenth Amendment right of association was violated by the way in which defendant-appellant Arthur J. Osborn (‘Osborn’) and his fellow trooper Joseph Whittom (‘Whittom’) handled the roadside incident that resulted in Casey’s death. As we discuss in more detail later, the troopers were responding to a call about an apparently abandoned vehicle parked in a highway pull-out area. Osborn, who arrived on the scene first, discovered the car was in fact oc-

cupied by Casey, who apparently had been asleep in the driver’s seat. In a rapidly escalating confrontation, the troopers shouted at a startled and confused Casey to get out of his car. When he failed to comply, both troopers quickly exited their cars and drew their guns, with Osborn taking the lead in approaching the car to get Casey to comply. When Casey rolled down his window but did not move to get out, Osborn pepper sprayed him through the open window. Casey reacted in pain and began to drive the car slowly forward toward Whittom’s patrol car, at which point Osborn fired five shots at Casey, killing him. Whittom, questioned shortly thereafter by an investigator, expressed his ‘shock’ that ‘shots were fired . . . in a situation like this.’

The district court dismissed all state law claims and all claims against Whittom, none of which are before us on this appeal. As to the Fourteenth Amendment claim, the district court found that there were enough disputed facts to preclude granting Osborn summary judgment on qualified immunity grounds, concluding that a jury could find that Osborn’s conduct shocked the conscience under a clearly established ‘deliberate indifference’ standard of culpability.

Osborn has appealed, arguing that his actions did not violate a constitutional standard, but even if they did, the deliberate indifference standard was not clearly established at the time. We conclude that a different and more demanding standard of culpability than deliberate indifference applies. Rather, in an urgent situation of the kind involved here, the established standard is whether Osborn acted with a purpose to harm Casey without regard to legitimate law enforcement objectives. Whether a jury could find Osborn violated that standard is not clear on the

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record before us. Although Osborn appears to have helped create and even exacerbate the confrontation he then ended by deadly force, the parties and the district court will need to readdress Osborn's summary judgment motion under the more stringent purpose to harm standard. We therefore reverse the court's denial of qualified immunity and remand for further proceedings."

*Posey v. Lake Pend Oreille* SC 07-35188 (October 15, 2008) "This case requires us to determine whether, following the Supreme Court's recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the inquiry into the protected status of speech in a First Amendment retaliation claim remains a question of law properly decided at summary judgment or instead now presents a mixed question of fact and law.

Plaintiff Robert Posey sued Lake Pend Oreille School District No. 84 (the 'School District'), arguing that by eliminating his job, the School District retaliated for his prior speech, in violation of the First and Fourteenth Amendments to the United States Constitution. The district court granted summary judgment in favor of the School District, concluding—purely as a matter of law—that the speech in question had been spoken pursuant to Posey's job responsibilities and thus in his capacity as a public employee, and that it was therefore not constitutionally protected. Posey appeals. We have jurisdiction under 28 U.S.C. § 1291.

We conclude that, following *Garcetti*, the inquiry into whether a public employee's speech is protected by the First Amendment is no longer purely legal and presents a mixed question of fact and law. Summary judgment is therefore inappropriate where, as here, (1) plaintiff has spoken on a matter of public concern, (2) the state lacks an adequate

justification for treating the employee differently from any other member of the general public, and (3) there is a genuine and material dispute as to the scope and content of plaintiff's employment duties. Accordingly, we reverse the grant of summary judgment on Posey's First Amendment retaliation claim and remand to the district court for further proceedings consistent with this opinion.

*Hoffman v. Citibank (South Dakota), N.A.* No. 07-55616 (October 14, 2008) "Plaintiff-Appellant Laura Hoffman ('Hoffman') appeals the district court's order compelling arbitration in her class action suit against her credit card company, Defendant-Appellee Citibank (South Dakota) N.A. ('Citibank'). The district court found that Hoffman was party to an arbitration agreement that waived her right to proceed on a class basis. Applying South Dakota law—the law chosen in the credit card agreement—the district court enforced the class arbitration waiver and ordered Hoffman to proceed on a non-class basis. Nonetheless, the district court found substantial grounds for a difference of opinion regarding a controlling issue of law, 'whether California law or South Dakota law should be used to determine the enforceability of the arbitration agreement,' and issued an order for immediate appeal. The case was stayed without completion of discovery. We granted permission for the appeal, and we have jurisdiction under 28 U.S.C. § 1292(b). Because we are persuaded that the district court's order compelling arbitration erroneously relied on cases that do not properly apply California choice of law rules, we remand for a determination of whether California or South Dakota law applies to the class arbitration waiver."

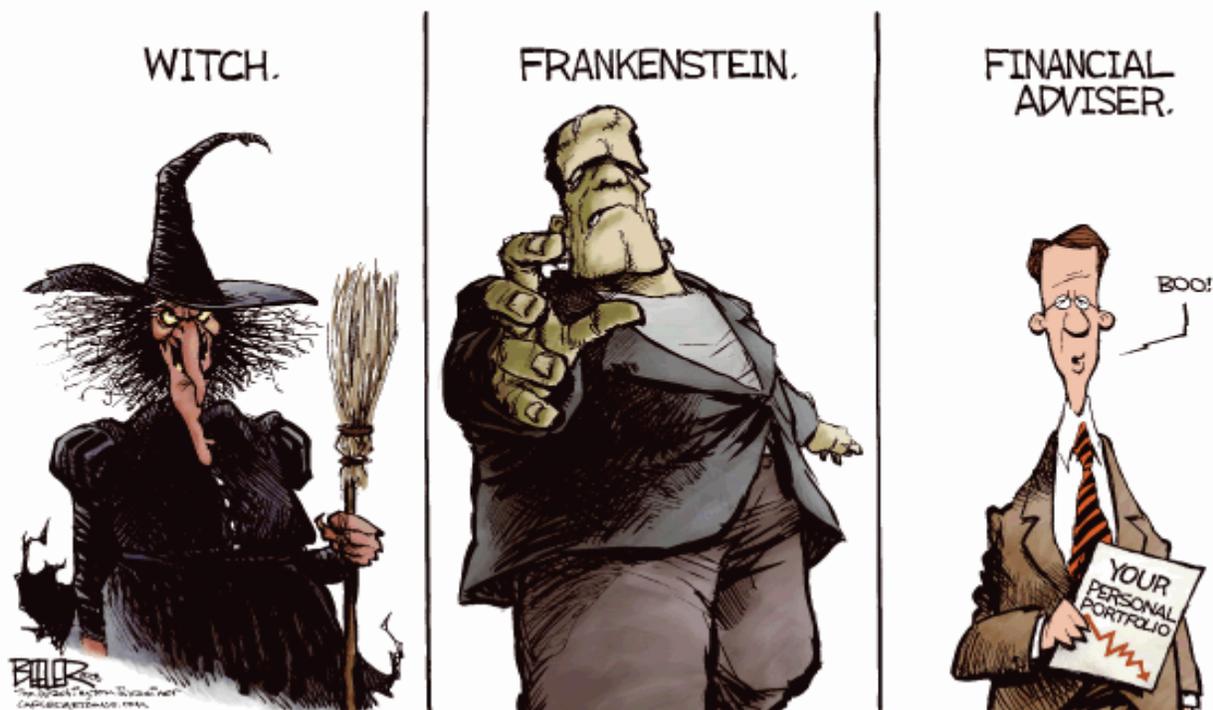
*United States v. Maes* No. 07-10495 (October

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10, 2008) “Defendant-Appellant Margaret Maes (‘Maes’) was stopped on Department of Veterans Affairs (‘VA’) property by a VA police officer who had seen Maes driving the wrong way down a one-way street, and this bad driving incident had severe consequences for Maes. The officer who saw her going the wrong way summoned another officer, who in turn observed drug paraphernalia on Maes’s dashboard. Upon questioning, Maes admitted that there might be drugs in

lation of 38 C.F.R. § 1.218(b)(32). Maes pleaded not guilty and moved to dismiss the possession charge, contending that she was improperly charged under 21 U.S.C. § 844(a). She argued that she should have been charged instead solely, so far as drug possession was concerned, under 38 C.F.R. § 1.218(a)(7), a VA regulation that reads: ‘The introduction or possession of alcoholic beverages or any narcotic drug, hallucinogen, marijuana, barbiturate, and

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the vehicle, and the officers searched the car. The search revealed a small bag of marijuana, bongs, pipes, cleaning rods, and other drug paraphernalia.

Maes was charged with one count of possession of a controlled substance in violation of 21 U.S.C. § 844(a), and with one count of driving in the wrong direction on a posted oneway street in vio-

lation of 38 C.F.R. § 1.218(b)(32). Maes pleaded not guilty and moved to dismiss the possession charge, contending that she was improperly charged under 21 U.S.C. § 844(a). She argued that she should have been charged instead solely, so far as drug possession was concerned, under 38 C.F.R. § 1.218(a)(7), a VA regulation that reads: ‘The introduction or possession of alcoholic beverages or any narcotic drug, hallucinogen, marijuana, barbiturate, and

amphetamine on [VA] property is prohibited, except for liquor or drugs prescribed for use by medical authority for medical purposes.’ A magistrate judge heard oral argument on Maes’s motion to dismiss, and denied the motion in an order. Maes later withdrew her not-guilty plea as to both counts, entered a conditional guilty plea, and received a fine of \$1000

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and a special assessment of \$25 for the first count and a fine of \$25 and a special assessment of \$10 on the second count. Maes then appealed the magistrate judge's order to the district court, which held a hearing and later affirmed the magistrate judge's decision. Maes timely appealed to this Court, again arguing that she should have been charged under the more specific VA regulation instead of the general federal possession statute. We conclude that the district court did not err by upholding the sentence under 21 U.S.C. § 844(a), and we affirm."

*Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission* No. 05-72739 (October 7, 2008) "The Snoqualmie Tribe petitions for review of a decision of the Federal Energy Regulatory Commission ('FERC') granting Puget Sound Energy, Inc. ('PSE') a license to operate for another forty years the Snoqualmie Falls Hydroelectric Project. The Tribe argues that FERC's relicensing decision violates the Religious Freedom Restoration Act ('RFRA') because FERC employed the wrong legal standard for reviewing claims under RFRA and because substantial evidence does not support FERC's conclusion that the relicensing decision does not substantially burden the Tribe's free exercise of religion. The Tribe also asserts that FERC failed to consult with the Tribe on a government-to-government basis in violation of the National Historic Preservation Act ('NHPA'). PSE cross-petitions for review of FERC's decision to impose water flow requirements that exceed those established in the Washington State Department of Ecology's ('Ecology') water quality certification ('WQC').

We have jurisdiction under 16 U.S.C. § 8251(b). After hearing argument in this appeal, we vacated submission pending publication of *Navajo Nation v. U.S. Forest Serv.*, No. 06-15371, 535 F.3d

1058, slip op. 10033 (9th Cir. filed Aug. 8, 2008) (en banc). In reliance on that opinion, we now issue our decision in this case. We deny the petitions for review."

*Alaska Independence Party v. State of Alaska* No. 07-35186 (October 6, 2008) "Alaska requires political parties to nominate candidates for the state's general election ballot in a state-run primary, in which any registered member of a political party may seek the party's nomination. Nominees are then chosen by the vote of party-affiliated voters and any other voters whom the parties choose to let participate. The Alaska Independence Party ('AIP') and the Alaska Libertarian Party ('ALP') contend that these laws burden their associational rights in violation of the First Amendment because they force them to associate with candidates who, they claim, are not members of their party or are not ideologically compatible with the party. We hold that Alaska's primary system is justified by compelling state interests and is therefore facially constitutional."

*Slovik v. Yates* No. 06-55867 (October 6, 2008) "California prisoner Michael D. Slovik petitions for a writ of habeas corpus, contending that his confrontation rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated when a California trial court prevented him from asking questions on cross-examination that would establish that one of the prosecution's key witnesses had likely lied under oath. The district court denied the petition. For the reasons explained below, we agree that Slovik was denied his confrontation rights and that the right was clearly established; accordingly, we reverse."

*Caldwell v. Caldwell* No. 06-15771 (October 3,

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2008) “We must decide whether Jeanne E. Caldwell, who asserts an interest in being informed about how teachers teach the theory of evolution in biology classes, has standing to pursue an Establishment Clause claim arising out of her offense at the discussion of religious views on the ‘Understanding Evolution’ website created and maintained by the University of California Museum of Paleontology and funded in part by the National Science Foundation. She avers that the website endorses beliefs which hold that religion is compatible with evolutionary theory and disapproves beliefs, such as her own, that are to the contrary, thereby exposing her to government-endorsed religious messages and making her feel like an outsider. In a published opinion, the district court concluded that Caldwell’s allegations state only a generalized grievance insufficient for injury in fact, and dismissed the complaint. *Caldwell v. Caldwell*, 420 F.Supp.2d 1102, 1007 (N.D. Cal. 2006). We also conclude that the harm asserted by Caldwell to her interest in being informed about the teaching of evolutionary theory is too generalized and remote to confer standing against the University of California faculty who administer the website and develop its content on behalf of the Museum of Paleontology. Caldwell’s complaint against the Director of the National Science Foundation has become moot since her appeal was taken. Therefore, we affirm.

*Espinosa v. United Student Funds, Inc.* No. 06-16421 (October 2, 2008) “In our earlier opinion in this case, *Espinosa v. United Student Aid Funds, Inc.*, 530 F.3d 895 (9th Cir. 2008), we remanded to the bankruptcy court for a determination under Rule 60(a) whether exclusion of petitioner’s student debt from its discharge order was the result of a clerical error. The bankruptcy court confirmed that:

the inclusion of paragraph 1(c) in the Discharge Order [which exempted student loan obligations from the general discharge] was inserted because of a clerical mistake, because it was the clear intent of the Court, as reflected in the Chapter 13 Plan, as approved by the Court, that all student loan-related obligations were to be discharged if the debtor successfully performed and completed the Plan.

Order of August 20, 2008. We thus finally have presented to us the question that the parties briefed and argued: Whether a debtor may obtain discharge of a student loan by including it in a Chapter 13 plan, if the creditor fails to object after notice of the proposed plan.”

“It is apparent that a number of courts in our circuit, including the district court below, are uncomfortable with the practice of some Chapter 13 debtors to seek to discharge their student debts by working them into their Chapter 13 plans. Some bankruptcy judges have announced that they won’t confirm plans that seek to discharge student loan debts without an adversary proceeding, even when the creditor fails to object to the plan. *See, e.g., Patton v. U.S. Dep’t of Educ. (In re Patton)*, 261 B.R. 44, 48 (Bankr. E.D. Wash. 2001); *In re Webber*, 251 B.R. 554, 557-58 (Bankr. D. Ariz. 2000). In fact, one of these opinions has suggested that inclusion of a ‘nondischargeable’ debt in a Chapter 13 plan ‘may be the subject of sanctions.’ *In re Patton*, 261 B.R. at 48.

For reasons explained above, we view matters quite differently. Our long-standing circuit law holds that student loan debts can be discharged by way of a Chapter 13 plan if the creditor does not object, after receiving notice of the proposed plan,

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*Pardee*, 193 F.3d at 1086, and that such notice is not constitutionally inadequate. *In re Gregory*, 705 F.2d at 1123. We find it highly unlikely that a creditor whose business it is to administer student loans will be misled by the customary bank-

of the order enforcing the discharge injunction and for a determination whether the creditor acted willfully in violating the injunction under the standard we announced in *Zilog, Inc. v. Corning (In Re Zilog, Inc.)*, 450 F.3d 996 (9th



ruptcy procedures or somehow be bamboozled into giving up its rights by crafty student debtors. If the creditor fails to object, it is doubtless the result of a careful calculation that this course is the one most likely to yield repayment of at least a portion of the debt. In such circumstances, bankruptcy courts have no business standing in the way. Cases such as *In re Webber* and *In re Patton* are, to that extent, overruled.

The district court's judgment reversing the bankruptcy court is reversed. The case is remanded to the bankruptcy court for reinstatement

Cir. 2006). REVERSED and REMANDED.” *Lazy Y Ranch, Ltd. v. Behrens* No. 07-3513 (September 26, 2008) “This case arises from Lazy Y Ranch’s attempt to lease grazing lands from the State of Idaho. The leases were auctioned by the State and although Lazy Y was the high bidder, the leases ultimately were awarded to other parties. Lazy Y filed a complaint under 42 U.S.C. § 1983, alleging that various state officials violated the Equal Protection Clause when they rejected its bids. In particular, Lazy Y alleged that the officials discriminated against Lazy Y because it (1) has perceived ties to con-

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servationists; and (2) is a Washington corporation that was attempting to enter the Idaho grazing market.

Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), contending that Lazy Y failed to state an Equal Protection claim and, alternatively, that they were entitled to qualified immunity. Defendants' motion relied on various documents indicating they had articulated a legitimate reason for rejecting Lazy Y's bids — namely, that leasing to Lazy Y would involve increased administrative costs because the lands were unfenced and cattle could wander onto adjoining property. The district court struck most of Defendants' extraneous documents and ultimately denied their motion to dismiss. This interlocutory appeal followed, with Defendants relying on the collateral order doctrine as a basis for appellate jurisdiction.

As we explain below, Lazy Y has properly alleged that Defendants violated its rights under the Equal Protection Clause, and also that they violated clearly established law. We therefore affirm.”

*McClung v. City of Sumner* No. 07-35231 (September 25, 2008) “In 1995, Daniel and Andrea McClung (the ‘McClungs’) sought to develop property they owned in the City of Sumner (the ‘City’), and learned that their underground storm drain pipe did not meet the City’s requirement for new developments to include pipes at least 12 inches in diameter. The McClungs assert that the City’s subsequent request that they install a 24-inch pipe in exchange for the City approving their permit application and waiving certain permit and facilities fees effected an illegal taking of their

property. This case presents an issue of first impression in this Circuit — whether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), or the nexus and proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). We affirm, holding that the Penn Central analysis applies to the 12-inch pipe requirement. As for the installation of the 24-inch pipe, we conclude that the McClungs voluntarily contracted with the City to install the 24-inch pipe and thus the installation of that pipe was not a ‘taking’ by the City.”

*United States v. Able Time, Inc.* No. 06-56033 (September 25, 2008) “Able Time, Inc. imported a shipment of watches into the United States. The watches bore the mark ‘TOMMY,’ which is a registered trademark owned by Tommy Hilfiger Licensing, Inc. The Bureau of Customs and Border Protection seized the watches pursuant to the Tariff Act, which authorizes seizure of any ‘merchandise bearing a counterfeit mark.’ 19 U.S.C. § 1526(e). Tommy Hilfiger did not make or sell watches at the time of the seizure. Customs later imposed a civil penalty upon Able Time pursuant to 19 U.S.C. § 1526(f), which authorizes the imposition of a fine upon any person who imports merchandise that is seized under § 1526(e). The district court concluded that, because Tommy Hilfiger did not make watches at the time of the seizure, the watches imported by Able Time were not counterfeit, and the civil penalty imposed by Customs was unlawful.

The government argues that the Tariff Act does

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not require the owner of the registered mark to make the same type of goods as those bearing the offending mark. The government acknowledges that such a requirement is commonplace in many related trademark statutes but maintains that Congress did not intend to include such a requirement—known as an ‘identity of goods or services’ requirement—in the Tariff Act. Able Time responds by arguing that Congress expressed its intent to require identity of goods in related statutes and legislative history.

We conclude that the Tariff Act does not contain an identity of goods or services requirement. We hold that Customs may impose a civil penalty pursuant to 19 U.S.C. § 1526(f) upon an importer of merchandise bearing a counterfeit mark, even though the owner of the registered mark does not manufacture or sell the same type of merchandise. We reverse the district court’s order granting Able Time’s motion for summary judgment and remand for further proceedings.”

*MB Financial Group, Inc. v. USPS* No. 06-56267 (September 25, 2008) “This is an unusual case involving the potential liability of the United States Postal Service (‘USPS’) for failing to make available a post office box it was obligated to provide for receipt of plaintiff’s business mail. The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12 for lack of jurisdiction and failure to state a claim, holding that the USPS was immune under the provision of the Federal Tort Claims Act (‘FTCA’) that exempts the USPS from liability arising from negligently transmitted mail. See 28 U.S.C. § 2680(b).

We reverse. The complaint alleges a tort that does not necessarily arise out of the negligent

transmission of mail. The complaint also alleges a facially viable breach of contract claim. The dismissal of the action at this preliminary stage, before any discovery could reveal either the USPS records of the transaction or the true nature of the parties’ understanding, was erroneous.”

*Abagninin v. AMVAC Chemical Corp.* No. 07-56326 (September 24, 2008) “Akebo Abagninin and others who live and work in the Ivory Coast (‘Abagninin’) appeal the district court’s dismissal with prejudice of their claims against manufacturers, distributors, and users of the pesticide DBCP for genocide and crimes against humanity under the Alien Tort Statute (‘ATS’), 28 U.S.C. § 1350. Abagninin alleges that DBCP caused male sterility and low sperm counts, which AMVAC knew. The district court granted with prejudice AMVAC’s motion for judgment on the pleadings as to the genocide claim for failure to allege that AMVAC acted with specific intent. Abagninin’s claim for crimes against humanity was subsequently dismissed for failure to allege that AMVAC’s conduct occurred within the context of a State or organizational policy. We affirm.”

*United States v. Pham* No. 06-30489 (September 23, 2008) “This case illustrates the dangers of an identity theft scheme whereby many persons and financial institutions are impacted when criminals steal identities. Lam Thanh Pham (‘Pham’) appeals the 78-month sentence and \$1 million restitution order imposed on him after he pled guilty to one count of bank fraud in violation of 18 U.S.C. § 1344.1 Pham and five other individuals were indicted on forty-four counts of bank fraud in connection with a massive identity theft scheme that compromised the bank accounts of ninety-five people held by fourteen different financial institutions and resulted in more than \$1.6 million in loss. Pham’s guilty plea followed. Pham contends

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that it was error for the district court to apply a fourlevel enhancement to his sentence for a property crime involving fifty or more victims where the shortfalls in the accounts of the ninety-five individuals whose identities were stolen were fully reimbursed by their banks. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we vacate Pham’s sentence and remand for resentencing on an open record.”

*State of Alaska v. Federal Subsistence Board* No. 07-35723 (September 23, 2008) “Defendant-Appellee Federal Subsistence Board (‘FSB’ or ‘Board’) administers the federal subsistence program at the heart of Title VIII of the Alaska National Interest Lands Conservation Act (‘ANILCA’), 16 U.S.C. §§ 3111-26. In 2005, the FSB granted residents of Chistochina, a rural community in Southeast Alaska, a Customary

and Traditional use determination (‘C & T determination’) for moose throughout Game Management Unit (‘GMU’) 12. The C & T determination permits Chistochina residents to harvest moose in GMU 12 under federal subsistence hunting regulations, which are more permissive than state hunting regulations.

Plaintiff-Appellant the State of Alaska (‘Alaska’) challenged the C & T determination in district court, contending that the FSB granted the determination in violation of the Administrative Procedure Act (‘APA’), 5 U.S.C. § 706(2)(A). The district court granted summary judgment in favor of Defendants-Appellees FSB, the Chairman of the FSB, the Secretary of the Interior, the Secretary of the Department of Agriculture (together, ‘Federal Defendants’), and Defendant-Intervenors Cheesh-na Tribal Council, Chistochina’s govern-



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ing body, and Larry Sinyon, a Chistochina subsistence hunter ('Intervenors'). After a careful review of the record, we find no reason to set aside the FSB's C & T determination. Because we may not substitute our own judgment for that of the FSB, see *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977)), we affirm."

*Barrett v. Belleque* No. 06-35667 (September 22, 2008) "Plaintiff-Appellant Jacob Barrett's *pro se* complaint was dismissed *sua sponte* by the district court, with prejudice, for failure to state a claim. Barrett, a prisoner at the Oregon State Penitentiary, attempted to mail a series of letters to his grandmother and mother—those letters used vulgar and offensive racist language to describe prison officials. After reviewing the letters, prison officials cited Barrett for violation of various prison disciplinary rules, resulting in a loss of good time, revocation of certain privileges, and other punitive measures. Barrett responded by filing a complaint in federal court pursuant to 42 U.S.C. § 1983, alleging that the prison officials violated his rights under the First and Fourteenth Amendments. Acting without the benefit of any substantive briefing from the parties, the district court reasoned that the prison had a 'legitimate penological interest' in preventing Barrett from using 'crude and racist language,' that outweighed any countervailing First Amendment interest. The district court's dismissal relied on an incorrect legal standard; under the correct standard Barrett has stated a claim for relief. We therefore reverse and remand."

Dismissal for failure to state a claim is reviewed *de novo*. *Weilburg v. Shapiro*, 488 F.3d 1202,

1205 (9th Cir. 2007). Factual allegations in the complaint are taken as true and all reasonable inferences are drawn in the plaintiff's favor. *Id.* 'Pro se complaints are to be construed liberally and may be dismissed for failure to state a claim only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Id.*

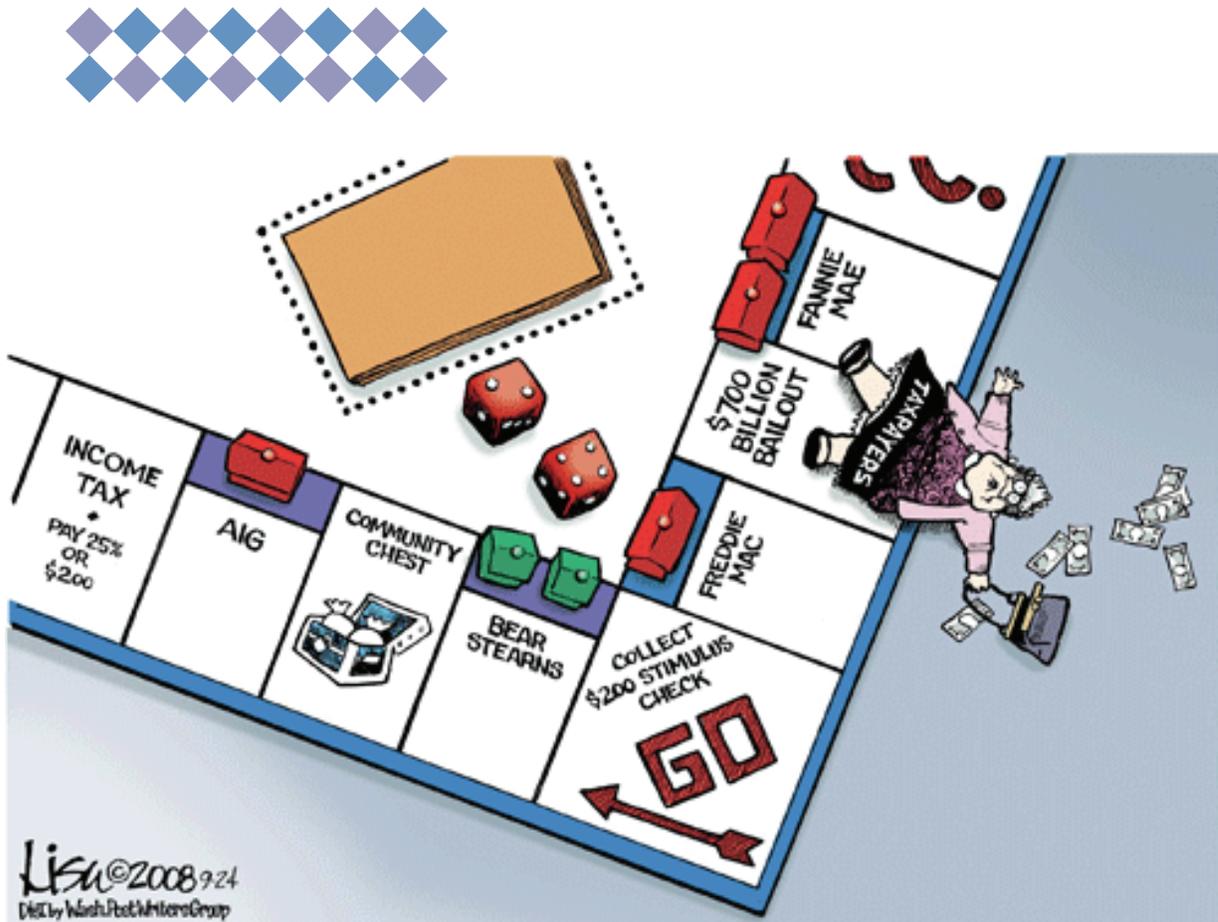
The standards for evaluation of a First Amendment claim concerning outgoing correspondence sent by a prisoner to an external recipient were established by the Supreme Court in *Procunier v. Martinez*, 416 U.S. 396 (1974), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989). Under these standards, censorship of prisoner mail is justified only if 'the regulation or practice in question further[s] an important or substantial governmental interest unrelated to the suppression of expression' and 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.' *Id.* at 413. *Procunier* is controlling law in the Ninth Circuit and elsewhere as applied to F.3d 1276, 1281 n.2 (9th Cir. 1995); *Loggins v. Delo*, 999 F.2d 364, 366 (8th Cir. 1993); *Brooks v. Andolina*, 826 F.2d 1266, 1268-69 (3d Cir. 1987); *McNamara v. Moody*, 606 F.2d 621, 624 (5th Cir. 1979).

Barrett's complaint—which unequivocally pleads facts alleging that the prison censored his outgoing mail and punished him for its contents—states a claim that is clearly cognizable under *Procunier*. The district court was not in a position to decide, on the pleadings, whether the Oregon State Penitentiary's rules 'further an important or substantial government interest,' or impose limitations 'no greater than is necessary or essential to the protection' of those interests.

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*Procurier*, 416 U.S. at 413. These are questions that go to the merits of Barrett's claim, not to whether he has stated a claim.

Instead of analyzing Barrett's claim under *Procurier*, which is precedent that takes account of the fact that the recipient's First Amendment rights are implicated when outgoing prisoner mail is censored, the district court relied on case law addressing prison regulations that concern communications between prisoners. *See, e.g., Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *see also Turner v. Safley*, 482 U.S. 78 (1987). These authorities are not controlling here. REVERSED AND REMANDED."



## UNITED STATES DISTRICT COURT

**Contributed by Daniel L. O'Brien, Senior Assistant General Counsel, Clark County School District**

*Houston v. Reebok International, LTD.*, 2:06-CV-00871-LRL (June 16, 2008) “Hassan Houston was coaching a basketball game on July 22, 2004. The game was part of a tournament being played at Liberty Heights High School, a school operated by the Clark Country School District (the District). During the game, Houston suffered a heart attack with anoxic brain injury, leaving him in a persistive vegetative state. Houston alleges that his injuries were caused in part by the District’s negligence. Specifically, he contends that the District was negligent in failing to provide reasonable and foreseeable access to medical equipment, including a defibrillator and other adequate medical material, and by failing to clear the road so as to allow ambulance access. Hassan Houston’s wife, Felicia, alleges that the District’s negligence caused a loss of consortium.

The Houstons filed the instant action on July 17, 2006. The summons were issued on July 18, 2006, and served on the District on August 11, 2006. It is undisputed, however, that the Houstons did not first file a claim with the District pursuant to NRS 41.036(2). NRS 41.036(2) provides, ‘Each person who has a claim against any political subdivision of the stat arising out of a tort must file his claim within 2 years after the time the cause fo action accrues with the governing body of that political subdivision.’ On September 11, 2006, the District filed the instant motion, arguing that the Houstons’ claims are barred for their failure to file a claim pursuant to NRS 41.036(2).”

“The Houstons contend that the claims notice

requirement of NRS 41.036(2) is unconstitutional. More specifically, they argue that it violates the Equal Protection Clause and deprives them of due process. Turning first to their equal protection claim, the Houstons conted that the claimsis notice requirement impermissibly creates two classes of victims of torts-victims of torts by the government, who must submit notice of claims, and victims of torts by private parties, who need not submit such a claim.”

“A majority of courts that have addressed the constitutionality of claims notice requiremnts have concluded that they are constitutional. *Johnson v. Maryland State Police*, 331 Md. 258, 294-95, 628 A.2d 162, 166-67 (Md. Ct. App. 1993) (collecting cases); *Rowland v. Washtenaw County Road Comm’n*, 447 Mich. 197, 214 n.9, 731 N.W.2d 41, 52 n.9 (2007) (collecting cases). The courts that have upheld the requirements have done so on various grounds, two of which are particularly persuasive. First, courts have reasoned that ‘because a State may contistiuonally choose not to allow any suits against itself, the legislature’s permission to sue in tort a previously immune sovereign can reasonably be accompanied by such terms and provision as the legislature wishes to impose on that right.’ *Johnson*, 331 Md. At 294, 628 A.2d at 166. Second, courts have conducted a traditional equal protection analysis, holding that claim requirements have a rational basis and therefore do not violate the Equal Protection Clause. *Id.* 295, 628 A.2d at 166-67.”

“In the Court’s view, the *Johnson* court’s analysis, as well as that of other courts relying on similar reasoning, is correct. In enacting NRS 41.031, the Nevada legislature waived the immunity of the State and its political subdivisions. In so doing, the legislature conditioned the waiver

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on the satisfaction of the requirements of NRS 41.063. NRS 41.031(1). NRS 41.036(2) creates a classification that ‘reasonably accompanies’ NRS 41.031’s waiver of sovereign immunity insofar as it requires only that the victim of government negligence provide notice to the government of a claim against it. *Johnson*, 331 Md. At 296, 628 A.2d at 167. Beyond that, there exists a rational basis for the claims notice requirement at issue. The State is involved in a great number of tort actions. The claims notice requirement affords the State and its subdivisions the ability to expeditiously dispose of tort claims filed against it, minimizing the cost to taxpayers of costly litigation that normally accompanies tort actions.”

“The Court holds that the claims notice requirement at issue here is not arbitrary or capricious. The requirement that a victim of government torts submit a claim with the appropriate government agency allows the ability of the State and its agencies to efficiently dispose of tort claims filed against it. Therefore, for the foregoing reasons, the Court holds that NRS 41.036(2) is constitutional.

The Houstons also argue, for the first time at oral argument, that the notice of claims requirement of NRS 41.036(2) is satisfied by virtue of the fact that their lawsuit was initiated within two years of the accident. They also introduced a new argument that because a representative of the District was on hand at the time of Mr. Hassan’s heart attack, they need not have filed a formal complaint. As to the claim that a filing of the lawsuit was sufficient to establish compliance with NRS 41.036(2), the Court is unpersuaded. Though there is some authority for the proposition that substantial compliance with NRS 41.036(2) is all that is required, to con-

clude that the filing of the lawsuit is sufficient is to read out the requirement of a notice of claim completely, defeating the purpose of the statute. Additionally, that a representative of the District may have witnessed Mr. Hassan’s attack in no way informs the District of the possibility of a legal claim or the basis thereof. Consequently, even assuming that NRS 41.036(2) can be satisfied by substantial compliance, the Court finds the presence of a District official at the scene of the accident to be insufficient to notify the District of the claim against it. For the foregoing reasons, the Court finds the Houstons’ failure to file a claim with the District precludes their suit and therefore grants the District’s motion.”



## **KROLLONTRACK.COM eDISCOVERY CASES**

### **Court Orders Production of ESI in Native Format Previously Produced in Paper Format**

*White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, 2008 WL 3271924 (D. Kan. Aug. 7, 2008). In this wrongful termination litigation, the plaintiff moved to compel the defendants to provide complete information on its document retention policy and how it may have affected relevant electronically stored information. The defendants argued that providing such information would be overly broad and unduly burdensome, and that such information was irrelevant, proprietary and confidential. Determining the defendants had provided a sufficient response to the discovery request via expert affidavit establishing an adequate search of the electronic systems, the court denied the motion to compel. The plaintiff also sought reproduction of certain electronic documents in native format, claiming that production of ESI in paper format was contrary to the "reasonably usable" requirement of Fed.R.Civ.P. 34. The defendants argued that converting the e-mails and attachments to PDF, then printing them and producing the printouts constituted a reasonably usable form since the plaintiff failed to request a particular format. Disagreeing with the defendants, the court held that the conversion of electronic documents to paper did not satisfy the requirements under Fed.R.Civ.P. 34, and accordingly granted the plaintiff's motion to compel production in native format. The court also noted that this dispute could have been avoided had the parties adequately discussed production format during the Fed.R.Civ.P. 26(f) conference as required by Guideline 4(f) of the United States District Court for the District of Kansas' Guidelines for Discovery of Electronically Stored Information.

Citing Lack of Bad Faith, Court Declines to Dismiss Complaint as Sanction for Discovery Misconduct

*Laethem Equip. Co. v. Deere & Co.*, 2008 WL 4056359 (E.D.Mich. Aug. 26, 2008). In this breach of contract and tortious interference with business relationships, inter alia, dispute, the defendant objected to the magistrate judge's recommendation that the defendant's motion to dismiss the complaint be denied. Seeking dismissal, the defendant alleged irreparable harm due to the plaintiff intentionally withholding two disks containing electronically stored information and failing to provide a privilege log despite asserting privilege. Countering, the plaintiff argued the existence of the disks was disclosed in 2005 and that the defense counsel abused the plaintiff's inadvertently produced privileged documents by using them as exhibits. Weighing the factors considered when determining whether to dismiss a case under either Fed.R.Civ.P 37(b) or 41(b), the magistrate judge found dismissal to be an inappropriate sanction for the discovery misconduct, citing lack of bad faith and the availability of less dramatic sanctions. The court adopted the magistrate judge's report and recommendation and referred the issue of the appropriateness of alternative sanctions back to the magistrate judge.

### **Court Denies Motion to Compel Due to Non-Existence of Documents**

*Dorn-Kerri v. South West Cancer Care*, 2008 WL 3914458 (S.D.Cal. Aug. 18, 2008). In this wrongful termination litigation, the pro se plaintiff moved to compel the defendant to supplement its response to her request for production of documents. The plaintiff sought a report from her period of employment in 2004-2005 from a database

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that updates continually. The defendant responded that the records no longer exist since the printed records are destroyed post-processing, and that the software program is incapable of producing historical reports, as corroborated by plaintiff's expert. Citing the Ninth Circuit's "repeated admonition that courts construe pro se pleadings and motions liberally," the court imposed a burden on the defendant to prove discovery should not be allowed. Finding the defendant had met its discovery obligations by demonstrating the reports no longer tangibly exist and are incapable of electronic regeneration, the court denied the motion. The court stated that if requested material does not exist, it cannot be in the "possession, custody, or control of a party and therefore cannot be produced for inspection."

### **Court Orders Production of E-Mails from Yahoo! Account**

*Infinite Energy, Inc. v. Thai Heng Chang*, 2008 WL 4098329 (N.D.Fla. Aug. 29, 2008). In this trade secret litigation, the plaintiff filed a motion to compel production of relevant e-mail and sought sanctions for defendant's untruthful representations regarding the e-mail account. The defendant argued he did not identify the particular Yahoo! account because he could not produce e-mails from it, claiming they were deleted as a result of his deactivation of the account. Frustrated by the defendant's lack of evidence of destruction, the court ordered the defendant to immediately attempt to obtain and produce e-mails from the Yahoo! account. The court also awarded sanctions against the defendant, but stayed the determination of which sanctions to impose until a later date.

### **Court Denies Spoliation Claim Finding De-**

### **struction in Accordance with Retention Policy**

*Gipetti v. United Parcel Service, Inc.*, 2008 WL 3264483 (N.D.Cal. Aug. 6, 2008). In this age discrimination litigation, the plaintiff sought sanctions for spoliation claiming the defendant destroyed relevant electronic documents, specifically tachographs, which records a vehicle's speed and length of time it is moving or stationary. The defendant responded that some of the requested tachographs were destroyed as part of the company's routine document retention policy, which due to the large volume of data, called for destruction of the records following 37 days. Additionally, the defendant argued it was not under a duty to preserve the records because they had no reason to believe that they had any bearing on the age discrimination claim. Agreeing with the defendant, the court refused to impose sanctions.

### **Court Orders Production of Text Messages Maintained by a Non-Party Service Provider through Rule 34**

*Flagg v. City of Detroit*, 2008 WL 3895470 (E.D.Mich. Aug. 22, 2008). In this ongoing wrongful death action, the court previously determined text messages of certain city employees were potentially discoverable and established a protocol under which two designated magistrate judges would make the initial determination as to their discoverability. In this current dispute, the defendants sought to prevent discovery from going forward, arguing that the court's previous order violated the Stored Communications Act ("SCA"), claiming it wholly precludes the production of electronic communications stored by a non-party service provider in civil litigation. Rejecting the defendants' reading of the SCA, the court held that possession for purposes of requir-

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ing production includes control over the information, which defendants maintained through its contractual relationship with the non-party service provider. However, the court was willing to modify the means of production - holding that the third party subpoena was unnecessary and instead the court ordered the plaintiff to file a Fed.R.Civ.P. 34 production request. See also *Flagg v. City of Detroit*, 2008 WL 787061 (E.D.Mich. Mar. 20, 2008).

### **Practice Points: The Impact of New Federal Rule of Evidence 502**

The long-anticipated Federal Rule of Evidence 502, titled "Attorney-Client Privilege and Work Product; Limitations on Waiver," was signed into law by the President on September 19, 2008. Rule 502 aims to provide predictability to litigants by creating a uniform set of federal rules regarding the scope of privilege waiver and inadvertent disclosure. The Rule also seeks to decrease the substantial costs associated with privilege review by providing protections against broad privilege waiver. Additionally, the Rule aims to protect parties that enter into nondisclosure agreements and extend their agreement onto non-parties. The newly enacted Rule 502 has the potential to significantly change the way parties and courts manage instances of inadvertent disclosure of privileged documents. Therefore, well-prepared legal practitioners should understand Rule 502's key provisions so as to be prepared for its real-world impact.

**Scope of Waiver.** Rule 502(a) governs when disclosure constitutes subject matter waiver, i.e. privilege waiver of related documents when one privileged document is disclosed. The Rule limits subject matter waiver to instances where:

"(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." The last provision provides courts with considerable discretion, making judicial determinations of subject matter waiver difficult to predict. Notwithstanding, the first requirement, i.e. intentional disclosure, should greatly limit the occurrence of entire subject matter waiver.

**Inadvertent Disclosure.** Rule 502(b) provides a uniform framework for federal courts in analyzing inadvertent disclosure of privileged documents. Rule 502(b) adopts the balancing approach previously taken by a majority of federal circuits, and provides that disclosure does not operate as a waiver if: "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error..."

As with any new rule, judicial interpretation, advocacy, legal scholarship and circumstance will undoubtedly mold the meaning of the phrase "reasonable steps." Rules do not exist in a vacuum and courts will look to existing precedent to determine standards of reasonableness. The recent judicial trend under the common law balancing test has been to demand high standards of privilege review. Accordingly, it is unlikely that courts will read this rule to allow for a decreased standard of reasonableness. In fact, it is more likely that courts will continue to order parties to produce specific evidence of cautionary measures taken to avoid inadvertent disclosure.

**Effect of State Determinations on Federal Proceedings.** Rule 502(c) provides guidance to federal courts deciding issues of waiver where privi-

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leged documents were previously disclosed in a state court. The Rule calls for application of law that is most protective against waiver, either Rule 502 or the law of the state where the disclosure occurred. The Rule is intended to broaden production in state courts by later protecting the disclosures in federal proceedings. Notably, however, Rule 502 does not provide that one state court determination is binding on proceedings in another state.

**Controlling Effect of a Court Order.** Rule 502(d) provides attorneys a powerful legal tool to prevent waiver decreeing that privilege is not waived by disclosure to other persons or entities, including third parties, if the agreement is incorporated into the court order. Most likely the court will incorporate an agreement between the parties that inadvertent disclosure will not constitute waiver. However, it appears that courts may also issue 502(d) orders sua sponte or in response to privilege disputes. Notably, the Rule provides that a court may issue an order; however it does not require that an order must be issued. Accordingly, practitioners should be prepared to advocate for their clients and argue why the court should or should not incorporate privilege protection. This provision of the Rule is especially likely to affect its success in decreasing discovery costs.

**Controlling Effect of a Party Agreement.** Rule 502(e) provides that a waiver agreement between parties is binding only on the parties to the agreement. Accordingly, practitioners may want to consider taking the extra step of obtaining a Rule 502(d) order so as to be protected in subsequent proceedings and against third parties.

**Controlling Effect of the Rule.** Rule 502(f) pro-

vides that all determinations made in federal proceedings are binding on subsequent state proceedings, and to federal court-annexed and federal court-mandated arbitration proceedings. The binding effect of federal privilege determinations is essential to achieving the goal of decreased costs associated with discovery as it allows holders of privileged documents to rely on the Rule's protections without fear of being overruled by another court.

In conclusion, Rule 502 provides the legal community with a much needed set of uniform rules to guide expectations regarding privilege determinations and to inform privilege arguments. However, nothing in Rule 502 excuses sloppy discovery practices. To the contrary, the finding of waiver through inadvertent disclosure falls under the court's discretion and requires attorneys to be prepared to defend their discovery conduct. Moreover, Rule 502 will not remedy the uncomfortable reality that, waiver or no waiver, disclosures provide your legal opponent with potentially case-compromising information it would not otherwise have.

### **How Not to Get Admitted to the Bar Law.com**

From an opinion of the [Supreme Judicial Court](#) of Massachusetts this week comes a brief lesson in how to be sure you are turned down when applying for admission to the bar.

First, start by verifying that you are properly enrolled in law school and close to completing your third year of study. Second, just before submitting your application for admission to the bar, engage in outrageous conduct, preferably directed at a current member of the bar or family member of a current member of the bar. It

## From the Blogs

is best if the conduct includes threats and harassment involving abuse of legal process. Sending angry e-mails also helps. Third, when bar officials interview you about your conduct, say you do not remember, but go ahead and acknowledge that you did "rant and rave."

Fourth, should the bar decide to conduct a hearing on your fitness to become a lawyer, try to call character witnesses who have nothing helpful to say about you.

Finally, when the initial decision is made to reject your application, file an appeal to the state's highest court and attempt to convince it that its authority over your case is preempted by federal law.

That's it. Those are the simple steps that could get you, too, rejected for admission. As the SJC said in its decision this week, *Desy v. Board of Bar Examiners*, such conduct "strongly suggests dishonesty, poor judgment, and a willingness to misuse the judicial process."

### Customize Your Web Search ABA Legal Technology Resource Center

The web has become an essential tool in most lawyer's research arsenal, but digging through the vast expanse of the web – which Google recently estimated at [more than 1 trillion pages](#) – can be daunting. Most popular search engines have indexes that include tens of billions of pages, making even simple searches seem useless at times due to the low signal-to-noise ratio in the results.

One way to minimize your frustration and maximize your results is to create

your own search engine. With tools like [Google Custom Search](#) and [Rollyo](#), building your own search engine is as easy as picking out the websites you'd like it to search. The custom search engines are ideal for users who have a specific interest area to which they'd like to confine their searches. For example, in October of last year the LTRC built the [Legal Technology Web Search tool](#) – a search engine that looks exclusively at legal technology sites. You can try out the search engine on the [LTRC home page](#) or you can even [add it to your iGoogle page](#).

Ready to learn more about custom search engines? Jim Calloway and Courtney Kennaday address the topic in some detail in their article for the September 2008 GP Solo Technology eReport Newsletter: [Build Your Own Search Engine](#).

