STATE BAR OF NEVADA

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NEVADA SUPREME COURT CASES

Thompson v. State, 125 Nev. Adv. Op. No. 59 (December 10, 2009). In this appeal, we consider whether the State's election to dismiss one of two charging documents and to proceed on the other constitutes "another prosecution" under NRS 178.562(1). Specifically, we address whether the 1997 amendment to NRS 178.562(1) affects our holding in Turpin v. Sheriff, 87 Nev. 236, 484 P.2d 1083 (1971). We hold that it does not and conclude that neither this issue, nor the other issues that appellant Luqris Thompson raises on appeal, warrants reversal of Thompson's conviction and sentence. Therefore, we affirm the judgment of conviction.

Fields v. State, 125 Nev. Adv. Op. No. 58 (December 10, 2009). This is an appeal from a judgment of conviction of first-degree murder with the use of a deadly weapon and conspiracy to commit murder, asserting evidentiary and instructional error and improper argument by the prosecutor. We find no error or abuse of discretion and therefore affirm.

Fields v. State, 125 Nev. Adv. Op. No. 57 (December 10, 2009). Linda Fields was convicted of one count of first-degree murder. She now appeals her conviction on the basis of the district court's admission of evidence of a prior bad act in the form of a prior uncharged conspiracy. Linda argues that such evidence was inadmissible for two reasons. First, Linda contends that the evidence did not fall within the common-plan-or-scheme exception to the general rule excluding bad act evidence because the crime charged was not similar enough to the prior conspiracy. Second, Linda contends that even if the bad act evidence was relevant as proof of a common plan or scheme, such evidence should not have been admitted because its probative value was substantially outweighed by the danger of unfair

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prejudice.

We conclude that the district court abused its discretion in admitting this bad act evidence because the prior conspiracy was not similar enough to the crimes charged to be relevant as proof of a common plan or scheme. We also conclude that the probative value of the bad act evidence was substantially outweighed by the danger of unfair prejudice. As such, we conclude that a new trial is warranted because the admission of the bad act evidence was not harmless.

Ouanbengboune v. State, 125 Nev. Adv. Op. No. 56 (December 3, 2009). In this appeal, we consider two issues. First, we review the circumstances under which inaccurate translations made during trial by a court-appointed interpreter warrant a new trial when such inaccuracies are discovered post-judgment. In doing so, we examine the procedures that should be employed to determine whether post-judgment discovery of inaccuracies made by a court-appointed interpreter fundamentally altered the context of the trial testimony, and whether the inaccuracies prejudiced the defendant such that a new trial is warranted. We therefore adopt procedures similar to the ones we adopted in Baltazar-Monterrosa v. State, 122 Nev. 606, 616-17, 137 P.3d 1137, 1144 (2006), to resolve

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claims of interpreter errors discovered post-judgment.
On appeal, Vannasone "Sonny" Ouanbengboune (Sonny) hired an independent interpreter to compare a tape-recording of his trial testimony to the transcript of the translated testimony. Based upon that review, Sonny argues that his constitutional rights were violated because he was convicted based upon the court-appointed interpreter's improper translation of his testimony. We disagree. After considering the disputed versions of Sonny's testimony, we conclude that although certain inaccuracies did fundamentally alter the context of Sonny's testimony, these inaccuracies did not prejudice Sonny such that a new trial is warranted.

Second, we consider whether the district court's failure to instruct the jury on afterthought robbery amounts to reversible error. We conclude that the district court erred when it failed to instruct the jury on afterthought robbery but that error does not rise to the level of plain error as the error did not affect Sonny's substantial rights. We therefore affirm the district court's judgment of conviction.

John v. Douglas County School Dist., 125 Nev. Adv. Op. No. 55 (November 25, 2009). This case arises out of an employment discrimination lawsuit. Appellant Greg John was a security officer for the Douglas County School District (DCSD). Other staff members of the school district alleged that John engaged in both unprofessional conduct and sexual harassment. Following the school district's investigation, John was suspended. John appealed the suspension under the collective bargaining agreement between the school district and his union, but the suspension was upheld. Later, John filed an Equal Employment Opportunity Commission (EEOC) complaint against the school district, but the EEOC did not find any violations. After the EEOC dismissed John's complaint, he filed an employment discrimination lawsuit in Nevada district court against the school district and various officials alleging both federal and state causes of action.

Approximately one year later, the school district discovered that John had improperly obtained confidential student records, and he failed to cooperate with the school's investigation into that conduct. After the investigation concluded, the school district fired John because of the information obtained during the records investigation and John's previous misconduct. Following John's termination, the school district filed a special motion to dismiss under Nevada's anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute. The district court granted the school district's motion, and John now appeals that order.

There are two primary issues on appeal. The threshold issue is whether Nevada's anti-SLAPP statute applies to John's federal causes of action raised in Nevada district court. John's three federal causes of action include the following: (1) religious discrimination, (2) First Amendment violations, and (3) civil rights violations. We conclude that Nevada's anti-SLAPP statute does apply to these federal causes of action because it is a neutral and procedural statute that does not undermine any federal interests.

Having concluded that Nevada's anti-SLAPP statute applies to John's federal causes of action, the next issue we consider is whether the district court erred in dismissing John's lawsuit under the statute. We conclude that the district court properly dismissed John's lawsuit for

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two reasons. First, the school district made a threshold showing that the communications by school employees and the DCSD regarding John's inappropriate behavior at work and the resulting investigations were protected under the anti-SLAPP statute, and this showing shifted the burden of production to John. Second, John failed to allege a genuine issue of material fact regarding the claims he filed based on the communications by school employees and the DCSD about the investigations into his conduct at work. As a result, the district court properly dismissed John's lawsuit.

Fierle v. Perez, 125 Nev. Adv. Op. No. 54 (November 19, 2009). Appellants Patricia Fierle and her husband, Daniel Fierle, filed a complaint against Dr. Jorge Perez, members of his staff, and his professional medical corporation. The complaint stemmed from an incident where Patricia suffered severe burns from chemotherapy treatment that Dr. Perez's staff administered. After initially failing to attach an expert affidavit to the complaint, the Fierles then filed a first amended complaint with an attached medical expert's affidavit. On respondents' motion, the district court dismissed the complaint in full and struck the first amended complaint. The Fierles then filed a motion for relief pursuant to NRCP 52(b), 59(e), and 60(b), which was denied. The Fierles now appeal.

This appeal involves mainly issues of first impression regarding the applicability of NRS 41A.071 to professional medical corporations in medical malpractice actions and nurses and nurse practitioners in professional negligence actions; and whether medical malpractice and professional negligence claims made in the complaint that are void ab initio because no expert affidavit is attached may be cured by the amendment of the complaint regardless of whether other claims in the original complaint survive.

We conclude that an expert affidavit is required for medical malpractice actions against professional medical corporations and professional negligence actions against nurses and nurse practitioners under NRS 41A.071, and therefore, we conclude that the district court did not err in dismissing the Fierles' complaint with regard to such claims. Additionally, we conclude that the district court erred in dismissing the negligent extravasation claim against one member of Dr. Perez's staff because that claim falls under the res ipsa loquitur statutory exception to NRS 41A.071 and, therefore, is not required to be supported by an expert medical affidavit. We further conclude that medical malpractice and professional negligence claims made in a complaint that become void ab initio for lack of the attachment of an expert affidavit may not be cured by the amendment of that complaint, regardless of whether other claims in the original complaint survive.

Glover v. Eighth Judicial Dist. Court, 125 Nev. Adv. Op. No. 53 (November 12, 2009). This

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petition for a writ of prohibition asks us to decide whether the district court violated petitioner Shawn Glover's double jeopardy rights when it granted a mistrial and ordered him to stand trial a second time on murder and lesser related charges. The district court determined that defense counsel had irretrievably biased the jury by putting before them facts not in evidence, making mistrial a "manifest necessity."

The controversy arose out of a voluntary statement Glover gave the police. The State told the defense that it did not intend to use Glover's statement at trial. The district court ruled that, when offered by the defense, the statement was inadmissible hearsay. Despite this ruling, defense counsel repeatedly put the statement before the jury, first in his opening statement, when he displayed excerpts of Glover's police statement on PowerPoint; then during cross-examination of the detective who interrogated Glover, whom defense counsel asked to show the jury an envelope, neither marked nor admitted in evidence, and confirm that it contained a videotape of Glover's interrogation; and again in closing argument. Although the State's objections were sustained, the jury could not help but get the point that the defense thought Glover's excluded statement was crucial and unfairly forbidden them.

Matters came to a head in closing argument when, despite earlier orders in limine, the defense exhorted the members of the jury to ask themselves why the State would not let them see or hear what Glover said to the police. The court rebuked defense counsel and directed him to discontinue this line of argument. He continued with it anyway, even after the court ordered him to stop, telling the jurors that the State kept Glover's police statement from them because it "is devastating to their case, absolutely devastating." It was at this point that the court called a recess, asked for input on the options available, including possible curative instructions, and ultimately, declared a mistrial.

We uphold the district court's orders excluding Glover's statement and prohibiting argument about its content. Significantly, the defense admits that Glover's out-of-court statement was hearsay. While the State could have offered the statement as the admission of a party opponent, no legitimate negative inference arose from the State's decision not to offer this otherwise inadmissible evidence. The State's failure to use the statement just meant the State had invoked the hearsay rule, which deems a defendant's exculpatory out-of-court statements self-serving and thus inadmissible.

We also reject Glover's double jeopardy challenge. Arizona v. Washington, 434 U.S. 497, 514 (1978), frames the question before us, which is not whether other reasonable judges might have assessed the risk of juror bias differently and proceeded with the trial, but whether the judge who presided over this trial abused his discretion in making the determination he did. Id. at 511. Here, as in Washington, the defense brought the mistrial order upon itself by arguing facts not in evidence and violating the court's orders in limine, and now seeks to benefit from the mistrial order its rule violations produced. The district judge saw firsthand the impact the defense's improper argument had on the jurors. It related directly to the key contested issue of self-defense. The number of times the excluded evidence was put before the jurors and the drama that played out before them over its exclusion led the district court to conclude that the risk of

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jury bias and the public's interest in having an impartial jury decide this case outweighed Glover's right to have the case conclude before the jury first sworn to hear it. On this record, we cannot say that the district judge did not exercise "sound discretion"—that is to say, that he acted "irrationally or irresponsibly"—in declaring that mistrial was a "manifest necessity." Id. at 514. Accordingly, we deny the petition and dissolve our temporary stay of Glover's retrial.

Lueck v. Teuton, 125 Nev. Adv. Op. No. 52 (November 12, 2009). Under the Nevada Constitution, when a district judge's office is vacated before the office's term expires, the Governor may appoint an individual to temporarily fill the office until "the first Monday of January following the next general election." Nev. Const. art. 6, § 20(1) and (2). In July 2008, a district judge vacated the office, and a temporary appointment later was made, several weeks before the November general election. The judge's office, however, was not included on the 2008 ballot. Instead, the appointed judge was commissioned to serve until the office could be filled by virtue of the 2010 general election, giving rise to the question of concern to this court: whether the commission's extension beyond the first Monday in January following the 2008 general election is valid.

That question initially was brought to this court's attention when movant, a private Nevada citizen, sought leave to file a petition on behalf of the State of Nevada for a writ of quo warranto removing the judge from office. As we conclude that movant lacks standing, however, we consider the merits of the judge's commission under our supervisory responsibilities over the judicial branch.

The legitimacy of the extended commission depends on the meaning of "next general election," as used in the Nevada Constitution provision noted above. Thus, in resolving this issue, we address whether "next general election" means the election most immediately fol-

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lowing the appointment or, as has been asserted, the next general election in which the vacancy may be filled in strict compliance with all election deadlines. In view of the apparent intent behind the Nevada Constitution's "next general election" language to allow Nevada citizens to elect a new district judge as soon as possible after an office becomes vacant and to correspondingly limit the Governor's appointment powers, we conclude that judicial vacancy appointments expire on the first Monday in January after the first general election following that appointment, without exception. Here, then, with regard to the temporary appointment at issue, the appointment expired on the first Monday in January after the November 2008 general election.

Ogawa v. Ogawa, 125 Nev. Adv. Op. No. 51 (November 12, 2009). This appeal involves an international child custody dispute and divorce action between appellant, who resides in Japan with the parties' three children, and respondent, who lives in Henderson, Nevada. The first of three issues in this appeal is whether the district court had home-state jurisdiction to make child custody determinations under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified at NRS Chapter 125A, when respondent did not file her divorce complaint and motion regarding child custody until eight months after the children left the State of Nevada. The second issue concerns whether the district court properly found that Nevada was the children's state of "habitual residence" and granted respondent's motion for the immediate return of the children, when Japan is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction—a treaty aimed at ensuring the prompt return of children who have been wrongfully removed from their state of habitual residence to a signatory country. The final issue in this appeal pertains to the divorce decree and whether the district court properly entered the decree by default, awarding respondent all of the community property, spousal and child support, and attorney fees and costs, even though appellant filed an answer to the divorce complaint and a counter complaint for divorce, and he made an appearance through counsel at the divorce hearing.

Addressing the first issue, the district court properly determined that it had jurisdiction to make custody decisions because Nevada is the children's "home state" under the UCCJEA. Although the children had been absent from the state for eight months when respondent filed her custody action, the testimony and evidence supported that the children left Nevada for a temporary three-month vacation, and under the UCCJEA, temporary absences do not interrupt the six-month pre-complaint residency period necessary to establish home state jurisdiction. Thus, taking into account the temporary absence, the action was filed timely under the UCCJEA, and the Nevada district court had home-state jurisdiction in this matter.

As for appellant's challenge to the order directing the children's return to the United States, the district court properly entered the order to the extent that it relied on its authority to enter custody orders under the UCCJEA. Although the order is unenforceable under the Hague Convention, as implemented in the United States by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11611 (1988), since Japan has not signed the Hague Convention, the district court nevertheless properly entered

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the order in the context of the custody proceeding. While the Hague Convention does not apply here, the parties remained free to pursue other remedies and the Convention's nonapplicability did not limit the district court's authority to order the children's return. Accordingly, although the district court erred to the extent that it relied on the Hague Convention, it otherwise properly exercised its jurisdiction over the custody matter in granting respondent's motion seeking the children's immediate return.

Finally, regarding the default divorce decree, because appellant made an appearance and answered the complaint, evidencing his intent to defend against the action, default was inappropriate. The district court therefore erred by entering a default judgment against appellant, awarding respondent all of the community property and child and spousal support in amounts not supported by the evidence, and awarding respondent sole legal and physical custody of the children and attorney fees and costs, without considering the merits of the case.

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The Legal Blog Watch 5-Point Checklist for Bank Robbers

I've been Legal Blog Watch-ing here for less than three months, but I feel that on one narrow topic -- bank robbery -- I have already gotten a thorough enough education from the blawgosphere to offer some specific pointers.

Here are five important points for bank robbers to keep in mind:

- **Punctuality: This one is really quite simple. If you arrive at the bank after it is closed and the doors are locked, your plan will be foiled. You need to get yourself a decent watch and arrive at the bank during banking hours, not at 5:36 p.m.**
- **Oral hygeine: Often overlooked amongst inexperienced robbers, but important. If your breath is so bad that it becomes part of the description the tellers give to the police, you are doing it wrong. Get yourself a good toothbrush and a bottle of Listerine to eliminate this risk.**
- **Obvious patterns: There are lots of banks in the world and even in your home town. There is no need to have a "go-to" bank for robberies. If you find yourself robbing the same bank so many times that the tellers recognize you when you come in and say, "It's him again," you need to get yourself a Yellow Pages and a navigation system for your getaway car and branch out.**
- **Penmanship: Ask yourself this question, robbers: If your hold-up note is written so sloppily that the teller cannot read it, forcing you to then go re-write the darn thing more legibly on a bank deposit slip during the robbery, is it really serving its intended purpose? Hardly. Give yourself sufficient time before the robbery itself to write a legible hold-up note or have an accomplice with better handwriting write it for you. Acknowledge your physical limitations: Let's face it, not all wannabe bank robbers are spring chickens. But that doesn't have to stop you. If you are 70 or 80 years old and cannot rob a bank without bringing along your oxygen tank, then dog-gone it, you bring that oxygen tank. There are no style points awarded here, and it will not help you to run out of breath as you flee walk from the scene.**

The Guide to Live-Blogging and Tweeting From Court

These days, anyone with a phone and a Twitter account has all the tools they need to provide real-time coverage of court proceedings. The courts are now coming to grips with this reality, and are slowly issuing guidance and rules to govern those who might wish to "live-blog" or tweet from court. In fact, some courts have banned the practice altogether. As I wrote here, a federal court in Georgia ruled last month in *United States v. Shelnutt* (M.D. Ga. Nov. 2), that Rule 53 of the Federal Rules of Criminal Procedure prohibits "tweeting" from the courtroom.

The many interpretations and standing orders that are now emerging from courts around the country on this subject have created a confusing situation for would-be court tweeters, but yester-

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day things became a lot clearer thanks to the Citizen Media Law Project. On its blog, the CMLP announced yesterday that it has created and will now be maintaining a guide to live-blogging and tweeting from court. This new guide provides step-by-step guidelines to help people "avoid legal trouble if you intend to provide live coverage of court proceedings through Twitter, live-blogging or other social media tools." CMLP's suggestions include checking the appropriate court's local rules and standing orders, contacting the court's public information officer, or even contacting the court or its staff directly. In addition, CMLP has compiled a growing list of courts and judges that are known to have previously allowed live-blogging in their courtrooms.

Judge Kressel Puts an End to Legalese in His Court

Attention all lawyers who practice before United States Bankruptcy Judge Robert Kressel, D. Minn.: He has just about had it with your crappy "legalese" and he has a 19-point plan to get you writing like a real person again.

In this post, The Lawyerist alerts us to the new "guidelines" issued this week by Judge Kressel. As the Lawyerist observes, "it is a catalog of and prohibition against every bad legal writing practice. And it makes sense, since he eventually has to sign those badly-drafted orders."

Here are some of the legal writing crimes that you won't be committing any longer in his court, as stated in his guidelines:

- **Guideline No. 6 -- Capitalization: Lawyers apparently love to capitalize words. Pleadings, including proposed orders, are commonly full of words that are capitalized, not quite randomly, but certainly with great abandon. Please limit the use of capitalization to proper names. For example, do not capitalize court, motion, movant, debtor, trustee, order, affidavit, stipulation, mortgage, lease or any of the other numerous words that are commonly capitalized.**
- **Guideline No. 7 -- Use of articles: Lawyers apparently disfavor articles, both definite and indefinite. Use the articles "the," "a," and "an" as appropriate. Write the way you would speak. So, "the debtor," not "debtor," "the trustee," not "trustee."**
- **Guideline No. 8 -- And/Or: Never use "and/or."**
- **Guideline No. 9 -- Superfluous Words and Phrases: Eliminate superfluous words. They serve no purpose other than to make the document sound more legal, which is exactly the opposite of the goal that I am trying to accomplish. Examples of such words are: "hereby," "herein," "in and for," "subject," "that certain," "now," "that," "undersigned," "immediately," "heretofore entered in this case," "be, and hereby is" -- the list goes on and on.**

Guideline No. 12 -- Undersigned: Never use the word "undersigned."

This is just a taste. Here is the full list of things you won't be doing any longer in Judge Kressel's court.

Supreme Court Engages in 'Talmudic Parsing' of Miranda Rights

It is somewhat hard to believe that 43 years after *Miranda v. Arizona*, the requirements for providing suspects with their legal rights could still be murky. Indeed, by now, grade-school kids can probably recite most of the now-famous "You have the right to remain silent. Anything you say or do can and will be held against you in a court of law..." speech.

But the Supreme Court appears to consider the requirements for effective Miranda warnings unclear, and it heard oral argument on Monday in *Florida v. Powell*. According to the case, the police read Powell his Miranda rights straight from a standardized form they use:

You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of

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our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Powell, however, argued that these warnings failed to advise him of one crucial thing: his right to have a lawyer with him throughout the entire time that any questioning was being done by law enforcement officers, not just “before answering questions.” As discussed in this post on The Briefcase blog, the Florida Supreme Court agreed with Powell, holding that the right to have an attorney present existed “at any time you want during” questioning. This right, however, was not stated on the standardized form used in the Florida jurisdiction in question, one of only a handful in Florida that failed to include it. The Briefcase writes that Monday's oral argument before the Supreme Court "resulted in a parsing of the Miranda decision on a scale usually observed in rabbinical debates about the Talmud."

The SCOTUSblog also has a detailed account of the argument. The Florida attorney general's office reportedly argued that its Supreme Court had improperly used a “hypertechnical analysis of the warning’s language.” The Solicitor General's office joined with Florida, arguing that no particular form of warnings was constitutionally required. SCOTUSblog says that Justice Stephen G. Breyer seemed to dis-

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agree, however, reciting from the Miranda decision that the lawyer must be “with him during interrogation.” Opting for a Catholic metaphor, Justice Scalia likened Powell's argument to debates over the number of "angels dancing on the head of a pin.” Scalia stated that it was “quite fantastic” for Powell to argue that "if I knew that I could have an attorney present during the interview, well, that would have been a different kettle of fish and I would never have confessed."

You can read a transcript of the entire oral argument in *Florida v. Powell* here

Sanctioned Lawyer Allegedly Offered Clients His 'Couch of Restitution'

A disciplinary proceeding that came out of Michigan last week may introduce a new phrase to the legal world: "The Couch of Restitution."

The Legal Profession blog reports that on Nov. 23, the Michigan Attorney Discipline Board affirmed findings of misconduct and imposed a 180-day sanction on an attorney who had pleaded guilty to a misdemeanor assault and battery, but failed to report the conviction to bar authorities. The conviction emerged, however, when a former client requested an investigation.

Among other salacious allegations, the

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Board wrote that not one but two women testified that the divorce lawyer in question responded to their inquiries as to how much they owed him for his work by closing the office blinds and telling them his fees could be paid on his "couch of restitution."

Subpoenas Target Rocker, Actress as Experts on Alienation

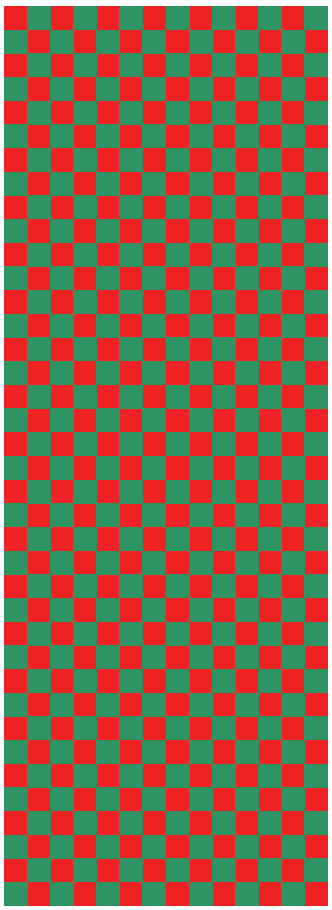
Martin Gore, a member of the brooding British electronic band Depeche Mode and the group's chief songwriter, once described the focus of his lyrics as "anything that appeals to really dysfunctional people." So if you happen to be the plaintiff in a lawsuit alleging that the defendant's product has caused you to suffer severe social alienation, who better to call as an expert witness on alienation than the selfsame Martin Gore?

I know what you're thinking: What about Winona Ryder?

Well, this particular plaintiff, Erik Estavillo, says he plans to subpoena both Gore and Ryder in his lawsuit against the company that produces the massively multiplayer online role-playing game, "World of Warcraft." Regular readers of this blog may remember Estavillo as the California agoraphobic who sued Sony on First Amendment grounds after it banned him from participating in multiplayer games on its PlayStation Network. In October, a federal judge threw out that case. Now, Estavillo has turned his attention to the company that produces "Warcraft," Activision Blizzard, according to a report at GameSpot, which says it obtained a copy of Estavillo's complaint and confirmed that he had filed it in California's Santa Clara County Superior Court. The suit sets forth various complaints against Activision, among them that it maintains a "harmful virtual environment" and engages in "sneaky and deceitful practices."

A central thrust of Estavillo's lawsuit is his allegation that "World of Warcraft" causes players to become alienated and suffer mental health problems. He says that he suffers major depression, obsessive compulsive disorder, panic disorder and Crohn's disease and does not want to end up like another game player who committed suicide in 2001, "as he relies on video games heavily for the little ongoing happiness he can achieve in this life."

Which brings us back to where we started in this post -- Estavillo's plans to subpoena Gore and Ryder as expert witnesses on alienation. He intends to subpoena Gore, he explains, because the rock star "himself has been known to be sad, lonely, and alienated, as can be seen in the songs he writes." As for actress Ryder, Estavillo says her appreciation for the novel "Catcher in the Rye" will make her an appropriate witness "to how alienation in the book can tie to alienation in real live video games such as World of Warcraft." Estavillo's complaint asks the court to award him $1 million in punitive damages and to order Activision to address the problems his suit describes.



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Perry v. Schwarzenegger, No. 09-17241 (December 11, 2009). Proposition 8 amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Two same-sex couples filed this action in the district court alleging that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The official proponents of Proposition 8 intervened to defend the suit. Plaintiffs served a request for production of documents on Proponents, seeking, among other things, production of Proponents' internal campaign communications relating to campaign strategy and advertising.

Proponents objected to disclosure of the documents as barred by the First Amendment. In two orders, the district court rejected Proponents' claim of First Amendment privilege. Proponents appealed both orders. We granted Proponents' motion for stay pending appeal.

We have the authority to hear these appeals either under the collateral order doctrine or through the exercise of our mandamus jurisdiction. We reverse. The freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment. Where, as here, discovery would have the practical effect of discouraging the exercise of First Amendment associational rights, the party seeking discovery must demonstrate a need for the information sufficiently compelling to outweigh the impact on those rights.

Plaintiffs have not on the existing record carried that burden in this case. We therefore reverse and remand.

Alvarada v. Cajun Operating Co., No. 08-15549 (December 11, 2009). Appellant Tannislado Alvarado filed a retaliation claim pursuant to the Americans with Disabilities Act alleging that Appellee Cajun Operating Co. retaliated against him for complaining that his manager had discriminated against him based on his disability.

Alvarado challenges the district court's grant of Cajun's motion in limine barring Alvarado from seeking punitive and compensatory damages for his ADA retaliation claim. Alvarado also contends that the district court erred in holding that, because ADA retaliation claims are limited to equitable relief, Alvarado was not entitled to a jury trial on his retaliation claim. We agree with the district court's resolution of these issues, and affirm the judgment.

Greene v. Camreta, No. 06-35333 (December 10, 2009). We are asked to decide whether the actions of a child protective services caseworker and deputy sheriff, understandably concerned for the well-being of two young girls, exceeded the bounds of the constitution. Specifically, the girls' mother, Sarah Greene, alleges, on behalf of S.G., one of her children, that the caseworker, Bob Camreta, and deputy sheriff, James Alford, violated the Fourth Amendment when they seized and interrogated S.G. in a private office at her school for two hours without a warrant, probable cause, or parental consent. Sarah also argues that Camreta's subsequent actions, both in securing a court order removing the girls from her custody and in subjecting the girls to intrusive sexual abuse examinations outside her presence, violated the Greenes' familial rights under the Due Process Clause of the Fourteenth Amendment.

As this brief description makes clear, resolving the constitu-

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tional claims at issue in this case involves a delicate balancing of competing interests. On one hand, society has a compelling interest in protecting its most vulnerable members from abuse within their home. The number of child abuse allegations is staggering: In 2007, for example, state and local agencies investigated 3.2 million reports of child abuse or neglect.

On the other hand, parents have an exceedingly strong interest in directing the upbringing of their children, as well as in protecting both themselves and their children from the embarrassment and social stigmatization attached to child abuse investigations. Of the 3.6 million investigations conducted by state and local agencies in 2006, only about a quarter concluded that the children were indeed victims of abuse. *See id.* This discrepancy creates the risk that "in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help." With these competing considerations in mind, we turn first to Sarah's constitutional claims. As we explain below, we hold that the investigation conducted by Camreta and Alford and the removal and examination instigated by Camreta all violated Sarah and the girls' constitutional rights. As to the investigation, however, we conclude that Camreta and Alford cannot be liable in damages because they have qualified immunity.

Ewing v. City of Stockton, No. 08-157 (December 9, 2009). Plaintiffs-Appellants Mark and Heather Ewing and their minor children filed a § 1983 action against the City of Stockton, California; Stockton police officers John Reyes, William Hutto and Steven McCarty, and District Attorney John D. Phillips and Deputy District Attorney Lester Fleming, Jr., alleging violations of their constitutional rights arising out of the search of their home and the arrest of Mark and Heather in connection with a murder that they did not commit. The district court granted summary judgment to defendants on most of the Ewings' claims, and the parties stipulated to the entry of judgment on such claims under Fed. R. Civ. P. 54(b), permitting this appeal.

United States v. Truong, No. 08-10446 (December 1, 2009). Defendant Timothy Truong appeals his ten year sentence for possessing fifteen or more unauthorized access devices with intent to defraud. He argues that by treating retail gift cards as access devices, the district court wrongly calculated the advisory sentence under the Guidelines. He also argues that the sentence the district court imposed was unreasonable. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

The purchaser of a gift card loads money onto the card and electronically activates it for use. An activated card can be used to purchase goods from the retailer who sold the card. Many retail gift cards contain a printed panel that can be scratched off to reveal the card's unique personal identification number, or PIN. The customer can use the PIN to track how much money is left on the card. Timothy Truong would steal gift cards from retail stores. With special equipment, Truong would capture the information that is stored magnetically on each gift card. He would
also scratch off a panel to reveal each card's PIN. After duplicating the card (plastic shaped like a credit card), he would return the duplicates to the shelves from which he had stolen the originals. He kept the originals. A few days later, he would use the PIN to learn whether the du-

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plicate gift card had been sold and, if so, how much money had been loaded onto it. If the duplicate gift card had been sold and thereby activated for use, Truong would use the original gift card to make purchases or would exchange it for cash.

summary judgment to the Office. Reviewing the order de novo, viewing the facts in the light most favorable to Becerril, and drawing all reasonable inferences in her favor, we conclude that there is no genuine issue of material fact for trial. *See Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564, 568 (9th Cir. 2004). We therefore affirm the district court. Becerril, who has a temporomandibular disorder, worked in the Office's mobile home section until December 2003, at which time the Pima County Assessor, Richard Lyons, decided to reassign her to the Office's public service section. The record suggests that the public service section can be stressful, and that Becerril's TMD is aggravated by stress. Becerril requested a transfer out of the public service section as a reasonable accommodation under the Americans with Disabilities Act. Her request was denied. She currently works full-time in the Office's audit section. After her request for a reasonable accommodation was denied, Becerril filed suit under the ADA, claiming that

Becerril v. Pima County Assessor's Office, No. 08-17070 (November 25, 2009). Plaintiff Becky Becerril, an employee of the Pima County Assessor's Office, appeals from an order granting

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the Office had discriminated against her by reassigning her because of her disability and by refusing to engage in the ADA's "interactive process" after she had requested a reasonable accommodation. The district court dismissed these claims on summary judgment.

We assume without deciding that Becerril has stated a prima facie case of discriminatory reassignment under the ADA. The Office, however, has articulated several legitimate, nondiscriminatory reasons for the reassignment, and thus to survive summary judgment Becerril must raise a genuine issue of material fact as to whether those reasons are pretexts for discrimination.

Delano farms Co. v. California Table Grape Comm'n, No. 08-16233 (November 20, 2009). We are again faced with the question whether a state statutory scheme requiring growers to fund generic advertising for promotion of an agricultural product violates the First Amendment. Here, we consider the case of compelled assessments on California table grape growers, levied through the California Table Grape Commission. Specifically, we address whether this generic advertising scheme is the government's own speech and is thereby exempt from a First Amendment compelled speech challenge, based on the Supreme Court's analysis in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), and our decision in *Paramount Land Co. LP v. California Pistachio Commission*, 491 F.3d 1003 (9th Cir. 2007). Because the Commission's promotional activities constitute government speech that is immune to challenge under the First Amendment, we affirm the district court's grant of summary judgment on this ground.

Reed v. Town of Gilbert, No. 08-17384 (November 20, 2009). Although "[i]t is common ground that governments may regulate the physical characteristics of signs," *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994), sign regulations have spawned legions of First Amendment challenges. Those challenges arise because signs "pose distinctive problems that are subject to municipalities' police powers," and yet they are also "a form of expression protected by the Free Speech Clause." *Id.* This case presents yet another variation on a sign ordinance—one that prohibits all signs without a permit, subject to nineteen enumerated exemptions ranging from directional signs to ideological and political signs.

Good News Community Church wishes to spread the word about its Sunday services by placing temporary directional signs around the Town of Gilbert, Arizona. Gilbert, however, limits Good News' deployment of temporary directional signs via the town's comprehensive sign ordinance. Good News Community Church and its Pastor, Clyde Reed, challenge the ordinance's constitutionality under the First and Fourteenth Amendments, contending it impermissibly burdens the right to free speech and treats similar speech unequally.

Good News appeals the district court's denial of a preliminary injunction barring enforcement of the ordinance. Although we conclude the provision of the ordinance directly regulating Good News' signs does not of itself violate the First Amendment, the district court did not address Good News' claim that the ordinance unfairly discriminates among forms of noncommercial speech. Consequently, we remand for the district court to consider this aspect of Good News' challenge, within the context of the preliminary in-

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junction motion.

Fleming v. Yuma Regional Med. Cntr., No. 07-16427 (November 19, 2009). This case presents a question of first impression in our court: Does § 504 of the Rehabilitation Act, 29 U.S.C. § 794, extend to a claim of discrimination brought by an independent contractor? In order to answer that question, we must decide whether § 504(d), which refers to "the standards applied under title I of the Americans with Disabilities Act . . . as such sections relate to employment," incorporates Title I literally or selectively. If Title I is incorporated literally, then the Rehabilitation Act is limited by the ADA and only covers employer-employee relationships in the workplace; if selectively, then the Rehabilitation Act covers all individuals "subject to discrimination under any program or activity receiving Federal financial assistance," who may bring an employment discrimination claim based on the standards found in the ADA. 29 U.S.C. § 504(a). The Sixth and Eighth Circuits have concluded that Title I is incorporated literally, *Wojewski v. Rapid City Reg'l Hosp.*, 450 F.3d 338 (8th Cir. 2006); *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999), while the Tenth Circuit has concluded that Title I is incorporated selectively. *Schrader v. Ray*, 296 F.3d 968 (10th Cir. 2002). We agree with the Tenth Circuit,

and conclude that § 504 incorporates the "standards" of Title I of the ADA for proving when discrimination in the workplace is actionable, but not Title I *in toto*, and therefore the Rehabilitation Act covers discrimination claims by an independent contractor. Accordingly, we reverse the judgment of the district court.

Perry v. Proposition 8 Official Proponents, No. 09-16959 (November 19, 2009). We consider whether a public interest organization is entitled to intervene in a suit challenging the constitutionality of Proposition 8, a state ballot initiative restricting the definition of marriage to the union of a man and a woman under California law. The Campaign for California Families seeks to intervene in part because it alleges that the Official Proponents of Prop. 8 and ProtectMarriage.com—parties to the suit—will not adequately represent all the Campaign's interests in the litigation. The reality is that the Campaign and those advocating the constitutionality of Prop. 8 have identical interests—that is, to uphold Prop. 8. Any differences are rooted in style and degree, not the ultimate bottom line. Divergence of tactics and litigation strategy is not tantamount to divergence over the ultimate objective of the suit. Because the existing parties will adequately represent the Campaign's interests, we affirm the district court's denial of intervention as of right. We also dismiss the appeal in part because the district court did not abuse its discretion in denying permissive intervention.

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Social Networking Web Sites – Growing Popularity Creates New Issues for Litigators

Social networking Web sites have been around since the mid-'90s, but the popularity of such sites has exploded since the inception of MySpace in 2003 and Facebook in 2004. Today, Facebook's global membership totals more than 300 million users. In the United States alone, membership has reached an astonishing 94,748,820 members, representing 29.95% of the Facebook global audience. MySpace, another social networking leader, has 125 million global users, with a U.S. membership of nearly 66 million

Sites such as Facebook, MySpace, Twitter and LinkedIn(R) boast that their technology connects the world's population in ways inconceivable even a decade ago. These avenues of communication provide efficient, simple means for an ever-increasing number of members to share information. The result is the generation of massive proportions of electronic information specific to each user. Information posted to social sites includes not only content, such as messages and photographs, but also a time stamp history of site access and specific activities. With the availability and prevalence of this type of information, it is no surprise that trial attorneys have begun to use evidence collected from social networking sites in their cases.

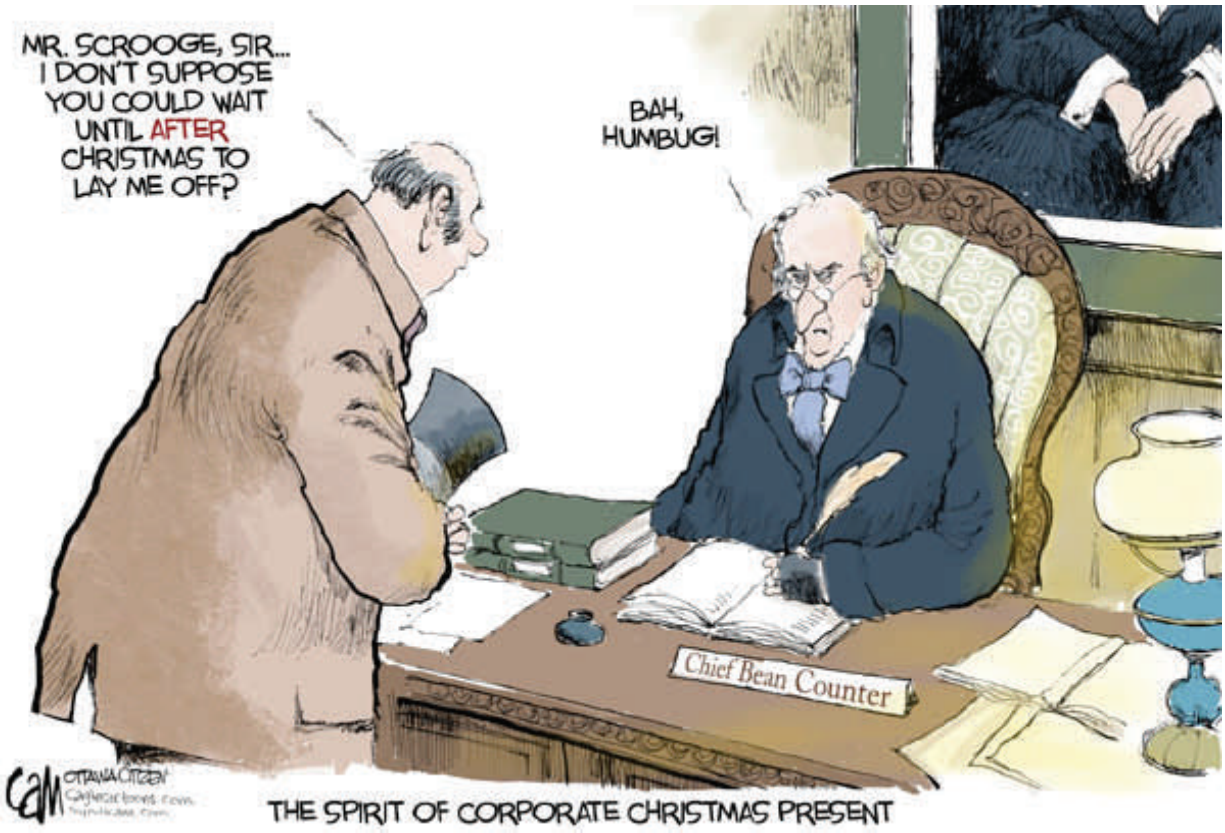
This use of evidence gleaned from social networking sites is on the rise. In a recent case from Connecticut, Bass v. Miss Porter's School, the defendant school sought production of evidence contained in the plaintiff's Facebook profile pertaining to alleged taunting and teasing. Facebook released all "reasonably available data" from the plaintiff's Facebook Web site from a four-month span. Over the plaintiff's objections, the court ordered the plaintiff to produce 1) all responsive Facebook discovery to the defendant and 2) all information produced by Facebook to the court for in camera review. The total production from Facebook amounted to 750 pages of documentation of the plaintiff's activities and communications, which was provided to the court. However, claiming that the majority of records were "immaterial and irrelevant" to the case, the plaintiff produced only 100 pages for the defense. After evaluating the total Facebook production by date, sender, recipient and content, the court found relevant communications in the set of documents not provided to the defendant. The court overruled the plaintiff's objections and ordered full disclosure of the Facebook profile's contents for the relevant period to the defense.

Trial attorneys have used evidence from social networking sites to prove criminal intent and enhance sentencing. In People v. Liciaga, the defendant was convicted of second-degree murder and possession of a firearm during the commission of a felony. At trial, the prosecution presented photographs found on the defendant's MySpace profile, which depicted the defendant displaying a gang sign and holding the murder weapon, as evidence of the defendant's intent. Although this evidence was challenged on appeal, the court held the admission was proper and affirmed the defendant's conviction. Similarly, in U.S. v. Villanueva, the court found that post-conviction photos of the defendant holding a semiautomatic gun with a loaded clip discovered on the defendant's MySpace profile could be used as evidence to enhance sentenc-

ing.

The challenges that litigators face in regard to the quantity and availability of information on social networking sites goes beyond the admission of unfavorable evidence. In another recent case, *Wilgus v. F/V Sirius, Inc.*, the plaintiffs brought a motion for a new trial based on an e-mail received by the plaintiffs' attorney from a juror only four days after a verdict in favor of the defense. The e-mail questioned the attorney's awareness of the plaintiffs' advocacy for illegal drug use on the Internet and suggested that this behavior should have been addressed and cleaned up before the proceedings. In addition, the juror also offered to provide the attorney with "more info and insight." The juror discovered the information that prompted the e-mail via photographs of the plaintiffs on Facebook. After trial, the juror sent friend requests to the plaintiffs on Facebook, which allowed the juror access to the plaintiffs' personal profiles. The court concluded that the juror did not send the friend requests until after the trial, and thus the material could not have influenced the juror during deliberations. Therefore, a new trial was unwarranted.

Social networking sites house an abundant source of personal information that may be relevant evidence admissible at trial. As the popularity of these social networking sites continues to increase, so will the challenges that litigators face. Trial attorneys must be aware of this information in order to develop strategies to deal with its implications.



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Recent ESI Court Decisions

Court Sanctions In-House Counsel for Failure to Issue a Litigation Hold and Ensure Preservation

Swofford v. Eslinger, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009). In this section 1983 claim asserting excessive force, the plaintiffs sought sanctions, alleging the defendants destroyed key evidence, including a laptop and e-mails. Despite receiving preservation notices from the plaintiffs, the defendants' in-house counsel only forwarded a copy of the letters to senior-level employees (who did not ensure other employees complied with the defendants' preservation obligations) and failed to issue a litigation hold. Citing Zubulake V, the court found that it is insufficient for in-house counsel to simply notify employees of preservation notices, but rather counsel "must take affirmative steps to monitor compliance" to ensure preservation. Finding sanctions appropriate for the preservation failures, the court issued an adverse inference sanction for the laptop wiping and deletion of e-mails. The court also awarded attorneys' fees and costs to the plaintiffs, holding the defendants and in-house counsel jointly and severally liable.

Court Awards Attorneys' Fees and Costs Citing Party's Failure to Issue a Proper Litigation Hold

Tango Transp., LLC v. Transp. Int'l Pool, Inc., 2009 WL 3254882 (W.D. La. Oct. 8, 2009). In this contract dispute, the defendant sought monetary and adverse inference sanctions alleging that after months of repeated requests for e-mail documents, the plaintiff failed to ask employees to locate, preserve or produce e-mail documentation. The plaintiff placed a litigation hold on e-mail accounts of some custodians; however, in-house counsel for the plaintiff admitted a litigation hold was not placed on three key players until six months after the request. Citing the plaintiff's failure to issue litigation holds, the court determined sanctions were appropriate and awarded the defendant almost $13,000 in attorneys' fees and costs to serve as a deterrent against the plaintiff's future commission of similar discovery abuses. However, because the defendant failed to demonstrate the destroyed e-mails would have supported its case, the court denied the adverse inference request.

Court Finds Copies Made of Opponents' Computer Files Violate Computer Data Access and Fraud Act

Joseph Oat Holdings, Inc. v. RCM Digesters, Inc., 2009 WL 3334868 (D.N.J. Oct. 14, 2009). In this business dispute, the defendants alleged the plaintiffs copied the defendants' computer files in violation of the Computer Data Access and Fraud Act (CDAFA). Prior to the joint venture termination, the plaintiffs' computers were connected to the defendants' server via a virtual private network. After the joint venture ceased, the plaintiffs copied approximately 152,000 documents, including proprietary business information, contained on the defendants' server in an act the court labeled "brazen and surreptitious." The plaintiffs claimed the defendants knew access to the joint system existed, were concerned the defendants would destroy relevant information on the network and that the defendants' litigation hold letter required them to preserve all documents within their possession or control. Finding the plaintiffs' "clandestine copying of computer files" was not performed purely for e-discovery

purposes, the court determined the copying of files created after the joint venture dissolved was a clear violation of the CDAFA. Accordingly, the court granted the defendants' motion for partial summary judgment.

Court Conducts Hardship Analysis and Orders Non-Party Compliance with Electronic Discovery Subpoena

Whitlow v. Martin, 2009 WL 33381013 (C.D. Ill. Oct. 15, 2009). In this employment dispute, the plaintiff subpoenaed a non-party seeking production of electronic information relevant to the defendants' employment practices. The non-party's numerous objections to the subpoena included that the requests were not reasonably likely to lead to the discovery of admissible evidence, could be obtained from more convenient sources, sought not reasonably accessible documents, and were overly broad and unduly burdensome. The non-party claimed complying with the subpoena would cost hundreds of thousands of dollars and would take more than two years to complete because several Microsoft(R) Exchange Servers and 200 to 300 file servers located across the state would have to be searched. Acknowledging the non-party status as a significant factor in determining whether a subpoena presents an undue burden, the court applied a relative hardship test to determine if the burden outweighed the value of the produced material. After considering such factors as relevance, need and particularity, the court, while slightly modifying the production requirements, ordered the non-party's compliance with the plaintiff's subpoena.

Court Sanctions Party for Reckless Spoliation of Video Evidence

Peschel v. City of Missoula, 2009 WL 3364460 (D. Mont. Oct. 15, 2009). In this section 1983 claim asserting unreasonable force and lack of probable cause, the plaintiff sought default judgment sanctions alleging the defendants spoliated video-recorded evidence. The defendants argued sanctions were not appropriate because the video's deletion was accidental. Citing the defendants' failure to have a backup system in place to ensure adequate preservation, the court determined the spoliation was the result of recklessness that warranted sanctions. In determining the appropriate sanction, the court found that an adverse inference was insufficient to cure the prejudice to the plaintiff. Although the court did not find an outright default judgment sanction appropriate, the court held that the defendants used unreasonable force. The court recognized this determination would effectively grant summary judgment on the issue of unreasonable force, "and, as such, [was] tantamount to a default judgment."

Court Reprimands Both Parties for Failure to Develop Meaningful ESI Discovery Plan

Mirbeau of Geneva Lake LLC v. City of Lake Geneva, 2009 WL 3347101 (E.D. Wis. Oct. 15, 2009). In this discovery dispute, the plaintiff requested production of the defendants' "computers and other electronic storage devices" for computer forensics analysis. The defendants argued that the plaintiff failed to demonstrate the need for a sequestering of all of the defendants' electronic devices. Denying the plaintiff's motion, the court found the plaintiff failed to justify the need for the forensic mapping of the defendants' entire computer system.

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However, the court acknowledged the need for the defendants to develop an organized system for the preservation and production of relevant ESI. The defendants' "click through" process to search e-mails "did not meet the level of diligence required for a fair discovery process." The court noted that the primary motivation for its decision was the failure of both parties to advance alternatives for discovery methods and stated that it expected the parties to develop a meaningful ESI discovery plan.

Court Determines Metadata is a Public Record Subject to Disclosure

Lake v. City of Phoenix, 2009 WL 3461304 (Ariz. Oct. 29, 2009). In this employment discrimination claim, the plaintiff appealed the appellate court's ruling that metadata is not considered a public record. The plaintiff sought production of electronic public records, including embedded metadata, after suspecting hard copies produced by the defendants were backdated. The Supreme Court of Arizona found the metadata to be a part of the underlying electronic document that could not stand on its own. As a result of this analysis, the court found that any embedded metadata is part of the electronic public record and is subject to disclosure. The court noted that this decision would be unlikely to cause the administrative nightmare the city prophesied because properly responding to a request for metadata would only require producing a copy of the electronic record in native format.

Court Admonishes Parties Failure to Comply with Texas State Electronic Discovery Rules

MRT, Inc. v. Vounckx, 2009 WL 3491165 (Tex.App.-Dallas, Oct. 30, 2009). In this civil litigation case, the plaintiffs appealed from a jury verdict in favor of the defendants, arguing they were entitled to a new trial because the defendants failed to comply with discovery obligations and misrepresented the steps taken to search and produce backup tapes (some of which were destroyed). The defendants argued the plaintiffs failed to make a specific request for the backup tapes as required by Texas Rules of Civil Procedure 196.4. Citing In re Weekley Homes, L.P. and the specificity requirement of Rule 196.4, the court disregarded the plaintiffs' contentions and affirmed the lower court's judgment. The court noted Rule 196.4's purpose was to ensure the clear understanding by both parties of ESI requests and reiterated the duties of both parties to share pertinent information regarding electronic storage systems prior to e-discovery requests, which did not occur in this case. Finally, the court concluded that the plaintiffs failed to demonstrate that the defendants knew, or should have known, that the destroyed tapes contained relevant information, and they therefore were not entitled to spoliation instructions because the defendants did not have a duty to preserve the backup tapes in question.