The Public Lawyer

STATE BAR OF NEVADA

Nevada Supreme Court Cases

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. No. 26 (July 1, 2010) In this appeal we consider whether the district court abused its discretion when it struck a defendant's answer, as to liability only, as a discovery sanction pursuant to NRCP 37(b)(2)(C) and NRCP 37(d). We conclude that the district court did not abuse its discretion by imposing non-case concluding sanctions and by not holding a full evidentiary hearing. We further conclude that the district court exercised its inherent equitable power and properly applied the factors set forth in *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92-93, 787 P.2d 777, 780 (1990). We therefore affirm the judgment of the district court.

Strickland v. Waymire, 126 Nev. Adv. Op. No. 25 (July 1, 2010) These consolidated appeals require us to interpret Article 2, Section 9 of the Nevada Constitution, which subjects every public officer in Nevada to recall by special election upon the filing of a qualifying recall petition signed by "not less than twenty-five percent (25%) of the number" of registered voters "who actually voted in the state or in the county, district, or municipality [that the officer] represents, at the election in which [the officer] was elected." Nev. Const. art. 2, § 9.

The question presented is whose signature counts toward the 25 percent needed to qualify a recall petition. Is it any registered voter, as the district court held? Or must the signatures come from those registered voters who in fact—"actually"—voted at the election in which the public officer was elected, as the Secretary of State and the Attorney General have concluded? Reasonable policy arguments exist on both sides. But Article 2, Section 9's text and relevant history convince us that the latter reading is more faithful to the provision's test and the evident understanding of the citizens who enacted it. We therefore reverse.

Public Lawyers Section

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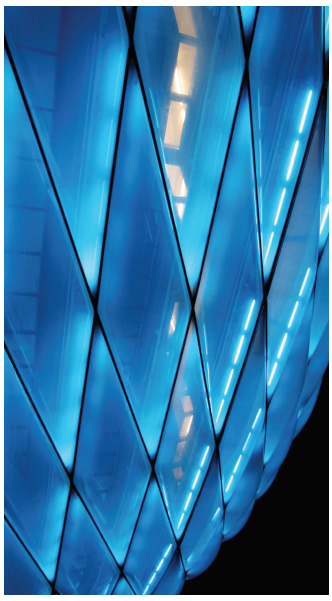

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Nevada Supreme Court Cases

***Renown Health, Inc. v. Vanderford*,** 126 Nev. Adv. Op. No. 24 (July 1, 2010) In this appeal, we consider whether hospitals owe an absolute nondelegable duty to provide competent medical care to their emergency room patients through independent contractor doctors. Although the parties settled in this matter, appellant Renown Health, Inc., reserved its right to appeal the district court's interlocutory order granting partial summary judgment based on the imposition of a nondelegable duty. A portion of the settlement remains contingent upon this appeal. We conclude that no such absolute duty exists under Nevada law, nor are we at this time willing to judicially create one. Accordingly, we reverse the district court's grant of partial summary judgment insomuch as the district court concluded that hospitals have such a nondelegable duty. We hold that Renown may be liable for patient injuries under the ostensible agency doctrine that we previously recognized in *Schlotfeldt v. Charter Hospital of Las Vegas*, 112 Nev. 42, 910 P.2d 271 (1996).

Reno Newspapers, Inc. v. Sheriff, 126 Nev. Adv. Op. No. 23 (July 1, 2010) In this appeal, we consider whether NRS 202.3662, which provides that an application for a concealed firearms permit and the sheriff's related investigation of the applicant are confidential, includes within its scope the identity of the permittee of a concealed firearms permit and any records of suspension or revocation generated after a permit is issued.

The Nevada Public Records Act considers all records to be public documents available for inspection unless otherwise explicitly made confidential by statute or by a balancing of public interests against privacy or law enforcement justification for nondisclosure.

Although NRS 202.3662 is plain and unambiguous in its declaration that an application for a concealed firearms permit is confidential, we conclude that the identity of the permittee of a concealed firearms permit, and any post-permit records of investigation, suspension, or revocation, are not declared explicitly to be confidential under NRS 202.3662 and are, therefore, public records under NRS 239.010. However, since post-permit records of investigation, suspension, or revocation may contain information from the application for a concealed firearms permit that is considered confidential under NRS 202.3662, we conclude that post-permit records of investigation of a permit holder, or suspension or revocation of a permit holder's permit, may be subject to redaction under NRS 239.010(3).

Ramirez v. State, 126 Nev. Adv. Op. No. 22 (July 1, 2010) In this appeal, we consider whether the jury was properly instructed on the offense of second-degree felony murder by means of child neglect or endangerment. For the reasons outlined in this opinion, we conclude that the jury was not completely and accurately instructed as to the necessary elements of second-degree felony murder and that the improper instruction affected appellant Felicia Ramirez's substantial rights. Accordingly, we reverse the district court's judgment of conviction and remand this matter for a new trial.

Buckwalter v. Eighth Judicial Dist. Court, 126 Nev. Adv. Op. No. 21 (June 24, 2010) This original writ proceeding asks us to decide whether a medical expert's declaration under penalty of perjury as provided in NRS 53.045 can satisfy the affidavit requirement stated in NRS 41A.071. We agree with the district court that it can and therefore deny writ relief.

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Happy Bar Day, Lawyers!

Today, July 27, is, in many states, the first day of the bar exam. Everybody and their mother has written posts offering tips and advice to those taking the test (see, *e.g.*, **Above the Law**, **The Bar Professors**, **The Bar Exam Project** (these guys are real serious; they even give advice on **how and when to pee** during the Bar)).

So I'm not gonna do that. I'm no expert, and if anyone taking the bar finds him or herself reading this blog on the way into the exam or during a lunch break, that person is probably pretty confident already. What I am going to do is to call upon all you lawyers to exercise your empathy muscles (assuming they haven't completely atrophied by this point):

> **If you're at a Wendy's tonight, and the woman in front of you seems to be taking forever to order, consider that she might just be involuntarily thinking about the appropriate parties to join in a lawsuit should she find a finger in her chili.**
>
> **See a guy sitting on a park bench, tears slowly streaming down his cheeks? His girlfriend didn't dump him, he's just terrified he's going to fail. When you sit down next to him and clap him on the shoulder, don't share your thoughts on the cruel nature of the female heart. Tell him you're sure he'd make a HELUVA lawyer, no matter what the Board of Law Examiners says.**
>
> **If you happen to be walking or driving past the Pasadena Convention Center or the Jacob K. Javits Convention Center (where yours truly took the exam many moons ago) around 3:30 this afternoon, give a reassuring smile and wave to the hordes of zombie-like wannabe attorneys shuffling down the street and/or vomiting in the bushes. Hell, swing by with a dozen donuts for the kids. You were once them.**

Don't get me wrong, there's no shame in being damned glad you're not taking the test today and that chapter of your life is over. But have a little respect for the next generation.

Strike the Right Email Tone With 'ToneCheck'

Did you ever receive an email from opposing counsel and think, "Who does this S.O.B. think he is, talking to me this way? Call off the settlement, it's ON now, sucker!" Meanwhile, the person you now believe to be an S.O.B. of the highest order thought he was just quickly wrapping things up. Avoiding misunderstandings based on the tone of your emails has always been challenging. Sometimes you spend three minutes on an email trying to convey a simple thought, but the recipient reads your words as hostile, threatening, irrational, happy or something else far different than you intended. Not anymore, though!

Now, according to **Lawyerist**, you can cleanse your outgoing email of any false "tones" through **ToneCheck**. It flags phrases and sentences that look hostile or angry (outside your specified "Tone Tolerance,") and offers substitutes. It also flags lines that appear too "contented," *e.g.*, overly cheerful when you are actually trying to strike a tougher tone.

Check out the ToneCheck demo **here**.

Calif. Court Finds 'Red Light Camera' Photos Inadmissible

By now, many readers are probably familiar with the "red light cameras" in some states that snap a photo of you and your car as you pass through a red light. The photo along with a traffic citation is then sent to the registered address of the vehicle in the photo for you to pay. According to a recent

opinion by the Superior Court of California, however, the evidence produced by these red light cameras is inadmissible.

In ***People v. Khaled*** (App. Div. - July 22, 2010), the prosecution sought to prove that Khaled ran a red light by introducing the red light photo along with a "declaration that was intended to support the introduction of photographs purporting to show the appellant driving through an intersection against a red light."

Khaled, however, objected to the introduction of the photographs and declaration as "inadmissible hearsay, and violative of appellant's confrontation rights." The trial court admitted the photographs "as business records, official records, and because a proper foundation for the admission had been made based on the submitted declaration." Khaled appealed. On appeal, the Superior Court reversed the trial court, holding that the lower court erred in admitting the photographs and the accompanying declaration over the Khaled's hearsay and confrontation clause objections.

Specifically, the court stated that:

the photographs contain hearsay evidence concerning the matters depicted in the photographs including the date, time, and other information. The person who entered that relevant information into the camera-computer system did not testify. The person who entered that information was not subject to being cross-examined on the underlying source of that information. The person or persons who maintain the system did not testify. No one with personal knowledge testified about how often the system is maintained. No one with personal knowledge testified about how often the date and time are verified. The custodian of records for the company that contracts with the city to maintain, monitor, store, and disperse these photographs did not testify. The person with direct knowledge of the workings of the camera-computer system did not testify.
In addition, the court found that neither the "official records exception" nor the "business records exception" to the hearsay rule applied. Read the full opinion **here** (via the **California Appellate Report** blog)

Local Currencies Emerging in U.S. Towns as Economic Downturn Lingers

An idea popular during the Great Depression appears to be growing in popularity again today as the effects of the financial crisis continue: local currencies.

The *American Banker* **reports** that in May 2010, people lined up around the block in Ardmore, Penn., to purchase "Downtown Dollars." Downtown Dollars are offered at a two-to-one exchange rate with the dollar, allowing consumers to instantly receive a 50 percent discount on purchases at participating merchants in Ardmore. Merchants then get the full value of the purchase when they exchange the Downtown Dollars for U.S. dollars.

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According to the *American Banker*, local currencies are perfectly legal and have gone in and out of vogue for decades. Today, more than 200 such currency systems are operated in the U.S., operating in different ways: "Some systems use community banks as conduits to exchange dollars for the local currencies and the reverse; in other programs, banks and credit unions let customers pay a portion of loans and fees with the local money. Still others don't involve banks at all." Large cities such as Detroit and Brooklyn, New York are now reportedly planning local currencies, as well.

While the Downtown Dollars initiative has been a success, other local currencies seem to be losing steam. Steven Kyle, a professor at Cornell University in Ithaca, N.Y., says the long-running local currency system known as "Ithaca Hours" does not appear to be thriving. Indeed, he says that in his 25 years in Ithaca, he's never seen an "Ithaca Hour" actually used. "Nobody only uses Ithaca Hours," he said. "To the extent that you do, you are basically limiting your options to spend that money that you have. It is, to some extent, a disincentive."

Court Finds 'Stolen Valor Act' That Prohibits Lying About Military Medals Violates Free Speech

A federal judge in Denver ruled last week that the "**Stolen Valor Act**," which prohibits people from falsely claiming they have been awarded military decorations and medals, is "facially unconstitutional." U.S. District Judge Robert E. Blackburn ruled on Friday of last week that the act violates free speech.

The act provides that:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration,or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

The act particularly hates it when people falsely claim to have received a "distinguished-service cross ... a Navy cross ... an Air Force ... a silver star ... or a Purple Heart" medal, and provides for extra prison time in such cases.

The case decided by Judge Blackburn involved Rick Strandlof, who allegedly posed as Rick Duncan, "a wounded Marine captain who received a Purple Heart and a Silver Star." Prosecutors claim he used that persona to found the Colorado Veterans Alliance and solicit funds for the organization, the *Denver Post* **reports**. Strandlof wasn't charged with stealing money meant for the veterans group, however, and was only charged based on his "speech" alone.

Judge Blackburn rejected the argument that lying about having military medals dilutes their mean-

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ing and significance, stating that

This wholly unsubstantiated assertion is, frankly, shocking and, indeed, unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor. To suggest that the battlefield heroism of our servicemen and women is motivated in any way, let alone in a compelling way, by considerations of whether a medal may be awarded simply defies my comprehension.

U.S. Rep. John Salazar, D., Colo., who introduced the legislation in 2005, said last week that "individuals who violate this law are those who knowingly portray themselves as pillars of the community for personal and monetary gain. The Stolen Valor Act has been upheld by other courts and I am confident this decision will be overturned on appeal."

Another defender of the statute from a veterans' group said they will push for an appeal.

NINTH CIRCUIT CASES

Murrary v. Principal Financial Group, Inc., No. 09-16664 (July 27, 2010) The plaintiff in this case, Patricia Murray, is a "career agent" for the defendants, Principal Financial Group, Inc., Principal Life Insurance Company, and Princor Financial Services Corporation. Murray and other Principal career agents sell Principal products that include a wide range of financial products and services, including annuities, disability income, 401(k) plans, and insurance. Murray sued Principal for sex discrimination in violation of Title VII. The only issue before us is whether Murray is an "employee" within the meaning of that statute, or whether she should be regarded as an independent contractor. Murray is entitled to the protections of Title VII only if she is an employee. *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999).

Brownfield v. City of Yakima, No. 09-35628 (July 27, 2010) Oscar J. Brownfield appeals the district court's grant of summary judgment in favor of the City of Yakima on his claims for violations of the Americans with Disabilities Act and the Family Medical Leave Act, and for First Amendment retaliation. We hold that the City did not violate Brownfield's rights under the ADA by requiring a fitness for duty exam after he repeatedly exhibited emotionally volatile behavior while serving as a police officer, that his complaints regarding a coworker with whom he shared duties did not address matters of public concern, and that his FMLA claim lacks merit. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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Mattel, Inc. v. MGA Entertainment, Inc., No. 09-55673 (July 22, 2010) Who owns Bratz?

Barbie was the unrivaled queen of the fashion-doll market throughout the latter half of the 20th Century. But 2001 saw the introduction of Bratz, "The Girls With a Passion for Fashion!" Unlike the relatively demure Barbie, the urban, multi- ethnic and trendy Bratz dolls have attitude. This spunk struck a chord, and Bratz became an overnight success. Mattel, which produces Barbie, didn't relish the competition. And it was particularly unhappy when it learned that the man behind Bratz was its own former employee, Carter Bryant.

Bryant worked in the "Barbie Collectibles" department, where he designed fashion and hair styles for high-end Barbie dolls intended more for accumulation than for play. In August 2000, while he was still employed by Mattel, Bryant pitched his idea for the Bratz line of dolls to two employees of MGA Entertainment, one of Mattel's competitors. Bryant was soon called back to see Isaac Larian, the CEO of MGA. Bryant brought some preliminary sketches, as well as a crude dummy constructed out of a doll head from a Mattel bin, a Barbie body and Ken (Barbie's ex) boots. The Zoe, Lupe, Hallidae and Jade dolls in Bryant's drawings eventually made it to market as Cloe, Yasmin, Sasha and Jade, the first generation of Bratz dolls.

In effect, Barbie captured the Bratz. The Bratz appeal.

Wilkinson v. Torres, No. 09-35098 (July 6, 2010) On May 8, 2005, Defendant-Appellant Rick Torres shot and killed Jason Scott Wilkinson as Wilkinson was driving a stolen minivan in a residential yard where the officers were on foot. Plaintiffs-Appellees Scott Wilkinson, Alisha Wilkinson, and the estate of Jason Scott Wilkinson brought an action against Torres and others, alleging that their constitutional rights under the Fourth and Fourteenth Amendments were violated by Torres' use of deadly force. Torres moved for summary judgment on the issue of qualified immunity, but the district court denied the motion, citing disputed issues of material fact. Torres appeals, arguing that he is entitled to qualified immunity because his use of force was reasonable as a matter of law. We agree and therefore reverse.

Mack v. Kuckenmeister, No. 09-15290 (July 22, 2010) Darren Mack murdered his wife, Charla Mack, and shot the state court judge overseeing their divorce proceedings before a final written divorce decree could be filed. Believing Darren Mack and Charla Mack had agreed to the terms of their divorce before Charla Mack's murder, the Estate of Charla Mack filed a motion in state court for the divorce decree to be memorialized in an order dated *nunc pro tunc* to a time before her death. The Nevada district court entered a domestic relations order over Darren Mack's objection. Among other things, the DRO decreed that a Quali- fied Domestic Relations Order should issue. Dar- ren Mack appealed to the Nevada Supreme Court, which affirmed the judgment.

These appeals require us to determine whether state courts have subject matter jurisdiction to decide that a state court issued domestic relations order is a QDRO as defined by the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 832, *as amended*, 29 U.S.C. § 1001 et seq. We conclude that they do and thus that the Nevada Supreme Court's QDRO determination in *Mack v. Estate of Mack*, 206 P.3d 98 (Nev. 2009), is entitled to

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full faith and credit. We reverse and remand with instructions for the dis- trict court to direct Joan Mack to deposit the contested funds with the court, if she has not already done so, and to award the funds to Randal Kuckenmeister, administrator of Charla Mack's Estate.

Retired Employees Assn. of Orange County, Inc. v. County of Orange, No. 09-56026 (June 29, 2010) ursuant to Rule 8.548 of the California Rules of Court, a panel of the United States Court of Appeals for the Ninth Cir- cuit, before which this appeal is pending, requests that the Supreme Court of California answer the following ques- tion:

Whether, as a matter of California law, a Califor- nia county and its employees can form an implied con- tract that confers vested rights to health benefits on retired county employees. Defendant-Appellee in this case contends that de- cisions of the Supreme Court of California and the California Courts of Appeal support a conclu- sion that an implied contract to which a county is one party cannot confer such vested rights. Plain- tiff-Appellant contends the contrary.

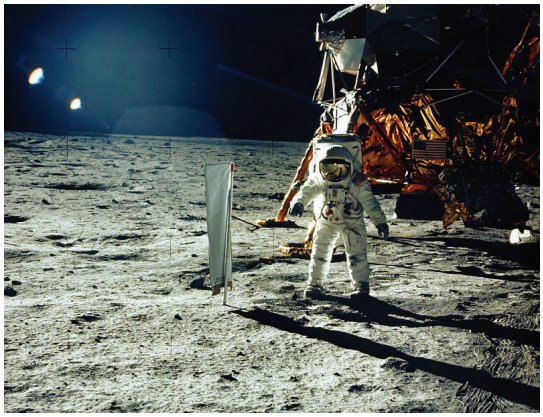
Visa Intl. Serv. Assn. v. JSL Corp., No. 08-15206 (June 28, 2010) She sells sea shells by the sea shore. That's swell, but how about Shell espresso, Tide motor oil, Apple bicycles and Play- boy computers? We consider the application of anti- dilution law to trademarks that are also common English words.

Visa International Service Association sued JSL Corporation, through which Orr operates eVisa, claiming that eVisa is likely to dilute the Visa trademark. The district court granted summary judgment for Visa, and JSL appeals.

Lal v. State of California, No. 08-15645 (June 25, 2010) Shelly Lal brought suit against the California Highway Patrol and officers Frank Newman and Matthew Otterby for the shooting death of her husband. The district court dis- missed her case with prejudice under Federal Rule of Civil Procedure 41(b) for failure to prosecute when her attorney failed to meet deadlines and attend hearings. When Lal later learned of her attorney's behavior and the dis- missal of her suit, she hired a new attor- ney and filed a motion for relief from judgment pur- suant to Federal Rule of Civil Procedure 60(b)(6). The district court denied the motion.

We reverse. We hold, pursuant to *Community Dental Ser- vices v. Tani*, 282 F.3d 1164 (9th Cir. 2002), that an attorney's gross negligence constitutes an extraordinary circumstance war- ranting relief from a judgment dismissing the case for fail- ure to prosecute under Rule 41(b).

Simmons v. Navajo County, No. 08-15522 (June 23, 2010) We must decide, among other issues, whether local jail per- sonnel, their su- pervisors, and their county employer violated the Fourteenth Amendment due process rights of a pretrial detainee who committed suicide while in their custody.



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Litigation Minute: Think Before You Post - A Look at the Rising Use of Social Site Evidence

Facebook has arguably succeeded in its mission to "give people the power to share and make the world more open and connected." Unfortunately, an ever-increasing number of people are starting to discover that sharing so much information is not always a good thing. Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure specifically address social networking sites, but many courts nonetheless consider social site evidence to be an admissible form of electronically stored information (ESI).

For now, courts consider private content contained on social networking sites to be protected under the Stored Communications Act (SCA), making disclosure of this information difficult to compel. In *Crispin v. Christian Audigier, Inc*., the District Court of California granted the plaintiff's motion to quash subpoenas issued to sites including Facebook and MySpace on the grounds that they fall within the definition of an electronic communication service provider (ECS). Note that extending SCA protection precludes subpoenas issued in civil suits; however, it does not prevent the information from being subpoenaed in a criminal investigation.

On the other hand, public content is fair game. Savvy litigators have wasted no time using status updates, wall postings, pictures and other profile information to investigate witnesses, prospective jurors and opposing counsel in an effort to help develop well-tailored trial strategies.

Courts across the country are also permitting the use of social site evidence at trial. Recently, the Maryland Court of Appeals affirmed that the identifying information in a MySpace personal profile, such as the person's photograph, date of birth and family references, could be used to link the page to the person – even when pseudonymous and anonymous profile names are used.

Social site evidence can wreak serious havoc on a case. With popularity of these sites on the rise, companies, employees and litigators must remember to be:

Aware: Information visible on social networking sites is admissible as evidence, so think before you post.
Proactive: Explore the increased security settings available on these sites, and consider suspending activity or removing profiles when engaged in litigation.
Savvy: Recognize the strategic value of these sites to your own case, and take advantage of the information early.

United States Supreme Court Upholds Search of Text Messages Sent on Employer-Issued Equipment

City of Ontario, California v. Quon, 2010 WL 2400087 (U.S. June 17, 2010). In this appeal addressing an employer's search of an employee's text messages, the United States Supreme Court found the search to be reasonable, but declined to issue a "broad holding concerning employees' privacy expectations vis-à-vis employer provided technological equipment." Addressing the reasoning for the search (i.e., review of the text message transcripts), the court found the City possessed a "legitimate interest" in ensuring employees were not forced to pay for overages out-of-pocket and that the City was not paying for personal communications. In regard to the search itself, the court found the City's method of reviewing the text message

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transcripts to be reasonable as it was an "efficient and expedient way" to determine the nature of the overages. In support of this decision, the court noted the steps taken to reduce the search intrusiveness, such as the restriction of the search date range and limitation of transcript review to messages sent by the employee while on-duty. The court also discussed that the employee should have understood or anticipated that it might be necessary for the City to audit the pager messages to determine whether the pagers were being appropriately used, or to assess the SWAT team's performance in emergency situations (the primary purpose for the pager issuance). Finally, the court determined the Ninth Circuit erred in suggesting the City could have used "less intrusive means" to make the overage determinations and also held that the search was not rendered unreasonable by the assumption that Arch Wireless violated the Stored Communications Act by turning over the transcripts.

In-House Impact: Clear policies addressing employee use of network systems and technology is absolutely critical. These policies must be as inclusive and explicit as possible, and should be updated periodically to reflect the adoption of new technology in the workplace. Employers must also take steps to educate employees of the company's right to monitor all communications, including personal items, sent over company networks with work-issued equipment.

Failure to Take Reasonable Steps to Prevent Disclosure Results in Privilege Waiver

Mt. Hawley Ins. Co. v. Felman Prod., Inc., 2010 WL 1990555 (S.D.W.Va. May 18, 2010). In this insurance claim dispute, the defendants argued the plaintiff waived privilege following the inadvertent disclosure of privileged documents during discovery, including an alleged "smoking gun" e-mail. The defendants claimed the plaintiff failed to take reasonable precautions to prevent inadvertent disclosure, citing the nearly 980 attorney-client communications that were produced, and argued the plaintiff failed the five-factor test. In response, the plaintiff argued the disclosure occurred due to an undetermined error in the vendor's software. Despite citing numerous steps the plaintiff undertook to prevent disclosure and the existence of a clawback agreement, the court found the plaintiff failed to perform critical quality control sampling and concluded the plaintiff did not take reasonable steps to prevent disclosure. As such, the efforts did not satisfy Fed.R.Evid. 502(b) and privilege was waived. In making its decision, the court also noted the e-mail was "a bell which cannot be unrung," which influenced the defendants' discovery requests and deposition questions.

This ruling reiterates the importance of quality when conducting e-discovery. Corporations must thoroughly vet a service provider's products and services through an open discussion on their strengths, weaknesses and offerings. This case also highlights the need for an effective document review. Document review is an expensive and time-consuming process, and engaging in smart technology and processes early on to condense data volumes will help identify privileged documents and reduce the possibility of inadvertent disclosure.

Court Orders Reproduction of Certain Documents in Native Format and Production of Inventory of Previous Computers

Phillip M. Adams & Assocs., LLC v. Fujitsu Ltd., 2010 WL 1901776 (D.Utah May 10, 2010). In this intellectual property litigation, one of the defendants sought reproduction of

documents and e-mails in native format, documents from the plaintiff's previous computers and documents from prior litigation. The plaintiff argued that it never agreed to produce documents in native format, and that producing documents from the old computers would be unduly burdensome and costly. Addressing the first production dispute, the court ordered the plaintiff to reproduce the documents relevant to one production request natively as it failed to object to the format specification. However, no format specification was made in the defendant's second request. As such, the court determined the plaintiff's production of documents per the ordinary course of business was sufficient, and that the burden of reorganizing and labeling the production would likely outweigh the benefit. Turning to the computer issue, the court ordered the plaintiff to produce an inventory of previous computers containing data described in the defendant's request to determine if the created archives for these systems were adequate. Finally, the court ordered the plaintiff to search documents related to a prior litigation matter, producing any document that is responsive, but not privileged.

Court Enforces Cooperation, Good Faith and Responsibility in Discovery

Kinetic Concepts, Inc. v. ConvaTec Inc., 2010 WL 1912245 (M.D.N.C. May 12, 2010). In this patent infringement litigation, the defendants filed a motion to compel alleging the plaintiffs failed to respond to several production requests and deficiently produced some documents. The plaintiffs argued that they did not withhold or refuse to produce the relevant, responsive and non-privileged documents sought. Reviewing the parties' communications, the court determined that the plaintiffs often responded to the defendants' requests with boilerplate objections including the unilateral claim that all relevant documents were produced pursuant to the requests. The plaintiffs also delayed their responses, agreed to comply with requests at an unstated future time and abruptly amended their reply, leading to the defendants' confusion and suspicion. Citing the plaintiffs' "pattern of apparently calculated ambiguity," the court ordered the plaintiffs to produce all responsive documents, except for the properly recorded privileged documents determined on a good faith basis. The court further ordered the plaintiffs to make the original versions of certain documents available for inspection.

Court Imposes Preclusion Sanctions for "Grossly Negligent" Preservation Behavior

Jones v. Bremen High Sch. Dist. 228, 2010 WL 2106640 (N.D.Ill. May 25, 2010). In this employment discrimination litigation, the plaintiff sought sanctions alleging the defendant failed to preserve relevant documents and intentionally concealed its document retention policy to hide its lack of compliance. Detailing the defendant's preservation efforts, the court found it "undisputed" that the defendant failed to place a litigation hold in effect when it learned the plaintiff filed charges in October 2007. Instead, the defendant directed just three employees – whose conduct was in question in the lawsuit - to search through their e-mail and cull out relevant documents without supervision of outside counsel. Notably, all employees in the district could permanently delete e-mails by "double-deleting" them from their computers, and the e-mails would then be automatically erased from the backup system in thirty days. Despite finding that the defendant "clearly breached its duty to preserve relevant documents," the court determined the actions were not willful and declined to impose an adverse inference instruction. However, the court found the defendant's

behavior grossly negligent, and precluded the defendant from arguing that an absence of discriminatory statements evidenced that no such statements were made and allowed for additional depositions at cost to the defendant.

Court Affirms Authentication of MySpace Page Attributed to Pseudonymous User

Griffin v. State, 2010 WL 2105801 (Md.App. May 27, 2010). In this criminal case, the defendant appealed his murder and handgun convictions, arguing the court erred in admitting a printed MySpace page into evidence, as it was not properly authenticated and was prejudicial. Given that a MySpace personal profile contains content supplied by the site's individual users, the State contended that the identifying information in the page's content sufficiently linked the page to the person because it included the person's photograph, date of birth, references to the person's children and the defendant's nickname. Agreeing with the State, the court held that even with pseudonymous and anonymous profile names, individualized content on social networking sites "may lend itself to authentication of a particular profile page as having been created by the person depicted in it." The court also denied the defendant's argument regarding the prejudicial effect of the evidence, citing the trial court's redaction of irrelevant evidence from the profile and the limiting instruction given to the jury.