The Public Lawyer

STATE BAR OF NEVADA

Public Lawyers Section

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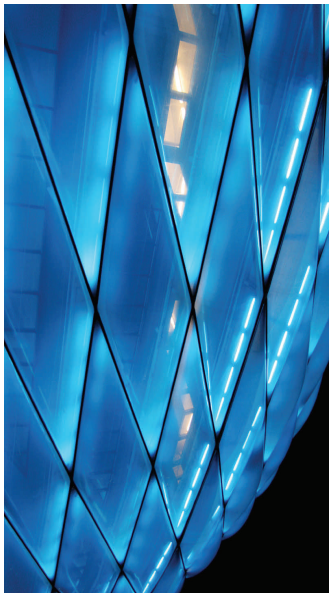
Nevada Supreme Court Cases

Cromer v. Wilson, 126 Nev. Adv. Op. No. 11 (March 11, 2010) Appellant Aaron Cromer received a jury verdict of $4,530,785.50 as a result of injuries he sustained in a car crash caused by respondent William Wilson. On appeal, Aaron and his wife Felicia Cromer raise several issues, only one of which merits detailed consideration. The Cromers contend that the district court should have granted summary judgment on the issue of liability because NRS 41.133 allows a judgment of conviction to conclusively establish civil liability for a crime and should have precluded Wilson from arguing comparative fault pursuant to NRS 41.141.

We conclude that the conclusive presumption of NRS 41.133 applies to liability but does not abrogate the law regarding comparative negligence or damages. The district court should have granted the summary judgment motion as to liability and held a trial as to damages only; at such a trial, the defense could have introduced evidence of comparative fault, if any, to reduce the damages award. In this case, the district court allowed the trial to proceed as to liability and damages. The jury found Wilson liable and awarded damages. Although the district court utilized the incorrect procedure, the appropriate outcome was reached. Therefore, we affirm the judgment of the district court.

Coast to Coast Demo. v. Real Equity Pursuit, 126 Nev. Adv. Op. No. 10 (March 4, 2010) This is an appeal from a judgment entered by confession. The appellants, who are the judgment debtors, acknowledged the debt but challenge the confession on statutory grounds and as unconscionable. We affirm.

Saylor v. Arcotta, 126 Nev. Adv. Op. No. 9 (March 4, 2010) In this appeal, we



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clarify the applicable limitations periods for equitable indemnity and contribution claims. In doing so, we conclude that claims for equitable indemnity are subject to the limitations period prescribed by NRS 11.190(2)(c), while claims for contribution are subject to the limitations period prescribed by NRS 17.285. Because no judgment has been entered in the case at hand, and thus the applicable statutes of limitations have not yet begun to run, we reverse the district court's summary judgment as to appellants' third-party complaint for indemnity and contribution.

Schwartz v. Schwartz, 126 Nev. Adv. Op. No. 8 (March 4, 2010) This appeal concerns a divorce and the awarding of assets by the district court to appellant Abigail Schwartz based on several agreements entered into by Abigail and Milton Schwartz before Milton's death. The several agreements were entered into by Abigail and Milton before and during their marriage and include a reconciliation agreement entered into after a separation period.

In this opinion, we examine whether the district court abused its discretion in failing to award Abigail lump-sum alimony.

We conclude that the district court abused its discretion in failing to conduct a full and proper analysis of whether lump-sum alimony was appropriate in this case and hold that a district court should assess not only age disparity as set forth in Daniel v. Baker, 106 Nev. 412, 794 P.2d 345 (1990), but should also assess whether the life expectancy of the payor makes the award illusory. Accordingly, we reverse the district court's order regarding the award of alimony and remand for the district court to make a determination as to whether an award of lump-sum alimony was appropriate in this case.

NAIW v. Nevada Self-Insurers Ass'n, 126 Nev. Adv. Op. No. 7 (February 25, 2010) In this appeal, we consider whether a workers' compensation regulation contradicts the statutory provisions for determining the percentage of an employee's disability resulting from a work-related spinal injury. Respondent Nevada Self-Insurers Association (the Association) filed a petition with appellant State of Nevada Department of Business and Industry, Division of Industrial Relations (DIR), requesting that DIR amend one of its regulations to conform to statutory provisions that prohibit physicians from considering factors other than a person's physical impairment when evaluating a work-related injury. After DIR denied the Association's petition, the Association filed a complaint for declaratory relief in the district court, which the district court granted, concluding that DIR's regulation violated applicable statutory provisions by allowing physicians to consider a person's ability to perform activities of daily living.

Foster v. Dingwall, 126 Nev. Adv. Op. No. 6 (February 25, 2010) In this opinion, we address two main issues. First, we consider whether an order to strike appellants' pleadings was a proper discovery sanction in this case. Second, we address the burden of proof that a party must satisfy at an NRCP 55(b) prove-up hearing to establish damages, following the entry of default.

Because we conclude that appellants' conduct during discovery was repetitive, abusive, and recalcitrant, we uphold the district court's decision to strike the pleadings and

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enter default. We clarify that after an entry of default, at an NRCP 55(b)(2) prove-up hearing, the nonoffending party retains the burden of presenting sufficient evidence to establish a prima facie case for each cause of action as well as demonstrating by substantial evidence that damages are attributable to each claim. Accordingly, we uphold the award of compensatory damages to respondent Terry Dingwall because Dingwall presented a prima facie case for damages on each cause of action, which included substantially demonstrating that he was entitled to the relief sought. However, we reverse the compensatory damage award to respondents Hyun Ik Yang and Hyunsuk Chai because it was duplicative and because no evidence was presented to show the relationship between the tortious conduct and the requested award.

Foster v. Dingwall, 126 Nev. Adv. Op. No. 5 (February 25, 2010) In this opinion, we clarify and explain more fully the process, announced in Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978), for seeking a remand to the district court to alter, vacate, or otherwise modify or change a district court order or judgment after an appeal to this court from that order or judgment has been perfected. We further address a related issue of first impression—whether when an appeal has been taken from a final order or judgment and a party subsequently files a motion in the district court for relief from that order or judgment under NRCP 60(b)(2) in accordance with the Huneycutt remand procedure, the perfection of the appeal tolls the six-month time period for seeking NRCP 60(b)(2) relief. For the reasons set forth below, we conclude that the perfection of an appeal does not toll NRCP 60(b)(2)'s six-month time period for seeking relief. Accordingly, because we conclude that appellants' request for NRCP 60(b)(2) relief was untimely, we deny their motion to remand this matter to the district court.

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EMAIL ARCHIVING

A significant majority of business communication is conducted via e-mail. Once other forms of electronically stored information are calculated into the mix, organizations that are heavily regulated and targeted in litigation face an increasingly significant risk regarding information management and storage. The growing data volumes coupled with decreased human resources in IT and other corporate departments require a proactive approach to managing data. Corporations must begin taking steps now to manage the mountainous volume of electronically stored information (ESI), while ensuring proper preparedness to comply with various regulations and litigation discovery rules.

Why Is Archiving Important?

Archiving enables efficient records management that not only facilitates business and storage efficiency, but also ensures compliance with legal and regulatory requirements. An effective e-mail and file archiving solution will allow legal, IT and compliance teams to appropriately preserve, manage, locate and produce relevant ESI, in addition to allowing for quick enforcement of the company's document retention policy. An archiving tool allows the organization to update and modify retention and disposal parameters as the needs of the business and regulatory requirements evolve, and ensures that the policies are consistently applied across the whole enterprise.

Implementing an effective archiving system also eases the strain on organizations' storage requirements and IT resources. An important component of an archiving tool is the ability to reduce the organization's storage footprint with compression and single-instance storage via de-duplication technology. Archiving tools can also reduce user reliance on local storage, such as individuals' personal storage tables of messages (.pst files), by housing retained e-mails and attachments in centrally managed repositories.

In addition to storage concerns, human resources are tight in IT departments. According to a 2010 Gartner report on IT spending, 50.3% of respondents cut IT head count by 1-15%, while 12.4% of respondents cut IT head count by more than 15%. This decreased head count further strains already overburdened IT resources and makes responding to incidents outside the normal business operations and responsibilities far more difficult. Deploying appropriate archiving technology to better manage the storage, retention and disposal of business records will provide a much needed helping hand for IT departments.

Regulatory Compliance

Other significantly important reasons to implement a high-quality archiving solution are the various regulations that mandate records retention. One of the most well-known regulations is Sarbanes-Oxley, which requires all financial services companies and publicly traded companies to retain work papers and other documents forming the basis of a financial audit or review for seven years. Another regulation in the financial

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services industry is SEC 17a-4, which requires such things as trading account records to be retained for six years.

The pharmaceuticals industry also faces numerous regulations, such as 21 CFR 205.50, which requires wholesale prescription drug distributors to retain inventories and records of all transactions regarding receipt and distribution or other disposition of prescriptions for three years. Likewise, the energy and utilities industry faces strict regulatory requirements, such as 18 CFR 35, which requires wholesalers of electric energy to retain all data and information upon which they billed, the prices they charged and the prices they reported for use for five years.

The above-mentioned regulations are merely the tip of the regulatory iceberg and not an exhaustive list. Each industry faces unique and numerous regulatory requirements, and it is important to consult with an expert regarding how the corporation can cost-effectively and efficiently demonstrate compliance with the specific obligations applicable.

Electronic Discovery Impact

In addition to the aforementioned qualities archiving systems must have, an important functionality is the ability to administer legal holds. Failure to adequately issue hold notices and properly preserve information may create trouble for an organization in the courtroom. As demonstrated in Kroll Ontrack's *2009 Year in Review* report, 39% of the cases in 2009 involved sanctions, and of those, almost 67% addressed sanctions regarding preservation and spoliation issues. An archiving solution will facilitate efficient identification of potentially relevant ESI through enterprise-wide searching and enables immediate implementation of litigation holds, preventing liability for preservation issues.

Courts are not tolerating the excuse that a company lacks the technological capability to retrieve data in this modern age. This point is clearly demonstrated in a recently released opinion from the Western District of Washington, ., 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009). In this case, the defendant argued against producing e-mails stored in an antiquated format. Originally, an IT employee cited estimates of $88,000 to produce the e-mails but then decided to "up the ante" to $834,285. The court was incredulous that a company as sophisticated as the defendant would fail to migrate data to its now-functional archive system, and ordered the defendant to "implement an immediate plan to make copies of the archive…disks, and to save them to an appropriate storage medium." Furthermore, the court explained that even if the information was ruled not reasonably accessible, good cause existed to order production. Proper retention management (in this case scheduled disposal) could have alleviated the issue in the first place. This case makes it clear that if data is being stored, even in an antiquated form, the courts will no longer tolerate poor or outdated IT infrastructure as a reason to not order the production of that ESI.

Likewise, the District of Utah denied application of the safe harbor provision found in the Federal Rules of Civil Procedure after finding

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far more evidence should exist than what was produced by the defendants. , 2009 WL 910801 (D. Utah Mar. 30, 2009). The defendants argued that their e-mail servers were not designed for archival purposes and that employees had been instructed to locally preserve e-mails. Denying the defendants' argument, the court found sanctions were appropriate given the fact that the defendants' "[irresponsible data retention] practices invite the abuse of others." This case demonstrates again that it is insufficient for a party to argue that the technological capability does not exist to appropriately archive and preserve data.

Conclusion

The above cases demonstrate that it is far more cost-effective for organizations to proactively implement archiving technology and properly manage retention and litigation holds, rather than incur the costs to file and defend motions for preservation failures later. It is important to remember that the courts do not require perfection, but rather expect necessary steps to be taken to properly preserve relevant records for collection, review and production. See , 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). Implementing an archiving system is a great proactive step toward reducing litigation expenses, while strengthening defensibility through a repeatable, well-documented process.

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Newdow v. Rio Linda United School Dist., Nos. 05-17257 (March 11, 2010) Nos. 05-17257We are called upon to decide whether the teacher-led recitation of the Pledge of Allegiance to the Flag of the United States of America, and to the Republic for which it stands, by students in public schools constitutes an establishment of religion prohibited by the United States Constitution. We hold it does not; the Pledge is constitutional. The Pledge of Allegiance serves to unite our vast nation through the proud recitation of some of the ideals upon which our Republic was founded and for which we continue to strive: *one Nation under God*—the Founding Fathers' belief that the people of this nation are endowed by their Creator with certain inalienable rights; *indivisible*—although we have individual states, they are united in one Republic; *with liberty* —the government cannot take away the people's inalienable rights; *and justice for all*—everyone in America is entitled to "equal justice under the law" (as is inscribed above the main entrance to our Supreme Court).

We hold that the Pledge of Allegiance does not violate the Establishment Clause because Congress' ostensible and predominant purpose was to inspire patriotism and that the context of the Pledge—its wording as a whole, the preamble to the statute, and this nation's history—demonstrate that it is a predominantly patriotic exercise. For these reasons, the phrase "one Nation under God" does not turn this patriotic exercise into a religious activity.

Newdow v. Lefevre, No. 06-16344 (March 11, 2010) This case calls upon us to decide whether the national motto of the United States, "In God We Trust," and its inscription on the Nation's coins and currency, violates the Establishment Clause of the First Amendment or the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq*, or both. We hold our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), forecloses both claims. Accordingly, we affirm the district court's order dismissing this case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Coyote Publishing, Inc. v. Miller, No. 07-16633 (March 11, 2010) [A]s long as poverty makes virtue hideous and the spare pocket-money of rich bachelordom makes vice dazzling, [the] daily hand-to-hand fight against prostitution with prayer and persuasion, shelters and scanty alms, will be a losing one.
—George Bernard Shaw, *Preface to Mrs. Warren's Profession* viii (1902)

The American experience with prostitution over the last hundred years is testament to the sagacity of Mr. Shaw. Even the coercive machinery of the criminal law, not yet arrayed against the sale of sexual services when Shaw penned *Mrs. Warren's Profession*, has not extinguished the world's oldest profession.

The State of Nevada, alone among the states, accommodates this reality by permitting the sale of sexual services in some of its counties. Nevada combines partial legalization of prostitution with stringent licensing and regulation, including health screenings for sex workers, measures to protect sex workers from coercion, and —

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the aspect of Nevada law here challenged — restrictions on advertising by legal brothels. We must decide whether the advertising restrictions violate the First Amendment.

Nevada appeals, arguing that (1) intermediate scrutiny (or some lesser level of scrutiny) applies; (2) at least in counties where brothels are prohibited, advertising of brothels does not relate to legal activity and is therefore not protected by the First Amendment; and (3) the substantial state interest in preventing the commodification and commercialization of sex vindicates the advertising restrictions. Taking into account the quite unique characteristics, legal and social, of prostitution, we conclude that Nevada's regulatory scheme is consistent with the First Amendment and so reverse the ruling of the district court.

Espinosa v. City and County fo San Francisco, No. 08-16853 (March 9, 2010)
"Officers of the San Francisco Police Department and the City and County of San Francisco brought an interlocutory appeal from the district court's denial of their summary judgment motion in this 42 U.S.C. § 1983 action brought by Kathleen Espinosa and other survivors of Asa Sullivan. Plaintiffs allege that Officers Paulo Morgado, Michelle Alvis, and John Keesor violated Asa Sullivan's Fourth Amendment rights by entering and searching an apartment, using unreasonable force, and intentionally or recklessly provoking a confrontation. The three officers entered an apartment in which Asa Sullivan was staying, searched it, and Officers Alvis and Keesor fatally shot Sullivan. We review *de novo* the denial of defendants' summary judgment motion, *Hopkins v. Bonvicino,* 573 F.3d 752, 762 (9th Cir. 2009), and we affirm.

The district court properly denied defendants' summary judgment motion regarding whether Officers Morgado, Alvis, and Keesor are entitled to qualified immunity for the alleged Fourth Amendment violations. For summary judgment, we determine whether, viewing the evidence in the light most favorable to the non-moving party, "there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004). For qualified immunity, we determine whether the facts show that (1) the officer's conduct violated a constitutional right; and (2) the right which was violated was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Hopkins*, 573 F.3d at 762. A right is clearly established if a reasonable officer would know that his conduct was unlawful in the situation he confronted. *Headwaters Forest Defense v. County of Humbolt*, 276 F.3d 1125, 1129 (9th Cir. 2002). If the officers did not violate a constitutional right, then they are entitled to immunity. *Hopkins*, 573 F.3d at 762. If the officers violated such a right, but it was not clearly established, then they are entitled to immunity. *Id*.

In this case, the district court properly denied the summary judgment motion because there are genuine issues of fact regarding whether the officers violated Asa Sullivan's Fourth Amendment rights. Those unresolved issues of fact are also material to a proper determination of the reasonableness of the officers' belief in the legality of their actions.

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United States v. Cha, No. 09-10 (March 9, 2010) Song Ja Cha and In Han Cha were charged with the federal crimes of conspiracy, sex trafficking and coercion, and enticement to travel for the purpose of prostitution in violation of 18 U.S.C. §§ 2, 371, 1591(a), 1594, and 2242. In the pretrial hearing before the magistrate judge, the Chas moved to suppress evidence that had been seized pursuant to a warrant at their house and adjoining business, the Blue House Lounge. The magistrate judge concluded that, although the police had probable cause to seize these premises while they obtained a warrant, the warrantless seizure was unreasonably long in violation of the Fourth Amendment to the U.S. Constitution. The district court agreed with the magistrate judge's conclusions, and the United States brought an interlocutory appeal to this court. We conclude that the seizure of the Cha residence, which lasted a minimum of 26.5 hours, was constitutionally unreasonable and that suppression of the evidence was warranted. We therefore affirm.

Doe v. Kamehameha Schools, No. 09-15448 (March 2, 2010) Few tenets of the United States justice system rank above the conflicting principles presented in this case: the transparency and openness of this nation's court proceedings and the ability of private individuals to seek redress in the courts without fear for their safety. The plaintiffs, four minor children, seek to proceed anonymously in their suit against Kamehameha Schools' allegedly race-based admissions policy. The plaintiffs' parents fear for the children's safety if their identities are revealed. After carefully considering the issue, the magistrate judge and district judge decided that the prejudice to the defendants and the public's interest in open courts outweigh plaintiffs' fears of harm. Rather than disclose their names, the Doe children suffered dismissal with prejudice with leave to appeal, giving us jurisdiction under 28 U.S.C. § 1291. We affirm.

United States v. Bright, No. 07-17027 (February 26, 2010) The Fifth Amendment protects individuals from having to disclose documents when the very act of production would constitute self-incrimination. Cherie and Benjamin Bright, subjects of an Internal Revenue Service investigation concerning past tax liability, jointly appeal the district court's order enforcing IRS summonses requiring production of documents, including those relating to offshore accounts. The Brights invoked their Fifth Amendment privilege and refused production. They also separately appeal the district court's subsequent order finding them in contempt for failing to produce the documents. We hold that the district court acted properly in enforcing the IRS summonses and finding the Brights in contempt, although we modify the conditions necessary to purge the contempt.

Traxler v. Multnomah County, No. 08-35641 (February 26, 2010) This case presents two issues concerning damages under the Family Medical Leave Act of 1993. 29 U.S.C. §§ 2601-2654 (2006). In an issue of first impression, we consider whether the court, rather than the jury, determines the amount of the front pay award**1** and whether the district court's calculation of that award was clearly erroneous. Second, we address whether the district court erred

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in denying liquidated damages without making specific findings as to the employer's good faith conduct and reasonable belief that it was not violating the statute. We conclude that under the FMLA, front pay is an equitable remedy to be determined by the court. We affirm the district court's determination and calculation of the front pay award. We reverse and remand the district court's decision not to award liquidated damages. Absent an articulated rationale to support this conclusion, we cannot meaningfully review the challenge to liquidated damages.

Doody v. Schirro, No. 06-17161 (February 25, 2010) This case emerged from a horrendous crime — the murder of nine individuals, including six monks, inside a Buddhist temple. The ensuing investigation ensnared Petitioner Johnathan Doody, a seventeen-year old high school student. Although Doody eventually confessed to participating in the nine murders, he now challenges his confession, asserting that the *Miranda* advisements he was given were inadequate and that his confession was involuntary. We agree on both counts. Specifically, we conclude that the advisement provided to Doody, which consumed twelve pages of transcript and completely obfuscated the core precepts of *Miranda*, was inadequate. We also hold that nearly thirteen hours of relentless overnight questioning of a sleep-deprived teenager by a tag team of officers overbore the will of that teen, rendering his confession involuntary.

Avalos v. Baca, No. 07-56511 (February 26, 2010) J. Avalos was over-detained by the Los Angeles Sheriff's Department. He filed this action against officers of the LASD in their official and individual capacities. He asserts claims pursuant to 42 U.S.C. § 1983 for alleged violations of his rights under the Fourth and Fourteenth Amendment based on his over-detention and for defendants' efforts to procure an involuntary waiver of his civil rights claim based on his over- detention. Avalos also alleges claims of conspiracy and violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(a)-(c). The district court granted summary judgment in favor of defendants. We conclude that (1) plaintiff has failed to show an unconstitutional custom, policy or practice of over-detention, (2) there is no actionable claim under § 1983 for procuring a coercive or involuntary waiver of a civil rights claim, (3) the district court properly granted summary judgment for defendants on plaintiff's conspiracy claims, and (4) plaintiff has failed to present sufficient evidence of a RICO violation or any harm to his business or property from the alleged act of racketeering. Accordingly, the district court's grant of summary judg-

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2nd Circuit Says OK to 'Heavy Hitter' Attorney Ads

On Friday, the 2nd U.S. Circuit Court of Appeals **rejected attorney advertising restrictions** put in place in 2007 by the State of New York. The opinion can be **found here**. Among the prohibitions that the court struck down as First Amendment no-nos were those barring "portrayals of judges" and "trade names or nicknames that imply an ability to get results." The court did uphold a **30-day moratorium on solicitation of accident victims** and a ban on the use of "fictitious names" implying that attorneys are members of the same firm.

It's an interesting case in that the attorneys challenging the restrictions affirmatively argued that the speech at issue was "irrelevant, unverifiable, [and] non-informational," and thus, not inherently false or misleading. **Alexander & Catalano**, the plaintiffs firm that was itself a plaintiff in this case, has trademarked the phrase "The Heavy Hitters," and has **archived its TV commercials** on its Web site. Barring an appeal to the Supreme Court, The Heavy Hitters are free to continue having actors portray judges and using thunder and lightning special effects in those ads. Perhaps it's time for **Adam "Bulletproof" Reposa** to open a New York office.

Observations After Six Months on Legal Blog Watch

As I approach the six-month anniversary of **the day I started writing** for Legal Blog Watch, it has struck me several times lately that there were so many things I simply did not appreciate about the legal system and the blogosphere before I started watching it intently every (other) day. Yes, I have been actively blogging in the **securities litigation/SEC niche** for years, but I certainly did not have hundreds of different feeds set up to "watch" the blogosphere and the law as I do now. And when you watch closely every day, you start to see things you never saw before.

For instance, I just never knew how much law-related craziness happens *every day* in this world. Every day, someone tries to **buy crack cocaine with Monopoly money** and gets beaten up. Or tells someone to be quiet in a movie theater and in return gets **stabbed in the neck with a meat thermometer**. Or loses their ability to walk through a museum at the worst possible moment, and stumbles into and **damages a $130 million Picasso**. Every single day!
I also never realized that there are certain pockets of legal craziness that do not manifest themselves until you put them under the daily magnifying glass. Like airlines, where people routinely do things like eat their winning airline scratchcard (rendering it worthless) because the stewardess **doesn't have €10,000 in cash on board** to hand them during the flight. Or where flights have to be canceled because **stewardesses get into fistfights**. Or where people are surprised when they check their bag **holding a 40.95 carat emerald** and it gets lost.

I also certainly never knew that bank robbers put **so little thought** into their work. Almost every week, a bank robber is apprehended after using obviously ill-fated tactics such as "disguising" themselves with a **clear plastic bag** or relying on a completely **illegible hold-up note**.
I also never knew how broad the blogosphere was. There are blawgs on everything from "**Law and Magic**" to "**Mixed**

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Martial Arts Law" to the legal consequences of what happens on each episode of "The Office." In short, I am learning new things every day. I'll keep you posted!

2nd Circuit Says Alternative Strip Club Sites Must Be Evaluated at Time of Suit

Meeting the Sin Laws had a post yesterday linking to a 2nd Circuit opinion in which the court ruled that, in determining the constitutionality of zoning ordinances affecting "adult entertainment" businesses, the availability of alternate sites must be evaluated not just as of the time the questioned ordinance is passed, but at the time it is challenged.

In so deciding, the court vacated a 2008 decision of the Eastern District of New York, where the court analyzed the issue as of the time the ordinance was enacted and, after a bench trial, found that the plaintiff, owner of the Oasis Gentleman's Club in Smithtown, N.Y., had plenty of other places to put its business once the law made its current site verboten.

So, Long Islanders, fear not. As the case goes back down the chute to the District Court, only to advance square by square toward a (hopefully, eventually) final resolution, you will still be able to get your lap dances from "strippers who are A) over 40, B) over 150 lbs and C) on parole." God bless the federal judiciary.

Judge Carton Rules: Four-Digit Prison Sentences and One-Named 'Milk-o-holics'

Welcome back to Judge Carton Rules, where a fake judge issues rulings to spare the parties to cases in which the outcome is obvious the time and expense of further litigation. Here is today's docket:

Case 1: In the awesome commercial below, the toddler girlfriend of the E-Trade baby demands to know if "that milk-o-holic Lindsay was over" at her boyfriend's house. Lindsay "You're So Vain, You Probably Think This Commercial Is About You" Lohan says that she “has the same single-name recognition as Oprah or Madonna,” and as such, the ad has misappropriated her "name and characterization.” She's asking for $100 million.

Judge Carton's ruling: Bwaaaah haaahaaaaahaaaaaa hahhaaaaa!! Wow. Good to laugh like that once in a while. Now get out of my fake courtroom, "Lindsay," and do not return. E-Trade's future Motion to Dismiss is GRANTED.

Case 2: On Monday, the Alhambra Superior Court sentenced 35-year old serial bank robber Anthony Richard Cuellar (dubbed the "Mickey Mouse Bandit") to 1,948 years in prison for a nail salon robbery and eight bank heists in 2007.

Judge Carton's ruling: Even divided by 10, Cuellar's sentence is still 40-plus years longer than Bernard Madoff's 150-year sentence. Cuellar's future motion to modify the sentence is hereby GRANTED and the sentence is reduced by 1,800 years, down to 148 years.

LBW Follow-Up Edition: Giraffe Gaffes, Potent Perfumes and Baby Einstein

Possibly spurred on by the looming threat of Judge Carton ruling in their cases, three matters recently discussed on Legal Blog Watch have come to interesting conclusions.

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Fake Killer Giraffes: Earlier this month, a Louisiana judge issued a TRO requiring a publisher to take down a clearly satirical story about **fictional killer giraffes**. Yesterday, however, common sense was restored in the Pelican State when a district judge **struck down the TRO** and ordered the wildlife preserve that had obtained it to pay $500 in attorney fees and court costs. The court found that the story was satire and protected speech.

Allergy-Inducing Perfume: Last month, a Detroit civil servant reached a $100,000 settlement agreement with the city after her supervisor failed to address her complaints that her coworker's perfume bothered her allergies. This week, the city of Detroit **announced** that it will soon install placards in three city buildings instructing employees to refrain from "wearing scented products, including ... colognes, aftershave lotions, perfumes, deodorants, body/face lotions ... (and) the use of scented candles, perfume samples from magazines, spray or solid air fresheners ..."

Baby Einstein refunds: Back in October 2009, the Walt Disney Co. caved in to demands from the Campaign for a Commercial-Free Childhood advocacy group that it **offer refunds to all purchasers of its "Baby Einstein" videos** because, in short, the videos will not make your child into an Einstein or a genius. This month, Disney may have quietly gained some payback, however, when **CCFC was "evicted** from the Harvard-affiliated children's mental-health center in Boston that had housed and sponsored it for more than a decade" after Disney allegedly "made contact" with health center officials.

"Maybe the wall wasn't such a bad idea, after all."

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Court Issues Another Round of Sanctions for Plaintiffs' Discovery Failures

Bray & Gillespie Mgmt., LLC v. Lexington Ins. Co., 2010 WL 55595 (M.D.Fla. Jan. 5, 2010). In this ongoing insurance litigation, the district court considered the defendant's motion for sanctions and reviewed the magistrate judge's previous recommendation of dismissal sanctions and reimbursement of costs. *See Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 2009 WL 2407754 (M.D. Fla. Aug. 3, 2009). The plaintiffs claimed they were unaware of an automatic function of the business's computerized accounts management system that archived records after six months. Citing the plaintiffs' duty of preservation, failure to consult its software provider to attempt to retrieve the archived documents, and the minimal effort and expense required for retrieval, the court denied the plaintiffs' request to be allowed to cure the production defect without sanctions. The court also noted the court orders were "clear, unambiguous and frequent" and that the plaintiffs' willful, bad faith actions "evidenced a pattern of inexcusable disregard for the authority of [the] court." Thus, the court found dismissal of the claims arising from or related to the documents appropriate and ordered the plaintiffs to pay the defendant $75,000 in expenses and costs.

Defendants Escape Monetary Sanctions for "Document Dump" Due to Plaintiffs' Untimely Sanctions Motion

2010 WL 126190 (D.Kan. Jan. 8, 2010). In this discovery dispute, the plaintiffs sought monetary sanctions for costs incurred as a result of the defendants' alleged discovery violations, which included a "document dump" of the computer hard drive, and a failure to adequately prepare witnesses and produce requested financial records. The defendants argued that the computer hard drive was produced in the format maintained in the normal course of business and that, upon court instruction, a search engine was loaded to allow the plaintiffs to search the hard drive. Despite finding the defendants' cooperation efforts unacceptable, the court denied the plaintiffs' motion in relation to the "document dump" as untimely since the plaintiffs were aware of the defendants' actions fifteen months prior to filing the motion. However, the court found the plaintiffs' arguments regarding the other violations compelling and awarded $26,382.99 in costs.

"Typical Computer Usage" Resulting in Destruction of Electronic Evidence Does Not Warrant Discovery Sanctions

2010 WL 145786 (N.D.Ill. Jan. 12, 2010). In this employment litigation, the plaintiff sought sanctions up to and including default judgment based on the defendant's alleged spoliation. The plaintiff argued that the defendant failed to preserve the hard drive of a company-issued laptop by using programs on the computer to destroy metadata and overwrite files. The defendant, whose use of the computer consisted of turning on the computer, accessing the Internet and allowing an automated defragmentation program to run, claimed his actions were not prohibited and did not result in the destruction of relevant evidence. Relying on expert testimony, the court found that any programs on the laptop that would have destroyed metadata, such as antivirus

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software, were not user initiated. The court held that the defendant's destruction of any evidence was unintentional, resulting from typical computer use "rather than a that is easily recognized by forensic experts as spoliation." (Emphasis in original.) Thus, the court found sanctions were not warranted and denied the plaintiff's motion.

Court Revisits *Zubulake*, Determines Failure to Issue Written Litigation Hold Constitutes Gross Negligence

2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). In this litigation involving hedge funds, the defendants sought sanctions, alleging the plaintiffs engaged in evidence spoliation and submitted false and misleading statements in regard to document preservation efforts. Originally, the thirteen plaintiffs discussed in this case failed to issue written litigation holds when the duty to preserve arose in 2003. Seven of the plaintiffs eventually issued written holds, while six plaintiffs failed to issue a written hold at any time. After defining negligence, gross negligence and willfulness in the discovery context, the court noted that following the final opinion in July 2004, the duty to issue written litigation holds was clear. The seven plaintiffs who eventually issued written holds were found to have acted negligently, while the six plaintiffs who failed to issue any written litigation hold were found grossly negligent and subject to a permissive adverse inference sanction. The court found all thirteen plaintiffs worthy of monetary sanctions since they "conducted discovery in an ignorant and indifferent fashion," and awarded the defendants reasonable attorneys' fees and costs associated with the motion. Finally, the court ordered two of the plaintiffs to search backup tapes for the relevant time period at their expense.

Court Denies Production Request, Labeling It a "Fishing Expedition"

2010 WL 174156 (D.Puerto Rico Jan. 20, 2010). In this discrimination litigation, the plaintiffs sought sanctions and production of electronically stored information. The plaintiffs argued that the requested ESI, unlike hard copy documents, contained relevant information pertaining to authenticity, reliability and chain of custody in the form of native format files and metadata. In opposing these motions, the defendants claimed the ESI request was overbroad and would produce thousands of nonresponsive, confidential and privileged documents. Following submission of an independent report approximating the ESI production cost to be $35,000, the court held that under Fed.R.Civ.P. 26(b)(2), "$35,000 [was] too high of a cost for the production of the requested ESI in this type of action" and determined the ESI was "not reasonably accessible." Furthermore, the court found the plaintiffs' argument that e-mails are more likely to lead to inappropriate comments was not sufficient to demonstrate good cause. Rather, the court determined the plaintiffs' "request [was] merely a fishing expedition," which is contrary to the point of discovery.

Court Dismisses Non-Party's Claims of Privilege and Undue Burden

2010 WL 378113 (D.Neb. Jan. 26, 2010). In this personal injury case, the defendants requested production of a non-party's e-

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mails and previously produced privileged documents. In support of their motion, the defendants argued that the information sought was not privileged, but if it was, any claim of privilege had been waived. Recognizing the non-party's failure to take reasonable precautions to prevent inadvertent disclosure of privileged information and its lack of promptness in asserting a claim of privilege, the court found the disclosure to be "knowing and intentional" and granted the defendants' motion to compel. Turning to the production issue, the court largely disagreed with the non-party's undue burden argument with respect to the two disputed production requests. The court found that narrowing the search terms would provide the necessary limitations on the request and left open the resolution of cost-shifting pending more accurate estimates.

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