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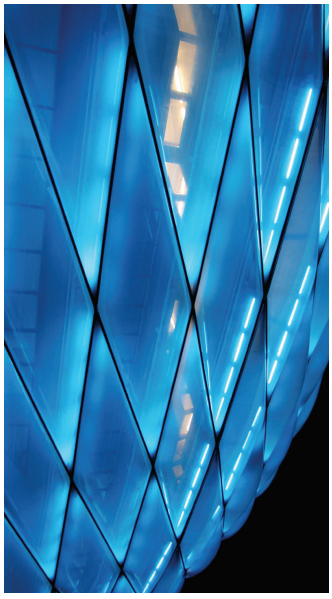
Nevada Supreme Court Cases

NC-DSH, Inc. v. Garner, 125 Nev. Adv. Op. No. 50 (October 29, 2009). Valley Hospital appeals from an order vacating a stipulated final judgment under NRCP 60(b) for fraud on the court. The fraud was committed by Lawrence Davidson, the lawyer who brought this malpractice case for the Garner family, plaintiffs below. Without the knowledge or approval of his clients, Davidson settled their case for $160,000, forged the necessary settlement papers, and disappeared with the money. Because Davidson was the Garners' agent, albeit a faithless one, the district court conditioned its order on the Garners giving Valley Hospital credit for the $160,000 against any eventual recovery they might make. Out both its $160,000 and the litigation peace it expected in return, Valley Hospital appeals.

Valley Hospital characterizes Davidson's misconduct as "intrinsic fraud." It argues that the district court should have ruled the Garners' motion untimely, because it was not filed within six months of the stipulated judgment being entered as NRCP 60(b)(3) requires; further, that the Garners should have proceeded by independent action, not motion, to set aside the judgment. The Hospital also



Inside this issue:

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Honolulu Cuts Costs With First All-Digital Election in the U.S.

Electronic has a bad rap it can't seem to shake. Across the country e-voting machines are regarded skeptically at best. Many citizen activists and some elections officials have re-embraced paper as the best and most accurate way to vote.

In May 2009, the city and county of tried a different approach ***(Cont. on page 19)***

maintains that Davidson had actual and apparent authority to settle the Garners' claims: Unlike the Garners, who chose Davidson as their lawyer, Valley Hospital and its lawyer had no choice but to deal with Davidson; it is bad policy and unfair, the Hospital argues, to visit the consequences of an opposing party's lawyer's fraud on innocent parties like Valley Hospital and its lawyer, who took all reasonable steps to document a valid, enforceable settlement. Finally, the Hospital argues that the district court erred in not finding that the Garners ratified the settlement.

We reject Valley Hospital's arguments and affirm.

Mendoza-Lobos v. State, 125 Nev. Adv. Op. No. 49 (October 29, 2009). In this appeal, we address two issues related to recent amendments to the deadly weapon enhancement statute, NRS 193.165(1), that require the district court to consider enumerated factors and state on the record that it has considered the factors in determining the length of the enhancement sentence. First, we consider whether these amendments to NRS 193.165(1) violate the separation-of-powers doctrine. Although we conclude that the amended statute violates the separation-of-powers doctrine to the extent that it requires the courts to state on the record that the enumerated factors have been considered and to make specific findings in that respect, we nonetheless elect to abide by the mandate contained therein because it serves a laudable legislative goal with respect to the length of enhancement sentences and facilitates appellate review. Second, we consider whether NRS 193.165(1) requires the district court to make findings on the record before imposing a sentence enhancement for the use of a deadly weapon. We conclude that it does and that findings must be made for each enhancement. Applying our holding to the instant case, we conclude that the district court's failure to make the required findings for two of appellant Douglas Mendoza-Lobos' enhancements does not amount to plain error warranting reversal of his conviction and sentence. Therefore, we affirm the judgment of conviction.

Citizens for Cold Springs v. City of Reno, 125 Nev. Adv. Op. No. 48 (October 15, 2009). In this appeal, we examine whether citizens have standing to challenge a land annexation if they do not own the property subject to annexation. Consistent with our prior holdings granting citizens the right to challenge land-use decisions and the language of NRS 268.668, we conclude that citizens may challenge an annexation even if the annexation does not include their property. In this, we expand our ruling in *Hantges v. City of Henderson*, 121 Nev. 319, 113 P.3d 848 (2005), to grant citizens standing to challenge land annexations. Our extension of Hantges is rooted in the plain language of NRS 268.668, which confers the right to seek judicial review to "any person" claiming to be adversely affected by an annexation. We further use this opportunity to clarify the meaning of adverse effect in the context of NRS 268.668.

Webb v. Clark County School Dist., 125 Nev. Adv. Op. No. 47 (October 8, 2009). This appeal arises out of a district court's judgment awarding appellant/cross-respondent Eric Webb, a minor, general and special damages for injuries sustained after Webb's teacher, respondent/cross-appellant Roger Phillips, placed his hand on Webb's chest during a disturbance at school. In this opinion, we address two issues of first impression: (1) whether the Paul D. Coverdell Teacher Protection Act of 2001 is an affirmative defense, and (2) whether expenses for psychological services rendered by an unlicensed person are recoverable as a matter of law.

First, we consider Webb's contention that the Paul D. Coverdell Teacher Protection Act of 2001 is an affirmative defense that must be pleaded or it is waived. Although we dismiss Webb's cross-appeal because he is not an ag-

Nevada Supreme Court Cases

grieved party, as required by NRAP 3(A)(a), we nevertheless must consider whether the Coverdell Act is an affirmative defense because respondent/cross-appellant Clark County School District (CCSD) and Phillips argue that the Act affords them immunity, which Webb counters in his combined answering brief on appeal and reply brief on cross-appeal, arguing that CCSD and Phillips waived the Act's protections by failing to raise the defense affirmatively.

In examining this issue, we are required to address the appropriate standard for reviewing a district court's decision regarding whether a defense must be affirmatively pleaded. We conclude that de novo review is appropriate. Reviewing the issue de novo, we employ the test set forth in Clark County School District v. Richardson Construction, 123 Nev. 382, 393, 168 P.3d 87, 94 (2007), and conclude that the Coverdell Act is a defense that must be affirmatively pleaded.

While we disagree with the district court's conclusion that the Coverdell Act is not a defense that must be affirmatively pleaded, we affirm the district court's judgment pertaining to liability because we conclude that CCSD and Phillips failed to raise the Coverdell Act in their pleadings, thereby waiving the defense, and the district court's conclusion as to liability is supported by substantial evidence.

Second, we consider CCSD and Phillips' challenge to the district court's damages award for psychological services rendered by David Hopper and for the emotional distress suffered by Webb. We conclude that, as a matter of law, damages for psychological services rendered in Nevada by a person who is not properly licensed in this state are not recoverable. Thus, because Hopper is not a licensed psychologist in Nevada, we reverse the district court's damages award for the psychological services he rendered.

Wyman v. State, 125 Nev. Adv. Op. No. 46 (October 8, 2009). In 2007, a jury convicted appellant Catherine Wyman of second-degree murder for the 1974 killing of her three-year-old adopted son. In this opinion, we address two of the issues that Wyman presents on appeal.

First, we address Wyman's challenge to the district court's denial of her motion to dismiss the complaint based on the pre-indictment delay. After establishing that this court will review a district court's denial of a motion to dismiss based on pre-indictment delay for an abuse of discretion, we conclude that the district court did not abuse its discretion by refusing to dismiss the complaint because Wyman failed to demonstrate that she was prejudiced by the delay and that the State intentionally delayed filing the complaint to gain a tactical advantage over Wyman. Hence, we conclude that this challenge does not warrant reversal.

Second, we consider Wyman's challenge to the district court's denial of her request for a certificate of materiality to obtain the out-of-state mental health records of the State's primary witness, under Nevada's Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, codified in NRS 174.395 through 174.445. In concluding that Nevada's Uniform Act applies to subpoenas duces tecum for material books and records that include an ancillary request for the appearance of an out-of-state witness, we further conclude that the term "material," as used in NRS 174.425(1) (which authorizes a criminal defendant in one jurisdiction

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to subpoena a "material witness" from another jurisdiction to testify in a criminal matter), refers to evidence that has some logical connection with the facts of consequence or the issues presented in the case. Turning to the merits of Wyman's challenge, we conclude that the district court abused its discretion by denying Wyman's request for a certificate of materiality to obtain the State's primary witness's out-of-state mental health records. Because we conclude that this error was not harmless, we reverse Wyman's judgment of conviction.

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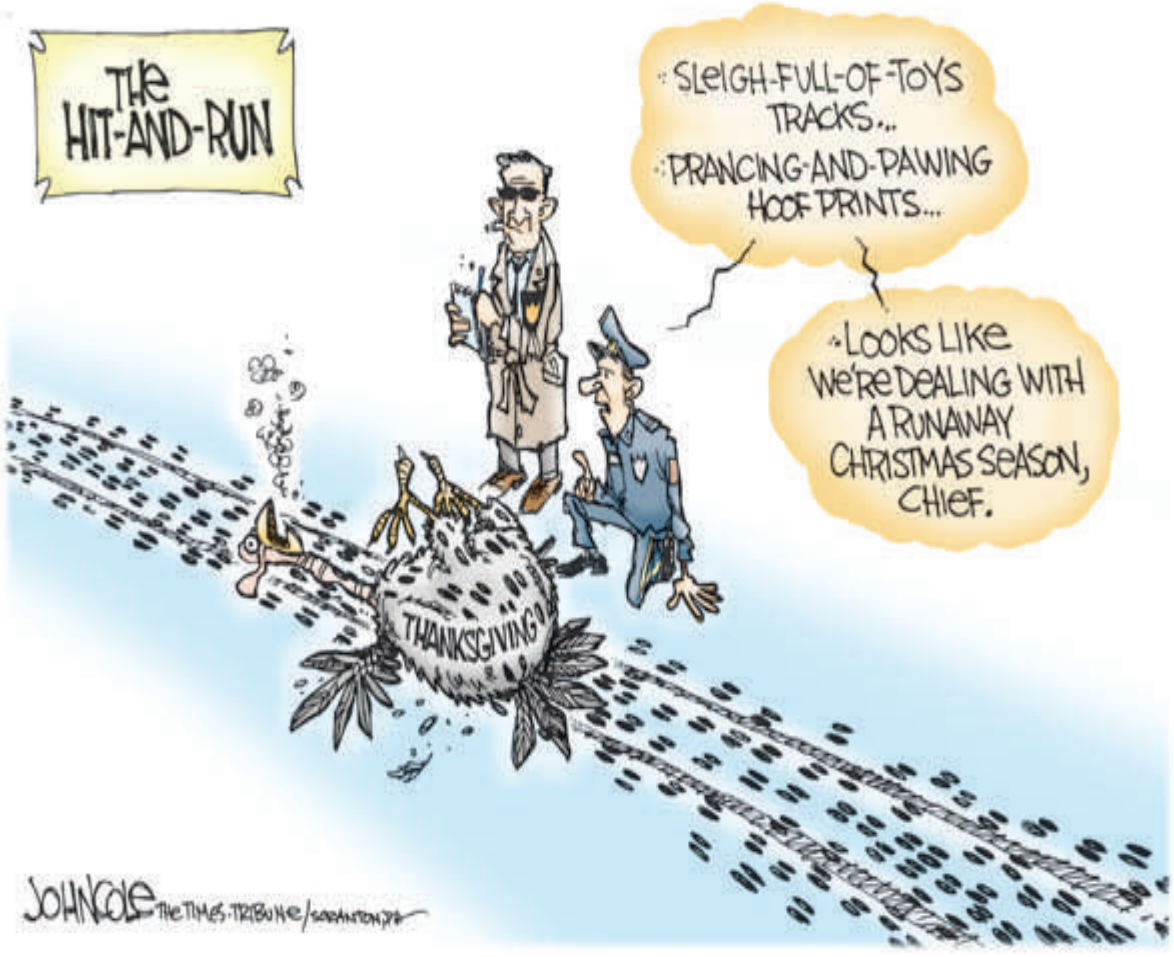
Contracts: Throughout the Universe, From the Beginning of Time

Inspired by a odd contract phrase that has suddenly popped up in a few places, the WSJ had an interesting story yesterday on the lengths to which lawyers are willing to go to be thorough in the agreements they draft.

The Terms of Use on Starwars.com tell users that they give up the rights to any



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content submissions "throughout the universe and/or to incorporate it in other works in any form, media or technology now known or hereafter developed."

Starwars.com is hardly alone here. According to a post on the THR, Esq. blog, the phrase is spreading rapidly throughout the legal universe, as a search of the SEC's Edgar database "turned up 560 examples of the phrase in the last couple years alone, including in CBS CEO Les Moonves' employment agreement."

For the record, a spokeswoman from Lucasfilm, which runs the Starwars.com Web site, says "to be honest with you, we have had very few cases of people trying to exploit rights on other planets."

One of my favorites in this area, which I still remember doing a double-take over when I saw it for the first time when I was practicing law, is the release form that releases all claims against a potential defendant "from the beginning of time" until the date of the agreement.

The WSJ article quotes the CEO of a company benefiting from such a release as stating, "we're trying to figure out how to cover every possible base as quickly as possible. When you start at the beginning of time, that is pretty clear."

Transactional lawyers, what are some other examples of "too-far-reaching" contract language?

E-Mail Not Protected by 4th Amendment, Judge Says

Update: Orin Kerr says he misread the opinion. Read his correction here.
The Fourth Amendment's protection against unreasonable searches and seizures does not apply to e-mail, a federal judge has ruled. The judge's reasoning would seem to sound a warning bell for anyone -- lawyers in particular -- not only who use Web-based e-mail accounts, but also who store documents of any kind online in "the cloud."

Orin Kerr, professor at George Washington University Law School, highlights the ruling and quotes from it at The Volokh Conspiracy, even though he says he disagrees with it.

The ruling from U.S. District Judge Michael W. Mosman in Oregon addresses the question of whether the government must notify someone when it obtains a search warrant to access the person's Web-based e-mail account. This case appears to have involved Google's Gmail.

The Fourth Amendment, Mosman writes, creates a "strong privacy protection for homes and the items within them in the physical world." But e-mail, he says, resides outside a person's home.

When a person uses the Internet, however, the user's actions are no longer in his or her physical home; in fact he or she is not truly acting in private space at all. The user is generally accessing the Internet with a network account and computer storage owned by an ISP like Comcast or NetZero. All materials stored online, whether they are e-mails or remotely

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stored documents, are physically stored on servers owned by an ISP. When we send an e-mail or instant message from the comfort of our own homes to a friend across town the message travels from our computer to computers owned by a third party, the ISP, before being delivered to the intended recipient. Thus, "private" information is actually being held by third-party private companies.

Acknowledging that the law is unclear on the question of whether and to what extent the Fourth Amendment protects Internet communications, Mosman ties his decision to Google's privacy policy, which makes clear that Gmail users have no expectation of privacy, he concludes.

Here, the defendants voluntarily conveyed to the ISPs and exposed to the ISP's employees in the ordinary course of business the contents of their e-mails. The Google privacy policy explicitly states that Google will share personal information of its subscribers when it has "a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to ... satisfy any applicable law, regulation, legal process or enforceable governmental request." Google Privacy Policy, http://www.google.com/privacypolicy.html (last visited May 13, 2009). The court understands that other ISPs have similar privacy policies. ... Thus subscribers are, or should be, aware that their personal information and the contents of their online communications are accessible to the ISP and its employees and can be shared with the government under the appropriate circumstances.

Much of the reluctance to apply traditional notions of third party disclosure to the e-mail context seems to stem from a fundamental misunderstanding of the lack of privacy we all have in our e-mails.

Some people seem to think that they are as private as letters, phone calls, or journal entries. The blunt fact is, they are not.

Kerr disagrees with the decision. "I think e-mails are protected under the Fourth Amendment despite the third-party doctrine," he says, point to an article he wrote for the Stanford Law Review in which he makes this case.

The judge's reasoning would seem to extend beyond e-mail to any documents stored online. If there is no protection for an e-mail stored on the Gmail servers, it follows that there would be no protection for a document stored on the Google Docs servers. We can only hope that the case is appealed and that the appellate panel sides with Kerr.

Legal Believe It or Not

Among the truth is stranger than fiction items in today's news:

An assistant attorney general in South Carolina was fired after police found him in his SUV parked in a cemetery in the company of a stripper, a Viagra pill and various sex toys. The 66-year-old former state legislator explained to police that he was on an innocent lunch break and

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always kept the Viagra and sex toys in his car "just in case."

The attorney for a New Jersey man on trial for murder is employing a rather weighty and certainly novel defense. His client, he contends, was too fat to commit the crime.

Whoever shot the victim would have had to be able to quickly run up and then back down a flight of stairs. At 5 feet 8 inches and 285 pounds, the unhealthy 62-year-old could never have pulled it off, his lawyer asserts.

A jury this week convicted a judge in Washington state of patronizing a prostitute and threatening to kill another man who talked about having sex with him. The conviction means that Michael Hecht will no longer serve as a Superior Court judge.

But the court's presiding judge and the state attorney general are at odds over whether Hecht gets to keep collecting his paycheck. No doubt, the state's prostitutes are hoping he does.

Finally, we have this news flash of interest to estate-planning lawyers. Be sure to advise your clients that they can now buy cut-rate caskets at Wal-Mart and Costco. Casket prices range from $999 for the "Dad Remembered" model and $1,699 for the oddly named "Executive Privilege" model up to the top-of-the-line Sienna Bronze Casket for $3,199.

Psycho-Acoustic -- or Just Psycho?
Beatles fans did not know whether to gasp or cheer when a little-known music site, BlueBeat.com, began to sell the Fab Four's remastered catalog for just 25 cents a song. After all, it was less than two months ago that fans were let down when rumors proved false that the Beatles would be available on iTunes. If the Apple Computer folks couldn't get the Apple Records all-stars, how did BlueBeat do it?

Simple. BlueBeat did it through psycho-acoustic simulation. If you don't know what that is, you're not alone. On Tuesday, EMI -- which controls rights to the Beatles' recordings in conjunction with Apple Corp. -- filed a federal copyright lawsuit against BlueBeat and its parent company, Media Rights Technologies, alleging that they are conducting "one of the largest piracy operations on the Internet." Yesterday afternoon, a judge agreed, ordering a halt to BlueBeat's sales, at least temporarily.

BlueBeat's defense is that it did not copy the Beatles' recordings. Instead, as a report on Ars Technica explains it, it claims it created a new "audio-visual work" from the original sound recordings by running them through its psycho-acoustical process. In a response to the complaint filed the next day, BlueBeat said, "Plaintiffs are not likely to succeed on the merits because Defendants' website markets and sells an entirely different sound recording than that copyrighted by Plaintiffs."

Even more bizarre is the exchange of e-mails between RIAA General Counsel Steven Marks and MRT head Hank Risan that preceded the lawsuit. After the

songs appeared on BlueBeat, Marks e-mailed Risan, "What's going on?" Risan replied that he owned the copyright for the songs he was selling. "I authored the sound recordings that are being used by psycho-acoustic simulation," he wrote. "I hope this satisfies your concerns." Ars Technica picks it up there:

Marks shot back a reply from his iPhone. "Thanks, Hank. What is psycho-acoustic simulation?"

Risan adopted a dismissive tone, saying that he had explained it to the RIAA back in 2001 when he was at their DC headquarters showing off MRT's streamripping protection tech. "Psychoacoustic simulations are my synthetic creation of that series of sounds which best expresses the way I believe a particular melody should be heard as a live performance."

At his blog Copyrights & Campaigns, Ben Sheffner dismisses BlueBeat's defense as a bunch of bunk. Copyright law, he says, "does not permit a company to re-record a recording by some new technical means -- even a 'psycho-acoustic simulation' device -- and then sell the 'new' recordings." Or as Dallas copyright lawyer Scott Mackenzie told Wired: "They're hosed."

Ten States Impose a Statutory 'Duty to Rescue'

One of the memorable moments of torts class in law school comes when the "duty to rescue" is discussed. In short, the common law is that a person who witnesses a crime or other emergency that is placing another person at risk of grave physical harm has no "duty to rescue" or to do anything whatsoever. Thus, to paraphrase my torts professor, no matter how easy it would be for a 200-pound, 8th-degree black belt in karate to rescue a child being beaten up by a 7-year-old girl, the black belt can walk on by under the common law (with certain **exceptions**, such as when the would-be rescuer is an emergency worker or the victim is your own child).

The **Volokh Conspiracy** blog notes in **this post**, however, that several states have enacted statutes that impose a duty to rescue crime victims or report crimes. These statutes apply "only when the person actually believes that he is (or at least might well be) witnessing a crime or emergency. If he is reasonably mistaken about what's going on, he'll (theoretically) be off the hook," Volokh writes.

The 10 states identified by Volokh with "duty to rescue" statutes are California, Florida, Hawaii, Massachusetts, Minnesota, Ohio, Rhode Island, Vermont, Washington and Wisconsin. Most of the statutes, however, impose only a very limited to duty to call the police if you witness a serious crime such as murder or rape, and can summon help without endangering yourself.

NINTH CIRCUIT CASES

Burke v. County of Alameda, No. 08-15658 (November 10, 2009). This case involves the conflict between the right of families to be free of arbitrary governmental interference and the legitimate role of the state in protecting children from abuse. In 2005, B.F., the fourteen-year old daughter of Melissa Burke and Clifton Farina, ran away from home. One week after she returned, Mark Foster, an Alameda County police officer, met with B.F. to discuss formally the circumstances surrounding her runaway. During the interview, B.F. reported that David Burke, her stepfather, had physically and sexually abused her. Although Foster had no warrant and made no attempt to contact Farina, B.F.'s biological father, he took B.F. into protective custody because he believed that B.F. was in imminent danger of serious bodily injury.

Melissa and Farina brought suit against Foster and the County of Alameda under 42 U.S.C. §1983, alleging, *inter alia*, that (1) Foster interfered with their constitutional right of familial association by removing B.F. without a protective custody warrant, and (2) the County caused their injury by failing to train its officers on the need to procure such warrants. Melissa and Farina appeal the district court's grant of summary judgment in favor of Foster and the County. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm as to Foster, and vacate the judgment as to the County.

Norse v. City of Santa Cruz, No. 07-15814 (November 3, 2009). "Plaintiff-Appellant Robert Norse was ejected from two meetings of the Santa Cruz City Council, one in 2002 and one in 2004. He filed this 42 U.S.C. § 1983 action against the City and its Mayor and Council members alleging violation of his First Amendment rights. In a 2004 unpublished, nonprecedential disposition, we unanimously upheld the validity of the Council rules that were being enforced at the time of the ejections. *Norse v. City of Santa Cruz*, No. 02-16446, 2004 WL 2757528 (9th Cir. Dec. 3, 2004) ("*Norse I*"), at 1. The rules authorize removal of "any person who interrupts and refuses to keep quiet . . . or otherwise disrupts the proceedings of the Council." We observed that the rules are materially similar to the regulations we upheld in *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990).

There is no doubt that ordering Norse's ejection in 2004 was a reasonable application of the rules of the Council. The videotape shows that Norse was engaged in a parade about the Council chambers protesting the Council's action, and his conduct was clearly disruptive.

With respect to the March 12, 2002 meeting, the behavior that prompted Norse's ejection was his giving a Nazi salute in support of a disruptive member of the audience who had refused to leave the podium after the presiding officer ruled that the speaker's time had expired, and that the portion of the Council meeting devoted to receiving oral communications from the public had ended. Two members of the audience in the rear were creating a disruption. When the Mayor told the speaker at the podium that her time had expired, the speaker was visibly unhappy with the ruling, and Norse directed a Nazi salute in the presiding officer's direction. The salute was obviously intended as a criticism or condemnation of the ruling.

Accordingly, we agree with the district court that the defendants did not violate Norse's constitutional rights. In addition, even if, in retrospect, we were to hold that Norse's First Amendment rights were violated, it would not

NINTH CIRCUIT CASES

have been clear to a reasonable person in the Mayor and Council's position that the ejection was unlawful, given the difficult circumstances and threat of disorder that was presented by the disruptions.

We also agree with the district court that Norse's refusal to comply with the ejection order established probable cause for his arrest. Even if the ejection itself violated Norse's rights, there would have been no basis for a reasonable police officer to believe that Norse was defying anything other than a lawful order.

Gonzaleszv. Brown, No. 07-56107 (0ctber 30, 2009). We consider the significance of a prosecutor's stated inability to recall the reason for exercising a peremptory strike to remove an African-American potential-juror, pursuant to the second step of the *Batson* inquiry. We hold that in view of the relatively low number of peremptory challenges that the prosecutor exercised against African-American jurors, the prosecutor's ability to justify her other peremptory challenges with specificity and to the state court trial judge's satisfaction, as well as the fact that two African-American jurors remained on the jury and a third was a prospective juror, we cannot say that the California Court of Appeal's denial of Gonzalez's *Batson* claim was contrary to Supreme Court precedent or an objectively unreasonable application of such precedents.

United States v. Rivera-Alonzo, No. 08-10081 (October 26, 2009). A district court does not abuse its discretion in refusing to give an instruction on the lesser included offense, where, as here, a rational jury could not have convicted the defendant of the lesser-included offense without finding the element that would convert the lesser offense into the greater offense. Also, given the record in this case, the district court did not commit clear error in finding on sentencing that the defendant's conduct was motivated by the victim's official status. Accordingly, we affirm.

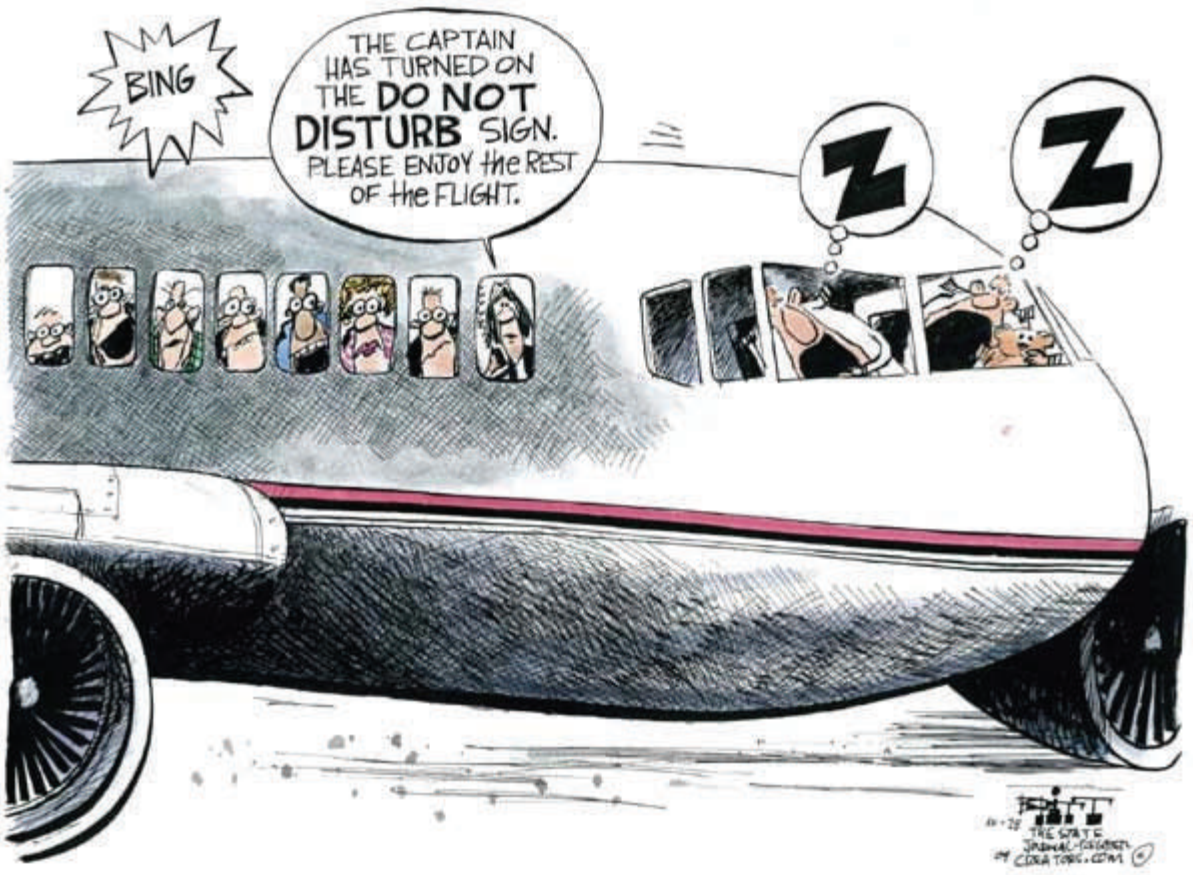
Barker v. Riverside County Office of Educ., No. 07-56313 (October 23, 2009). Susan Lee Barker was employed by the Riverside County Office of Education as a Resource Specialist Program teacher for students with disabilities. She brought suit against her employer based on constructive termination arising out of an intolerable work environment. Barker's complaint alleged that her supervisors at the Riverside County Office of Education retaliated against her after she voiced concerns that the Riverside County Office of Education was not complying with requirements of federal and state law in how it provided educational services to its disabled students. The district court dismissed Barker's lawsuit for lack of standing. Barker argues that she has standing to sue the Riverside County Office of Education pursuant to the anti-retaliation provisions of both section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act. We agree with Barker and therefore reverse and remand.

John Doe # 1 v. Reed, No. 09-35818 (October 22, 2009). Washington's Secretary of State and Public Records Officer and Intervenors, Washington Coalition for Open Government and Washington Families Standing Together, appeal a decision of the district court granting Plaintiffs, Protect Marriage Washington and two individual signers of the Referendum 71 petition, a preliminary injunction prohibiting the State from making referendum petitions available in response to requests made under Washington's Public Records Act.

NINTH CIRCUIT CASES

On July 28, 2009, Plaintiffs filed this action, seeking to enjoin the State from publicly releasing documents showing the names and contact information of the individuals who signed petitions in support of Referendum 71. Count I of the complaint alleges that, as applied to referendum petitions, the PRA violates the First Amendment because the PRA is not narrowly tailored to serve a compelling government interest. Count II alleges that, as applied to the Referendum 71 petition, the PRA is unconstitutional because "there is a reasonable probability that the signatories . . . will be subjected to threats, harassment, and reprisals."

We are presented with the novel questions of whether referendum petition signatures are protected speech under the First Amendment and, if so, what level of scrutiny applies to gov- ernment action that burdens such speech. For the purposes of our analysis, we assume, as did the district court, that the act of signing a referendum petition is



speech, such that the First Amendment is implicated.[9] *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (noting that when a litigant challenges a statute on First Amendment grounds, the threshold question is whether the statute burdens expression the First Amendment protects). Even assuming that speech is involved, however, we conclude that the district court applied an erroneous legal standard when it subjected the PRA to strict scrutiny.

NINTH CIRCUIT CASES

The district court's analysis was based on the faulty premise that the PRA regulates anonymous political speech. The signatures at issue, however, are not anonymous. First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition. Second, each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers. Third, any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise. In fact, the PRA provides to the contrary. Fourth, Washington law specifically provides that both proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process. Thus, the district court's finding that the speech at issue is anonymous is clearly erroneous. And, because it was based on that faulty premise, the district court's application of anonymous speech cases requiring strict scrutiny was error.

As in *O'Brien*, we assume for the purposes of our analysis that signing a referendum petition has a "speech" element such that petition signing qualifies as expressive conduct. We also assume that the PRA's public access provision has an incidental effect on referendum petition signers' speech by deterring some would-be signers from signing petitions. Given these assumptions, we conclude that intermediate scrutiny applies to the PRA.

Under intermediate scrutiny, as articulated in *O'Brien*, application of the PRA to referendum petitions is constitutional if the PRA is within the constitutional power of the government to enforce, it furthers an important government interest unrelated to the suppression of free expression, and the incidental restriction on alleged First Amendment freedoms is no greater than necessary to justify the interest.

Parth v. Pomona Valley Hosp. Med. Cntr., No. 08-55022 (October 22, 2009). When an employer changes its shift schedule to accommodate its employees' scheduling desires, the mere fact that pay rates changed, between the old and new scheduling schemes in an attempt to keep overall pay revenue-neutral, does not establish a violation of the Fair Labor Standards Act's overtime pay requirements.

Lone Star Security and Video, Inc. v, City of Los Angeles, No. 07-56521 (Ocotber 21, 2009). The City of Los Angeles routinely towed vehicles owned by Lone Star Security & Video, Inc. for violating an ordinance that Lone Star contends was preempted by the California Vehicle Code. Lone Star brought a claim under 42 U.S.C. § 1983, arguing that because the ordinance was invalid under state law, the City violated Lone Star's due process rights under the United States Constitution. We must decide whether this claim makes out a federal constitutional violation. We also address whether due process required the City to provide notice to Lone Star, a chronic violator of the ordinance, each time it towed one of Lone Star's vehicles.

In short, Lone Star's claim is premised on an untenable notion of due process. It is a tenet of our federal system that state constitutions are "not taken up into the 14th Amendment" such that federal courts may strike down a statute as inva-

NINTH CIRCUIT CASES

lid under state law. *Pullman Co. v. Knott*, 235 U.S. 23, 25 (1914) (Holmes, J.). It is likewise "axiomatic that 'for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.' " *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting *Hilsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). Therefore, we reverse the district court's grant of summary judgment on Lone Star's invalid-ordinance claim and instruct the district court to enter summary judgment on this claim in favor of the City.

In sum, the City's interests in preventing vandalism, abating a nuisance and deterring Lone Star's practices outweigh Lone Star's uniquely low interest in additional, individualized notices. The towings here were "necessary and appropriate" and thus did not violate Lone Star's due process rights.

United States v. $186,410.00 in U.S. Currency, No. 07-56549 (October 20, 2009). This difference lies behind the civil forfeiture case before us. The case concerns $186,416.00 in U.S. currency seized by officers of the Los Angeles Police Department during a search of the United Medical Caregivers Clinic, a non-profit medical marijuana dispensary owned by United Medical Caregivers Clinic, Inc. Although the LAPD secured a state court warrant for the search, the Department failed to inform the issuing court of extensive evidence that UMCC may have been operating in accordance with California's medical marijuana laws. The state court subsequently approved the release of the seized currency to the United States, which then initiated a federal civil forfeiture action against it. UMCC presented its own claim to the currency. On UMCC's motion the District Court suppressed the currency as evidence, holding the search to have been illegal. The District Court held, however, that the government had sufficient evidence, independent of the currency itself and of any other evidence tainted by the illegal search, to initiate the forfeiture action against the currency.

We conclude that the evidence relied upon by the District Court was itself tainted by the illegal search and should be suppressed, and that without the suppressed evidence the government lacked probable cause to connect the defendant currency to a violation of federal law. We thus reverse the judgment of the District Court and remand for further proceedings.

Sprint PCS Assets v. City of Palos Verde Estates, No. 05-56106 (October 14, 2009). The City of Palos Verdes Estates appeals the grant of summary judgment in favor of Sprint PCS Assets, L.L.C.. We must decide whether the district court erred in concluding that the City violated the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in various sections of U.S.C. titles 15, 18, and 47), when it denied Sprint permission to construct two wireless telecommunications facilities in the City's public rights of way. Specifically, we must decide (1) whether the City's denial is supported by substantial evidence, as required by 47 U.S.C. § 332(c)(7)(B)(iii), and (2) whether the City's denial constitutes a prohibition on the provision of wireless service in violation of 47 U.S.C. §§ 253(a) and 332(c)(7)(B)(i)(II). Because the City's denial is supported by substantial evidence, and because disputed issues of material fact preclude a finding that the decision amounted to a prohibition on the provision of wireless service, we reverse and remand.

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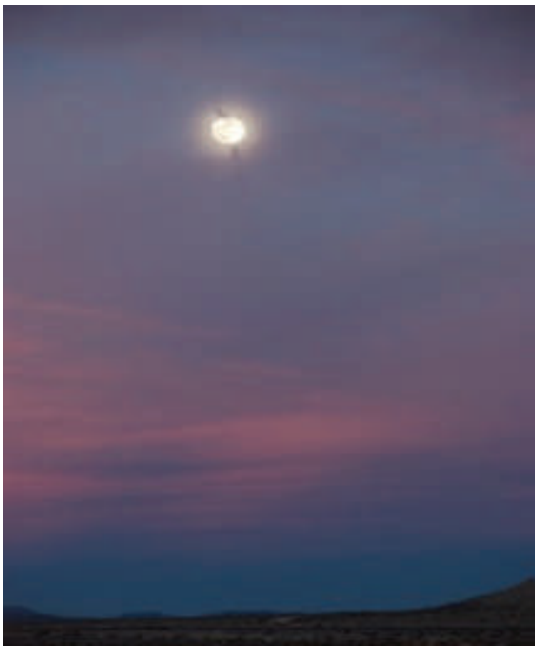
Padgett v. Wright, No. 08-16720 (October 14, 2009). Generally, denials of summary judgment are not appealable. *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 693-94 (9th Cir. 1992). The Supreme Court has recognized a narrow exception for a district court's denial of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The reasoning behind this departure from the general rule is that qualified immunity is "an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526.

Although a pretrial appeal of an order denying qualified immunity normally divests the district court of jurisdiction to proceed with trial, the district court may certify the appeal as frivolous and may then proceed with trial, as the district court did here.



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Court Determines E-Mail Sent Through Company Server Is Not Protected by Attorney-Client Privilege

Leor Exploration & Prod. LLC v. Aguiar, 2009 WL 3097207 (S.D. Fla. Sept. 23, 2009). In this business litigation, the plaintiffs objected to the special master's ruling regarding two exhibits – both e-mails – in which the first was classified as attorney-client privileged and the second as protected work product. Discussing the first exhibit, the court found there was no reasonable expectation of privacy because the e-mail was sent by the defendant (a former employee of the plaintiffs) through the plaintiffs' server. The plaintiffs' employee handbook stated that all electronic communications were owned by the plaintiffs and that no expectation of privacy existed. Thus, the court overruled the special master's report and found no attorney-client privilege existed with the first exhibit. The court also granted the plaintiffs' objection regarding the second exhibit because it was not prepared in anticipation of litigation and could not therefore be protected work product.

Court Denies Production of 17 Gigabytes of Data Using the Federal Rules of Civil Procedure's "Proportionality Standard"

High Voltage Beverages, LLC. v. Coca-Cola Co., 2009 WL 2915026 (W.D.N.C. Sept. 8, 2009). In this trademark infringement litigation, the plaintiff filed a motion to compel 17 gigabytes of data, which amounted to about 1.5 million pages. The defendant did not object to producing the documents but argued that a review was unnecessary as it believed every document related to the merits of the underlying action had already been produced.

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Applying Fed.R.Civ.P. 26(b)(2)(C)'s proportionality standard, the court determined the plaintiff's request would be unreasonably duplicative of earlier efforts and outweighed its likely benefit because the plaintiff had ample opportunity to obtain the information, which in all likelihood, it had already obtained. The court further held that the defendant must extend to the plaintiff's counsel the opportunity to search data on the defendant's computers at the defendant's place of business.

Court Finds Waiver of Privilege Citing Party's Failure to Reasonably Rectify the Production Error

United States v. Sensient Colors, Inc., 2009 WL 2905474 (D.N.J. Sept. 9, 2009). In this cost recovery action filed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, the defendant filed a motion to compel production, alleging the plaintiff waived its privilege and work product objections. Subsequent to its production of approximately 45,000 documents, the plaintiff identified 214 as inadvertently produced. The plaintiff argued the joint discovery plan in place precluded a privilege waiver. Rejecting that argument, the court noted that the plan did not excuse the parties from meeting the requirements of Federal Rule of Evidence 502(b). Separating the documents into three different sets, the court conducted its Rule 502 analysis. Regarding the first set, the court found the plaintiff's production was inadvertent and that the plaintiff took reasonable efforts to rectify the error after responding to the defendants' letter describing the error within eight work days. However, the court found the plaintiff failed to reasonably rectify the error with respect to the last two document sets, and thus held the privilege was waived.

Court Dismisses "Stripped" Metadata Argument Relying on Expert's Testimony

United States v. Haymond, 2009 WL 3029592 (N.D. Okla. Sept. 16, 2009). In this criminal case, the defendant renewed his request for access to unlawful images allegedly contained on his computer that were seized by the government. The defendant argued the hard drive was "stripped" of metadata prior to the mirror image creation, which prevented him from preparing a forensic defense. The defendant also requested redacted copies of the images to support subpoenas to the Web sites where the images originated. Relying upon the defendant's expert's testimony that he was "99.99-percent sure" no metadata would be located, the court found no basis for the defendant's claim that metadata had been "stripped." The court further ordered the defendant to identify the images with embedded Web site information in advance of trial, at which point the government is to prepare redacted images for the defendant's use in conjunction with the subpoenas.

Court Holds Parties Accountable for Failure to Timely Produce Documents Stored on a "Shared" Directory

Wixon v. Wyndham Resort Dev. Corp., 2009 WL 3075649 (N.D. Cal. Sept. 21, 2009). In this litigation, the parties filed several motions regarding the special master's report. The report found the defendants' violation of a previous production agreement was harmless but still held the defendants responsible for 75 percent of the fees related to the special master proceeding. In particular, the plaintiffs objected to the special master's finding that the defendants' noncompliant production was harmless. Addressing the timeliness of the production, the court upheld the report with

respect to 47 of the documents because they did not contain any keywords selected by the plaintiffs. However, the court rejected the portion of the report that pertained to the defendants' failure to produce documents stored on a "shared" directory in a timely manner, noting the defendants should have noticed a flaw in the custodian-based search when a group of potentially relevant documents had no custodian. Based on this failure, the court issued sanctions, which included requiring the defendants to bear expenses incurred by the plaintiffs in preparing the motion to strike and the full cost of the special master's fees.

Court Imposes Sanctions for Destruction of Information Contained on BlackBerry® Smartphones

Se. Mech. Servs., Inc., v. Brody, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009). In this ongoing computer fraud and abuse litigation, the plaintiff requested sanctions alleging the laptops and BlackBerry smartphones belonging to the defendants were wiped of data. The defendants argued that all evidence was preserved on the servers and that e-mails were produced in hard copy from the servers. Relying on explanations provided by computer forensics experts that the "wiped" state of the BlackBerry smartphones was attributed to intentional and deliberate actions, the court disagreed with the defendants' arguments and held that sanctions were appropriate. Given the nature of the destroyed evidence, including personal e-mails, telephone records, text messages and calendar entries, the court determined the evidence was likely unfavorable to the defendants and therefore issued an adverse inference instruction.

Court Grants Preclusion Sanctions for Pattern of Stubborn Defiance Regarding E-Discovery

Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 2009 WL 2407754 (M.D. Fla. Aug. 3, 2009). In this ongoing insurance litigation, the defendants sought dismissal sanctions or preclusion of evidence pertaining to a key business interruption loss claim. The defendants argued the plaintiffs' violation of three court orders to compel production, misrepresentations that discovery was complete and production of 188 pages of key documents after the close of discovery warranted sanctions. In opposition, the plaintiffs argued they had no reason to know the production was incomplete. Finding that none of the court's previous efforts were effective to defer the plaintiffs from "continuing their pattern of stubborn defiance," the magistrate judge determined severe sanctions were warranted. In cataloging the plaintiffs' discovery failures, the magistrate judge noted that "no reasonable person could conclude" the plaintiffs' failure to timely produce documents was justified and that the plaintiffs' conduct was intended to deceive and prevent discovery. The magistrate judge also discussed the attorneys' role in the discovery misconduct, noting lawyers owe a duty of candor to the court and a duty to deal honestly and fairly with opposing counsel. Accordingly, the magistrate judge granted the motion for preclusion sanctions and determined the plaintiffs and counsel were jointly and severally responsible for the defendants' expenses and costs.

Court Orders Production of Litigation Hold Letters upon Preliminary Finding of Spoliation

Major Tours, Inc. v. Colorel, 2009 WL 2413631 (D.N.J. Aug. 4, 2009). In this discrimination litigation, the plaintiffs sought production of the

defendants' two litigation hold letters. The plaintiffs argued the letters were relevant to their examination of the defendants' document production and whether spoliation occurred. In opposition, the defendants claimed the plaintiffs failed to demonstrate evidence of spoliation and thus the letters were protected from discovery. Noting that litigation hold letters are in general privileged and not discoverable unless spoliation occurs, the court found a preliminary showing of spoliation existed in this case. The court inferred that relevant evidence was lost given the failure to timely ask a number of pertinent custodians to preserve evidence in addition to the significant time lapse that occurred between the duty to preserve and the issuance of the first litigation hold letter. Accordingly, the court granted the plaintiffs' production request, limiting it to those portions of the letters pertaining to preservation.

Court Orders Return of Inadvertently Produced E-Mail Pursuant to Fed.R.Evid. 502

Coburn Group, LLC v. Whitecap Advisors LLC, 2009 WL 2424079 (N.D. Ill. Aug. 7, 2009). In this breach of an oral contract dispute, the defendant requested the return of a half-page long e-mail the defendant claimed was protected work product. In opposition, the plaintiff made several arguments including that the e-mail was not protected and that, if it was, the inadvertent production waived protection. After determining the e-mail constituted work product, the court considered the waiver issue under Fed.R.Evid. 502. The court interpreted the "inadvertent disclosure" portion of Rule 502 as asking whether the party intentionally produced a privileged or work product protected document and found the defendant did not intend to produce the e-mail. Next, the court considered prior case law regarding what constituted "reasonable steps" to prevent an inadvertent disclosure. The court discussed the defendant's thoroughly documented review process and noted that in this case only three documents slipped through the review of 72,000 document pages. Finding that Rule 502 would have no purpose if the inadvertent production of a single privileged document deemed the document review process unreasonable, the court granted the defendant's motion and ordered the plaintiff to return all copies of the e-mail.

Court Issues Sanctions for Preservation and Litigation Hold Failures

Green v. McClendon, 2009 WL 2496275 (S.D.N.Y. Aug. 13, 2009). In this breach of contract dispute, the plaintiff sought sanctions alleging the defendants failed to preserve and produce electronically stored information (ESI). Finding the duty to preserve arose no later than the lawsuit's filing, the court determined the defendants' counsel failed to meet discovery obligations by neglecting to issue a litigation hold and properly search for responsive documents. Despite these failures, the court declined to issue an adverse inference instruction since there was no proof that the defendants' actions created an unfair evidentiary imbalance, noting the absence of evidence that any relevant information was destroyed. However, the court held other sanctions were appropriate, including further discovery of ESI and an award of attorneys' fees and costs to be allocated among the defendants and counsel once the "respective blame-worthiness" was determined.

Court Foresees Day When a Lack of Internal E-Discovery Software Will not be Well Received

Capitol Records, Inc. v. MP3tunes, LLC, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009). In this

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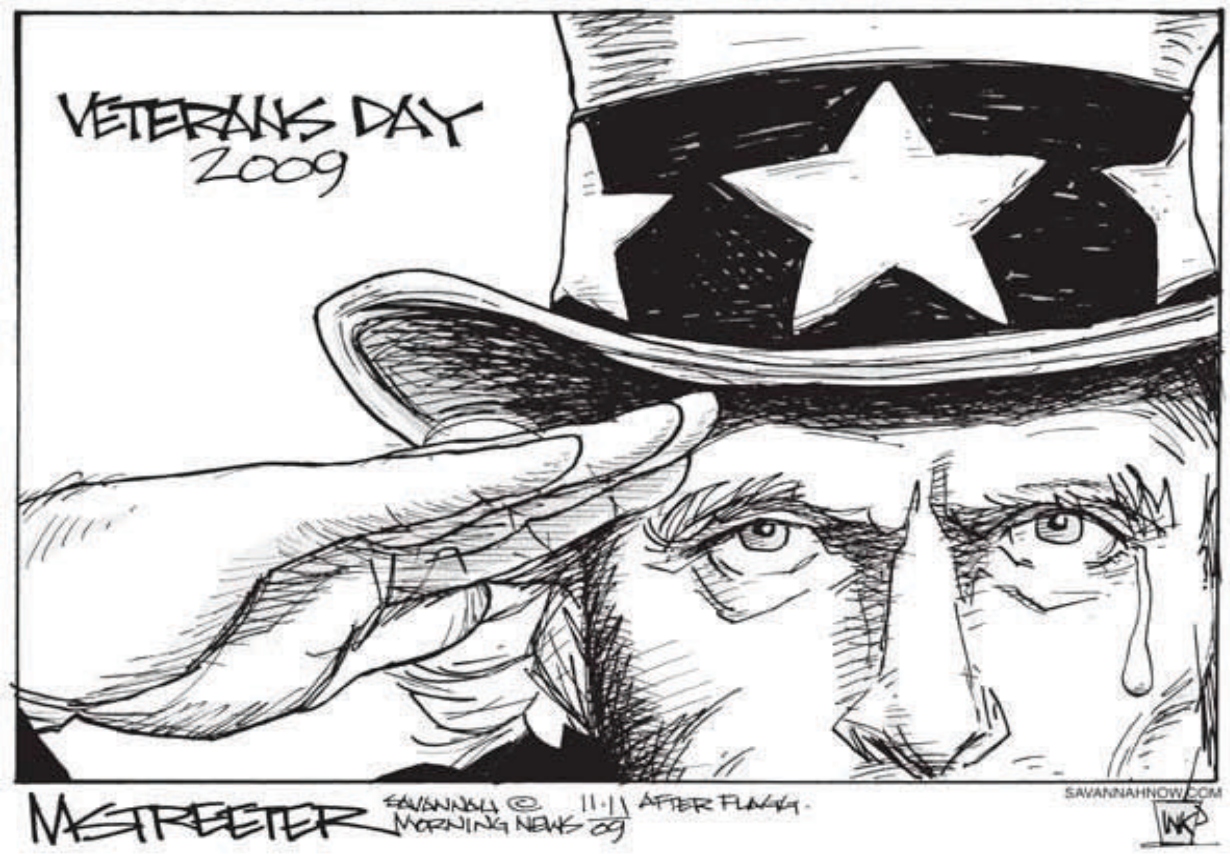
copyright infringement litigation, the court addressed several discovery disputes it claimed could have been avoided if the parties had "focused their attention on discussing their differences, rather than drafting dueling epistles." Addressing the defendant's issues, the court did not agree with the defendant that producing and searching files would be unduly burdensome. Thus the court ordered the defendant to conduct thirty searches proposed by the plaintiffs, which included additional custodians. The court then addressed the plaintiffs' arguments that the discovery sought by the defendant was unduly burdensome in part because they were unable to conduct centralized e-mail searches without relying on an outside service provider. Noting that the day will come when the burden argument based on a large organization's lack of internal e-discovery software will not be well received, the court found that e-discovery case law had not yet developed to this point. Therefore, the court upheld the plaintiffs' argument and concluded that the e-mail files the defendant sought to search were not reasonably accessible. Finally, the court considered the specific document requests from the defendant to the plaintiffs that were at issue, and restricted the search terms and production scope as appropriate for each request.



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for electing members of its Neighborhood Boards. Instead of e-voting machines, residents voted either online or by phone. No paper ballots were available. The all-digital election -- which may be the first of its type in the United States -- didn't come about because the government sought to advance technology. The move was driven by a more pedestrian reason: budget cuts.

Although participation was low, city officials said eliminating paper ballots slashed typical election costs by half.

Digital Pilot

In Oahu, 33 Neighborhood Boards form the Neighborhood Commission. Those elected to the commission serve their constituents by advising other government entities about what is going on in Oahu's neighborhoods.

Bryan Mick, community relations specialist for the Neighborhood Commission Office, said the agency had to come up with a more efficient way to hold its elections."We did this at the direction of the City Council," Mick said. "They cut our budget to encourage us to go this route."

But Mick had been toying with the idea since he was brought onboard five years ago. A vendor called Kids Voting USA had caught Mick's attention. For eight years, Kids Voting USA has organized digital mock elections for local schools. The mock election results happen to mirror closely the actual election results, so Mick approached the company about crafting a pilot project for the Neighborhood Commission Office.
"They said it would be pretty simple to adapt software [for the Neighborhood Commission elections]," Mick said, "so we did a pilot project with them where we still did the paper ballots, but you also got an online code that you could use. They were integrated so if you did one, it negated the other. We scanned everything that came back in, and if you'd already voted online a red light would flash and we'd put that one aside."

Satisfied with the pilot project, the Neighborhood Commission Office revisited it when the City Council's budget ruling came down. But the office needed to partner with an organization that could quickly roll out a Web and telephone interface that was secure enough to put voters and local officials at ease.

The office found a San Diego-based company called Everyone Counts, which for the last decade, helped conduct digital elections in the UK and for military personnel and expatriates. The office hired Everyone Counts and began planning for a groundbreaking election.

"It's the first [election] in the U.S. that was all-digital," said Lori Steele, head of Everyone Counts. "That means they offered our computer solution and our telephone voting solution, and there was not a paper channel provided."

Much of what has held back e-voting -- and by association, digital elections -- is the issue of security. E-voting machines and their lack of paper trail, as well as proprietary code, have earned the reputation -- justly or not -- of being easy targets for hackers. Steele said her company's security protocol is like the two-key system required to launch a nuclear missile. In fact, Steele describes the security as "military grade."

"When we open our election, [password] keys are provided to a group of election officials," she

said. "That can be, depending on the government and what their election rules are, people from different parties or people in the election office, or a combination thereof. The election begins, the voters vote, and each of the ballots is encrypted and stored securely. At the end of the election, the encrypted ballots are removed from the Internet and put on a clean PC. But they still aren't accessible by any one individual until each of the election officials comes together in a quorum and provides their unique passwords to the system. That allows for the decryption and counting of the votes. At the end of the election, the voter can verify that their vote was received and counted by going to a special Web site." Everyone Counts also offers what it calls its Open Code Advantage. Steele said anyone who requests to do so can audit the software's code.

Three individuals had an encryption key in the Honolulu election, according to Mick. One representative was from the Neighborhood Commission Office, another was from the city clerk's office and the third was from the League of Women Voters.

Each voter received a mailer containing a unique nine-digit password. This password, combined with the voter's last four Social Security number digits, provided access to either a visual Web ballot or an audio touchtone phone ballot.

The Results Are In

The Neighborhood Commission Office's solution sounds simple and would seemingly have encouraged large numbers of people to vote. However, according to Oahu news station KITV, voter turnout was down 83 percent from 2007.

Reception to the digital election was "lukewarm," Mick admitted. "Participation rates were low," he said, citing the 10 percent voter turnout. "We don't have a particularly high participation rate even with paper ballots. I would suspect our demographic voter is probably older. I think this kind of bore out that conclusion."

Though turnout was low, there was a bright spot. The all-digital election cost half of the conventional election in 2007 -- about $90,000, according to Mick.

That savings was due partly to the fact that only about a third of the areas had contested races. Had more races been contested, the costs would have escalated, Mick said. "So theoretically it could have been much more expensive," he said. However, Mick pointed out that digital ballots are less expensive to scale up than paper ballots because postage costs "skyrocket" when the number of candidates and voters increases.

So are digital elections ready for a statewide or federal arena?

"When you ask if this is ready for primetime -- federal elections -- the answer is yes," Steele said. But small steps should be taken first, she cautioned. "The main focus should initially be overseas and military voters," she said.

Mick was a bit more conservative in his assessment. "I think it was a step forward technology-wise," he said, adding, "I think the general population is getting more comfortable doing things online."

Whether that includes voting on a larger stage remains to be seen.