# The Public Lawyer

STATE BAR OF NEVADA

## Nevada Supreme Court Cases

***Vega v. State***, 126 Nev. Adv. Op. No. 33 (August 12, 2010) In this opinion, we address three issues on appeal.

First, we consider whether appellant Bernardo Vega's constitutional right to confrontation under the Confrontation Clause, Crawford v. Washington, 541 U.S. 36 (2004), and Melendez-Diaz v. Massachusetts, 557 U.S.___, 129 S. Ct. 2527 (2009), was violated. We conclude that Vega's constitutional right to confrontation was violated when the district court erroneously admitted the testimonial statements from an unavailable expert witness without the witness previously being subjected to cross-examination. However, we conclude that the error did not affect Vega's substantial rights and did not amount to plain error because the testifying expert offered her own opinions independent of those of the unavailable expert witness.

Second, we consider whether the district court properly admitted evidence that the child victim made two suicide attempts during the time period when she was subjected to sexual abuse. Vega asserts that this evidence was irrelevant and intended to appeal to the emotions of the jury. We disagree. The State introduced evidence regarding the victim's suicide attempts to demonstrate that Vega had subjected the victim to ongoing and repetitive sexual abuse, and to show the effect and harm the abuse had on the victim. Therefore, we conclude that it was not manifest error for the district court to admit this evidence.

Third, Vega challenges the sufficiency of the evidence to convict him on counts 4, 5, and 9 of sexual assault with a minor under the age of 14 because the record does not show that the child victim was under the age of 14 at the time of the sexual assaults. We conclude that based on the evidence presented at trial, a rational jury could have reasonably determined that the victim was under the age of 14 at the time the sexual as-

**Public Lawyers Section**

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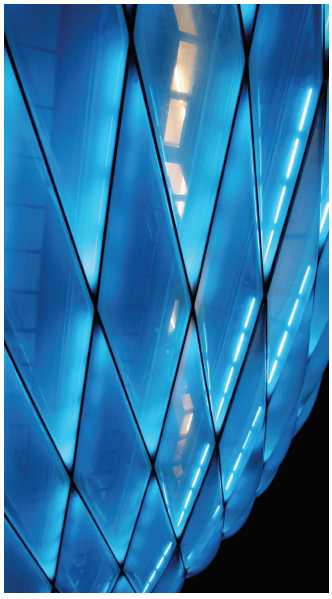

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saults charged in counts 4 and 5 occurred, but not when the sexual assault charged in count 9 occurred. Thus, we conclude that there was sufficient evidence to support Vega's convictions on counts 4 and 5, but that there was insufficient evidence to support his conviction on count 9.

***Schiff v. Winchell***, 126 Nev. Adv. Op. No. 32 (August 12, 2010) In this appeal, we consider whether the district court erred in determining that the date of the original judgment on a jury verdict, rather than the date of an amended judgment entered on remand, was the appropriate date for determining the rate of prejudgment interest. We conclude that the district court did not err and that the appropriate date for determining prejudgment interest is the date the original judgment was entered.

***George L. Brown Ins. Agency, Inc. v. Star Ins. Co.***, 126 Nev. Adv. Op. No. 31 (August 12, 2010) In this appeal, we consider what approach Nevada should adopt in interpreting indemnity provisions in insurance contracts when an indemnitee seeks to be indemnified on claims arising out of the indemnitee's own negligence. We conclude that Nevada should adopt the majority rule regarding indemnification; therefore, the contract must expressly or explicitly reference the indemnitee's own negligence before an indemnitee may be indemnified for his or her own negligence. Consequently, we conclude that the district court erred in granting summary judgment in favor of respondents Star Insurance Company, Meadowbrook, Inc., and Meadowbrook of Nevada, Inc. (collectively, Star), because there are genuine issues of material fact concerning fault that must be decided before the indemnification clause at issue here may be enforced

***Quinlan v. Camden USA, Inc.***, 126 Nev. Adv. Op. No. 30 (July 29, 2010) Audrey Quinlan sued Camden USA, Inc. for damages after she tripped on a sidewalk in its apartment complex. She lost at trial and was ordered to pay Camden $41,976 in attorney fees and costs. The district court based its award on the offer of judgment Camden made under NRS 17.115 and NRCP 68, which Camden sent by facsimile. Although Quinlan's lawyer received the offer of judgment, he had not expressly consented to fax service as NRCP 5(b)(2)(D) requires. It was error to shift fees and costs based on Camden's offer of judgment because NRS 17.115, NRCP 5(a), and NRCP 68(a) all require an offer of judgment to be served in compliance with NRCP 5 and Camden's was not.

With the exception of the fee award, no other reversible error appears. Accordingly, we affirm the judgment but reverse the award of fees and costs and remand so the district court can calculate and award Camden its taxable costs under NRS 18.020(3).

***Boorman v. Nevada Memorial Cremation Society, Inc.***, 126 Nev. Adv. Op. No. 29 (July 29, 2010) The United States District Court for the District of Nevada certified ten questions relating to causes of action for the alleged negligent handling of a deceased person's remains.[1] The first three questions generally ask us to decide who may assert a cognizable emotional distress claim for the alleged negligent handling of a deceased person's remains and to determine the necessary requirements to assert such a claim, without distinguishing between the defendant actors involved in this action. Because our answer necessarily depends upon identifying the alleged negligent actor, we must re-craft those questions to focus on the two actors involved—a mortuary and the county coroner. As a result of this re-crafting, we do not view it necessary to separately answer the questions

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relating to a county coroner's duty not to lose, misplace, or misappropriate the deceased person's organs. In our view, the question of whether a county coroner owes duty not to lose, misplace, or misappropriate a deceased person's organs is consumed within the question of whether the county coroner owes a duty not to negligently handle a deceased person's remains.

***Carrigan v. Commission on Ethics***, 126 Nev. Adv. Op. No. 28 (July 29, 2010) In this appeal, we consider whether the Nevada Commission on Ethics' censure of an elected public officer for alleged voting violations under NRS 281A.420(2)(c) violates the First Amendment.[2] NRS 281A.420(2)(c) sets forth one of the legal standards for determining whether a public officer must abstain from voting on a particular matter, based on the officer's "commitment in a private capacity to the interests of others." NRS 281A.420(8) defines this commitment to include four specific prohibited relationships between a public official and others and describes a fifth catchall definition as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." The catchall definition of a prohibited relationship by a public official in NRS 281A.420(8)(e) confronts the First Amendment on appeal.

We first conclude that voting by public officers on public issues is protected speech under the First Amendment. Because NRS 281A.420(2)(c) directly involves the regulation of protected speech by a public officer in voting, we next determine that the definitional statute NRS 281A.420(8)(e) must be strictly scrutinized under a First Amendment overbreadth analysis. Applying a strict scrutiny standard, we conclude that NRS 281A.420(8)(e) is unconstitutionally overbroad in violation of the First Amendment, as it lacks necessary limitations to its regulations of protected speech. Consequently, the district court erred in its interpretation of NRS 281A.420(8)(e) and its application to NRS 281A.420(2)(c), and thus, we reverse the district court's order.

***City of Reno v. Citizens for Cold Springs***, 126 Nev. Adv. Op. No. 27 (July 29, 2010) In this appeal, we consider whether the City of Reno violated Nevada law by conditionally approving amendments to the Reno Master Plan prior to the Truckee Meadows Regional Planning Commission's decision that the proposed amendments conformed to the Truckee Meadows Regional Plan. We also consider whether the City violated a former provision in the Reno Municipal Code (RMC) by failing to make a sufficient finding about plans for water services and infrastructure before passing a zoning ordinance that corresponded with the proposed master-plan amendments. We conclude that the City complied with Nevada law because the master-plan amendments only became effective after the Regional Planning Commission determined that the proposed amendments conformed to the regional plan. We further conclude that the City violated the RMC because the findings it made prior to approval of the zoning ordinance about planned water services and infrastructure deferred the subject to a later date and were too general in nature to satisfy the mandates of the code. Therefore, we affirm in part and reverse in part.

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## A Bomb, You Say? Well Can We Interest You in a Toaster?

Nothing pleases me more on a Friday morning than being able to add to the official **Legal Blog Watch Checklist for Bank Robbers**.

Today's addition is inspired by the story of Mark Smith, a 59-year-old would-be bank robber from **Watsonville, Cal**., a super-cute little town that I know I've been to at some point in my life, but can't remember why. As reported by **Gawker** and the **Santa Cruz Sentinel**, Smith strolled into a bank last week, claiming to have a bomb in his backpack and demanded $2,000 to "pay his friend's rent."

Somehow, the bank manager convinced Smith that, rather than rob the bank, he should simply apply for a loan. So, she went to "**get the papers**" for him to fill out, and had him sit down and make himself comfortable. Little did Smith know that, as he was dotting his "i"s, the cops were on the way. From this vignette, I'd say there are two checklist-worthy takeaways:

> **Loftier Goals -- If you're gonna go through the trouble of robbing a bank and expose yourself to federal charges, my God man, ask for more than $2,000.**
>
> **Don't Get Upsold -- Stick to your guns (pun intended). You went in there expecting to walk out with cash and not be burdened by the constant pressure of personal debt that so many Americans are suffering in these tough economic times. Instead, you were persuaded by some slick-talking banker to sign right there on the dotted line, likely without even understanding the terms of the deal. Elizabeth Warren would be mortified.**

While we at LBW may believe that Smith could use a little help in developing his robbery techniques, he was judged even more harshly by Keith Olbermann, who gave Smith third place in his "**World's Worst**" segment the other night.

## Thoughts on 'Rita's Golden Rules for E-Mail'

Via a **post yesterday** on the *Texas Lawyer*'s Work Matters blog I found an interesting list of "Golden Rules for E-Mail." The 10-point list, created by **Rita Gunther McGrath**, offers several helpful suggestions about e-mail, some of which are highlighted below. My comments are in italics:

2. No e-mail should ever be longer than one screen of information. If it means scrolling down, you're not being concise. [*Agree. The size of a "screen" varies these days, of course, since some people use iPhones and BlackBerrys almost exclusively, but if your e-mail is busting out of an entire computer screen then you need to trim it down immediately*].

3. One subject per e-mail. When I've dealt with it, I want to delete it or file it and I can't do that if your e-mail contains 10 action items, one of which is going to hang out there for six months. *[Agree. In general, I find that people will respond and take the action you are seeking if you keep it simple. If it is a multi-part, complicated request, it often gets pushed to the "get around to it when I have more time to deal with this" pile.]*

4. E-mail is the wrong place for emotional outbursts. *[For sure, because although you will soon be calm about whatever the subject was, your e-mail outburst will live forever].*

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8. Because you sent it doesn't mean I got it. Because I got it doesn't mean I read it. Because I read it doesn't mean I understood it. Because I understood it doesn't mean that I agree with you. Check for closure on your communications. *[Well said.]*

10. Don't send e-mail when a short phone call would do the job better. *[Disagree. Just send me a short e-mail that I can deal with when I'm ready!]*

## The Alphabet According to 'Google Instant'

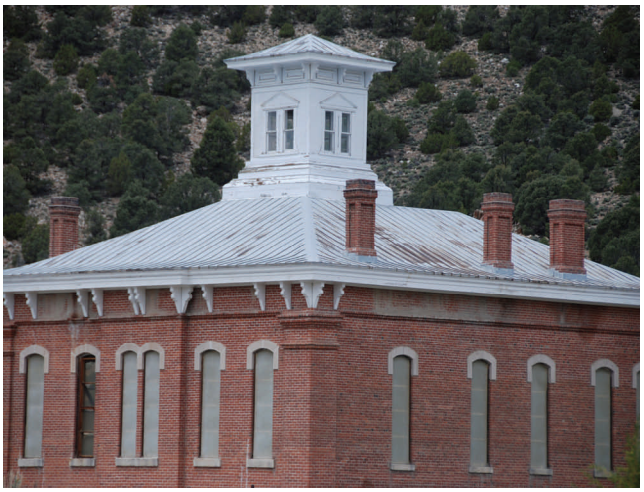
Google made a splash this week with the introduction of Google Instant. As Google **describes it**, "Google Instant is a new search enhancement that shows results as you type." Basically, even if you type just one letter into the search box, Google offers you a list of searches (and results) that it believes you may be headed toward.

On the **Slaw.ca blog**, Simon Fodden has compiled a complete alphabet of what you get at the top of your Google Instant results if you type in just one letter:

A is for Amazon
B is for Best Buy
C is for Craigslist
D is for Dictionary.com
E is for eBay
F is for Facebook
G is for Gmail
H is for Hotmail
I is for Ikea
J is for JetBlue
K is for Kohl's
L is for Lowe's
M is for MapQuest
N is for Netflix
O is for Orbitz
P is for Pandora
Q is for quotes at BrainyQuote
R is for REI
S is for Sears
T is for Target
U is for US Postal Service
V is for Verizon
W is for Weather.com
X is for Xbox.com
Y is for Yahoo
Z is for Zillow

When I tried this, my own results varied in an interesting way. I am based out of the DC area, and, on my computer at least, "D is for DC Metro" and "K is for Kings Dominion," which is a DC-area theme park. I guess this means that Google Instant knows where you are located and uses that to anticipate your searches and desired results? That theory is supported in this **article**, but can anyone out there shed additional light on whether this is the case?

Also -- how long until Google introduces "channels" on Google Instant? You could search on the "Google Instant: Law" channel, for example and it would provide you with law-related responses: "A is for Ambrogi; B is for Baker Botts" -- and so on.



# NINTH CIRCUIT CASES

***Anderson v. City of Hermosa Beach***, No. 08-56914 (September 9, 2010) We address a question of first impression in our circuit: whether a municipal ban on tattoo parlors violates the First Amendment. Although courts in several jurisdictions have upheld such bans against First Amendment challenges, *see, e.g., Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 659-61 (N.D. Ill. 2008); *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253-55 (D. Minn. 1980); *State v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986); *People v. O'Sullivan*, 409 N.Y.S.2d 332, 333 (App. Div. 1978); *State v. White*, 560 S.E.2d 420, 423-24 (S.C. 2002); *Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 72 Va. Cir. 388, 390 (Cir. Ct. 2007), we respectfully disagree. We hold that tattooing is purely expressive activity fully protected by the First Amendment, and that a total ban on such activity is not a reasonable "time, place, or manner" restriction.

***Delia v. City of Rialto***, No. 09-55514 (September 9, 2010) Appellant Nicholas B. Delia, a firefighter, brought this 42 U.S.C. § 1983 action against the City of Rialto, the Rialto Fire Department, Rialto Fire Chief Stephen C. Wells, two Rialto Fire Department Battalion Chiefs, Mike Peel and Frank Bekker, and a private attorney, Steve Filarsky. Delia alleges violations of his constitutional rights arising during a departmental internal affairs investigation. While being represented by counsel and interrogated at headquarters, he was ordered to go directly to his home while being followed by Battalion Chiefs Peel and Bekker in a City vehicle. He was ordered that when he arrived at his home he was to enter his home while in full view of the Battalion Chiefs, retrieve several rolls of recently purchased insulation, and bring them out of the house and place them in his front yard for inspection by the Battalion Chiefs. Delia was told earlier in the interview that if he failed to do this he could be found to be "insubordinate" and subject to disciplinary action including termination.

This order was given a few minutes after Delia and his counsel refused to consent to a warrantless search of his home by Battalion Chief Peel. The district court granted summary judgment in favor of all For the reasons discussed below, we conclude that Delia's constitutional right under the Fourth Amendment of the United States Constitution to be protected from a warrantless unreasonable compelled search of his home was violated. However, because we also conclude that this right, under these or similar facts, was not clearly established at the time of this constitutional violation, we affirm the district court's order granting qualified immunity to Stephen Wells, Mike Peel, and Frank Bekker.

For the reasons discussed below, we conclude that Delia's constitutional right under the Fourth Amendment of the United States Constitution to be protected from a warrantless unreasonable compelled search of his home was violated. However, because we also conclude that this right, under these or similar facts, was not clearly established at the time of this constitutional violation, we affirm the district court's order granting qualified immunity to Stephen Wells, Mike Peel, and Frank Bekker. We also affirm the district court's grant of summary judgment to the City on Delia's Monell claim, but reverse the district court's grant of qualified immunity to Steve Filarsky and remand for further proceedings.

***Mohamed v. Jeppsen Dataplan, Inc.***, No. 08-15693 (September 8, 2010) This case requires us to address the difficult balance the state se-

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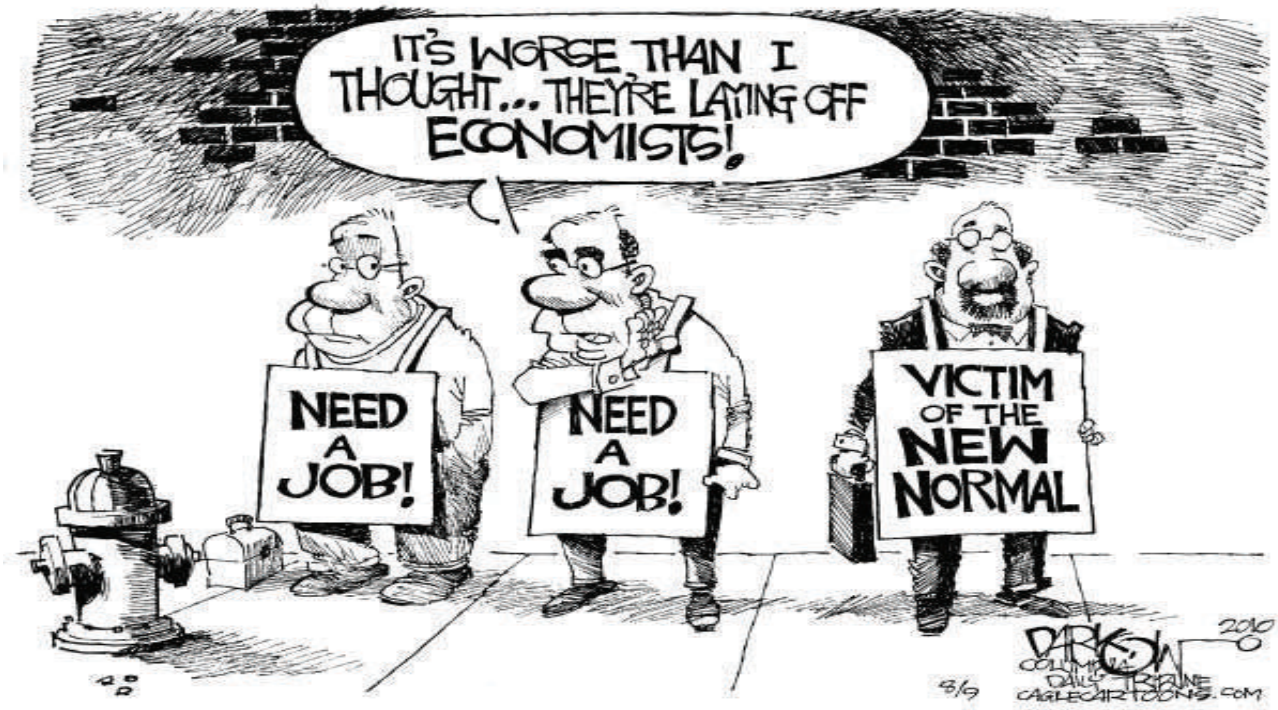
crets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor all of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court's admonition that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake." United States v. Reynolds, 345 U.S. 1, 11 (1953). After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs' action must be dismissed. Accordingly, we affirm the judgment of the district court.

***Equal Employment Opportunity Comm'n v. Prospect Airport Servs., Inc.***, No. 07-17221 (September 3, 2010) This is a sexual harassment case in which a male employee was the victim of a female co-worker.

***Nader v. Cronin***, No. 08-16444 (September 1, 2010) Independent candidates for president, denied access to Hawaii's ballot for the 2004 election, appeal the district court's holding that the relevant provisions governing such access do not violate the Equal Protection Clause or the First and Fourteenth Amendments. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.




***California State Foster Parents Ass'n v. Wagner***, No. 09-15025 (August 30, 2010) We hold that it does. The district court correctly permitted the Foster Parents' action to go forward because the Children's Welfare Act grants foster care providers a federal statutory right to payments that cover certain enumerated costs, a right redressable under § 1983. As we explain more fully below, this conclusion flows from

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the controlling Supreme Court and Ninth Circuit authority governing when federal statutes create federal rights enforceable through 42 U.S.C. § 1983.

***U.S. Equal Employment Opportunity Comm'n v. UPS Supply Chain Solutions***, No. 08-56874 (August 27, 2010) The Equal Employment Opportunity Commission filed suit under the Americans with Disabilities Act alleging that UPS Supply Chain Solutions failed to provide reasonable accommodations for Mauricio Centeno's deafness because UPS did not provide him with a sign language interpreter for certain staff meetings, disciplinary sessions, and training. The district court granted summary judgment to UPS on all claims. The EEOC appeals the district court's decision. We find that there are genuine issues of material fact as to whether UPS unlawfully discriminated against Centeno by failing to make reasonable accommodations. We therefore reverse and remand.

***Millender v. County of Los Angeles***, No. 07-55518 (August 24, 2010) Plaintiffs Augusta Millender, Brenda Millender, and William Johnson filed this suit under 42 U.S.C. § 1983 against the County of Los Angeles, the Los Angeles County Sheriff's Department, and several individual members of the Sheriff's Department, alleging violations of their civil rights. Their complaint arose from a search pursuant to a warrant obtained by Detective Curt Messerschmidt of the Los Angeles County Sheriff's Department and executed under the supervision of Sergeant Robert Lawrence. Messerschmidt and Lawrence appeal from the district court's determination that they were not entitled to qualified immunity with respect to the alleged overbreadth of the search warrant. Because the challenged sections of the warrant were "so lacking in indicia of probable cause as to render official belief in its existence unreasonable," *Malley v. Briggs*, 475 U.S. 335, 345 (1986), we affirm.

***Price v. Stossel***, No. 09-55087 (August 24, 2010) Journalists and publishers risk a defamation action when they put words in a public figure's mouth. The New Yorker magazine learned this to its chagrin in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). The issue in this case is whether there are similar risks when a network television program broadcasts a statement actually made by a public figure, but presents the statement in a misleading context, thereby changing the viewer's understanding of the speaker's words.

The plaintiff public figure in this case is Dr. Frederick Price, a minister known for his television evangelism. Defendants are American Broadcasting Companies, Inc. and others involved in the production of the news program "20/20," including correspondent John Stossel, producer Glenn Ruppel, and televangelist critics Ole Anthony and Trinity Foundation, Inc., who allegedly provided the original footage of Price to the network. The primary statement in question comes from a film clip of Price delivering a sermon, in which Price says: "I live in a 25-room mansion. I have my own $6 million yacht. I have my own private jet, and I have my own helicopter, and I have seven luxury automobiles." ABC broadcast the Clip suggesting that Price was boasting about his own wealth, which is substantial. In fact, however, the Clip was excerpted from part of a longer sermon in which Price was speaking from the perspective of a hypothetical person who, though wealthy, was spiritually unfulfilled. After ABC broadcast a retraction acknowledging the mistake, this lawsuit ensued.

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**Court Denies Sanctions in Favor of Commendation for Discovery Efforts**

*Chapman v. Gen. Bd. of Pension and Health Benefits of the United Methodist Church, Inc.*, 2010 WL 2679961 (N.D. Ill. July 6, 2010). In this litigation arising from claimed violations of the Americans with Disabilities Act, the plaintiff sought punitive sanctions for discovery noncompliance alleging the defendant engaged in a "flagrant violation of both the letter and the spirit of Discovery rules" by unreasonably delaying production of electronic copies and accompanying metadata of requested documents previously produced in a hard copy. Denying the request for sanctions, the court affirmed the defendant's argument that no duty existed to also produce electronic copies when the initial request merely sought "documents" - making no mention of digital information. Instead the court stated the fact that the defendant "ultimately agreed to do so and did is the occasion not for sanctions, but for some measure of commendation." After disposing of the motion, the court further admonished the plaintiff for prematurely seeking sanctions under Fed.R.Civ.P. 37 in a brief that lacked analysis, was devoid of supporting case law and asked for documents "concededly obtained without any court intervention."

**Court Approves Recommendation to Enlist Third Party Vendor for Document Review and Production**

*Multiven, Inc. v. Cisco Sys. Inc.*, 2010 WL 2813618 (N.D. Cal. July 9, 2010). In this antitrust litigation, the court adopted the magistrate judge's recommendation directing the plaintiff and counter-defendant to retain a third party vendor for assistance with further data collection, search, review and production. Having earlier rejected the idea of using an outside vendor, the producing parties instead relied on approximately five attorneys to review a "giant mass of information" without using search terms. Concerned by the looming discovery deadline and anticipating "no end in sight" to the process, the court agreed that "something must be done." The court approved the order recommending that a vendor "assist with this increasingly perilous situation," with the defendant paying half of the costs as it so offered. Noting that "there are several more [discovery] problems on the horizon," the court additionally recommended granting full authority to a previously appointed special master to help the parties resolve any further discovery issues, such as choosing a third party vendor if the parties could not reach an agreement, crafting a search protocol and establishing deadlines.

**Court Imposes Sanctions for Failure to Disclose "Secret E-Mails" and Violating Attorney-Client Privilege**

*Meridian Fin. Advisors LTD v. Pence*, 2010 WL 2772840 (S.D. Ind. July 12, 2010). In this business litigation, the defendants sought dismissal sanctions alleging one of the plaintiffs engaged in deceptive discovery practices, which included withholding 250,000 "secret e-mails" obtained from the defendants' hard drives, and working with a co-defendant and a former employee of the defendants to gather privileged information. The plaintiff argued it did not disclose the e-mails' existence until formal requests were made to "lock the Defendants into sworn testimony" and that adequate disclosures were made via the indications it possessed "e-mails, documents and corporate minutes." Dismissing these arguments, the court determined the plaintiff's actions violated Fed.R.Civ.P. 26. The court also held the plaintiff violated attorney-client privilege by failing to disclose to the defendants that it had seen potentially privileged e-mails

and accessed personal communications. Finding dismissal an inappropriate sanction given the lack of prejudice suffered by the defendants, the court ordered the plaintiff to pay all attorneys' fees and costs and precluded the plaintiff's use of the ESI.

**Order Stipulates Acceptable Formats, Methods and Required Content of ESI Preservation**

*In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, 2010 WL 2901798 (C.D. Cal. July 20, 2010). In this products liability litigation, the court entered a preservation order based on the parties' submissions regarding preservation methods and categories of content to be preserved for production and use in the ongoing multidistrict litigation. Among the ESI preservation requirements, the parties were ordered to retain existing documents in their existing form or in a reasonably usable format that would not result in loss of content or usability, including the preservation of metadata and e-mail attachments. Additionally, all subsequently created ESI was required to be retained in original or native format, or copied to an alternative storage device or media. The order also provided instructions for the identification of custodians and specified data that was not required to be preserved, such as "system" data created by the normal operation of computer systems. Finally, the order identified the permissible modifications and alterations of documents generally resulting from the routine maintenance and operation of computer systems.

**Court Denies Terminating Sanctions Absent Clear Proof of Spoliation**

*Phillip M. Adams & Assoc., L.L.C. v. Winbond Elec. Corp.*, 2010 WL 2977228 (D. Utah July 21, 2010). Previously in this intellectual property litigation, the magistrate judge granted the plaintiff's motion for sanctions in part and ordered both parties to produce documents for a determination of the degree of prejudice to the plaintiff. Examining the plaintiff's evidence of prejudice, the court found that the produced materials did not prove the defendant destroyed documents noting "[t]he fact that evidence is not present does not mean it was spoliated." Moving to the defendant, who failed to preserve and produce its original source code as ordered, the court found this failure again highlighted the lack of an information retention policy. The court nevertheless found the evidentiary value of the developer's comments from the original source code to be mere speculation - not the proverbial "smoking gun" as claimed by the plaintiff. Declining to issue terminating sanctions, the court opted to allow the jury to consider the plaintiff's arguments regarding why the original source code should be available and draw their inferences.

**Court Orders Entry of Clawback Provision to Control Discovery Costs**

*Rajala v. McGuire Woods, LLP*, 2010 WL 2949582 (D. Kan. July 22, 2010). In this securities, inter alia, litigation, the defendant moved for an entry of a clawback provision that would govern inadvertent disclosure and protect against privilege waiver, arguing the provision was necessary to "prevent contentious, costly, and time consuming discovery disputes." The plaintiff argued that, in light of Fed.R.Evid. 502, a clawback agreement was not justified and that such an agreement would prevent arguments relating to care and reasonableness if documents were inadvertently produced. Despite the plaintiff's arguments and the parties' inability to reach an independent agreement, the court found that "this case is precisely the type of case that would benefit from a clawback provision." Based on the substantial amount of ESI involved and the defendant firm's duty to pro-

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tect its extensive client base, the court determined that the risk of inadvertent disclosure was high and that "[s]uch a provision will permit the parties to conduct and respond to discovery in an expeditious manner, without the need for time-consuming and costly pre-production privilege reviews" - an outcome the court deemed consistent with the intent behind the recent privilege waiver amendments and rules.

**Court Affirms Dismissal with Prejudice for Intentional Wiping of Hard Drives**

*Peal v. Lee*, 2010 WL 3001338 (Ill. Ct. App. 1 Dist. July 30, 2010). In this defamation action, the plaintiff appealed the circuit court's dismissal with prejudice following his failure to comply with discovery requests and intentional destruction of evidence. On appeal, the court affirmed the circuit court's order based on review of testimony from the defendants' computer forensic expert that indicated the plaintiff obtained a new hard drive and "used seven different data 'wiping' programs to permanently delete data" from his personal computer just days prior to its surrender. Forensic investigation of the personal computer also indicated the plaintiff failed to produce as many as five external storage devices that may have contained discoverable information. In affirming the order's severity, the court berated the plaintiff for seeking "to cover up his electronic tracks by subterfuge" and making an argument of "pure pettifoggery" on appeal, characterizing his actions as "the personification of bad faith" and a "deliberate, contumacious and unwarranted disregard of the court's authority." Finally, the court denied the defendant's request for monetary sanctions finding dismissal an adequately severe sanction.