# The Public Lawyer

STATE BAR OF NEVADA

## Nevada Supreme Court Cases

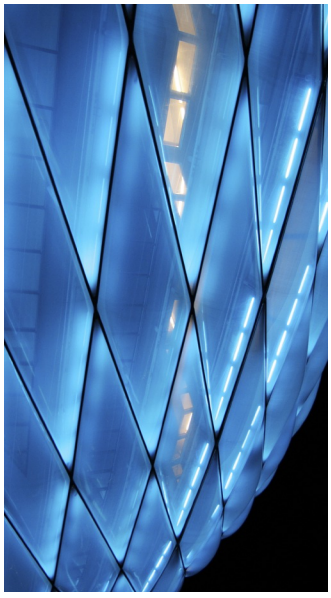
***Canarelli v. Eighth Judicial Dist. Court***, 127 Nev. Adv. Op. No. 72 (November 10, 2011) In this petition for extraordinary writ relief, we must determine whether the district court may appoint an unwilling director trustee of a dissolved corporation for the purpose of defending actions against the corporation that arose post-dissolution and after completion of the winding-up process. To resolve this issue, we must construe Nevada's corporate survival statutes and, in particular, NRS 78.600, which allows the district court to "continue the directors trustees as provided in NRS 78.590 upon dissolution." We conclude that NRS 78.600 does not confer authority upon the district court to appoint an unwilling director trustee of a dissolved corporation because, once the director trustee has completed winding up the affairs of the corporation as provided for in NRS 78.590, his or her power to act on behalf of the corporation terminates. Thus, writ relief is appropriate here.

***Pacificare of Nevada, Inc. v. Rogers***, 127 Nev. Adv. Op. No. 71 (October 27, 2011) In this appeal, we address two issues regarding the enforceability of an arbitration provision. To begin, we consider the circumstances in which an arbitration provision contained in an expired contract may be properly invoked. Next, we address whether a plaintiff may rely on Nevada's unconscionability doctrine to invalidate an arbitration provision contained in a contract governed by the federal Medicare Act.

First, because the parties in this case did not expressly rescind the arbitration provision at issue, the provision survived the contract's expiration and it was properly invoked. Second, as the Medicare Act expressly preempts any state laws or regulations with respect to the type of Medicare plan at issue here, we conclude that Nevada's unconscionability doctrine is preempted to the extent that it would regulate federally approved Medicare plans. We therefore reverse the district

**Public Lawyers Section**

**November 2011**



**Inside this issue:**

# Nevada Supreme Court Cases

court's order denying Pacificare's motion to compel arbitration.

***Cervantes v. Health Plan of Nevada, Inc.***, 127 Nev. Adv. Op. No. 70 (October 27, 2011) Appellant Margerita Cervantes allegedly contracted hepatitis C as a result of treatments she received at the Endoscopy Center of Southern Nevada (ECSN). She obtained treatment at ECSN as part of the health care benefits she received through her union, the Hotel Employees and Restaurant Employees International Union Welfare Fund (Culinary Union). The Culinary Union operated a self-funded Employee Retirement Income Security Act (ERISA) health care plan and retained respondents Health Plan of Nevada, Inc.; Sierra Health Services, Inc.; Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc.; and Prime Health (collectively, HPN) as its agents to assist in establishing a network of the plan's chosen medical providers.

Cervantes filed a lawsuit alleging that HPN is responsible for her injuries because it failed to ensure the quality of care provided by ECSN and referred her to a blatantly unsafe medical provider. In response, HPN argued, among other things, that Cervantes' claims were preempted by ERISA section 514.

The district court, having considered the parties' contentions, concluded that Cervantes' claims were preempted by ERISA section 514(a). In this appeal, we consider whether ERISA section 514 precludes state law claims of negligence and negligence per se against a managed care organization[1] (MCO) contracted by an ERISA plan to facilitate the development of the ERISA plan's network of health care providers. We conclude that such claims are precluded by ERISA section 514, and therefore, we affirm the district court's grant of summary judgment.[

***Nunnery v. State***, 127 Nev. Adv. Op. No. 69 (October 27, 2011) A jury found appellant Eugene Nunnery guilty of multiple charges and sentenced him to death for a first-degree murder conviction. Nunnery raises numerous claims of error at the guilt and penalty phases of his trial and challenges his death sentence. We conclude that none of his claims warrant relief and therefore affirm the judgment of conviction.

In this opinion, we focus primarily on three of Nunnery's claims related to the penalty phase of the trial. First, we consider the circumstances in which a district court may allow an untimely notice of evidence in aggravation under SCR 250(4)(f). We hold that the district court has discretion to allow an untimely notice of evidence in aggravation upon a showing of good cause and that the relevant factors include the danger of prejudice to the defense in its preparation as a result of the untimely notice. Second, we consider whether the confidentiality provision in NRS 176.156 precludes the admission of presentence investigation reports at penalty hearings. We conclude that it does not and that the admission of information in presentence investigation reports is within the discretion of the trial judge. Third, we consider whether Nunnery's Sixth Amendment trial rights were violated when the district court declined to instruct the jury that it must find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances before it could find him eligible for the death penalty. We conclude that the district court did not err because the weighing of the aggravating and mitigating circumstances is not a factual determination subject to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), and because Nevada's statutory scheme focuses on whether there are miti-

# Nevada Supreme Court Cases

gating circumstances sufficient to outweigh the aggravating circumstances, not whether the aggravating circumstances outweigh the mitigating circumstances.

***Wilson v. State***, 127 Nev. Adv. Op. No. 68 (October 27, 2011) Appellant Edward Thomas Wilson pleaded guilty to first-degree murder and related felonies in the killing of an undercover Reno police officer in 1979. A three-judge panel sentenced Wilson to death for the murder. In this appeal from the denial of Wilson's third state habeas petition, we address whether our decision in McConnell v. State (McConnell I), 120 Nev. 1043, 102 P.3d 606 (2004), invalidates two of the aggravating circumstances used to make Wilson eligible for the death penalty. In particular, we consider whether McConnell I precludes the State from relying on the same predicate felony to support felony murder and felony aggravating circumstances when the defendant has pleaded guilty to first-degree murder based on both premeditated and deliberate murder and felony murder. We conclude that McConnell I does not preclude the State from using the same predicate felony in those circumstances. Because we conclude that this and Wilson's remaining claims do not warrant relief, we affirm the district court's order.


***Dep't of Taxation v. Masco Builder Cabinet Group***, 127 Nev. Adv. Op. No. 67 (October 20, 2011) In this appeal, we consider two issues regarding a taxpayer's request for a refund from the Nevada Department of Taxation. First, we consider whether the Nevada Tax Commission improperly substituted its own judgment for that of an administrative law judge in reversing the judge's determination that the taxpayer was entitled to a refund. Second, we consider whether the

# Nevada Supreme Court Cases

statute of limitations governing the time within which a taxpayer must file a formal refund claim should be tolled when the Department of Taxation has led the taxpayer to believe that a formal filing was unnecessary. Because we conclude that the Tax Commission improperly substituted its own judgment for that of the administrative law judge, we affirm the district court's decision to grant the taxpayer's petition for judicial review. Additionally, we conclude that, under the facts of this case, equitable considerations warrant a tolling of the statute of limitations, and we affirm the district court's decision to grant the taxpayer its entire refund request.

***Walters v. Eighth Judicial Dist. Court***, 127 Nev. Adv. Op. No. 66 (October 13, 2011) This original petition for a writ of mandamus or prohibition presents the issue of whether the counterclaim, cross-claim, and written motion setting the grounds for the application and the relief sought satisfies the requirements of NRS Chapter 40 for seeking a deficiency judgment based upon a breach of guaranty. We conclude that it does and deny petitioner William T. Walters' request for extraordinary relief.

***Stephans v. State***, 127 Nev. Adv. Op. No. 65 (October 6, 2011) To establish grand larceny in this felony shoplifting case, the State needed to prove that the stolen goods had a value of $250 or more. Here, the only proof of value came from the department store's loss prevention officer. He testified, over the defense's foundation, hearsay, and best evidence objections, that the stolen goods he recovered bore price tags adding up to $477. Neither the price tags nor duplicates of them were offered or admitted.

The defense objections to this testimony should have been sustained. While there are several ways to establish value in a shoplifting case, testimony from a witness whose knowledge rests on what he remembers reading on a price tag is not, without more, one of them. For this reason, we reverse and remand for a new trial on the grand larceny charge. We affirm the judgment of conviction as to conspiracy and burglary.

***G.C. Wallace, Inc. v. Eighth Judicial Dist. Court***, 127 Nev. Adv. Op. No. 64 (October 6, 2011) In this original petition for a writ of mandamus, we consider whether a landlord who seeks summary eviction in justice court under NRS 40.253[1] against a tenant is precluded from subsequently bringing a damages claim in district court for breach of the lease agreement. In the underlying matter, the landlord prevailed in the summary eviction proceeding in justice court and thereafter filed a claim for damages in district court. The tenant filed a motion for summary judgment, arguing, among other things, that the landlord's damages claim was barred by the doctrine of claim preclusion. The district court denied the motion for summary judgment, and this petition followed.

We first address whether the elements of the doctrine of claim preclusion as set forth in *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008), are met. Because we conclude that these elements are met, we consider whether an exception to claim preclusion applies—namely, whether the summary eviction scheme provided in NRS 40.253 permits a landlord to bring a summary eviction proceeding in justice court and subsequently bring a damages claim in district court.

We conclude that although NRS 40.253 is ambiguous on this point, the purpose and policies underlying the statute reveal that the Legislature

# Nevada Supreme Court Cases

intended to permit a landlord to bring a damages claim in district court after seeking summary eviction in justice court. Thus, although such a damages claim would otherwise fall within the purview of the claim preclusion doctrine, it is exempt from the application of the doctrine. Consequently, a landlord who seeks summary eviction in justice court is not prevented from subsequently bringing a claim for damages in district court, as the landlord did here. Accordingly, we deny the petition

***Merits Incentives v. Eighth Judicial Dist. Court***, 127 Nev. Adv. Op. No. 63 (October 6, 2011) In this original writ proceeding we review a district court's decision to deny a motion to disqualify opposing counsel, when opposing counsel reviewed confidential documents he received, unsolicited, from an anonymous source. We initially conclude that although there is no Nevada Rule of Professional Conduct that specifically governs an attorney's actions under these facts, the attorney in this case fulfilled any ethical duties by giving prompt notification to opposing counsel, soon after his receipt of the disk from an unidentified source, through an NRCP 16.1 disclosure.

We must also determine whether the district court abused its discretion when it refused to disqualify counsel, even though one of the documents sent to counsel was privileged. We adopt factors to aid a district court in determining whether disqualification is warranted under such circumstances, and conclude in this case that the factors weigh in favor of the district court's decision. Therefore, although we consider the writ petition, we ultimately deny the relief requested.

***City of North Las Vegas v. Warburton***, 127 Nev. Adv. Op. No. 62 (October 6, 2011) In this appeal, we must determine, for the purpose of awarding workers' compensation benefits, the proper calculation of the average monthly wage of an injured employee who claims to have changed jobs as of the day of the employee's industrial accident. NAC 616C.444 bases the calculation of the average monthly wage for such an employee on payroll information regarding the employee's primary job at the time of the accident. Although the administrative appeals officer in this case failed to make any specific findings regarding respondent Mallory Warburton's primary job at the time of her accident, we conclude that substantial evidence supports the district court's determination that Warburton's primary job at the time of the accident was that of pool manager. Thus, the appeals officer's conclusion that Warburton's average monthly wage had to be calculated based on the rate of pay of a water safety instructor is not supported by substantial evidence, and we affirm the district court's order granting judicial review and reversing the appeals officer's decision.

***Emerson v. Eighth Judicial Dist. Court***, 127 Nev. Adv. Op. No. 61 (October 6, 2011) In this petition for extraordinary writ relief, we consider whether the district court can impose sanctions after it enters an order dismissing a case with prejudice pursuant to a stipulation of the parties under NRCP 41(a)(1)(ii). In resolving this issue, we initially address whether the district court has jurisdiction to impose sanctions after a stipulated dismissal. We conclude that the district court retains jurisdiction after a case is dismissed to consider sanctions for attorney misconduct that occurred prior to the dismissal. Next, we address whether the district court may impose as a sanction attorney fees and costs incurred in the original trial when a new trial is ordered. We conclude

# KROLLONTRACK

that the district court did not abuse its discretion by imposing as a sanction attorney fees and costs incurred in the original trial. We, therefore, deny writ relief.

***Francis v. Wynn Las Vegas, LLC***, 127 Nev. Adv. Op. No. 60 (October 6, 2011) In this appeal, we address several issues arising from a civil litigant's invocation of his Fifth Amendment privilege against self-incrimination. The salient issue we consider is how, in response to a civil litigant's request for accommodation of his or her privilege, the district court should proceed in order to prevent the opposing party from being unfairly disadvantaged. As it pertains to this matter, we address whether the district court abused its discretion in refusing to permit appellant to withdraw his invocation and in denying his request to reopen discovery.

Following the lead of well-established federal precedent, we conclude that in response to a civil litigant's request for accommodation of his or her privilege, the district court should balance the interests of the invoking party and the opposing party's right to fair treatment. After reviewing the particular considerations that bear on striking this balance in the instant case, we conclude that the district court did not abuse its discretion in refusing to permit appellant to withdraw his invocation or in denying his request to reopen discovery. We further conclude that the district court did not abuse its discretion in denying appellant's NRCP 56(f) motion, nor did it err in granting respondent summary judgment.

## Krollontrack

**Magistrate Judge Imposes Sanctions Against Defendants and Counsel Following Failure to Produce E-mails, Documents and Skype Chats**

*Mikhlyn v. Bove*, 2011 WL 4529619 (E.D.N.Y. Aug. 3, 2011). In this trademark infringement and unfair competition litigation, the defendants responded to the magistrate judge's sanctions recommendation claiming their formal counsel alone is responsible for discovery misconduct. Although the magistrate judge previously found that the defendants' misconduct was not egregious enough to warrant the plaintiffs' original request for default judgment, he recommended reopening discovery to determine whether plaintiffs allegations of unproduced e-communications were true. Following this, newly discovered evidence revealed that tens of thousands of e-mails, documents and Skype chats were in the defendants' possession, known about by counsel, not produced and not identified in a privilege log. In light of this new evidence, the magistrate judge reconsidered his previous recommendation and apportioned fault, fees and costs between the defendants and their former counsel, finding them both responsible for the discovery misconduct (a separate firm assisting with the intellectual property issues was not found liable for any discovery missteps). As a result, the magistrate judge recommended the plaintiffs be awarded $48,700.52 in attorney fees and costs.

**Court Rejects Default Judgment Request Despite Deletion of ESI**

Cedar Rapids Lodge & Suites, LLC v. JFS Dev., Inc., 2011 WL 4499259 (N.D. Iowa

# KROLLONTRACK

Sept. 27, 2011). In this discovery dispute, the plaintiffs sought a default judgment alleging the defendants willfully destroyed ESI. Previously, the defendants produced "seven computers/laptops, ten internal/external hard drives, and twenty-three compact discs" to the plaintiffs' expert for inspection and copying. Following the forensic examination, the plaintiffs' expert identified that four external media devices and three drives were not produced for imaging, and noted that numerous documents, orphan files and e-mails had been deleted or were missing. Citing the defendants' status as a "small company" who is "unsophisticated in the requirements of litigation and preservation of documents," the court denied the default judgment request. Further supporting the court's finding was the lack of bad faith present and the inability to prove the deleted documents were likely to be helpful to the plaintiffs' claims.

**Appellate Court Denies Privacy Claims by Employee Citing Employer's Usage Policy**

*Sitton v. Print Direction, Inc.*, 2011 WL 4469712 (Ga. App. Sept. 28, 2011). In this privacy rights dispute, the plaintiff appealed the trial court's determination that the defendant-employer's investigation of the plaintiff's computer for evidence of involvement with a competing business did not constitute an invasion of privacy. The defendant conducted its investigation by entering the plaintiff's office, moving the computer's mouse, clicking on the e-mail listing which appeared on the screen and printing e-mails related to a competing job after catching wind the plaintiff had been improperly competing with the defendant's business. Notably, the e-mails were on a separate e-mail address on the plaintiff's personal computer that he used for work with the defendant and his own personal use over the company's systems. Addressing the plaintiff's arguments, the court determined the defendant's conduct did not constitute an "unreasonable intrusion" or "surveillance" under OCGA § 16-9-93, which addresses computer theft, trespass and invasion of privacy. Further, the court cited the defendant's computer usage policy (noting it was not limited to only work-issued technology) and the employee manual which clearly stated that communications transmitted over the company's systems should not be regarded as "private or confidential," and affirmed the trial court's ruling.

**Court Finds Plaintiff in Contempt of Court, Awards Attorney Fees for Failure to Meet Deadlines**

*Who Dat Yat Chat, LLC v. Who Dat, Inc*., 2011 WL 4575215 (E.D. La. Sept. 30, 2011). In this trademark litigation, the defendants requested a finding of contempt and sought sanctions alleging the plaintiff failed to comply with court discovery orders and altered response deadlines. Objecting, the plaintiff claimed it did not act willfully or in bad faith, and that it was waiting for a written court order before proceeding. Finding no good cause for the plaintiff's noncompliance the court noted the "glaring problem" that this was the plaintiff's seventh attempt to fulfill its discovery obligations and determined the plaintiff was in contempt. Although the court awarded the defendants with attorney fees in connection with the subject motion, it refused to strike the plaintiff's affirmative defenses as requested by the defendants because other sanctions were available.

**Court Finds Electronic Communications Privacy Act Literally Extends to "Any Person"**

*Suzlon Energy Ltd. v. Microsoft Corp*., No. 10-35793 (9th Cir. Oct. 3, 2011). In this civil fraud proceeding, the appellant objected to the district court's holding that denied production of e-

mails sent by an Indian citizen (a former employee of the appellant) via his Hotmail account. Previously the district court did grant production, but then reconsidered following Microsoft's objections. The district court disagreed with two of these objections, including that the documents sought must be discoverable in the foreign proceeding and that the subpoenas must be compliant with the Federal Rules of Civil Procedure, but agreed with the third objection that raised the Electronic Communications Privacy Act (ECPA). This ruling forms the basis of the plaintiff/appellant's objection. Upon appeal, the United States Court of Appeals for the Ninth Circuit analyzed the statutory framework of the ECPA and determined that "any person" as defined in § 2510(13) of the ECPA extends protection to *literally any person*, including foreign citizens. Based on this plain text reading of the statute, the court upheld the district court's ruling finding the ECPA protects the domestic communications of noncitizens.

**Court Finds Various Costs Associated with E-Discovery Properly Taxable**

*In re Aspartame Antitrust Litig*., 2011 WL 4793239 (E.D. Pa. Oct. 5, 2011). In this class action, the plaintiffs objected to the defendants' bill of costs, which included costs associated with creating a litigation database, processing and hosting electronic data, conducting keyword and privilege screens, making documents OCR searchable, extracting metadata, creating CDs and DVDs of electronic documents, copying, scanning and other related work. In discussing the taxation of these costs, the court noted that in cases of this complexity, "e-discovery [processes and technology] saves costs overall by allowing discovery to be conducted in an efficient and cost-effective manner." Although the court taxed costs for the work described, it drew the line at advanced e-discovery technology that exceeded "necessary keyword search and filtering functions" and related "Tech Usage" fees, in addition to costs associated with Bates and confidentiality labeling, and converting TIFF documents to PDFs. In sum, the court awarded total costs of $510,138.18 which were split amongst the three defendants pursuant to the court's analysis.

**Court Orders Preservation of Thousands of Hard Drives**

*Pippins v. KPMG LLP*, 2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011). In this action involving the Fair Labor Standards Act and New York State Labor Law, the defendant sought a protective order seeking to limit the scope of its preservation obligations, claiming it should not be responsible for preserving computer hard drives of thousands of former and departing employees. Instead, the defendant requested an order requiring it to only preserve a random sample of 100 hard drives that have already been preserved, or alternatively, that the plaintiffs be required to bear the preservation costs. Noting that relevancy determinations are difficult to make based on the defendant's "own efforts to keep that information at bay," the court determined that each and every former and departing employee is a "key player" at this time. The court also cited that courts in its district have "cautioned against the application of a proportionality test as it relates to preservation" and found that permitting the destruction of hard drives at this early stage of litigation was inappropriate. Further, the court noted the ongoing burden is largely self-inflicted by the defendant due to its continued reluctance to work with the plaintiffs to generate a reasonable sample of the hard drives. Based on this analysis, the court denied the protective order and cost-shifting. Until a fur-

# KROLLONTRACK

ther order or agreement is reached, the court ordered the defendant to preserve the existing hard drives of all former and departing employees who are potential class members.

**Court Imposes Default Judgment Sanction Based on Egregious, Intentional Deletion of ESI** *Gentex Corp. v. Sutter*, 2011 WL 5040893 (M.D. Pa. Oct. 24, 2011).


In this action alleging violations of the Computer Fraud and Abuse Act, the plaintiff sought default judgment sanctions alleging the defendants intentionally deleted relevant ESI by prematurely lifting a litigation hold, erasing a home computer belonging to one of the defendants, delaying preservation of computers and deleting files, defragmenting disks, and destroying server backup tapes, ghost images, portable storage devices, e-mails and a file server. First, the court determined that genuine issues of material fact existed as to whether one of the defendants should be sanctioned and excluded the defendant from this opinion. Second, the court found two of the other defendants engaged in spoliation and that sanctions were appropriate. The court considered several factors including fault, prejudice and proportionality, and determined that default judgment was appropriate given the defendants' "unabashedly intentional destruction of relevant, irretrievable evidence" and egregious conduct.

**Court Declines to Impose Sanctions and Order Evidentiary Hearing in Light of Numerous Procedural Defects**
*Kermode v. Univ. of Miss. Med. Ctr.*, 2011 WL 2619096 (S.D. Miss. July 1, 2011). In this wrongful termination litigation, the plaintiff sought default judgment for various discovery violations and an evidentiary hearing regarding

the alleged spoliation of relevant e-mails. Despite the discovery violations alleged by the plaintiff, including the failure to preserve and produce relevant e-mails, the court noted that procedural defects and the Rule 37(e) safe harbor provision barred the imposition of sanctions as the e-mails were deleted as part of a routine system. Turning to the request for an evidentiary hearing regarding alleged spoliation of relevant e-mails, the court found that despite having nine months to develop the evidentiary record, the plaintiff had failed to present evidence the e-mails actually existed, and that even if he had, did not sufficiently demonstrate the presence of bad faith. Finally, the court dismissed the plaintiff's belatedly proffered authenticity challenge of e-mails produced in paper form, noting that the opportunity for such a motion had passed.

**Court Orders Defendant to Pay Sanctions Without Possibility of Indemnification**

*PIC Grp., Inc. v. LandCoast Insulation, Inc.*, 2011 WL 2669144 (S.D. Miss. July 7, 2011). In this commercial liability litigation, the court reviewed the recommendations of a special master assigned to investigate alleged discovery abuses and provide a report on the plaintiff's motion for sanctions. In his report, the special master found the majority of the defendant's conduct constituted gross negligence, exemplified by the defendant failing to turn over e-mails it claimed had been destroyed, but in actuality resided on an external hard drive directly connected to the e-mail server and clearly labeled "backups." Further, the defendant's *de facto* in-house counsel willfully ran a scrubbing program on his laptop just hours before the special master arrived to inspect his files and no litigation hold or preservation plan was ever put in place. The special master recommended sanctions covering the plaintiff's additional expenses, to be paid directly by the defendant and not indemnified by an insurer. The defendant argued that such sanctions were too harsh given its relative lack of technical sophistication and the lack of prejudice to the plaintiff, and challenged the court's authority to sanction directly without the possibility of indemnification. Setting aside all of these objections, the court adopted the special master's recommendations and ordered the plaintiff to tabulate its costs stemming from the discovery misconduct for the purpose of assessing sanctions.

**State Court Finds Order that Parties Split Costs of Neutral Forensic Expert Contrary to Rules of Civil Procedure**

*SPM Resorts v. Diamond Resorts Mgmt., Inc.*, 2011 WL 2650893 (Fla. App. 5 Dist. July 8, 2011). In this business litigation, the plaintiff (who is the defendant in the underlying case) sought certiorari review of a circuit court decision ordering it to pay $20,000 – and potentially more in the future – to conduct computer searches to comply with the defendant's (the plaintiff in the underlying case) discovery request. The plaintiff argued the court order was unreasonable and unduly burdensome, and marked a departure from the "essential requirements of the law." Agreeing with the plaintiff's arguments, the court believed ordering the plaintiff to split the costs associated with engaging a computer expert to inspect its computer systems was unreasonable. Further, the court noted that "placing a substantial financial burden on a party relating to the production of its adversary's document request does nothing more than require a party to fund its adversary's litigation" which is not permitted by the Rules of Civil Procedure. Accordingly, the court granted the plaintiff's request and quashed the trial court's order.

# KROLLONTRACK

**Court Broadens Existing Discovery Agreement Between Parties, Denies Sanctions Against Party Opposing Modification**

*Uhlig LLC v. Shirley*, 2011 WL 2728445 (D.S.C. July 13, 2011). In this discovery dispute, the plaintiff moved to impose sanctions and modify the forensic examination protocol for the defendants' computers and peripheral devices. The parties had agreed to the protocol following numerous interventions by a magistrate judge; however, disputes continued to arise after forensic experts conducted searches and the plaintiffs sought to broaden the scope of discovery. Finding the plaintiff presented sufficient evidence that the broader scope of e-discovery was warranted, the court lifted the protocol's date restrictions and agreed that running hash value comparisons eliminated any need to limit search terms. Finally, the court declined to impose sanctions against the defendants, who were simply opposing the plaintiffs' efforts to modify and extend a previously agreed upon discovery protocol.

**Court Upholds $3.2 Million in Sanctions for Intentional Deletion of Unallocated Free Space**

*Genger v. TR Investors, LLC*, 2011 WL 2802832 (Del. Supr. July 18, 2011). In this shareholder litigation, the defendant (an "international man of mystery") sought review of the Court of Chancery's judgment including, its award of $3.2 million in attorney fees and costs for the spoliation of ESI in violation of a preservation order. On appeal, the defendant argued the sanctions were disproportionate and excessive as he merely erased unallocated free space, which was not specifically prohibited by the order and did not did not result in the spoliation of material evidence. The defendant further argued that because normal computer use causes similar overwriting to occur, sanctioning this behavior would require the suspension of all computer activities every time a court issued a preservation order. Rejecting both arguments, the court determined the trial court's finding was based on narrow grounds related to evidence spoliation – not rewriting in general – and that the parties previously compromised, agreeing to the specified fee amount. In order to avoid future confusion, the court recommended that parties address the issue of unallocated free space in their preservation orders and document retention policies.

**Court Affirms Cost-Shifting After Plaintiffs Fail to Meet and Confer**

*Couch v. Wan*, 2011 WL 2971118 (E.D. Cal. July 20, 2011). In this RICO action, the plaintiffs sought reconsideration of a magistrate judge's order requiring the parties to share costs of the plaintiffs' requests for ESI. The plaintiffs argued the cost-shifting order was contrary to law because the requested data was stored on reasonably accessible hard drives or optical drives. Alternatively, the plaintiffs argued that cost-shifting was premature because they should not have to "bear the burden" of sharing costs for the initial 140 gigabytes of data identified by the defendants, which likely contains irrelevant and unrequested information. Finding for the defendants, the court noted that the plaintiffs' unsupported assertions that the $54,000 estimated cost to produce the requested ESI was exaggerated and that hard drives are accessible did not support a finding that the ruling was clearly contrary to law. In denying the motion, the court also admonished the plaintiffs for seeking reconsideration without the benefit of first attending the court ordered meet and confer session, noting this failure was currently the only issue of prematurity.

# Ninth Circuit Cases

**Court Imposes Adverse Inference Sanction for Bad Faith Spoliation**

*E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc*., 2011 WL 2966862 (E.D. Va. July 21, 2011). In this ongoing trade secrets litigation, the plaintiff sought sanctions alleging the defendant spoliated evidence by deliberately destroying relevant ESI and engaged in prolonged efforts to conceal misconduct. Offering a "no harm, no foul" defense, the defendant claimed that because many of the deleted files were recovered, no spoliation occurred and the plaintiff suffered no prejudice. Finding the defendant did not engage in a widespread effort to delete relevant information, the court however determined the litigation hold notices were inadequate and, according to forensic analysis, several key employees intentionally and in bad faith destroyed approximately 12,836 e-mails and 4,975 electronic files. Declaring these deletions significant in substance and number, the court imposed an adverse inference instruction and ordered payment of attorney fees and costs incurred as a result of the spoliation.

**Court Applies Balancing Test, Finds Privilege Waived For Unreasonable Precautions Taken to Prevent Disclosure**

*MSP Real Estate, Inc. v. City of New Berlin*, 2011 WL 3047687 (E.D. Wis. July 22, 2011). In this Fair Housing Act and Americans with Disabilities Act litigation, the plaintiffs alleged the defendants waived attorney-client privilege with regard to 72 documents – 42 of which were not contested that were inadvertently produced in response to a public records request. Reviewing the defendants' production, the court applied a five-part balancing test to determine whether privilege was waived. Finding several factors immaterial, the court weighed heavily the defendants' unreasonable precautions taken to prevent disclosure. Rather than tasking an attorney to review and mark each document for privilege, the city clerk – without the supervision of an attorney – conducted an initial review of all responsive documents and then forwarded any potentially privileged items to the city attorney who separated those documents into three piles identified with only a single post-it note. All documents were then photocopied by the city clerk and interns, and no privilege log was produced or maintained. Finding the defendant's review unreasonable and that overriding issues of fairness weighed in favor of the plaintiff, the court determined privilege was waived for the 30 contested documents.

## NINTH CIRCUIT CASES

***Stein v. Ryan***, No. 10-16527 (November 18, 2011) Alan Stein appeals from the judgment of the district court dismissing his action against the State of Arizona and individual officials employed by the Arizona Department of Corrections (Department) for alleged negligence and alleged violations of his civil rights. The district court held that Stein failed to state a claim for which relief can be granted. We have jurisdiction to review the district court's judgment under 28 U.S.C. § 1291. We affirm.

Thus, when Stein was sentenced in February 2006, he had already been on probation longer thanauthorized by statute. On February 23, 2009, the superior court vacated Stein's sentence, discharged him from probation, and ordered him released. In sum, Stein spent just over three years in prison pursuant to an erroneous sentence.

The district court dismissed all of Stein's claims with prejudice. It also held that Stein had failed to state a claim of negligence against the State

# Ninth Circuit Cases

of Arizona because, while the Department had a duty to ensure that his prison sentence was calculated correctly, it had no duty to review the legality of his sentencing order. It held that Stein had not alleged facts to support a claim for infliction of emotional distress.

With respect to Stein's claim against the individual defendants brought under 42 U.S.C. § 1983, the district court concluded that they were protected by qualified immunity. The district court also held in the alternative that Stein had failed to allege that they were liable based on their own actions.


***Campbell v. State of Washington Dept. of Health and Social Servs.***., No. 09-35892 (November 7, 2011) Plaintiff Loraine Campbell appeals the district court's grant of summary judgment in favor of Defendants Sonja Pate, Lashonda Mitchell, and Murine McGenty, employees of the State of Washington's State Operated Living Alternative ("SOLA") program. Defendants were responsible for the care of Campbell's 33-year-old developmentally delayed daughter, Justine Booth, at the time Justine was found unconscious in her bathtub. Justine died one week later. Campbell suedDefendants on behalf of herself and Justine's estate under 42 U.S.C. § 1983, alleging that Defendants deprived Justine of her Fourteenth Amendment substantive due process right to safe physical conditions while in involuntary state custody.

The district court concluded that Campbell did not present a genuine issue of material fact as to her § 1983 claim because she did not proffer

# Ninth Circuit Cases

evidence that the state owed Justine an affirmative duty of care. The district court also held that Defendants were protected by qualified immunity. We likewise hold that Defendants had no constitutionally required duty of care towards Justine because (1) there was no special relationship between Justine and the state and (2) there was no state-created danger, and we affirm.

***Glenn v. Washington County***, No. 10-35636 (November 4, 2011) Eighteen-year-old Lukus Glenn was shot and killed in his driveway by Washington County police officers. His mother had called 911 for help with her distraught and intoxicated son after Lukus began threatening to kill himself with a pocketknife and breaking household property. Within four minutes of their arrival, officers had shot Lukus with a "less-lethal" beanbag shotgun, and had fatally shot him eight times with their service weapons. Lukus' mother filed suit against the officers and Washington County alleging a state law wrongful death claim and a 42 U.S.C. § 1983 claim for excessive force under the Fourth Amendment. The district court granted summary judgment to the defendants after concluding there was no constitutional violation. We reverse and remand for trial.

In evaluating a grant of qualified immunity, we ask two questions: (1) whether, taking the facts in the light most favorable to the nonmoving party, the officers' conduct violated a constitutional right, and (2) whether the right was clearly established at the time of the alleged misconduct. *See Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009). Either question may be addressed first, and if the answer to either is "no," then the officers cannot be held liable for damages. *See Pearson*, 555 U.S. at 236. In this case, the district court focused on whether the officers' use of force violated Lukus' Fourth Amendment rights, and held that it did not. Glenn argues on appeal that the district court erred in granting summary judgment on that basis. We agree that genuine issues of fact remain, and accordingly reverse. We further conclude that resolution of these issues is critical to a proper determination of the officers' entitlement to qualified immunity. We express no opinion as to the second part of the qualified immunity analysis and remand that issue to the district court for resolution after the material factual disputes have been determined by the jury.

***Gypsum Reources, LLC v. Masto***, No. 09-17849 (October 31, 2011) In 2003, Gypsum bought 2400 acres in Clark County, Nevada, on the site of an abandoned gypsum mine. ER 155-58. Gypsum's property lies adjacent to the Red Rock Canyon National Conservation Area of the Spring Mountains National Recreation Area. ER 156. Gypsum's land was zoned as a rural area to allow the building of no more than one house on every two acres. ER 157. Also in 2003, the local, state and federal officials discussed the possibility of buying Gypsum's land to include it within the Red Rock Canyon National Conservation Area, but the Bureau of Land Management did not want to take responsibility for the land due to its damaged condition from its days as a mine. Gypsum intended to seek a zoning variance to allow it to develop the land for both houses and commercial uses. ER 157. Before it could seek such a variance, the Nevada legislature enacted SB 358.

Because this case now involves the constitutionality of a Nevada state statute under the Nevada Constitution, we respectfully request that the Nevada Supreme Court accept and decide whether SB 358 violates the Nevada Constitu-

# Ninth Circuit Cases

tion, art. IV, §§ 20, 21, or 25.

***Miller v. City of Los Angeles***, No. 10-55235 (October 27, 2011) This is a strange case. Its resolution hinges on the absence, as a factual matter, of something we must accept as a legal matter. There are unlikely to be many more like it, so this opinion's precedential value is probably limited. We nevertheless publish pursuant to General Order 4.3. While we're at it, we offer some advice to lawyers: Don't apologize unless you're sure you did something wrong. And there's also a lesson for district judges: Don't accept too readily lawyers' confessions of error or rely on your own memory of what happened. Trials are complicated and we sometimes misremember details. That's why we have transcripts.

This case arises from a lawsuit filed by Philip Miller's family against the City of Los Angeles, its police department, police chief and Sergeant Mata. Philip died after Mata shot him, and plaintiffs claimed that Mata was not justified in using deadly force. The district court issued an in limine order precluding defendants from arguing that the decedent was armed when he was shot. In his summation, defense counsel Richard Arias argued that Mata thought Miller failed to surrender


because he had shot Bean just moments earlier. Plaintiffs' counsel objected, apparently based on the in limine order. The court sustained the objection and instructed the jury to ignore Arias's statement.

The jury was unable to reach a verdict and the district court declared a mistrial. The case was eventually retried and a second jury returned a defense verdict. Plaintiffs moved for sanctions against Arias for his statement during the first trial's summation. Defendants conceded that Arias had violated the in limine order but opposed sanctions on the grounds that the transgression was inadvertent, fleeting and harmless. Arias attached a declaration admitting fault and apologizing. Exercising its inherent power, *see Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43-46 (1991), the district court granted the motion and sanctioned defendants $63,687.50. They appeal.

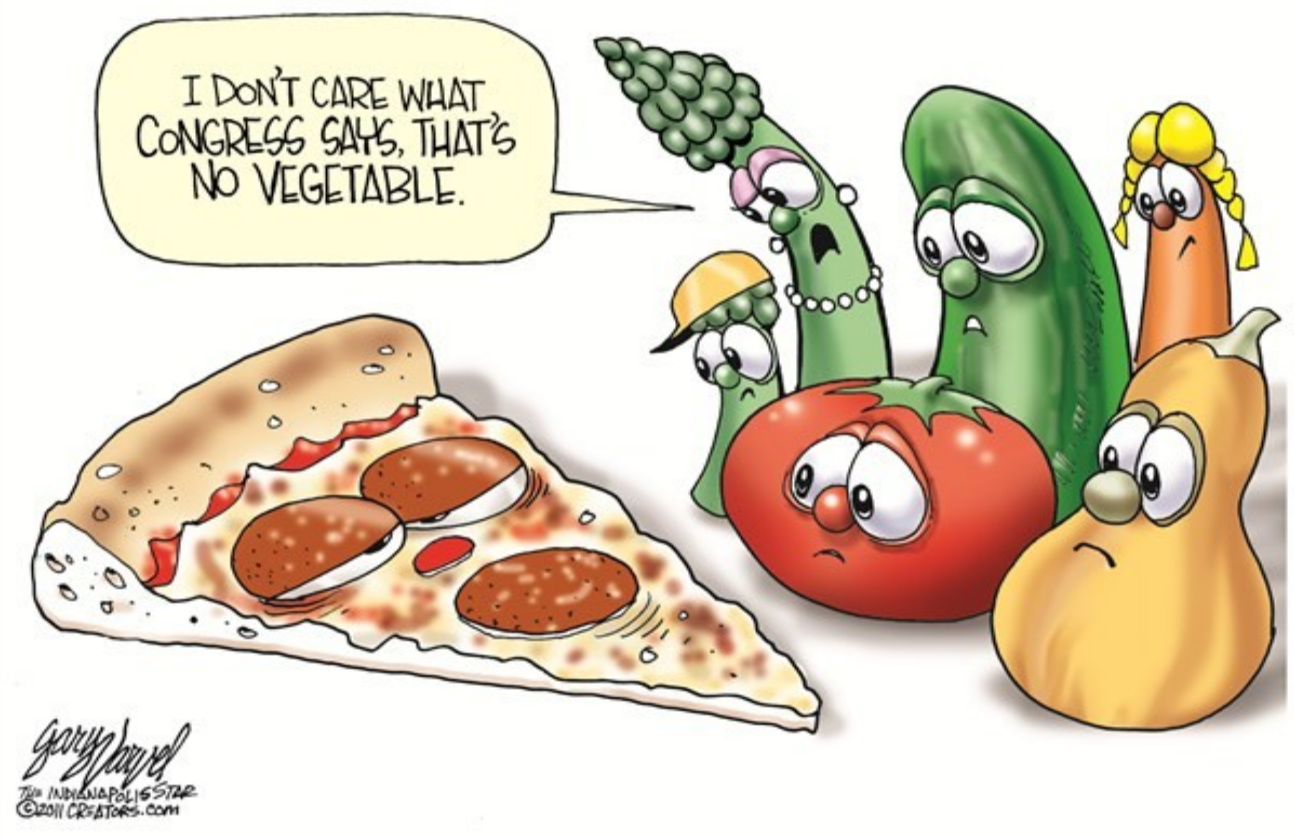
Arias and the city did not, however, concede that the violation was made in bad faith; they vigorously dispute it here and below. This raises the unusual question of how we treat a finding of bad faith for a transgression that didn't actually occur. We conclude that Arias couldn't have acted in bad faith if he did not, in fact, violate the district court's order. You can't have chicken parmesan without chicken; you can't have an amazing technicolor dreamcoat without a coat; you can't have ham and eggs if you're short of ham or eggs. And you can't have a bad faith violation without a violation.

***Washington State v. Chimei Innolux Corp.***, No. 11-16862 (October 3, 2011) This appeal presents the question, *inter alia*, of whether *parens patriae* actions filed by state Attorneys General constitute class actions within the meaning of the Class Action Fairness Act of

# Ninth Circuit Cases

2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-15). We conclude that they do not, and we affirm the remand order entered by the district court.

***Log Cabin Republicans v. United States***, No. 10-56634 (September 29, 2011) We are called upon to decide whether the congressionally enacted "Don't Ask, Don't Tell" policy respecting homosexual conduct in the military is unconstitutional on its face.




We therefore vacate the judgment of the district court. *Burke*, 479 U.S. at 365 (vacating and remanding to dismiss complaint); *Helliker*, 463 F.3d at 880 (same); *Martinez*, 32 F.3d at 1420. Because Log Cabin has stated its intention to use the district court's judgment collaterally, we will be clear: It may not. Nor may its members or anyone else. We vacate the district court's judgment, injunction, opinions, orders, and factual findings—indeed, all of its past rulings—to clear the path completely for any future litigation. Those now-void legal rulings and factual findings have no precedential, preclusive, or binding effect. The repeal of Don't Ask, Don't Tell provides Log Cabin with all it sought and may have had standing to obtain.

***Confederate Tribes v. Gregoire***, No. 10-35776 (September 23, 2011) States lack authority to tax Indian tribes or registered members of Indian tribal organizations absent a clear authori-

# ACC

zation from Congress. *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992). The Tribes of the Yakama Nation (the Yakama or Tribes) claim that this principle of Indian tax immunity has been violated by the State of Washington's current cigarette excise tax, which the Tribes argue leaves their retailers liable for payment of the tax when retailers sell cigarettes to non-Indians.

In 1978, a three-judge district court held that the legal incidence of the Washington cigarette tax did not fall on the Tribes. *Confederated Tribes of Colville Indian Reservation v. Washington*, 446 F. Supp. 1339 (E.D. Wash. 1978). In 1980, the Supreme Court agreed with the three-judge court and upheld the validity of Washington's cigarette tax and its requirement that tribal retailers collect the tax from non-Indian cigarette purchasers. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159-61 (1980). Although some elements of Washington's cigarette tax law have been modified over the past thirty years, we conclude, as did the district court in awarding summary judgment to the State, that none of those changes has materially altered the legal incidence of the cigarette tax approved of in *Colville*, and we affirm.

**Employers' use of credit reports significantly limited by new law**

Baker & Hostetler LLP

Effective January 1, 2012, an employer will only be permitted to obtain a consumer credit report regarding an employee or prospective employee for "employment purposes" if the employee or applicant holds or seeks one of the following:

a position in the state Department of Justice,

a managerial position, as defined in the statute,

that of a sworn peace officer or other law enforcement position,

a position for which the information tained in the report is required by law to be disclosed or obtained,

a position that involves regular access to specified personal information for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment,

a position in which the person is, or would be, a named signatory on the employer's bank or credit card account, or authorized to transfer money or enter into financial contracts on the employer's behalf,

a position that involves access to confidential or proprietary information, as specified, or

a position that involves regular access to $10,000 or more of cash, as specified.

In addition to complying with the existing notice requirements under California's Consumer Credit Reporting Agencies Act, the new law requires employers to identify which of the specific purposes listed above provides the basis for running the credit report.

As a related reminder, also effective January 1, 2012, an employer using an investigative consumer reporting agency to obtain an investigative consumer report regarding an applicant or employee must include in its disclosure to the "consumer" applicant or employee the website address of the investigative consumer reporting agency, or, if the agency has no website address, the telephone number of the agency, where the consumer may find information about the investigative reporting agency's privacy

# ACC

practices, including whether the consumer's personal information will be sent outside the United States or its territories.

Accordingly, employers who run credit reports on applicants and employees should update their policies and forms by year end to ensure they are seeking credit reports only in connection with the positions enumerated by this law and that they are providing the appropriate notices.

**Employee terminations: the Seventh Circuit reminds employers that statements from non-decision makers do matter**

Baker & Daniels LLP

A reminder to employers – statements made by non-decision makers do matter. A recent Seventh Circuit decision found that a human resources director's comments about an employee's termination can be considered a party admission.

In *Makowski v. SmithAmundsen, LLC*, et al., No. 10-3330 (7th Cir. Nov. 9, 2011), Laura Makowski, a marketing director, sued her former employer alleging pregnancy discrimination and violations of the FMLA. While Makowski was on FMLA leave for the birth of her child, the employer's Executive Committee decided that it wanted to terminate Makowski's employment. The Chief Operating Officer was told to consult with outside counsel to discuss Makowski's potential termination. The COO delegated this task to the Director of Human Resources. The employer later terminated Makowski and an IT employee explaining that the positions were being eliminated due to organizational restructuring.

When Makowski came to collect her personal items from her employer's office, the Director of Human Resources allegedly told Makowski that her termination was due to her pregnancy and because she took a medical leave. The Director also allegedly divulged to Makowski that her termination was labeled a reduction in force based on outside counsel's recommendation.

The District Court ruled that the director's statement was inadmissible hearsay because the Director's "job responsibilities were not related to the decision to terminate Makowski, and because [the Director] was not involved in the decision-making process." The Seventh Circuit reversed finding that while the Director was not involved in the employment action (i.e., Makowski's termination), "she was involved in the decision-making process leading up to that action due to her consultation with outside counsel regarding the termination and her job duties, which include ensuring the [employer's] compliance with federal anti-discrimination laws." The Seventh Circuit noted that the Director's comments were direct evidence of a discriminatory intent, and revived all of Makowski's claims against her former employer. Employers must remember that "involvement in the process leading up to the employment action at issue is enough to make an employee's statement an admission."

**New IRS proposal on what is a government agency and government retirement plan**

Hanson Bridgett LLP
On November 7, 2011 the IRS issued an "advance notice of proposed rulemaking" on the definition of what is a government agency for retirement plans and on what is a government plan. The IRS has asked for public comment on the notice. This memo gives a first cut review of

# Law.com

the notice. Because the rules are all based on facts and circumstances within prescribed criteria, retirement systems and public agencies should review their particular facts to fully understand the implications.

This is only the start of the process. We believe that the IRS has just begun to learn about how local government works and needs much more information before any formal proposed regulations are issued. All stakeholders should pay attention to these proposed rules and should consider commenting on them.

Even agencies that are without question government entities could have problems under this notice. For example, while it is clear that counties and cities will be treated as governmental agencies, if they are in a retirement system with many other employers, their retirement system may not be in the clear. Under the notice, if even one employee of an IRS-determined non-governmental entity participates in what is otherwise a government plan, then the entire plan would not be a government plan. This would have potentially disastrous effects for all agencies and their employees that participate in that plan. Theoretically, this could affect even a plan the size of CalPERS. The IRS notice does suggest that they may develop ways out of this problem but apparently with some very awkward administrative, labor and financial consequences.

## 'Jailbait'? 'Third Degree'? New Book Tracks Down Origins of Common Legal Phrases

Via a post on **The Faculty Lounge** I came across an interesting new book called **"Lawtalk: The Stories Behind Familiar Legal Expressions."** The authors of the book are James E. Clapp, Elizabeth G. Thornburg, Marc Galanter and Fred R. Shapiro. As described on Amazon, Law-related words and phrases abound in our everyday language, often without our being aware of their origins or their particular legal significance: *boilerplate*, *jailbait*, *pound of flesh*, *rainmaker*, *the third degree*. This insightful and entertaining book reveals the unknown stories behind familiar legal expressions that come from sources as diverse as Shakespeare, vaudeville, and Dr. Seuss. ...

Skimming the Table of Contents, I selected several phrases to learn their origins, including:

**"Affirmative action": First used in President Kennedy's Executive Order 10925 in 1961, which requires federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." "Lawtalk" credits the phrase to Houston businessman Hobart Taylor Jr., who drafted the executive order. Taylor says he chose the phrase "affirmative action" over alternatives such as "positive action" because "it was alliterative."**

**"One bite at the apple": This expression was originally stated as "one bite at the cherry," which made sense because a cherry is small and eaten in one bite. However, in the 20th century, the word "cherry" took on the additional meaning of "hymen" or "virgin." According to Bryan Garner's Dictionary of Modern Legal Usage, the phrase appears to have gradually changed to**

# Law.com

**"one bite of the apple" because its users were embarrassed by the new double-entendre. As "Lawtalk" notes, however, this substitution was somewhat unfortunate because the switch was from an image that made sense to one that did not, since "usually you get lots of bites at an apple."**

**"Hearsay": This term originated in a 16th century textbook on French language that included English translations. In one of the discussions, a cleric is trying to explain the properties of earth, water, air and fire, but admits this is not his area of expertise. He stated French words meaning "I know nothing about it except by hearing it said," which was translated in the book as *"I knowe nothying of it but by here say."* The phrase "by hear say" gradually began to appear in English writings, eventually as a single word: "hearsay."**

The book seems like an interesting resource for lawyers interested in the origins of some of the phrases that they utter on a daily basis. Check it out **here** .

## Things You Can't Do on a Plane: Vol. 7

You might think that after Volume 1, Volume 2, Volume 3, Volume 4, Volume 5 and Volume 6 of Things You Can't Do on a Plane, that we'd have exhausted the list of things you can't do on a plane. Nope! The list grows daily.

Here are three more things I've recently learned that you cannot do on a plane:

**Kiss a girl mid-flight (when you yourself are a girl).** Girls may not kiss other girls on planes, even if the airline in question is the official airline of the Gay & Lesbian Alliance Against Defamation. **CONSEQUENCE**: Kisser will be escorted off plane upon landing for a "discussion" with airline personnel.

**Try to open the emergency exit door over the wing while the aircraft is at cruising altitude.** Passengers may not open this door, period. It needs to stay shut. **CONSEQUENCE**: Pilot will turn the plane around and land. Passenger will be arrested and charged with crime of interfering with flight crew.

**Forcefully push your way past airline gate agents and take a seat on a plane despite having no ticket.** You need a ticket to ride, sorry. There is nothing gained by simply making it to the plane and sitting down. **CONSEQUENCE**: Police will come onto the plane, walk you right back off of the plane, and arrest you.

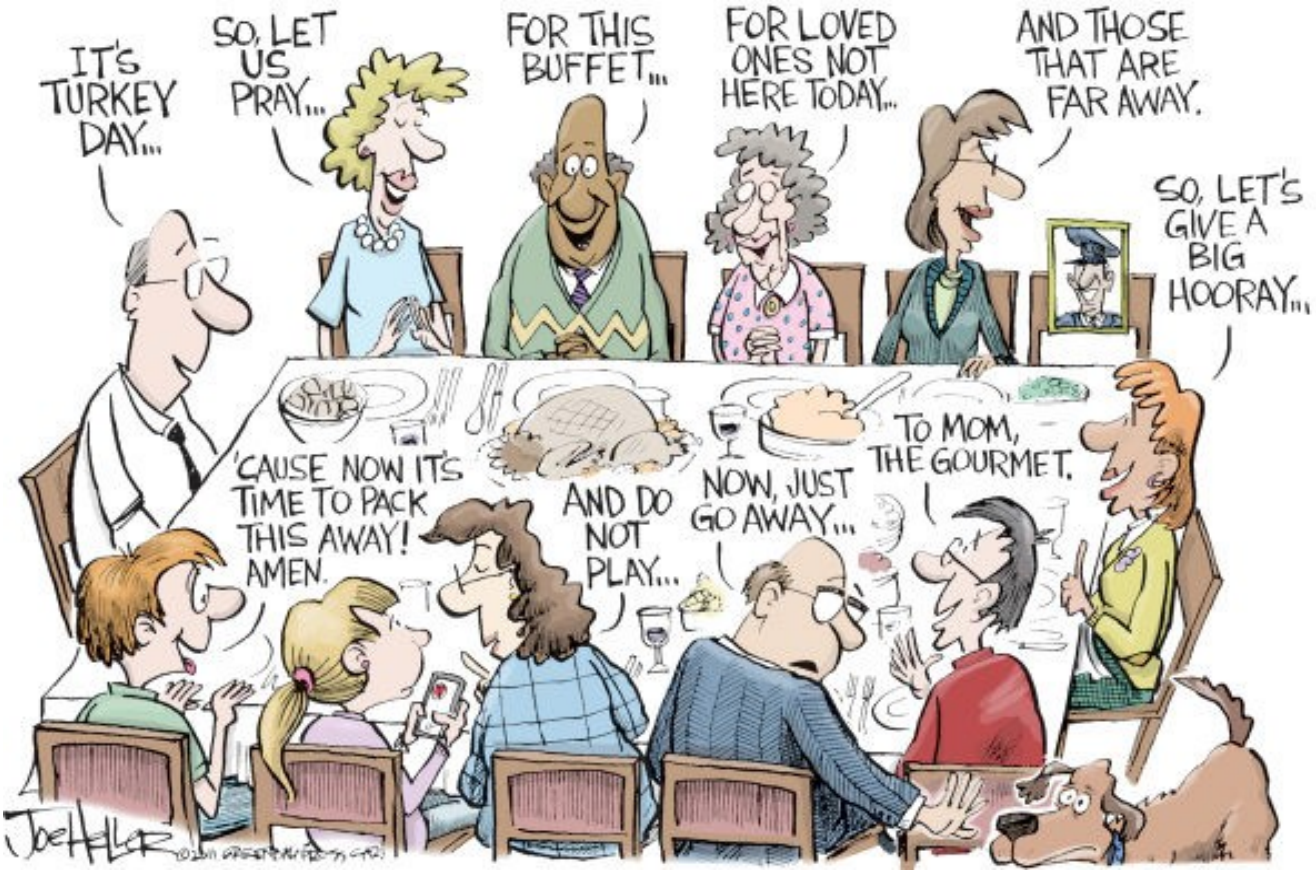
## After Supreme Court Denies Cert, Police Association Must Contend With Unconstitutional Highway Crosses

Since 1998, the Utah Highway Patrol Association, a private organization, has paid for and erected more than **a dozen 12-foot-high crosses** to honor fallen state troopers. Ten of the memorial crosses are on public land.

A group called American Atheists challenged this practice in a 2005 lawsuit, arguing that the crosses were an endorsement of Christianity by the Utah state government, and therefore unconstitutional. The district court granted summary judgment for the defendants, holding that the memorial crosses did not violate the federal or state constitution. Plaintiffs appealed, however, and in December 2010 the 10th Circuit reversed the lower court, **holding** that the crosses did "have the impermissible effect of conveying to the reasonable observer the message that the State prefers or otherwise endorses a certain religion. They therefore violate the Es-

## Law.com

tablishment Clause of the federal constitution." The defendants asked the U.S. Supreme Court to rule on the issue, but on Oct. 31, 2011, the Supreme Court **denied the petition** and refused to hear the case. The Utah Highway Patrol Association has since tried to remedy the "unconstitutional memorial" problem, the *Deseret News* **reports**, by removing all UHP logos from the 14 crosses at issue and "tap[ing] on notes stating they are private memorials."




Brian Barnard, an attorney representing American Atheists Inc. said that even with these changes, the fact that the crosses are on government property still presents a problem. "Those crosses are on government property only with the permission of Utah officials," Barnard said. He noted that the disclaimers are too small to be read from a car traveling on the highway and that "a reasonable observer seeing the Roman cross on the front lawn of a UHP office will see an improper connection between the state of Utah and Christianity."

The UHP has had offers from people to help buy the land on which the crosses stand to make it private property, but Barnard said this idea of buying "postage stamp sized pieces of land" has been tried in other states and does not work. "A private plot of land in the middle of government land still gives the impression of government support," he said.

Barnard and other atheist groups have stated that more litigation is likely to follow if the

# Law.com

UHPA simply uses these disclaimers instead of some other symbol that is "inclusive of all Utahns."

## Austin, Texas Considers Deputizing Smart-phone Owners for Parking Enforcement

The city of Austin, Texas is considering the implementation of program called "Parking Mobility" that seems like a surefire way for some do-gooder citizen to get his or her butt kicked.

According to **thenewspaper.com**, the Austin city council unanimously voted on Oct. 20 "to explore the concept of deputizing vigilante meter maids using an iPhone app." The plan would allow anyone with an Android, Blackberry or iPhone to download a "parking ticket app." If they see a vehicle that is parked in a handicapped parking spot, the "deputy" would then take three photographs (of the license plate; the windshield; and the car in the handicapped parking sign). The software from Parking Mobility then transmits the photos and the GPS location to the city so it can issue a ticket.

Thenewspaper.com says that the city council meeting was attended by disabled advocates trying to guarantee easier parking and "others who were just interested in writing the $511 tickets." Some attendees even asked if the city would provide them with smartphones so they could start community-policing the handicapped spots. The council has reportedly asked the city manager to report back on the feasibility of the program within ninety days.

Parking Mobility's **website notes** that as an additional incentive for neighbors to rat each other out, "when the city collects the fine, your favorite charity receives 20% of the fine!"

On the subject of the potential beatdown that might be given to a person caught in the act of taking the three photos, Parking Mobility has a "**Personal Safety**" section on its website that states:

For your safety, we have designed Parking Mobility to minimize the amount of time you need to be around the vehicle parked illegally. The less time you're around the vehicle, the less likely you may be confronted by the owner. ... If you are confronted by someone while taking the 3 photos, we strongly encourage you to simply walk (or roll!) away. Again, no violation is worth putting yourself in harm's way. But also remember that taking photos of an illegally parked vehicle is a legal activity -- you have done absolutely nothing wrong.