

THE PUBLIC LAWYER

JULY 11, 2003

NEVADA CASES

Haberstroh v. State, 119 Nev. Adv. Op. 23 (May 30, 2003). In this habeas proceeding, the court first admonished a federal public defender for filing an appendix of 52 volumes and 11,384 pages, while not citing to even a single page in 22 of the volumes. It then held that, even though the parties had stipulated to the resolution of many issues on the merits, “we hold that the parties in a post-conviction habeas proceeding cannot stipulate to disregard the statutory procedural default rules. We direct all counsel in the future not to enter into stipulations like the one in this case and direct the district courts not to adopt such stipulations.” Finally, “[t]he jury's finding of depravity of mind as an aggravating circumstance was improper because there was no jury instruction limiting the term in a constitutional manner. This error was not harmless beyond a reasonable doubt. We therefore affirm the district court's order vacating Haberstroh's death sentence and granting a new penalty hearing.”

Niitinger v. Holman, 119 Nev. Adv. Op. 24 (May 30, 2003). Hotel security guards (with their shift supervisor watching) beat and injured the plaintiff. Compensatory damages were not at issue, but punitive damages were and their award depended on whether the shift supervisor was a “managerial agent” and could ratify the acts of the guards that deviated from the hotel’s use of force policy. The court held he was not and could not because there was no evidence he had the “authority to deviate from the established policy or that he had any discretion or could exercise his independent judgment.”

Buchanan v. State, 119 Nev. Adv. Op. 25 (May 30, 2003). After the death of several of her infants, the mother was convicted of murdering two of them. The trial was a “battle of the medical experts,” who did not disagree about the “physical evidence, only the interpretation of that evidence.” The court held there was sufficient evidence for the jury to arrive at its decision. The court also rejected a lost or destroyed evidence claim, finding “no evidence of bad faith on the part of law enforcement” and that the defendant could not carry the burden of showing prejudice to her case.

Salazar v. State, 119 Nev. Adv. Op. No. 26 (June 11, 2003). Salazar attended a party, got into a fight with other party goers, cut two of them with a box cutter, and was convicted of both battery with use of a deadly weapon with substantial bodily harm and mayhem with a deadly weapon for injuries inflicted on one

person. Applying the *Blockburger* double jeopardy test the reversed the substantial bodily harm conviction: “We conclude, under the specific facts of this case, that the gravamen of both the battery with use of a deadly weapon with substantial bodily harm and mayhem with use of a deadly weapon

offenses are the same and, therefore, Salazar's convictions for battery and mayhem are redundant. The gravamen of the battery offense, as charged, is that Salazar cut Clark and he suffered substantial harm, which was the nerve damage. The gravamen of the mayhem offense, as charged, is that Salazar cut Clark and he suffered permanent nerve damage. Both arise from and punish the same illegal act—cutting Clark with a box cutter. '[T]he Legislature never intended to permit the State to proliferate charges as to one course of conduct by adorning it with chameleonic attire.'"

Nieto v. State, 119 Nev. Adv. Op. No. 27 (June 11, 2003). "Nieto's sole contention is that he is entitled to additional credit for time served for his period of pretrial confinement in California while awaiting extradition to Nevada. Nieto alleges, and the State concedes, that he was arrested in California pursuant to a fugitive warrant on the instant charges on or about April 11, 2001, and that he was extradited to Nevada on or about June 5, 2001. Nieto also alleges, and the State does not refute, that he 'waived extradition and voluntarily requested to come back to Nevada to face the charges.' Therefore, Nieto argues that because the charges in Nevada were the sole reason for his incarceration in California, pursuant to NRS "We hold that an arrest made in violation of NRS 484.795 violates a suspect's right to be free from unlawful searches and seizures under Article 1, Section 18, even though the arrest does not offend the Fourth Amendment. An officer violates NRS 484.795 if the officer abuses his or her discretion in making a full custodial arrest instead of issuing a traffic citation. We adopt the test set forth by the Montana Supreme Court in for determining the proper exercise

176.055, he is entitled to credit for the time spent in custody from the date of his arrest until his extradition." The court agreed with Nieto.

Ayala v. Caesars Palace, 119 Nev. Adv. Op. No. 28 (June 26, 2003). This case involved a workers comp benefit level determination by a third party administrator. The court held Ayala could appeal after a hearing officer's remand for a redetermination, that the hearing officer retained jurisdiction to hear an appeal from the redetermination, and that the recalculation was not supported by substantial evidence.

State v. Bayard, 119 Nev. Adv. Op. No. 29 (June 26, 2003). Bayard was stopped for two traffic violations after the officer observed a pedestrian wave at Bayard, who then tried to avoid being observed flagging down the vehicle. Bayard exited the vehicle, informed the officer he had a concealed weapon on him, consented to a search, was arrested on the traffic violations, and then for possession and trafficking of cocaine and marijuana found during a booking strip search.

The court established the standard for arresting for fine-only misdemeanors:

of police discretion to arrest under NRS 484.795. To make a valid arrest based on state constitutional grounds, 'an officer's exercise of discretion must be reasonable.' Reasonableness requires probable cause that a traffic offense has been committed and circumstances that require immediate arrest. Absent special circumstances requiring immediate arrest, individuals should not be made to endure the humiliation of arrest and detention when a citation will satisfy the

state's interest. Such special circumstances are contained in the mandatory section of NRS 484.795 or exist when an officer has probable cause to believe other criminal misconduct is afoot. This rule will help minimize arbitrary arrests based on race, religion, or other improper factors and will benefit law enforcement by limiting the high costs associated with arrests for minor traffic offenses.”

Hathaway v. State, 119 Nev. Adv. Op. 30 (June 26, 2003). “We conclude that the district court erroneously relied upon *Harris* to determine that Hathaway had not demonstrated cause for his delay. *Harris* does not preclude a finding of good cause in every case in which the good cause allegation is based upon an appeal deprivation claim. Rather, *Harris* stands for the proposition that an appeal deprivation claim is not good cause if that claim was reasonably available to the petitioner within the one-year statutory period for filing a post-conviction habeas petition. A petitioner’s mistaken but reasonable belief that his or her attorney was pursuing a direct appeal is good cause if the petitioner raises the claim within a reasonable time after learning that his or her attorney was not in fact pursuing a direct appeal on the petitioner’s behalf.”

Sellers v. Fourth Judicial Dist. Court, 119 Nev. Adv. Op. 31 (June 26, 2003). “This proper person writ petition presents an issue of first impression—whether NRS 69.030 authorizes an award of attorney fees to a prevailing proper person litigant. We conclude that it does not and that a justice’s court exceeds its jurisdiction by awarding *Guinn v. State Legislature*, 119 Nev. Adv. Op. 34 (July 10, 2003). “The two-thirds majority requirement is a procedural

attorney fees to a prevailing proper person litigant who has not incurred any obligation to pay attorney fees, even if the proper person litigant is an attorney.”

Wheeler Springs Ploaza, LLC v. Beemon, 119 Nev. Adv. Op. 32 (July 2, 2003). This case presents an issue of first impression in Nevada: whether payment of a monetary judgment pending an appeal renders the appeal moot. We hold that payment of a judgment only constitutes a waiver of the judgment debtor’s appellate rights when the payment is intended as a compromise or settlement of the matter.”

J.J. Indus. v. Bennett, 119 Nev. Adv. Op. 33 (July 8, 2003). The court clarified two elements of intentional interference with contractual relations. First, “[b]ecause interference with contractual relations is an intentional tort, the plaintiff must demonstrate that the defendant knew of the existing contract, or at the very least, establish ‘facts from which the existence of the contract can reasonably be inferred.’” Second, “mere knowledge of the contract is insufficient to establish that the defendant intended or designed to disrupt the plaintiff’s contractual relationship; instead, the plaintiff must demonstrate that the defendant intended to induce the other party to breach the contract with the plaintiff. Accordingly, the plaintiff must inquire into the defendant’s motive.”

requirement. It is a process requirement by which legislative action is accomplished and decisions that weigh the public interests are

accounted for. In the area of taxation this means that the Legislature must agree by a two-thirds majority as to which mechanisms will be employed to generate revenue. Without a two-thirds majority, revenue measures may not be enacted. This general constitutional provision does not purport to say what the substance of the revenue measures ought to be, only that whatever they be, they are acceptable to two-thirds of the elected members of each house of the Legislature.

In contrast, the Constitution requires specifically, as a matter of substantive constitutional law, that public education be funded. The framers have elevated the public education of the youth of Nevada to a position of constitutional primacy. Public education is a right that the people, and the youth, of Nevada are entitled, through the Constitution, to access. If the procedural two-thirds revenue vote requirement in effect denies the public its expectation of access to public education, then the two-thirds requirement must yield to the specific substantive educational right.

The Legislature must resume its work of funding education and selecting appropriate methods of revenue generation to balance the state's budget. Therefore, we grant the petition as to the Legislature of the State of Nevada and direct this court's clerk to issue a writ of mandamus directing the Legislature to proceed expeditiously with the 20th Special Session under simple majority rule."

From James Polley's NDAA CLIPS:

GAO: SOCIAL SECURITY ADMINISTRATION VULNERABLE TO IDENTITY THIEVES

Congressional investigators working undercover obtained Social Security numbers for nonexistent newborns and used the Social Security numbers of dead people to obtain driver's licenses, exposing weaknesses at the Social Security Administration that could be exploited by identity thieves.

The thieves use a person's personal information, such as a Social Security number or credit card number, to establish a false name or citizenship, purchase goods or fraudulently apply for credit.

Investigators from the General Accounting Office, Congress' investigative arm, used counterfeit documents to build fake identities that included Social Security numbers.

http://www.foxnews.com/printer_friendly_story/0,3566,91520,00.html

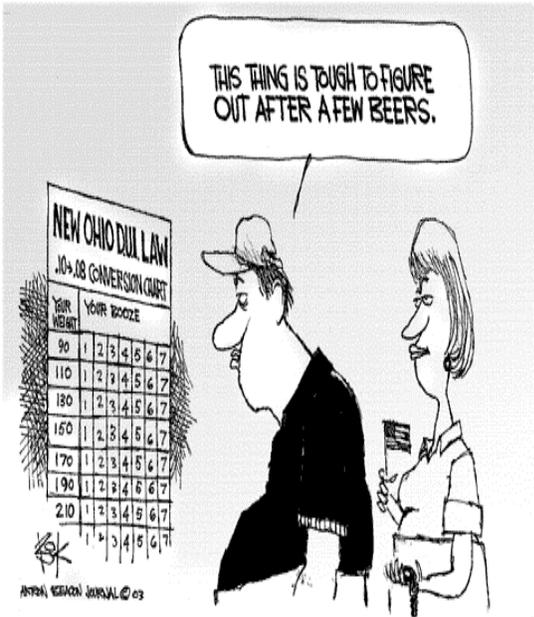
COURT REJECTS MEASURE ON POLICE SEIZURES

A divided Oregon Court of Appeals struck down another ballot measure

Wednesday. The measure restricts police seizures of property involved in criminal activity unless someone has been convicted first. Net proceeds go to drug treatment, not law-enforcement operations. Voters approved it in 2000 by a 2-1 majority. But a panel of appeals judges voted 2-1 to overturn it based on a state constitutional ban on multiple amendments in a single measure, unless those changes are "closely related."

http://news.statesmanjournal.com/article_print.cfm?i=64449

This cartoon is a replacement for a previous version, for Ohio papers only. Feel free to use it if it works for you.



NINTH CIRCUIT CASES

Doe v. Hawaii Dep't of Educ., No. 01-17566 (9th Cir. June 30, 2003). A vice principal taped a second grader's head to a tree for five minutes after the second grader would not stand still during a time out. The panel held that a particularized Fourth Amendment inquiry—not a generalized substantive due process analysis—was the proper standard, that the Fourth Amendment applied to the vice principal's administrative action, and that an unreasonable seizure had occurred: "At the time that Keala taped him to the tree, Doe's only offense had been 'horsing around' and refusing to stand still.

There is no indication that Doe was fighting or that he posed a danger to other students. Doe was eight years old. Taping his head to a of the state is functionally similar to the prosecutorial institution of a criminal

tree for five minutes was so intrusive that a fifth grader observed it was inappropriate."

American Civil Liberties Union of Nevada v. City of Las Vegas, No. 01-15958 (9th Cir. July 2, 2003). "In sum, we reverse the district court's determination that the Fremont Street Experience was not a public forum. We affirm the district court's grant of summary judgment to the ACLU and issuance of a permanent injunction against enforcement of the leafleting ordinance and vending ordinance with respect to the sale of message-bearing items. We reverse the district court's grant of summary judgment to the Defendants with regard to the general injunction and solicitation and tabling ordinances and remand to allow the district court to consider the constitutionality of these restrictions in light of the Fremont Street Experience's public forum status."

Miller v. Gammie, No. 01-15491 (9th Cir. July 9, 2003). This case involves the placement of a sexually abused ward of the state in a foster home, the withholding of his sexual abuse history from the foster family, and the subsequent molestation of the foster parent's biological child.

On the immunity of social workers, the panel held: "Moreover, the defendants bear the burden of showing that their respective common-law functional counterparts were absolutely immune. It would appear that the critical decision to institute proceedings to make a child a ward

proceeding. The decision, therefore, is likely entitled to absolute immunity. It also may be

that some submissions to the court by social workers are functionally similar to the conduct recognized at common law to be protected by absolute prosecutorial immunity. To the extent, however, that social workers also make discretionary decisions and recommendations that are not functionally similar to prosecutorial or judicial decisions, only qualified, not absolute immunity, is available. Examples of such functions may include decisions and recommendations as to the particular home where a child is to go or as to the particular foster parents who are to provide care.”

The en banc panel also elucidated when a three member panel may depart from circuit precedent to account for intervening Supreme Court or state court (on state law) decisions: “We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.”

<http://caselaw.lp.findlaw.com/data2/circs/9th/0115491p.pdf>

Nulph v. Cook, No. 01-35556 (9th Cir. June 26, 2003). On direct remand from a successful habeas petition, Nulph’s sentence was increased from 35 to 70 years. The court granted a new habeas petition. “We agree with the District Court that the *Pearce* presumption applies in this case. Because the Board imposed a harsher sentence (45 more years) on direct remand from Nulph’s successful challenge to its retrospective application of the new matrix-range method, and because the Board’s reasons for increasing Nulph’s sentence do not

Himes v. Thompson, No. 01-35311 (9th Cir. July 10, 2003). “The Oregon State

‘affirmatively appear.’ Further, the presumption applies to the Board’s decision even though different Board members may have presided over the case on remand. Accordingly, we presume vindictiveness unless the State can meet its burden to rebut the *Pearce* presumption. “

<http://caselaw.lp.findlaw.com/data2/circs/9th/0135556p.pdf>

Alford v. Haner, No. 01-35141 (9th Cir. June 23, 2003). Alford was initially stopped because of his use of wig-wag lights and possible impersonation of a police officer. During the stop, the officer noticed a recording device Alford was using and, although Alford explained he had a Washington appellate decision allowing the recording available in his glove box, was arrested for violation of the state privacy act.

“The facts and the law clearly established that the traffic stop was public. There was no evidence that Alford had violated the Privacy Act or that the encounter was private. No objectively reasonable officer could have concluded that taping an officer during a traffic stop on a public thoroughfare was barred by the Privacy Act. We conclude that on the evidence presented, viewed in the light most favorable to defendants, it was not possible to rule for the defendants. The district court abused its discretion in not granting the motion for a new trial. We reverse and remand to the district court for further proceedings consistent with this decision.”

<http://caselaw.lp.findlaw.com/data2/circs/9th/0135141p.pdf>

Board of Parole and Post-Prison Supervision (‘the Board of Parole’) found that Robert

Lewis Himes had violated the terms of his parole and ordered him reincarcerated to serve twenty-nine and one half additional years. The Board of Parole based its decision on parole regulations more onerous than those in place at the time Himes committed the offense for which he was incarcerated. The question for decision is whether that determination violated the Ex Post Facto Clause of the United States Constitution. U.S. Const. art. I, § 10. We conclude that it did and therefore reverse the district court's denial of Himes' petition for habeas corpus.”
<http://caselaw.lp.findlaw.com/data2/circs/9th/0135311p.pdf>

United States v. Alanis, No. 02-30194 (9th Cir. July 10, 2003). “When a defendant objects to a prosecutor’s peremptory strikes of potential jurors in alleged violation of the Equal Protection Clause, trial courts are supposed to evaluate the constitutionality of the prosecutor’s actions using the threestep process the Supreme Court announced in *Batson v. Kentucky*, 476 U.S. 79 (1986). In this appeal, we determine whether, after a prosecutor offers a race-neutral explanation for the peremptory strikes (step two of the *Batson* process), a trial court must proceed to step three to make a deliberate decision on purposeful discrimination even absent a further affirmative request by the defendant. We conclude that a defendant’s original objection imposes on the trial court an obligation to complete the third step of the *Batson* process, when required, without

Investigators for the U.S. Treasury Department discovered last week that many IRS employees use the Internet and e-mail for personal use, signaling a two-year crackdown on personal surfing has been ineffective. The agency made an effort to

further request from counsel. We also hold that, on these facts, a *Batson* equal protection violation occurred.”
<http://caselaw.lp.findlaw.com/data2/circs/9th/0230194p.pdf>

Court finds QDRO may collect overdue child support

An Illinois court has ruled a qualified domestic relations order (QDRO) may be used to gain access to retirement assets to collect past due child support payments.

Although state law shields individuals’ retirement assets from creditors, the court ruled such assets are marital property if they were accumulated during the marriage and may be tapped to collect child support once a marriage is dissolved. While the ruling only applies to Illinois residents, benefits managers would do well to stay abreast of similar developments in other states and localities as the nation’s child support debt continues to grow, and custodial parents seek non-traditional collection methods. According to the National Coalition for Child Support Options, child support payments owed nationwide totals more than \$99 billion.

www.benefits.com

IRS, other employers battle workplace Web surfers

restrict surfing after a 2001 study revealed employees spent more than half their workday on the Internet for personal reasons. In the latest probe, investigators found employees were still accessing prohibited sites for games, e-mail and

sexually explicit material. In response, the agency will step up its policing efforts of employee surfing, IRS Chief Information Officer David Mader told the Associated Press. "Even one employee using the Internet for this purpose is one too many, and the IRS will not stand for it." IRS isn't the only employer with Web-wandering staff. One survey reports 90% of employees admit to recreational Web surfing on company time. Another poll reveals 64% of online shoppers make purchases at work, compared to 39% who do so at home. The Labor Department estimates personal e-mails and Web browsing cost employers \$3 million per year in lost productivity. Research shows some 45% of employers monitor employees' Internet usage. Sensing a need in the marketplace, Vero Beach, Fla.-based firm SpectorSoft offers employers its Spector and eBlaster Spy software, which can track all Web sites visited, keystrokes, in- and outgoing e-mails and instant messages.

www.benefits.com

SHE SUED ME FOR WHAT?!?"SEX WITH CLIENTS: Utah Recognizes Tort Cause of Action by Client for Sexual Relationship

In yet another warning shot across the bow of lawyers, a Utah court reversed a trial court's "An investigator may be held liable under § 1983 for making material false statements either knowingly or in reckless disregard for the truth to establish probable cause for an arrest. To overcome an officer's entitlement to qualified immunity, however, a plaintiff must establish: (1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted

dismissal of a former client's claims for breach of fiduciary duty, fraud, and intentional infliction of emotional distress based upon the lawyer's engaging in a consensual intimate relationship with the client during their attorney-client relationship. *Walter v. Stewart*, 2003 UT App. 86 (Utah Ct. App. Mar. 27, 2003). Plaintiff was a divorce client of the defendant. Upon discovering that her lawyer had lied to her about being married, the plaintiff filed suit against him. Need we say more? Well, apparently so . . ." *Walter v. Stewart*, 2003 UT App. 86 (Utah Ct. App. Mar. 27, 2003). <http://www.ethicsandlawyering.com>

OTHER CASES

Vakilian v. Shaw, Nos. 01-2377 (6th Cir. July 2, 2003). Shaw, a attorney general working with a medicaid fraud task force, provided evidence precomplaint and in support of arrest warrants to prosecute Vakilian for illegally receiving kickbacks for excessive testing in violation of Michigan law. The charges were dismissed and Shaw was sued for civil rights violations.

The court that Shaw was entitled to qualified immunity on a § 1983 claim: "In a civil rights case, investigators are entitled to rely on a judicially-secured arrest warrant as satisfactory evidence of probable cause."

information was material to the finding of probable cause." Here, the false statements were not necessary for prosecution under then current interpretation of Michigan's false claims act, and the remaining truthful statements were sufficient to establish probable cause." But he was not entitled to qualified immunity on a § 1985 claim based on selective enforcement. <http://laws.lp.findlaw.com/6th/03a0218p.html>

Glassroth v. Moore, No. 02-16708 (11th Cir. July 1, 2003). Alabama Chief Justice Moore campaigned on a platform of restoring the moral foundation of the law and, after his election, installed on his sole authority and without consultation with fellow justices, a two and one-half ton stone monument displaying the Ten Commandments in the court's rotunda. The installation occurred at night and was filmed by an evangelical group which later used the film to raise funds and to provide for Moore's defense. The court invalidated the display on Establishment Clause grounds and also rejected another of Moore's arguments: "Finally, we turn to a position of Chief Justice Moore's that aims beyond First Amendment law to target a core principle of the rule of law in this country. He contends that the district court's order and injunction in this case contravene the right and authority he claims under his oath of office to follow the state and federal constitutions 'as he best understands them, not as understood by others.' He asserts that 'courts are bound by the Constitution, not by another court's interpretation of that instrument,' and insists that he, as Chief Justice is 'not a ministerial officer; nor is he answerable to a higher judicial authority in the performance of his duties as administrative head of the state judicial system.'"

<http://caselaw.lp.findlaw.com/data2/circs/11th>

Today, more than 1,100 defendants are supervised by Pretrial Services in Maricopa County. The agency's goals are straightforward: minimizing community risk, getting defendants to their court dates and monitoring defendants during release as cost efficiently as possible.

Specifically, the agency collects, verifies and provides information and bond

[/0216708p.pdf](#)

Dickerson v. Bailey, No. 02-21137 (5th Cir. June 26, 2003). Several Houston oenophiles brought a Commerce Clause action challenging the Texas restrictions on shipping out-of-state wine into Texas, when Texas allowed shipping of wine from in-state wineries.

"In the face of these statutes, the Administrator baldly asserted before the district court and re-asserts on appeal that the Texas Alcohol Beverage Commission does not discriminate between in-state and out-of-state wineries. It is clear beyond peradventure, however, that the TABC permits in-state wineries to circumvent Texas's three-tier system and both sell and ship directly to in-state consumers; and it is equally clear that the statutes prevent out-of-state wineries from exercising the same privileges. To paraphrase the Bard, that which we call discrimination by any other name would still smell as foul."

<http://caselaw.lp.findlaw.com/data2/circs/5th/0221137p.pdf>

Pretrial Program Enhances Results, Saves Through Partnerships

Dan Broome
Government
West May/June 2003

reports on felony defendants to Superior Court judicial officers. Critical housekeeping duties are meticulously managed, from gathering criminal histories and other defendant information and producing summary reports pending the arrestee's initial court appearance. This objective data helps judges make informed release decisions regarding bonds, pretrial detention or

community supervision.

To get the job done with tight budgets, the Maricopa County Pretrial Services Agency aggressively incorporated technology to help it accomplish its tasks efficiently and cost effectively. In many ways, the technology the agency used has acted as a staff multiplier, allowing supervising officers to do more with less, at a lower cost.

For example, to help supervise defendants requiring special supervision, the Pretrial Services Agency established a home detention program. Maricopa County officials found a vendor in 1999, BI Inc., that offers a flexible mix of monitoring solutions. BI works with more than 2,500 probation, parole and pretrial release agencies to monitor and provide treatment services to almost 100,000 offenders daily.

CHAMPERTY & MAINTENANCE: Ohio Rules Litigation Funding Arrangement

VoidPop Quiz: Define champerty and maintenance. Without Black's Law Dictionary. Give up? Well, you might want to review the latest decision from the Ohio Supreme Court, which struck a blow against that segment of the litigation-funding industry that advances money directly to personal-injury plaintiffs in return for promises to repay much larger amounts from the ultimate proceeds of claims, contingent upon plaintiff's recovery. Both champerty and maintenance involve "officious intermeddlers" attempting to "stir up" litigation, and the court detailed mathematically how it thought the financial interests of outsiders such as those in this case would prolong litigation and reduce the incentive to settle (both bad things, of course). *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St. 3d 121, 2003 Ohio 2721 (June 11, 2003).

<http://www.ethicsandlawyering.com/Issues/fil>

[es/Rancman.pdf](#) **Macaronic**

(Adjective) **Pronunciation:**

on: [mæ-kê-'ron-ik]

Definition 1: Characterized by the mixing of two or more languages in speech.

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