

THE PUBLIC LAWYER

PUBLIC LAWYERS SECTION

JULY 1, 2005



NEVADA CASES

<http://www.leg.state.nv.us/scd/OpinionListPage.cfm>

Gumm v. State, Dep't of Education, 121 Nev. Adv. Op. No. 35 (June 23, 2005). "The Individuals with Disabilities Education Act (IDEA) is designed 'to ensure that all children with disabilities have available to them a free appropriate public education' in light of their special needs. In this, the IDEA aims to help schools prepare students with disabilities for independent living, to ensure that the rights of such children and their parents are protected, and to assist continuing efforts to provide and implement the most effective educational programs possible. To accomplish those purposes, the IDEA and its corresponding regulations set forth certain procedural measures, which are intended to safeguard the substantive

rights afforded to children and their parents under the act. This petition for a writ of mandamus involves a state educational agency's alleged refusal to comply with one of those procedures. We take this opportunity to clarify and distinguish two mechanisms for obtaining review of IDEA issues."

Wilson v. State, 121 Nev. Adv. Op. No. 34 (June 23, 2005). "While running an errand with the 10-year-old daughter of a family friend, Wiley Gene Wilson stopped at a local Wal-Mart store to buy new clothes for the girl because she had urinated in her pants. Wilson also purchased a Polaroid camera and film. Wilson then took photographs of the girl in various stages of undress and in various sexually suggestive poses as she changed clothes in the back of his Ford Bronco. The State charged Wilson by indictment with four counts of using a minor in the production of pornography and four counts of

possession of a visual presentation depicting sexual conduct of a person under 16 years of age. Following a jury trial, Wilson was convicted on all eight counts and sentenced to four terms of 24 to 72 months on the possession charges to run concurrently with four consecutive terms of life with the possibility of parole after ten years for the production charges. The district court further ordered that all sentences were to run consecutively to any remaining time on the federal prison sentence Wilson was currently serving.

Wilson appeals his conviction arguing that (1) it violates double jeopardy because he was convicted on four counts of production of child pornography arising out of a single incident, (2) it violates double jeopardy because the four charges of possession of child pornography are lesser-included offenses to the four production charges, (3) the district court erred by denying Wilson possession of material evidence (the photographs) against him at trial, (4) the district court violated his Sixth Amendment right to confront his accuser, (5) the district court erred by denying Wilson's motion to dismiss based on the State's alleged failure to meet the 120-day deadline under the Interstate Agreement on Detainers, (6) the district court failed to compel the testimony of material witnesses for the defense, and (7) the indictment failed to adequately advise Wilson of the charges such that he could prepare a defense. We reverse three of Wilson's four convictions for production of child pornography and remand the case to the district court for resentencing as appropriate. However, we conclude that Wilson's remaining arguments on appeal lack merit."

Garcia v. State, 121 Nev. Adv. Op. No. 33 (June 23, 2005). "On appeal, Ramon Jacobo Garcia argues that his convictions should be reversed because (1) the jury instruction on false imprisonment must include an asportation requirement, (2) the State presented insufficient evidence to support a verdict on kidnapping and false imprisonment, (3) the district court failed to

hold a hearing on his motion to dismiss counsel, (4) the statutory reasonable doubt instruction is unconstitutional, (5) the district court failed to permit cross-examination of certain non-adverse witnesses, and (6) the convictions for conspiracy to commit robbery and conspiracy to commit burglary violate the Double Jeopardy Clause. We hold that when a person is charged with false imprisonment and a separate associated offense, an additional instruction stating that the false imprisonment requires a factual basis independent of the associated crime is required. Accordingly, Garcia's convictions for false imprisonment must be set aside. However, we conclude that the State presented sufficient evidence on the charges of kidnapping, that the district court did not abuse its discretion in failing to hold a hearing on Garcia's motion to dismiss counsel, and that the reasonable doubt instruction required by NRS 175.211 is not unconstitutional. In addition, we conclude that the record is insufficient to establish that the district court erred by not permitting Garcia to cross-examine non-adverse witnesses at trial. Finally, we conclude that the evidence produced at trial is insufficient to support Garcia's conviction on the charge of conspiracy to commit robbery at the Silver Dollar Store, and we reverse the district court's judgment of conviction on that charge but affirm the conspiracy to commit burglary charge."

Hantges v. City of Henderson, 121 Nev. Adv. Op. No. 32 (June 23, 2005). "In this taxpayer mandamus action, we decide whether a citizen has standing to challenge an agency's determination of blight for a redevelopment plan. Consistent with our prior holdings granting citizens the right to challenge land-use decisions, we conclude that citizens may also challenge the blight findings. We also take the opportunity to decide whether an advisory commission decision must be overturned when members to the commission have an alleged conflict of interest. Because the Nevada ethics statutes do not apply to advisory committees and because the

committee members recused themselves from any decision-making, we conclude that there is no basis to overturn the actions of the redevelopment agency in its adoption of the redevelopment plan.”

Pope v. Motel 6, 121 Nev. Adv. Op. No. 31 (June 23, 2005). “This is a proper person appeal from a district court order granting summary judgment in an employment discrimination and tort case that raises three issues of first impression: (1) whether an employee who brings discrimination claims in the district court without first presenting them to the administrative agency has failed to exhaust administrative remedies; (2) whether NRS 613.340(1), Nevada’s anti-retaliation statute, supports a retaliation claim when a third party, and not the complaining party, has engaged in allegedly protected activity; and (3) whether statements made to police before criminal proceedings are commenced should be subject to an absolute privilege or only a qualified privilege.

We take this opportunity to clarify that a party cannot bring a state court claim for employment discrimination unless that claim was first presented to the administrative agency or is reasonably related to the administrative claims. Additionally, we conclude that NRS 613.340(1) does not support a retaliation claim when the individual claiming retaliation has not personally engaged in protected activity. Finally, we hold that a qualified privilege applies to statements made to police before criminal proceedings are initiated.”

Fiegehen v. State, 121 Nev. Adv. Op. No. 30 (June 9, 2005). “A jury found appellant Christopher Fiegehen guilty of murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, burglary while in possession of a deadly weapon, and invasion of the home while in possession of a deadly weapon. The jury was not instructed that, under NRS 200.030(3), if it found Fiegehen guilty of

murder, it was required to designate whether the murder was of the first or second degree. Consequently, the jury's verdict did not specifically designate whether Fiegehen committed murder of the first or second degree. In resolving this appeal, we have revisited this court's precedent holding that such a verdict renders a murder conviction fatally defective and a nullity. We conclude that where, as here, the verdict as a whole unequivocally establishes a finding of felony murder, the verdict satisfies the command of NRS 200.030(3) because felony murder is first-degree murder as a matter of law. We further conclude that Fiegehen's remaining assignments of error do not warrant reversal, and we affirm the judgment of conviction in its entirety.”

Grover C. Dils Medical Ctr. v. Menditto, 121 Nev. Adv. Op. No. 29 (June 9, 2005). “In this appeal, we examine the ‘last injurious exposure rule,’ which links workers’ compensation liability with the employment that last contributed to the causation of a subsequent disabling condition. Primarily, the parties dispute whether the claimant’s most recent disabling condition is, under the rule, the result of a work-related “‘aggravation’ and thus the most recent employer’s responsibility, or merely a ‘recurrence’ of her previous injuries, which remains the former employer’s responsibility. This opinion clarifies the standards for determining whether a subsequent condition is an ‘aggravation’ or a ‘recurrence’ under the rule: an ‘aggravation’ is the result of a specific, intervening work-related trauma, amounting to an ‘injury’ or ‘accident’ under workers’ compensation law, that independently contributes to the subsequent disabling condition; a ‘recurrence’ occurs when no specific incident can independently explain the worsened condition.”

Village Builders 96 v. U.S. Laboratories, 121 Nev. Adv. Op. No. 28 (June 9, 2005). “These cases involve the applicability of the

general rule against finding a successor corporation liable for the acts of its predecessor and the exceptions to the rule and the appropriateness of an award of costs.

While this court has adopted the general rule that a successor is not liable for the acts of its predecessor and has recognized the rule's exceptions, we have yet to address the parameters of those exceptions under Nevada law. We now clarify the requirements that a plaintiff must meet to have a successor corporation held liable under the de facto merger and mere continuation exceptions to the general rule. We decline to expand the mere continuation exception by adopting the continuity of the enterprise exception urged by appellant. We do conclude, however, that neither of the exceptions applies in the instant case; as a result, the district court ruled correctly on the issue of summary judgment, and we affirm the district court's order. Nevertheless, we conclude that the district court abused its discretion in awarding costs to respondent U.S. Laboratories, Inc. (U.S. Labs) in the absence of a verified memorandum of costs. Accordingly, we reverse the district court's order awarding costs to U.S. Labs."

Towbin Dodge, LLC v. Eighth Judicial Dist. Court, 121 Nev. Adv. Op. No. 27 (June 9, 2005). "In this petition, we consider whether an affidavit to disqualify a district judge, filed after contested pretrial matters were heard but almost immediately after the alleged basis for disqualification was discovered, was timely. NRS 1.235 sets forth the procedure for disqualifying district judges and requires that an affidavit be filed at least twenty days before trial or at least three days before any contested pretrial matter is heard. We conclude that the statute must be enforced as written. But when new grounds for disqualification are discovered after the statutory time has passed, the Nevada Code of Judicial Conduct provides an additional, independent basis for seeking disqualification through a motion under the governing court

rules. Accordingly, since petitioners filed a statutory affidavit, not a motion under the Nevada Code of Judicial Conduct, their affidavit was untimely, and we deny the petition."

Weiner v. Beatty, 121 Nev. Adv. Op. No. 26 (June 9, 2005). "In this appeal, we consider whether a public-employee union member has an independent claim for legal malpractice against an attorney provided by his union. We conclude that state labor law should be interpreted consistently with federal labor law, which bars legal malpractice claims against lawyers supplied by unions. A union member's remedy lies in an action against the union for breach of the duty of fair representation."

State v. Eighth Judicial Dist. Court, 121 Nev. Adv. Op. No. 25 (June 9, 2005). "This is an original petition by the State for a writ of prohibition or mandamus. The underlying proceeding in the district court involves an untimely and successive post-conviction habeas petition filed by David Robert Riker, the real party in interest here. The State contends that the claims raised in Riker's petition are procedurally barred and the district court abused its discretion or exceeded its jurisdiction in ordering an evidentiary hearing on the merits of the claims. The State seeks a writ ordering the district court to vacate its order and to dismiss Riker's habeas petition as procedurally barred.

For the last year and a half this court has been burdened with an increasing number of petitions by the State seeking our extraordinary intervention in post-conviction habeas proceedings. These petitions ask this court to compel district courts to impose procedural bars against post-conviction habeas claims. We have granted relief in some of these cases, and we determine that some relief is appropriate here. However, we emphasize that mandamus or prohibition is an extraordinary remedy, not a means for routine correction of error, and accordingly set forth some guidance on the

narrow circumstances under which that remedy may be appropriate regarding post-conviction procedural bars. We also address some claims that Riker makes in attacking this court's general application of post-conviction procedural default rules."

Matter of Harrison Living Trust, 121 Nev. Adv. Op. No. 24 (June 9, 2005). "In this appeal, we consider whether petitions to challenge void judgments pursuant to NRCP 60(b)(4)[1] may be denied in exceptional circumstances. Because NRCP 60(b) expressly requires filing petitions within a reasonable time, we conclude that district courts may consider lack of diligence, including equitable estoppel principles, to deny relief from a void judgment."

NEW JERSEY ENLISTS EXPERTS TO LOWER BENEFIT COSTS

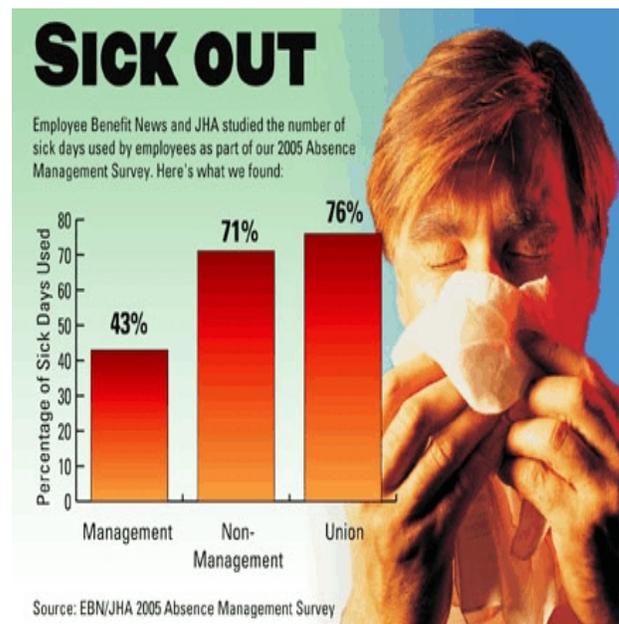
June 8, 2005

<http://www.benefitnews.com>

Companies aren't the only ones with pension problems. Acting New Jersey Gov. Richard Codey recently created a taskforce to deal with the rising cost of benefits for state and local government workers. "Each year the state's fixed costs grow larger and larger and consume more and more of the budget," he says.

The taskforce, which includes experts from Sharp Electronics, Goldman Sachs and Rutgers University, will examine the current laws, regulations, procedures and agreements regarding benefits of government workers. It will compare the level of benefits provided by New Jersey with those offered in other states and recommend how the government can control benefit costs.

The taskforce's job won't be easy. Last month, actuaries reported that the pension system for public employees has a projected deficit of \$2.7 billion, almost five times the liability of \$593 million reported a year ago. By 2009, the total cost of employee pensions and health insurance will consume more than one-fifth of all state spending, according the Division of Pensions and Benefits.



UNEXPECTED CONSEQUENCES

Edith Matthai, the president-elect of the L.A. County Bar, and a partner at Robie & Matthai, gave a provocative and sometime-puzzling keynote address at LegalTech West Coast Wednesday.

She focused on the "unintended consequences" of legal technology, and well-articulated many of the challenges faced by the profession -- especially Baby Boomers. Matthai compared technology today to that of the mid-'70s, and raised alarms about some of the security issues that firms must now confront, such as assuring that metadata is cleared from documents.

There was an almost audible gasp from some corners of the audience when she said that she requires her firm's lawyers to print out e-mail and put hard copies into client files.

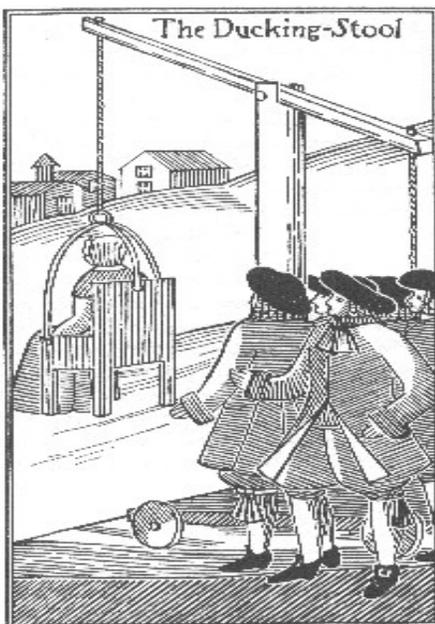
She told an amazing war story about how a young law clerk's very racy personal blog ("Princess Love Child") -- that happened to mention by name the firm's two name partners -- triggered high Google hits and would show up anytime someone searched for the firm by its name.

Matthai's talk clearly illustrates some of the challenges faced by the profession, as we all struggle to adopt and integrate technology. It's important that we (vendors, journalists, etc.) not get so 50,000 feet up in the air that we forget that with all the productivity gains technology brings, that it's still not easy. And as Matthai says, there are unexpected and unintended consequences to any new tools.

But those challenges, IMHO, should not dissuade lawyers from embracing technology -- because the benefits wildly overpower the headaches.

<http://commonsold.typepad.com/>

The Ducking Stool



The ducking stool seems to have been placed on the lowest and most contempt-bearing stage among English instruments of punishment. The pillory and stocks, the gibbet, and even the whipping-post, have seen many a noble victim, many a martyr. But I cannot think any save the most ignoble criminals ever sat in a ducking-stool. In all the degrading and cruel indignities offered the many political and religious offenders in England under the varying rules of both church and state, through the fifteenth, sixteenth and seventeenth centuries, the ducking-stool played no part and secured no victims. It was an engine of punishment specially assigned to scolding women; though sometimes kindred offenders, such as slanderers, "makebayts," "chyderers," brawlers, railers, and women of light carriage also suffered through it. Though gruff old Sam Johnson said to a gentle Quaker lady: "Madam, we have different modes of restraining evil -- stocks for men, a ducking-stool for women, and a pound for beasts;" yet men as well as women-scolds were punished by being set in the ducking-stool, and quarrelsome married couples were ducked, tied back-to-back. The last person set in the Rugby ducking-stool was a

brutal husband who had beaten his wife. Brewers of bad beer and bakers of bad bread were deemed of sufficiently degraded ethical standing to be ducked. Unruly paupers also were thus subdued.

That intelligent French traveler, Misson, who visited England about the year 1700, and who left in his story of his travels so much valuable and interesting information of the England of that day gives this lucid description of a ducking-stool:

"The way of punishing scolding women is pleasant enough. They fasten an armchair to the end of two beams twelve or fifteen feet long, and parallel to each other, so that these two pieces of wood with their two ends embrace the chair, which hangs between them by a sort of axle, by which means it plays freely, and always remains in the natural horizontal position in which a chair should be, that a person may sit conveniently in it, whether you raise it or let it down. They set up a post on the bank of a pond or river, and over this post they lay, almost in equilibrio, the two pieces of wood, at one end of which the chair hangs just over the water. They place the woman in this chair and so plunge her into the water as often as the sentence directs, in order to cool her immoderate heat."

The adjectives pleasant and convenient as applied to a ducking-stool would scarcely have entered the mind of any one but a Frenchman. Still the chair itself was sometimes rudely ornamented. The Cambridge stool was carved with devils laying hold of scolds. Others were painted with appropriate devices such as a man and woman scolding. Two Plymouth ducking-stools still preserved are of wrought iron of good design. The Sandwich ducking-stool bore the motto:

"Of members ye tonge is worst or beste
An yll tonge oft doth breede unreste."

We read in Blackstone's *Commentaries*:

"A common scold may be indicted, and if convicted shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or ducking-stool."

The trebuchet, or trebucket, was a stationary and simple form of a ducking machine consisting of a short post set at the water's edge with a long beam resting on it like a see-saw; by a simple contrivance it could be swung round parallel to the bank, and the culprit tied in the chair affixed to one end. Then she could be swung out over the water and see-sawed up and down into the water. When this machine was not in use, it was secured to a stump or bolt in the ground by a padlock¹ because when left free it proved too tempting and convenient an opportunity for tormenting village children to duck each other.

A tumbrel or scold's-cart, was a chair set on wheels and having very long wagon-shafts, with a rope attached to them about two feet from the end. When used it was wheeled into a pond backward, the long shafts were suddenly tilted up, and the scold sent down in a backward plunge into the water. When the ducking was accomplished, the tumbrel was drawn out of the water by the ropes. Collinson says in his *History of Somersetshire*, written in 1791: "In Shipton Mallet was anciently set up a tumbrel for the correction of unquiet women." Other names for a like engine were gumstool and coqueen-stool.

<http://www.getchwood.com/punishments/curious/chapter-2.html>

NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at <http://www.ca9.uscourts.gov/ca9/neopinions.nsf>)

United States v. Barken, No. 03-50441 (June 27, 2005). “Gary Donald Barken appeals his jury trial conviction and sentence for unlawful transportation and disposal of hazardous material without a permit in violation of 42 U.S.C. § 6928(d)(1) and (d)(2)(A) (codifying the Resource Conservation and Recovery Act, (RCRA)). He argues that the district court erred by denying his motion to dismiss the indictment for pre-indictment delay in violation of his due process rights under the Fifth Amendment and under Federal Rule of Criminal Procedure 48(b). He also alleges four sentencing errors. We affirm Barken’s conviction and remand to the district court to consider the sentencing issues in accordance with *United States v. Booker*, 125 S. Ct. 738 (2005), and *United States v. Ameline*, No. 02-30326, 2005 WL 1291977 (9th Cir. June 1, 2005) (en banc).”

Resendiz v. Kovensky, No. 03-55136 (June 27, 2005). “Hugo Rangel Resendiz appeals the district court’s dismissal of two petitions for habeas corpus — one under 28 U.S.C. § 2254, naming the State of California as the respondent, and a second under 28 U.S.C. § 2241 against the Bureau of Immigration and Naturalization Service. We have jurisdiction pursuant to 28 U.S.C. § 2253. We conclude that (1) Resendiz was not ‘in custody pursuant to the judgment of a State court’ when he filed his § 2254 petition, and he is not entitled to an exception from the in custody requirement; (2) the district court did not err in construing Resendiz’s § 2254 petition as a petition against the INS (3) the enactments of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) do not change the long standing principle that a petitioner may not collaterally attack his state

court conviction in a § 2241 petition against the INS. Accordingly, we affirm.”

United States v. Nakai, No. 03-10485 (June 27, 2005). “Gregory Nakai appeals his conviction of a set of serious federal crimes committed on an Indian reservation: premeditated first degree murder; robbery; felony murder-kidnaping; carjacking resulting in death; felony murder-robbery and use of a firearm during the commission of crimes of violence. We affirm the convictions.”

United States v. Vo, No. 03-10699 (June 27, 2005). “Petitioner Rick Vo and his wife Brenda were indicted for conspiring to possess more than fifty grams of methamphetamine with intent to distribute and for aiding and abetting each other in the possession of more than fifty grams of methamphetamine with intent to distribute. See 8 U.S.C. § 841(a)(1); 21 U.S.C. § 846. The VOs were arrested after an employee of Mail Boxes, Etc., notified the Federal Bureau of Investigation that a suspicious package had been dropped off for shipment to California by Federal Express. The shipping label stated that the shipment contained hair products and makeup, and the employee opened the box pursuant to store policy to ensure that it did not contain any aerosol products. Realizing that the package was suspicious (because it did not contain hair products but rather contained fifteen pounds of an unknown substance), the store clerk notified the FBI, and the FBI obtained a search warrant from a federal magistrate judge. The FBI discovered four gallon sized bags of a substance testing positive for methamphetamine. The VOs were arraigned and indicted in October 2002 for charges stemming from the methamphetamine possession.

In April 2003, Brenda pleaded guilty to conspiracy. A jury convicted Rick Vo in May 2003 on one count, aiding and abetting possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Vo raises three

claims on appeal. First, Vo claims that the district court erred by denying his Speedy Trial Act motion to dismiss under 18 U.S.C. § 3161, because more than seventy days elapsed between the filing of the government's indictment and Vo's trial. Second, Vo claims that the district court erred by allowing Brenda, his wife, to testify about marital communications in violation of his marital communications privilege. Third, Vo argues that the district court erred in admitting evidence of a thirteen-year-old drug conviction in violation of Federal Rules of Evidence 401, 402, 403, and 404(b). Finding no error, we affirm the conviction. Vo also submitted a Rule 28(j) letter regarding the upward enhancement of his sentence under the federal sentencing guidelines by the district court. Because Vo did not challenge his sentence on Sixth Amendment grounds in the district court, we grant a limited remand pursuant to *United States v. Ameline*, No. 02-30326, 2005 WL 1291977, at 11 (9th Cir. June 1, 2005) (en banc)."

United States v. Camacho, No. 04-10078 (June 24, 2005). "Victor Camacho is a federal civilian employee serving as an Air Reserve Technician in the 749th Aircraft Maintenance Squadron at the Travis Air Force Base in California. Camacho allegedly stole a home theater system from the Base Exchange; in response, the squadron commander sanctioned Camacho for theft. Nearly one year later, the United States Attorney's office filed an information charging Camacho for the same alleged theft, as a misdemeanor violation of 18 U.S.C. § 641. Camacho filed a motion to dismiss the information on double jeopardy grounds, arguing that the sanctions his commander imposed constituted punishment barring his subsequent prosecution. We have jurisdiction over the district court's collateral order under 18 U.S.C. § 1291, and we review de novo. *United States v. Schiller*, 120 F.3d 192, 193 (9th Cir. 1997). We affirm the district court's denial of Camacho's motion to dismiss."

Kennedy v. City of Ridgefield, No. 03-35333 (June 23, 2005). "Defendant Noel Shields appeals the district court's ruling that he is not entitled to summary judgment against Plaintiff Kimberly Kennedy's 42 U.S.C. § 1983 claim. He argues that his alleged conduct did not violate Plaintiff's clearly established constitutional rights. We disagree, and conclude the district court correctly determined that Shields is not entitled to qualified immunity. Accordingly, we affirm the decision below.

Early on the morning of September 25, 1998, Michael Burns broke into the Kennedy house and shot Jay and Kimberly Kennedy while they slept. Jay Kennedy died as a result of his injuries. Michael Burns was convicted of the premeditated murder of Jay Kennedy and attempted premeditated murder of Kimberly Kennedy.

Kennedy brought a lawsuit against Shields and Ridgefield City, among others, in Clark County Superior Court asserting several state causes of action and a claim under 42 U.S.C. § 1983 and the Fourteenth Amendment. The case was removed to the United States District Court for the Western District of Washington. On March 13, 2003, Shields and Ridgefield City moved for summary judgment. The court granted summary judgment to the defendants on all state law claims and to Ridgefield City on Kennedy's § 1983 'failure to train' claim. The court denied Shields's motion for summary judgment based on qualified immunity. The district court concluded that viewing the facts in a light most favorable to plaintiffs, 'a jury could find that Officer Shields unreasonably created a false sense of security in plaintiffs by agreeing to give plaintiffs advanced notice of advising the Burns family of the allegation that Michael Burns sexually molested Tera Teufel, and assuring the plaintiffs of a neighborhood patrol.' This interlocutory appeal followed."

Botello v. Gammick, No. 03-16618 (June 23, 2005). “Appellant Rene Botello alleges that after he brought to light abuses in the Washoe County District Attorney’s sexual assault response program, Washoe County District Attorney Richard Gammick and Deputy District Attorney John Helzer retaliated against him for his protected First Amendment activity, in violation of 42 U.S.C. § 1983, defamed him and subjected him to intentional infliction of emotional distress. Botello brought suit in the district court against Gammick, Helzer and Washoe County. The district court dismissed Botello’s first amended complaint on the basis of absolute prosecutorial immunity, and this appeal followed. Because certain of the prosecutors’ acts were not within the scope of their prosecutorial functions and were not closely associated with the judicial process, they were not shielded by absolute immunity. In addition, the County was not entitled to absolute immunity. Accordingly, we affirm in part, reverse in part and remand.”

Bradley v. Henry, No. 04-15919 (June 22, 2005). “Nicole Bradley appeals the judgment of the district court denying her habeas corpus petition. Holding that she was denied due process of law at a critical stage in her criminal trial with harm to her ability to defend herself in a capital case, we reverse the judgment of the district court.”

United States v. Gonzalez, Inc., No. 04-10041 (June 22, 2005). “The government appeals the district court order granting in part defendants’ motion to suppress evidence obtained as a result of wiretaps at the Los Angeles headquarters of Gonzalez, Inc., dba Golden State Transportation (GST). We consider below whether the district court erred by: (1) conducting a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); (2) finding that the wiretap issued for the company headquarters failed to meet the statutory necessity requirement; and (3) granting standing to Antonio and Francisco Gonzalez to challenge

all conversations intercepted under the invalidated wiretap order. We conclude that each of the district court’s rulings was correct, and thus we affirm.”

United States v. Sears, No. 03-10573 (June 20, 2005). “In this case, we must determine the proper remedy for a search pursuant to a warrant that, due to police error in preparing the document for distribution, contained eight words not reviewed by a neutral magistrate. The eight words were ‘or nearby’ (twice) and ‘but not limited to.’ It is undisputed that those words expanded the scope of the search and violated the particularity requirement of the Fourth Amendment. Defendant John Sears appeals the district court’s decision to remedy this Fourth Amendment violation by suppressing only that evidence seized pursuant to the unreviewed portions of the warrant. We affirm. Because the Fourth Amendment violation was not flagrant, and the invalid portions of the warrants were relatively insignificant, we hold that blanket suppression was not required.”

United States v. Afshari, No. 02-50355 (June 20, 2005). “We review the constitutionality of a statute prohibiting financial support to organizations designated as ‘terrorist.’

Conceivably the MEK developed its practices at a time when the United States supported the previous regime in Iran, and maintained its position while harbored by the Saddam Hussein Ba’ath regime in Iraq. Maybe the MEK’s position will change, or has changed, so that its interest in overturning the current regime in Iran coincides with the interests of the United States. Defendants could be right about the MEK. But that is not for us, or for a jury in defendants’ case, to say. The sometimes subtle analysis of a foreign organization’s political program to determine whether it is indeed a terrorist threat to the United States is particularly within the expertise of the State Department and the Executive Branch. Juries could not make

reliable determinations without extensive foreign policy education and the disclosure of classified materials. Nor is it appropriate for a jury in a criminal case to make foreign policy decisions for the United States. Leaving the determination of whether a group is a 'foreign terrorist organization' to the Executive Branch, coupled with the procedural protections and judicial review afforded by the statute, is both a reasonable and a constitutional way to make such determinations. The Constitution does not forbid Congress from requiring individuals, whether they agree with the Executive Branch determination or not, to refrain from furnishing material assistance to designated terrorist organizations during the period of designation."

Brambles v. Duncan, No. 01-55716 (June 17, 2005). "Michael D. Brambles appeals the district court's dismissal of his habeas corpus petition as time-barred under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d). Brambles filed an earlier petition that was timely, but it included one exhausted and two unexhausted claims. The district court told Brambles he could either dismiss the unexhausted claims or dismiss the whole petition 'without prejudice to any right [he] may have to file a new petition once available state remedies are exhausted as to all claims.' The court also warned Brambles, who was then pro se, that 'recently amended 28 U.S.C. § 2244 limits the time period within which a petition may be filed.' In fact, the one-year period within which to file a federal petition had already expired by the time the district court made this ruling. Thus, if Brambles dismissed his petition, his right to seek federal habeas review would be lost unless he could establish equitable tolling. *See Tillema v. Long*, 253 F.3d 494, 503-04 (9th Cir. 2001) (en banc).

Relying on what the district court told him, and unfamiliar with the consequences of dismissing his timely petition in its entirety, Brambles chose to have the entire petition

dismissed without prejudice. He then went back to state court, exhausted his two unexhausted claims, and thereafter returned to federal court where he filed his present petition which includes all three claims. The district court dismissed the petition with prejudice, finding that it was time-barred.

We affirm the district court's dismissal. We conclude that while the court failed to inform the pro se Brambles of all of the consequences of having his entire petition dismissed, the court did not actively mislead Brambles, and no extraordinary circumstances existed beyond his control that would account for his failure to timely file."

Spoklie v. State of Montana, No. 03-35857 (June 13, 2005). "Appellants Kim J. and Cindy R. Kafka, Diamond K Ranch Enterprises L.L.C., Robert Spoklie, and Spoklie Enterprises L.L.C. challenge a Montana ballot initiative, Proposition I-143, on federal and state constitutional grounds. We affirm the district court's denial of a motion to stay proceedings in the federal court pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). We hold that the Kafkas' claims against the State of Montana and the Montana Department of Fish, Wildlife and Parks are precluded by the final judgment previously entered in their parallel state court case. Finally, we affirm the district court's dismissal of all remaining claims.

Robert Spoklie owns one alternative livestock ranch, Spoklie Enterprises, and is the co-owner of another, Spoklie Elk Ranches. Until the passage of Proposition I-143, the income from the Kafka and Spoklie ranches came primarily from 'fee shooting,' a practice by which members of the public, many of them from out of state, paid to shoot a pre-selected animal on the ranch under the supervision of a guide. In October 1999, an animal on a Montana game farm ranch was diagnosed with chronic wasting disease. Concerned about the risk of the

disease spreading among stocks of alternative livestock, the legislature imposed a moratorium on applications for new alternative livestock ranches in May 2000. Meanwhile, opponents of fee shooting collected enough signatures to qualify I-143 for the November 2000 statewide ballot. Montana voters passed I-143 on November 7, 2000. It became effective immediately.”

United States v. Holler, No. 03-50129 (June 13, 2005). “Holler argues that the district court erred by not dismissing his indictment for outrageous government conduct because (1) the CI had a history of misconduct as an informant and the DEA was aware of the prior misconduct, (2) the CI engaged in misconduct in this case, including the theft of drug money, and (3) the government ratified the CI’s behavior. A claim that the indictment should be dismissed because the government’s conduct was so outrageous as to violate due process is reviewed *de novo*. *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003). The evidence is viewed in the light most favorable to the government and findings of fact underlying the dismissal are reviewed under a clearly erroneous standard. *Id.*; see also *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991).

“Outrageous government conduct is not a defense, but rather a claim that government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed.” *United States v. Montoya*, 45 F.3d 1286, 1300 (9th Cir. 1995). To meet this high standard, the ‘governmental conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice.’ *Barrera-Moreno*, 951 F.2d at 1092 (quotations omitted). Here, the CI’s conduct was neither attributable to the government, nor was it “so excessive, flagrant, scandalous, intolerable, and offensive as to violate due process.” *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996) (quotations omitted). Moreover, as we

noted in *United States v. Simpson*, 813 F.2d 1462, 1470 (9th Cir. 1987), ‘[i]t is unrealistic to expect law enforcement officers to ferret out criminals without the help of unsavory characters.’

Accordingly, we find that the misconduct complained of in this case, even if proved, does not rise to the level required to establish outrageous government conduct.”

Huftile v. Miccio-Fonseca, No. 03-16734 (June 10, 2005). “In this case, we must decide a question of first impression: Does the favorable termination rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), apply to civil commitments under California’s Sexually Violent Predators Act? We conclude that the *Heck* rule applies. We therefore affirm the district court’s dismissal of Huftile’s § 1983 action for damages and declaratory relief. However, we reverse the dismissal of his claim for prospective injunctive relief under *Heck*, and remand for further proceedings concerning this form of relief.”

United States v. Davis, No. 04-50030 (June 9, 2005). “We must decide whether a district court has discretion to permit a defendant to withdraw his guilty plea prior to sentencing when the district court finds that defense counsel ‘grossly mischaracterized’ the defendant’s possible sentence, but also finds that the mischaracterization did not actually prejudice the defendant as is required to invalidate a plea post-sentence. We answer ‘yes.’ Because the district court did not believe it had such discretion, we vacate and remand for reconsideration of defendant’s motion to withdraw his plea.”

United States v. 144,744 Pounds of Blue King Crab, No. 03-36006 (June 9, 2005).

“King crab taken in violation of Russian fishing regulations is subject to forfeiture under the Lacey Act, 16 U.S.C. § 3374(a), on a strict liability basis. The question before us is whether an importer of such crab may assert an ‘innocent

owner defense' in forfeiture proceedings. Under the Civil Asset Forfeiture Reform Act, 18 U.S.C. § 983, the innocent owner defense cannot be asserted when the property to be forfeited is 'contraband or other property that it is illegal to possess.'

We hold today that if the crab at issue here was imported, received, or acquired in violation of the Lacey Act, 16 U.S.C. § 3372(a), it constitutes 'property that it is illegal to possess' for the purposes of 18 U.S.C. § 983(d)(4)."

Overstreet v. United Bhd. of Carpenters and Joiners, No. 03-56135 (June 8, 2005). The National Labor Relations Board Regional Director, Cornele Overstreet, seeks to enjoin members of a building trades union from holding aloft large banners announcing a 'labor dispute.' The banners are located so that they are visible to customers of businesses that deal with certain contractors who do not have union contracts. While the banners are displayed, other union members distribute handbills that explain the 'labor dispute.' The questions before us involve interpretation of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, set against the backdrop of First Amendment concerns raised by the request to enjoin peaceful speech activity. We conclude that the district court correctly declined to issue the injunction."

Shannon v. Newland, No. 03-16833 (June 8, 2005). "We must decide whether a California prisoner's petition for writ of habeas corpus is timely when it is filed long after his conviction but shortly after a decision by the California Supreme Court clarifying the state's criminal law in a way potentially favorable to his federal constitutional claim.

Because Shannon's petition for writ of habeas corpus was untimely, the district court was correct to dismiss it. We need not reach—and take no position on—the merits of

Shannon's constitutional claim. The judgment of the district court dismissing the petition as untimely is **AFFIRMED**."

Thomas v. City of Tacoma, Nos. 03-35799 (June 8, 2005). "This is an appeal and cross-appeal from the district court's denial of the parties' respective motions for attorney's fees pursuant to 42 U.S.C. § 1988(b).

To deny an award of attorney's fees notwithstanding Plaintiff's clear victory on one of his claims for relief is an abuse of discretion; a reasonable fee in this case is *not* no fee at all.

On remand, the district court must determine the reasonable fee for Plaintiff in this case. Because Plaintiff 'achieved only partial or limited success, the product of hours reasonably expended on the litigation *as a whole* times a reasonable hourly rate *may be* an excessive amount.' *Id.* at 436 (emphasis added). Therefore, the district court's inquiry is more searching, though it 'should not result in a second major litigation.' *Id.* at 437. In such cases, we have employed a two part test: (1) whether Plaintiff prevailed on unrelated claims ('[h]ours expended on unrelated, unsuccessful claims should not be included in an award of fees'), and (2) whether 'the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award.' *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003)."

United States v. Burt, No. 04-10240 (June 8, 2005). "The government filed a two-count indictment charging appellant Marnie Ann Burt with conspiracy to transport illegal aliens and transportation of illegal aliens. Burt requested jury instructions on her apparent public authority defense. The district court refused to give Burt's requested jury instructions, and the jury found Burt guilty on both counts. Burt appeals and argues the district court erred in refusing to instruct the jury on her public authority defense. Burt presented sufficient evidence to justify jury

instructions on her public authority defense. We reverse and remand for a new trial.”

United States v. Marquez, No. 04-30243 (June 7, 2005). “Sergio Ramon Marquez was randomly selected for secondary security screening at Seattle-Tacoma International Airport and found to be in possession of two kilograms of cocaine lodged underneath his pants. He challenges the denial of his motion to suppress the evidence obtained during this administrative airport search. He questions whether an airport screening procedure subjecting passengers to a handheld magnetometer wand scan, in addition to the standard walkthrough magnetometer and x-ray luggage scan, is constitutionally reasonable where the passenger is randomly selected for more intrusive screening upon or before entering the Transportation Security Administration security checkpoint. We hold that this random, additional screening procedure is reasonable under the Fourth Amendment. Accordingly, we affirm the district court’s denial of Marquez’s motion to suppress.”

United States v. Fay, No. 04-10401 (June 3, 2005). “Corey Lee Fay appeals the district court’s denial of his motion to suppress and his consequent judgment of conviction as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). We hold that there was no violation of the Fourth Amendment in the discovery of Fay’s gun. We affirm the judgment of conviction.

Mandy Ortiz was the tenant of Apartment 1099 at 2200 N. Torrey Pines, Las Vegas, Nevada. Fay lived with Ortiz and her four-year-old daughter at this address. Ortiz knew that Fay had been a gang member and that he kept a gun in the apartment. On October 8, 2003, Ortiz and Fay quarreled. Fay angrily threatened Ortiz. Ortiz tried to leave to go to her job at Sav-On. Fay refused to let her leave without him and got in her car and rode with her to the store, where the quarrel continued. Officer Stout responded to a

call reporting domestic violence. Ortiz told Stout that she was afraid of Fay, that there was a warrant for his arrest, and that he had a gun at her apartment. After checking on the arrest warrant, Stout arrested Fay and then, with Fay in his car, followed Ortiz back to her apartment at Ortiz’s request.

Ortiz asked Fay to accompany her into the apartment and told Stout that she wanted Fay’s gun out of her house. She pointed to a black duffle bag on a shelf in the open laundry room and said, ‘He keeps it there.’ Stout reached up on tip toes and retrieved the bag. He ascertained that the bag was open; had no name on it; contained men’s clothes; contained a box of ammunition; and showed the outline of a gun. He called for help from Detective Joe Kelley. Upon arriving, Kelley asked Fay if the gun Officer Stout had seen in outline was his. Fay said that it belonged to a friend but that he had it in his possession for more than a month. Kelley obtained a search warrant by telephone then searched the bag and found the gun.”

Collier v. Bayer, No. 04-15017 (June 3, 2005). “Petitioner-Appellant Stephen Wayne Collier appeals from the decision of the United States District Court for the District of Nevada, which denied his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied Collier’s habeas petition for failing to comply with the State of Nevada’s time limits for pursuing habeas relief. Collier challenges the adequacy of Nevada’s time limit for filing habeas corpus appeals and the tolling provisions provided therein. Further, he argues cause and prejudice to excuse his purported procedural default. We have jurisdiction pursuant to 28 U.S.C. § 2253. We reverse the district court’s decision and hold that the particular application of Nevada’s time limits and tolling provisions in Collier’s case was not adequately established prior to his appeal. Because we reverse on this ground, we do not reach the question of whether Collier had cause or suffered prejudice.”

Menotti v. City of Seattle, No. 02-35971 (June 2, 2005). “In this case we search for the proper balance between, on the one hand, the vibrant rights of free speech and assembly in an open society and, on the other hand, the needs of a city to maintain order and security. We consider the constitutionality of an emergency order prohibiting access to portions of downtown Seattle, Washington, during the 1999 World Trade Organization (WTO) conference. Appellants filed lawsuits in the United States District Court for the Western District of Washington seeking damages for the constitutional rights that were alleged to be violated by the emergency order. Four of the Appellants also filed individual claims in which they alleged that their constitutional rights were infringed by Seattle police officers in the course of the conference. We determine that the emergency order was a constitutional time, place, and manner restriction on speech on its face, and we affirm the judgment of the district court on that issue. But we also determine that there are genuine issues of material fact whether the emergency order was constitutional as applied to certain Appellants, and we reverse and remand for trial on that issue. As for the Appellants’ individual claims, we affirm in part, reverse in part, and remand.”

Juan H. v. Allen, No. 04-15562 (June 2, 2005). “Petitioner Juan H. appeals the United States District Court decision denying a writ of habeas corpus. He argues that his California juvenile delinquency petition for first-degree murder and attempted first-degree murder was sustained in violation of: 1) *Miranda v. Arizona*, 384 U.S. 436 (1966); 2) the Fifth Amendment prohibition on the use of involuntary or coerced statements; and 3) the Fourteenth Amendment due process right to be convicted by evidence that proves guilt beyond a reasonable doubt. The district court denied the writ. We have jurisdiction pursuant to 28 U.S.C. § 2253. We reverse the judgment of the district court and remand with instructions to grant the writ of habeas corpus.”

Today's Word:**Austral** (*Adjective*)**Pronunciation:** ['a-strêl]**Definition 1:** Of, pertaining to, or coming from the south.**Usage 1:** A word for "southern" on a somewhat higher plane: "austral winds", "austral climes", "austral gravitation".<http://www.yourdictionary.com/>**Today's Word:****Diaphanous** (*Adjective*)**Pronunciation:** [dɪ-'æ-fê-nês]**Definition 1:** Thin and fragile, translucent, filmy or flimsy.

Beating Drought in Las Vegas

An Interview With Pat Mulroy, General Manager of the Las Vegas Valley Water District

Kevin Hopkins

July/August 2004

<http://www.govwest.com>

Pat Mulroy has served as general manager of the Las Vegas Valley Water District since 1989, where she is charge of monitoring and planning water resource policies for one of the fastest growing regions of the nation. Government West Editor Kevin Hopkins spoke with Ms. Mulroy in July to learn how the Las Vegas area was addressing these challenges in the face of the ongoing drought in the West.

1. What are the major water-related challenges that the Las Vegas valley and Southern Nevada in general are facing, particularly in light of its tremendous growth in recent years?

The biggest water-related challenge Southern Nevada is facing is the same challenge facing many Colorado River users: the worst drought on record. The Colorado River basin is experiencing conditions not seen in at least 500 years. Flows in the river have been just a fraction of normal, and those extreme conditions are taking a toll on Lakes Powell and Mead, which act as the primary reservoirs for the Lower Basin states. At Lake Mead, a stark “bathtub ring” clings to the former water line, showing the more than 85 feet the lake has declined in the last five years, a decline representing trillions of gallons of water. Nevada receives just 300,000 acre-feet of water from the Colorado River—the smallest allocation of any user. That water meets the needs of 1.7 million residents and more than 35 million annual tourists.

For Southern Nevada, the challenges have rested with changing the perception about the community in which we live. We are learning to embrace living in the desert. It is changing how we use water and it is making us adept at doing more with less. It is a challenge that this community has met head on and I am confident that we will continue to do so. That success is due to the collaborative efforts of the Southern Nevada Water Authority (SNWA) and our member agencies. The SNWA is a regional agency that manages water resources and water conservation for Southern Nevada. It’s made up of seven member agencies, including: Big Bend Water District; the cities of Boulder City, Henderson, Las Vegas, and North Las Vegas; the Clark County Water Reclamation District; and the Las Vegas Valley Water District. The SNWA was formed in 1991 to manage water on a regional basis, rather than each agency competing for resources. That collaborative effort served us well during this drought. The drought has also reinforced the notion that how we grow is important to our long-term sustainability.

2. What steps has the region taken to prepare for the possibility of a worsening drought in the coming years?

In 2003, the SNWA and our member agencies implemented a comprehensive drought plan. The plan has three stages: Drought Watch, Drought Alert, and Drought Emergency. Each stage has restrictions and incentives to reduce water use and restrictions become more stringent with each stage. Our emphasis is on outdoor water uses, because all indoor water is effectively recycled.

In 2003, the community was in a Drought Watch stage. Some of those restrictions include assigned landscape watering days for residents and businesses, the elimination of grass in new commercial developments, water budgets for golf courses, and restrictions on fountains. The community’s response has been a resounding success: in 2002, the community used 318,000 acre-feet of water consumptively. In 2003, the consumptive use dipped to just 272,000 acre-feet of water. That’s a difference of 46,000 acre-feet of water in a year. The decline is due to the changes we’ve made in how we use water outdoors. Our landscapes are more efficient and we have limits on how we irrigate them.

We’re currently in a Drought Alert stage, which tightened the watering schedule, increased water waste fees, and eliminated turf from new residential front yards in favor of water-smart landscaping. As the worst drought on record continues, we turned to the community for guidance on what restrictions to implement for Drought Emergency, the third phase of the drought plan. A Citizens Advisory Committee met and recommended a series of restrictions. Those recommendations are being reviewed now and will build upon the success of the drought plan so far.

In addition, the SNWA is working to develop additional in-state water resources. These resources have been part of our water resource portfolio for years, but the drought is forcing us to speed up the development of those resources. Bringing non-Colorado River water to bear will allow us to better weather future droughts by diversifying our water resource portfolio.

3. What have been the region’s most successful water conservation efforts?

The SNWA's drought plan balances restrictions with incentives to give customers the tools necessary to significantly reduce water use and maintain a high quality of life. The most successful element of our conservation efforts is the Water Smart Landscapes rebate program. The program offers a rebate of \$1 for every square foot of grass replaced with water-smart landscaping. That's well worth the investment: for every square foot of grass replaced, the community saves 55 gallons of water per year. Last fiscal year, which ended June 30, 2004, the community upgraded nearly 24 million square feet of grass, saving 1.3 billion gallons of water.

The program is a success on two fronts: It immediately reduces water use, which will help us get through the drought; and it is also an investment in long-term savings because that landscaping will continue to use less water than the turf landscape originally in place. The other efforts that will ensure long-term savings are new development restrictions. New codes prohibit grass at new commercial properties. New homes must have water-smart landscaping in the front yard and may only plant grass in half of the backyard.

4. What role has water reclamation played in increasing the region's water supplies?

Southern Nevada has an advantage when it comes to location. Just 30 miles from the Colorado River, Southern Nevada captures and treats all indoor water use. That water is returned to the river system so it can be used again. That stretches our water resources. Additionally, many recreational turf areas use recycled water, which has environmental benefits and saves on power needed to treat and deliver water 2,500 feet uphill.

5. What can other states and localities in the West learn about water conservation and drought planning from the Las Vegas experience?

Southern Nevada's success in weathering the drought has come from the cooperation of the SNWA member agencies and the community. The drought plan was approved by the SNWA board and member agencies, and is supported by consistent codes and restrictions in all areas. The plan focuses on both immediate and long-term water savings. It strikes a balance between the need to conserve water, protect the environment, and maintain the quality of life for Southern Nevadans.

6/9/05: The Ninth Circuit has issued a [decision](#) which analyzes the impact of disclaimers on law firm websites which purport to deny formation of an attorney client relationship to those who submit information through forms on law firm web sites. The Ninth Circuit permitted a plaintiff who had submitted information to a firm while disclaiming creation of any attorney-client relationship to claim privilege over it. In contrast, a recent [Interim opinion from California](#) suggests that lawyers can avoid creating a confidential relationship only by specifically denying any obligation of confidentiality in order to avoid disqualification by a prospective client using the firm's website. Taken together, the two suggest that denying confidentiality is necessary to avoid disqualification, but doing so will preclude the person [who submits the information from claiming privilege over it](#). Professor Hricik suggests some [model language](#) that avoids these issues.

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