



The Public Lawyer

Nevada Supreme Court Cases

SFPP, L.P. v. Second Judicial Dist. Court, 123 Nev. Adv. Op. No. 56 (December 27, 2007) "This matter arises from a dispute concerning an underground petroleum pipeline relocation project, the ReTRAC project. Although the parties ultimately settled the dispute and had the corresponding case dismissed, differences concerning the share of the project's costs persisted. In this pe-

tion, we consider whether the district court retains jurisdiction to conduct proceedings with regard to the parties' dispute over the project costs, after the parties had the case dismissed according to their settlement agreement, which purports to reserve the district court's jurisdiction to address certain project cost issues. We conclude that once the district

court dismissed this case with prejudice, it lost all jurisdiction concerning that judgment, except to alter, set aside, or vacate its judgment in conformity with the Nevada Rules of Civil Procedure. Otherwise the district court is without jurisdiction to conduct proceedings with respect to the parties' continuing dispute over the project's costs. The entering of the order for dis-

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Public Lawyers Section

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PUBLIC ATTORNEY-CLIENT PRIVILEGE

New York Lawyer
By Martin A. Schwartz

The attorney-client privilege "is one of the oldest recognized privileges for confi-

dential communications."¹The privilege is designed to encourage "full and frank communications between attorneys and their clients

...."²
In *Upjohn v. United States*,³ the Supreme Court held that the attorney-client privilege encompasses

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missal with prejudice effectively ended the jurisdiction of the district court.”

Awada v. Shuffle Master, Inc.,

123 Nev. Adv. Op. No. 57

(December 27, 2007) “In this appeal, we consider the primary issue of whether a district court has the authority to bifurcate the legal and equitable claims presented in a single action, conduct a bench trial on an equitable claim, and then use the findings of fact and conclusions of law from that bench trial to dispose of the case. On this issue of first impression, we conclude that Nevada district courts have discretion to bifurcate legal and equitable claims in a single action and to first conduct a bench trial on an equitable claim. Furthermore, a district court that exercises such discretion may then use its findings of fact and conclusions of law as a basis for disposing of claims remaining in the case, so long as it does so in a manner consistent with Nevada law and our rules of civil procedure.

We also consider whether the district court abused its discretion by sua sponte disposing of the remaining claims in a summary judgment-like manner after conducting a bench trial on respondents’ counterclaim for rescission. In this case, the dis-

trict court did not abuse its discretion when it first considered respondents’ counterclaim for rescission and rescinded the parties’ agreement. Based on its findings and conclusions, the district court properly disposed of all of appellants’ contract-based claims against respondent Shuffle Master, Inc., because those claims could not stand absent a valid contract. However, the district court improperly granted summary judgment as to the claims against respondent Mark Yoseloff and appellants’ remaining claims against Shuffle Master because those claims can survive absent a valid contract between the parties. Additionally, the district court erred in resolving those claims without satisfying the procedural requirements of NRCp 56.

Accordingly, we affirm the district court’s judgment as to appellants’ claims for breach of contract and contract-based claims for breach of the implied covenant of good faith and fair dealing; we reverse the district court’s judgment as to appellants’ claims for fraud, civil conspiracy, conversion, unjust enrichment, and tortious interference with contractual relations/prospective economic advantage and as to appellants’ claims against Yoseloff; and we

remand this case to the district court for further proceedings consistent with this opinion.”

Johanson v. Eighth Dist.

Court, 123 Nev. Adv. Op. No.

58 (December 27, 2007) “This original petition for a writ of mandamus or prohibition challenges a district court order sealing the entire case file and issuance of a gag order sua sponte restricting all parties and their attorneys from discussing the case with the public. In this petition we consider whether the district court manifestly abused its discretion when it ordered the entire case file sealed, without making any findings under NRS 125.110, and prohibiting all communication relating to the case, without providing notice or a meaningful opportunity to be heard.

We conclude that by failing to comply with NRS 125.110 when it sealed the entire case file, the district court manifestly abused its discretion. District courts must comply with NRS 125.110 when sealing divorce cases. We also conclude that the district court manifestly abused its discretion when it, sua sponte, issued a gag order prohibiting all communication relating to the case, without providing reasonable notice that it was considering such a restric-

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tive order. Gag orders may be issued only when: (1) the activity poses a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) no less restrictive means are available. Because here, these require-

Court, 123 Nev. Adv. Op. No. 59 (December 27, 2007) “In this opinion, we consider whether solicitation to commit murder is a felony involving the use or threat of violence to the person of another within the meaning of the death penalty aggravator defined in NRS 200.033(2)(b).

not. Accordingly, we grant the petition and direct the district court to strike the notices of intent to seek the death penalty.”

Hsu v. County of Clark, 123 Nev. Adv. Op. No. 60 (December 27, 2007) “In this appeal, we determine whether

this court

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ments were not met, and for the reasons stated below, we grant this petition for extraordinary writ relief.”

Hidalgo v. Eighth Judicial Dist.

We conclude it is not. We also consider whether the State's notices of intent to seek the death penalty against petitioners satisfy the requirements of SCR 250(4)(c). We conclude they do

should adopt equitable exceptions to the law of the case doctrine. We also revisit the prior decision we issued in the first appeal of this airspace takings case, given our intervening deci-

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sion in *McCarran International Airport v. Sisolak*, which set forth a new scheme for analyzing airspace takings claims. We conclude that, in some instances, equitable considerations justify a departure from the doctrine that the principles set forth in a first appeal are the law of the case on all subsequent proceedings. Accordingly, when this court issues an intervening decision that constitutes a change in controlling law, courts may depart from the decided law of the case and apply the new rule of law. Thus, applying the rule of law set forth in *Sisolak* to this case, we conclude that appellants properly established a claim for a per se regulatory taking of airspace and are entitled to appropriate just compensation.”

ASAP Storage, Inc. v. City of Sparks, 123 Nev. Adv. Op. No. 61 (December 27, 2007) “This appeal arises from a storm-induced flood that occurred in Sparks, Nevada, on January 1, 1997. During the storm, respondent City of Sparks (the City) evacuated appellants’ businesses, barricaded the street entrance to their businesses, and denied them access to their businesses. Consequently, appellants were unable to remove their property before the flood waters destroyed it. Appellants

contend that they could have saved their property if the City had allowed them access to their businesses.

Three main issues are raised on appeal. First, we consider whether appellants produced sufficient evidence in support of their takings claim under Article 1, Section 8 of the Nevada Constitution. In analyzing their takings claim, we undertake two distinct sub-inquiries: (a) whether appellants’ real and personal property constitutes ‘private property’ under the Nevada Constitution, and (b) whether the City’s actions that

“Appellants contend that they could have saved their property if the City had allowed them access to their businesses.”

denied appellants access to their businesses constituted a “taking” under the terms of the Nevada Constitution. With respect to these sub-inquiries, we conclude that (a) appellants’ real and personal property constitute private property under the Nevada Constitution, and (b) the City’s erection of a barricade was only a temporary interference with appellants’

property rights and did not rise to the level of a taking. Thus, the district court properly granted summary judgment to the City on appellants’ Article 1, Section 8 takings claim.

Second, we consider whether appellants produced sufficient evidence to support their tort claims and to defeat summary judgment. When analyzing appellants’ tort claims, we again undertake two distinct sub-inquiries: (a) whether NRS 414.110 provides the City with immunity for pre-emergency negligence, gross negligence, or willful misconduct; and (b) whether NRS 414.110 provides the City with immunity for negligence, gross negligence, or willful misconduct during emergency management activities. We conclude that NRS Chapter 414 facially immunizes the City from liability for acts that constitute either preparing for an emergency or carrying out emergency functions. In reaching this conclusion, we overrule, in part, our previous holdings in *Nylund v. Carson City* and *Vermeff v. City of Boulder City*, which determined that immunity for pre-emergency negligence turned on whether this negligence exacerbated damages that resulted from negligent emergency management. Instead, pre-emergency immunity de-

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depends on whether the government acts were undertaken in preparation for an emergency. As neither the parties nor the district court had the opportunity to consider the City's pre-emergency activities under the proper statutory framework, we reverse that portion of the district court's order relating to pre-emergency activities and remand for further proceedings.

We also conclude that although NRS 414.110(1) plainly immunizes the City from tort liability for activities related to emergency preparation and its actions in handling emergencies, the statute contains a latent ambiguity, as it does not immunize city workers' acts of gross negligence, intentional misconduct, or bad faith. This discrepancy may subject the City to vicarious liability for its workers' non-immunized acts. We need not reach this issue, however, because, in its answer and summary judgment motion, the City also relied on discretionary-function immunity under NRS 41.032(2). In rendering summary judgment on the City's liability for its activities related to emergency management, the district court relied solely on NRS 414.110(1) and did not consider the application of NRS 41.032(2). Immunity under this provision should be considered,

however, because it may render moot the issue of the City's potential vicarious liability. Thus, on remand, the district court is instructed to analyze immunity under NRS 41.032(2).

Third, with respect to whether appellant ASAP Storage, Inc., produced sufficient evidence to create a genuine issue of material fact in support of its breach-of-contract claim, the district court's order granting summary judgment did not 'set forth the undisputed material facts and legal determinations' regarding ASAP Storage's breach-of-contract claim as required by NRCP 56(c). Accordingly, we reverse the portion of the district court's order relating to this claim. On remand, should the district court conclude that summary judgment is warranted on this claim, then it must set forth the information necessary under NRCP 56(c)."

UNDER OATH

Q: Are you sexually active?

A: No, I just lie there.

GOVERNMENT AGENCIES AND PRO BONO PROGRAMS

The Minnesota State Bar Association has developed a [Model Pro Bono Policy and Procedures](#)

[for Government Attorneys](#). The model policy provides sample language for a pro bono policy along with explanatory comments. The policy covers topics including the definition of pro bono, procedures for pro bono participation, identification with the government agency, and use of agency resources.

Court Won't Accept Chimp As Person

VIENNA, Austria (AP) -- Austria's Supreme Court has dashed hopes by animal rights activists to have a chimpanzee declared a person, a statement suggested Tuesday.

The court recently rejected a petition to appoint a trustee for the chimp, named Matthew Hiasl Pan, the Vienna-based Association Against Animal Factories said, and subsequently vowed to contact the European Court of Human Rights over the matter.

The court's decision follows in the footsteps of a similar ruling last fall. In September, a provincial judge in the city of Wiener Neustadt dismissed the case, ruling the Association Against Animal Factories has no legal standing to argue on the chimp's behalf.

The legal back and forth began in February, when the

Tattoo Arbitration

animal shelter where Pan and another chimp, Rosi, have lived for 25 years filed for bankruptcy protection.

Activists want to ensure the apes don't wind up homeless. Both were captured as babies in Sierra Leone in 1982 and smuggled to Austria for use in pharmaceutical experiments. Customs officers intercepted the shipment and turned the chimps over to the shelter.

Donors have offered to help with the upkeep costs, but under Austrian law, only a person can receive personal gifts.

Organizers could set up a foundation to collect cash for Pan, whose life expectancy in captivity is about 60 years. But they argue only personhood will ensure he isn't sold to someone outside Austria, where he's protected by strict animal cruelty laws.

Maryland Police taking tattoo ban to arbitration

From The Baltimore Sun, January 13

The Anne Arundel County police officers union is taking its challenge of a ban on visible tattoos to a federal arbitrator after months of disagreement with the department's administration.

In hopes of negotiating a new

policy, officials with the Fraternal Order of Police have met three times with the chief, Col. James E. Teare Sr., since he began requiring officers to cover up their body art.

The union president said Teare's only concession was to spare tattooed officers in long-sleeve uniforms from wearing ties.

Cpl. O'Brien Atkinson said the chief told union officials that the department was simply clarifying a policy on grooming and appearance.

"If there's an officer that has a tattoo that is offensive or indecent, the department should take action," Atkinson said. "But to make a blanket policy which affects our narcotics departments and other officers doesn't make sense. I mean, we have officers who have Tigger from Winnie the Pooh."

At question is whether the department is required to establish a specific policy on tattoos in its force or whether it can regulate them under existing rules.

"What we are saying is that there is an obligation to negotiate over working conditions, and this is clearly a working condition," Atkinson said.

Teare said he had no comment

before litigation in the case.

County Executive John R. Leopold, who has not taken a public stance on the issue, also declined to comment.

Several jurisdictions in Maryland have imposed similar bans, as have at least a dozen departments nationwide in states including California, Oklahoma and Connecticut.

In Connecticut, the Supreme Court upheld a ban that was challenged by a group that said it infringed on the First Amendment right of freedom of expression. In other cases, departments cracked down on displays of tattoos after complaints that some were offensive.

Larry Harmel, executive director of the Maryland Chiefs of Police Association, said some chiefs "look at it and in some cases see the tattoos are very inappropriate and they don't feel it presents a professional image."

"Just like there are hair restrictions and they have a uniform, they want you to project professionalism," he said. "Maybe they're taking issue with it now because this is the 21st century and tattoos now are becoming more prevalent."

Tattoo Arbitration

According to a recent study from Ohio University and Scripps Howard News Service, about 30 percent of Americans ages 25 to 34 have tattoos.

In the county Police Department, which has 686 sworn officers, the new policy affects at least 20 officers and probably many more civilian personnel, Atkinson said.

Teare distributed a memo June 22 saying that department personnel would be required to cover any visible tattoos with long-sleeved uniforms or remove the tattoos.

Tattooed officers quickly complained to the union because they had to wear long-sleeved winter uniforms in the summer heat. The union filed a grievance within the week.

The federal arbitrator will mediate a hearing in February or March. The decision would be binding.

Atkinson estimated that the county might spend "in the tens of thousands of dollars" of taxpayer money during the mediation. The union would spend about the same amount, he said.

"We're putting everything we can behind this," he said.



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The Steroid Era

Ninth Circuit Cases

KRL v. Aquaro, No. 06-16282 (January 16, 2008) “Defendants Russell Moore, David Irey and Ron Hall appeal the district court’s denial of summary judgment based on qualified immunity for their involvement in preparing, reviewing and executing two search warrants, one issued on January 11, 1999 and the other issued on January 13, 1999. Defendants contend that although the two warrants lacked probable cause, their conduct was reasonable. We hold that Moore, Irey and Hall are entitled to qualified immunity for the January 11 warrant, but that Hall is not entitled to qualified immunity for the January 13 warrant. For this reason, we affirm in part, reverse in part and remand for further proceedings.”

United States v. Lowry, No. 06-10469 (January 16, 2008) “In this case we are presented with a question of first impression: Who bears the burden of proof when a defendant is charged with occupation of Forest Service land in violation of 36 C.F.R. §§ 261.10(b) and (k)? Must the prosecution prove that the defendant does not have individual aboriginal title, or is the claim an affirmative defense? We hold that the occupant claiming individual aboriginal title bears the burden of

demonstrating such title as an affirmative defense. Applying that standard, we conclude that the defendant in this case failed to meet this burden, and we affirm the judgment of the district court upholding the defendant’s convictions.”

Bingue v. Prunchak, No. 05-16388 (January 15, 2008) “In *Onossian v. Block*, we applied the Supreme Court’s decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and held that a police officer in a high-speed chase—whether he in-

“unless the plaintiff can prove that the officer acted with a deliberate intent to harm.”

injures the fleeing suspect or a bystander—is entitled to qualified immunity unless his behavior ‘shocks the conscience’ because it demonstrates an intent ‘to cause harm unrelated to the legitimate object of arrest.’ 175 F.3d 1169, 1171 (9th Cir. 1999) (internal quotation marks omitted). We were not called upon to consider whether the district court must apply this ‘intent to harm’ standard to *all* high-speed chases, or only those chases that involve ‘emergencies’ or ‘split-second decisions.’ Today we refine our *Onossian* analysis

and hold, following the Eighth Circuit, that police officers involved in all high-speed chases are entitled to qualified immunity under 42 U.S.C. § 1983 unless the plaintiff can prove that the officer acted with a deliberate intent to harm. See *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001) (en banc).

The officer involved in the high-speed chase in this case is entitled to summary judgment based on step one of the qualified immunity analysis as set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). We thus reverse the judgment of the district court.”

“We conclude that high-speed police chases, by their very nature, do not give the officers involved adequate time to deliberate in either deciding to join the chase or how to drive while in pursuit of the fleeing suspect. We hold, therefore, that Lewis requires us to apply the ‘intent to harm’ standard to all high-speed chases. Since Prunchak’s actions do not meet this stringent standard, Bingue’s claim fails under the first step of the Saucier analysis and Prunchak is entitled to dismissal. Consequently, we reverse the judgment of the district court and remand for an entry of judgment for Prunchak on the § 1983 claims.”

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Fichman v. Media Center, No. 05-16653 (January 14, 2008)

“This appeal presents the question of whether directors of a nonprofit organization or independent volunteer producers may be considered employees within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12,101 *et seq.* We conclude that they may not, and we affirm the district court’s grant of summary judgment holding that the nonprofit corporation does not have a sufficient number of employees to be considered an ‘employer’ within the meaning of the statutes.

Sierra Nevada Community Access Television, Inc. d/b/a The Media Center is an independent, nonprofit 501(c) corporation established in 1991. It operates a Community Access Channel in Reno and Sparks, Nevada. Like most Community Access Channel operators, Media Center broadcasts local government meetings and programming supplied by independent producers. Fred Fichman served as Executive Director of Media Center from July 8, 2002 until he was terminated from the position on December 1, 2003. During that period, Media Center did not

have fifteen or more paid employees except for one two-week span of time. During that period, there were approximately eighty independent producers who supplied broadcast content, but received no compensation from Media Center. Also during that period, Media Center was governed by a nine-member Board of Directors, the members of which were not compensated by Media Center.

After his termination, Fichman sued Media Center, alleging violations of the Age Discrimination in Employment Act and the Americans with Disabilities Act, and asserting a state law tort claim of intentional infliction of emotional distress.”

United States v. Ross, No. 06-50569 (January 14, 2008) “Ross argues that his guilty plea is invalid because the plea colloquy did not comply with Federal Rule of Criminal Procedure 11. The district court showed great patience during the lengthy plea colloquy, which lasted more than forty minutes and spans thirty-three pages of the record. However, the court overlooked its regular practice of advising the defendant that the government must prove its case beyond a reasonable doubt. *See Benchbook for U.S. District Court Judges* 78 (5th ed.) (2007)

(‘Ask the defendant: Do you understand . . . that at trial you would be presumed to be innocent and the government would have to prove your guilt beyond a reasonable doubt[?]’).

This was error. Rule 11 provides, in part, that Ross must understand his ‘right to a jury trial’ and ‘the nature of each charge’ before his guilty plea may be accepted. *See* Rule 11(b)(1)(C), (G). Because the reasonable doubt standard of proof is a due process requirement that permeates all aspects of a criminal trial, *see In re Winship*, 397 U.S. 358 (1970), we read Rule 11 as requiring an advisement of the reasonable doubt standard of proof.”

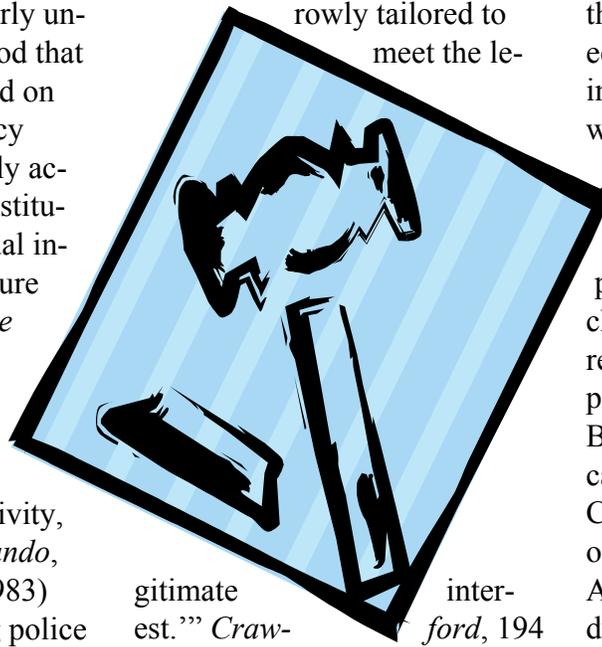
Nelson v. National Aeronautics and Space Admin., No. 07-56424 (January 11, 2008) “The named appellants in this action are scientists, engineers, and administrative support personnel at the Jet Propulsion Laboratory, a research laboratory run jointly by the National Aeronautics and Space Administration and the California Institute of Technology. Appellants sued NASA, Caltech, and the Department of Commerce, challenging NASA’s recently adopted requirement that ‘low risk’ contract employees like themselves submit to in-depth background

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investigations. The district court denied Appellants' request for a preliminary injunction, finding they were unlikely to succeed on the merits and unable to demonstrate irreparable harm. Because Appellants raise serious legal and constitutional questions and because the balance of hardships tips sharply in their favor, we reverse and remand."

"The district court similarly underestimated the likelihood that Appellants would succeed on their informational privacy claim. We have repeatedly acknowledged that the Constitution protects an 'individual interest in avoiding disclosure of personal matters.' *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). This interest covers a wide range of personal matters, including sexual activity, *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding that questioning police applicant about her prior sexual activity violated her right to informational privacy), medical information, *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ('The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidential-

ity'), and financial matters, *Crawford*, 194 F.3d at 958 (agreeing that public disclosure of social security numbers may implicate the right to informational privacy in 'an era of rampant identity theft'). If the government's actions compel disclosure of private information, it 'has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the le-



gitimate interest." *Crawford*, 194 F.3d at 959 (internal quotation marks omitted)."

Feldmar v. Bomar, No. 06-55675 (January 10, 2008) "Richard M. Feldman, Robert Lee Puddicombe, and In Defense of Animals (IDA) appeal the judgment in favor of the Nature Conservancy (TNC), the National Park Service (NPS),

NPS's director, and the Chief of Natural Resources Management at Channel Islands National Park on their claims that Appellees violated the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA) in adopting NPS's program to restore and protect Santa Cruz Island by, in part, eradicating its feral pig population. Appellants do not dispute that the pigs threatened Santa Cruz Island's ecological and archeological infrastructure; however, they would have preferred eliminating the population through non-lethal means, such as sterilization or removal of the pigs to the mainland, and they challenge NPS's process in reaching its conclusion that the pigs should be killed instead. Because NPS completely eradicated the feral pigs from Santa Cruz Island during the pendency of this litigation, and because Appellants allege only procedural violations in the development of the eradication program and do not seek compensation in monetary damages, we grant Appellees' motion to dismiss the appeal as moot. Appellees have met their heavy burden of demonstrating that 'no effective relief for the alleged violation[s] can be given.' *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir.

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2002).”

Berger v. City of Seattle, No. 05-35752 (January 9, 2007)

“We must determine the bounds of a city’s authority to restrict expression in a public forum. I The public forum is the ‘Seattle Center,’ an entertainment zone covering roughly 80 acres of land in downtown Seattle, Washington. Each year, the Seattle Center’s theaters, arenas, museums, exhibition halls, conference rooms, outdoor stadiums, and restaurants attract nearly ten million visitors. The city wields authority over this large tract of land and has delegated its power to promulgate rules to the Seattle Center Director. *See* Seattle, Wash., Municipal Code § 17.04.040. In 1978, the Director issued rules setting forth procedures and requirements governing use of the Seattle Center campus. In 2002, after an open process of public comment, the Director issued a superseding set of provisions in response to specific complaints and safety concerns, which became known as the Seattle Center Campus Rules.

This litigation, originally brought by Michael Berger, a street performer, requires us to consider the validity of five Campus Rules. The first four affect street performers only:

Rule F.1 requires a permit for street performances and requires badges to be worn during street performances, Rule F.2 sets the terms of conditions of obtaining a permit, Rule F.3.a bars active solicitation by street performers, and Rule F.5 limits street performances to sixteen designated locations. Another provision affects all persons in the Seattle Center: Rule G.4 forbids speech activities within 30 feet of a captive audience. Berger mounts a facial attack on the constitutionality of these five restrictions.”

“‘Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.’ *Clark v. Comty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Such restrictions must satisfy three conditions to be enforceable: (1) they must be ‘justified without reference to the content of the regulated speech,’ (2) they must be ‘narrowly tailored to serve a significant governmental interest,’ and (3) they must ‘leave open ample alternative channels for communication of the information.’ *Id.* In applying this three-pronged test to the five rules challenged at bar, we review the district court’s grounds for summary judgment *de novo*. *Lopez v. Smith*, 203 F.3d 1122,

1131 (9th Cir. 2000) (en banc).”

“In sum, Rules F.1, F.2, F.3.a, F.5, and G.4 satisfy the requirements for valid restrictions on expression under the First Amendment. Such content neutral and narrowly tailored rules, which leave open ample alternatives for communication, must be upheld. The rules also survive rational basis review under the Fourteenth Amendment. The order granting summary judgment to Berger is REVERSED. The case is REMANDED to the district court for further proceedings consistent with this opinion.”

Saleh v. Fleming, No. 04-35509 (January 3, 2008) “ We must decide whether a phone conversation with police investigators initiated by a suspect who is in jail for an unrelated offense constitutes a ‘custodial interrogation’ under *Miranda v. Arizona*, 384 U.S. 436, 442 (1966), and its progeny.”

“Here, the Washington Court of Appeals affirmed the trial court’s conclusion that the March 25, 1998, statements, though obtained in violation of *Miranda*, were voluntary. In light of its conclusion that the March 26, 1998, phone conversation was not a custodial interrogation (and therefore did not

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require a *Miranda* warning), it concluded that under *Elstad's* reasoning, there was no reason to treat the March 26 statements as tainted. Saleh seemingly does not challenge the state courts' determination that his March 3, 1998, and March 25, 1998, statements were voluntary. Nor does he contest that he initiated the March 26, 1998, phone call and that he was free at all times to end it. Although this case is distinguishable from *Elstad* inasmuch as there was no intervening *Miranda* warning between the March 25 interrogation and the March 26 phone call, because the latter was not a custodial interrogation, no such warning was required. *See Medeiros*, 889 F.2d 819 (holding that 'the fundamental constitutional principles' underlying *Elstad* require its application even where there is no intervening *Miranda* warning). Accordingly, *Elstad's* 'relevant inquiry . . . whether, in fact, the second statement was also voluntarily made' must be answered in the affirmative. We therefore conclude that the Washington Court of Appeals's decision was correct; in any event, we cannot conclude that it was contrary to clearly established Supreme Court precedent."

Aguilera v. Baca, No. 05-56617

(December 27, 2007)
 "Plaintiffs, various Los Angeles County sheriff's deputies, appeal an adverse summary judgment in favor of Sheriff Leroy Baca, the Sheriff's Department, other supervisory officers, and internal affairs investigators. The deputies allege that they were improperly detained at the East Los Angeles Sheriff's Station and later punished through involuntary shift transfers for failing to give non-privileged

"We decline to hold that the deputies were seized by their supervisors' orders"

statements in connection with an internal criminal civil rights investigation of their possible misconduct while on uniformed patrol duty. The deputies alleged § 1983 violations of their own Fourth Amendment right to be free from unreasonable seizures, their Fifth Amendment due process right against compelled self-incrimination, and their Fourteenth Amendment due process rights to be free from coercive police questioning and governmental conduct that shocks the conscience. We have jurisdiction under 28

U.S.C. § 1291 and affirm."

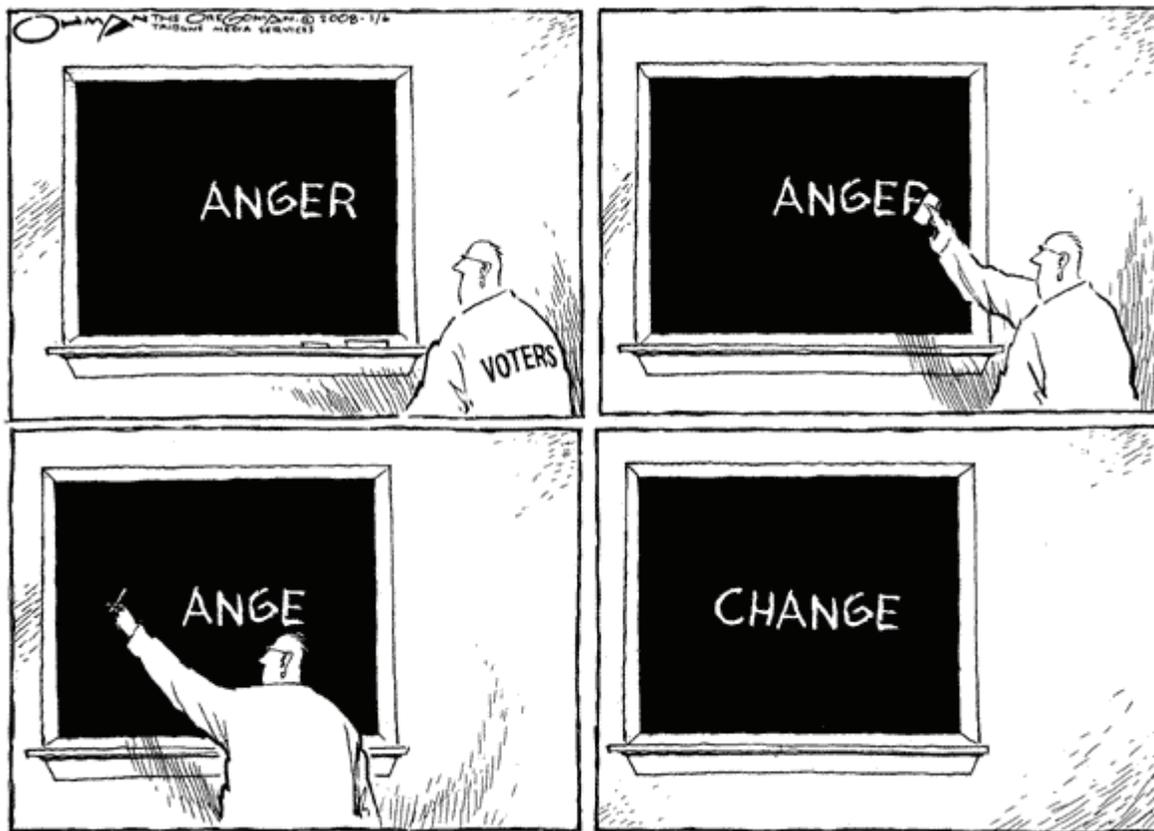
"We decline to hold that the deputies were seized by their supervisors' orders, which were issued in accordance with Department policies, to cooperate with a necessary internal criminal investigation. To hold otherwise would equate to a pronouncement that a law enforcement agency cannot, even under negotiated provisions of a labor agreement or the agency's general policies to preserve public confidence and the integrity of its personnel in the discharge of their public safety responsibilities, order its employees to cooperate in an investigation of possible officer misconduct by standing by at their duty station after the end of their watch. We do not intend to, and will not, act as a super-personnel board to micromanage the employment actions of law enforcement professionals. 'Law enforcement agencies are entitled to deference, within reason, in the execution of policies and administrative practices that are designed to preserve and maintain security, confidentiality, internal order, and esprit de corps among their employees.' *Driebel*, 298 F.3d at 648. We affirm the district court's grant of summary judgment on the deputies' Fourth Amendment claim."

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“We hold that the supervisors did not violate the deputies’ Fifth Amendment rights when they were questioned about possible misconduct, given that the deputies were not compelled to answer the investigator’s ques-

ment that refusing to answer the investigator’s questions could have resulted (and, in fact, did result) in reassignment: We do not consider re-assignment from field to desk duty as equivalent to losing one’s job under *Gardner*, 392 U.S. at 273.

the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness.’ Only after a compelled incriminating statement is used in a criminal proceeding has an accused suffered the requisite



constitutional injury for purposes of a § 1983 action.”

“The deputies argue that the district court erred in concluding that the supervisors’ conduct did not violate the deputies’

tions or to waive their immunity from self-incrimination. Indeed, it appears that the deputies were never even *asked* to waive their immunity. In these circumstances, it is clear that the deputies’ Fifth Amendment right against self-incrimination was not implicated by the supervisors’ conduct. It is of no mo-

The deputies’ Fifth Amendment claim also fails because the deputies were never charged with a crime, and no incriminating use of their statements has ever been made. In *Chavez*, 538 U.S. at 769 (plurality opinion), the Supreme Court held that ‘mere coercion does not violate

Fourteenth Amendment substantive due process rights. In our view, the Sheriff’s Department had a legitimate need to determine whether an officer or officers had engaged in criminal behavior under color of office and, until that criminal investigation was resolved, it had a duty to protect the public from

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the potential for further assaults by the unknown deputy potentially responsible by reassigning all of those involved in the incident to station duty. Even assuming that the deputies were assigned to less favorable shifts and given ‘degrading’ employment positions, we agree with the district court that the reassignment did not transform the questioning into a coercive police investigation under *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992). We also agree that a reassignment, even as punishment for failure to make a voluntary statement, does not ‘shock[] the conscience’ or run counter to the ‘decencies of civilized conduct’ under *Rochin v. California*, 342 U.S. 165 (1952).”

United States v. Cohen, 06-10145 (December 26, 2007) “These consolidated appeals follow the convictions and sentences of a well-known recidivist tax protestor, Irwin Schiff, and two of his acolytes, Cynthia Neun and Lawrence Cohen. After Schiff’s last release from prison in 1991 for income tax evasion, he opened a store in Las Vegas, Nevada, where he sold books, audio tapes, videos and instructional packages, many created by him, explaining how to ‘legally stop paying income taxes.’ Cohen and Neun

worked at the store, and, together with Schiff, they provided ‘consultation services’ to clients who wished to avoid paying federal income taxes. They encouraged their clients to file ‘zero returns,’ federal individual income tax returns containing a zero on every line related to income and expenses, and, in most cases, seeking an improper refund of all federal income taxes withheld during the tax year for which it was filed.

Following a twenty-three day joint trial in which Schiff represented himself, the jury returned guilty verdicts with respect to many of the counts in the indictment. In particular, Cohen was convicted of one count of aiding and assisting in the filing of a false federal income tax return in violation of 26 U.S.C. § 7206(2), for which he received a thirty-three month sentence.² At trial, the district court summarily convicted Schiff of fifteen counts of criminal contempt pursuant to 18 U.S.C. § 401 based on his unruly courtroom behavior. Schiff’s total sentence for those convictions was twelve months in prison to be served consecutively to his tax evasion and conspiracy sentence.

Cohen argues that his convic-

tion must be overturned because the district court wrongfully excluded the expert testimony of his psychiatrist who would have offered evidence of Cohen’s mental state. We agree, and we reverse Cohen’s conviction, vacate his sentence, and remand for a new trial.”

Marable v. Nichtman, No. 06-35940 (December 26, 2007) “Public employees suffer a constitutional violation when they are wrongfully terminated or disciplined for making protected speech. *See Pickering*, 391 U.S. at 563. To state a First Amendment claim against a public employer, an employee must show: 1) the employee engaged in constitutionally protected speech; 2) the employer took ‘adverse employment action’ against the employee; and 3) the employee’s speech was a ‘substantial or motivating’ factor for the adverse action. *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (citing *Bd. of County Comm’rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 675 (1996)). Significantly, to qualify as ‘protected speech’ under the first element, the employee must have uttered the speech as a citizen, not an employee; as the Supreme Court recently clarified, when public employees make statements pursuant to their offi-

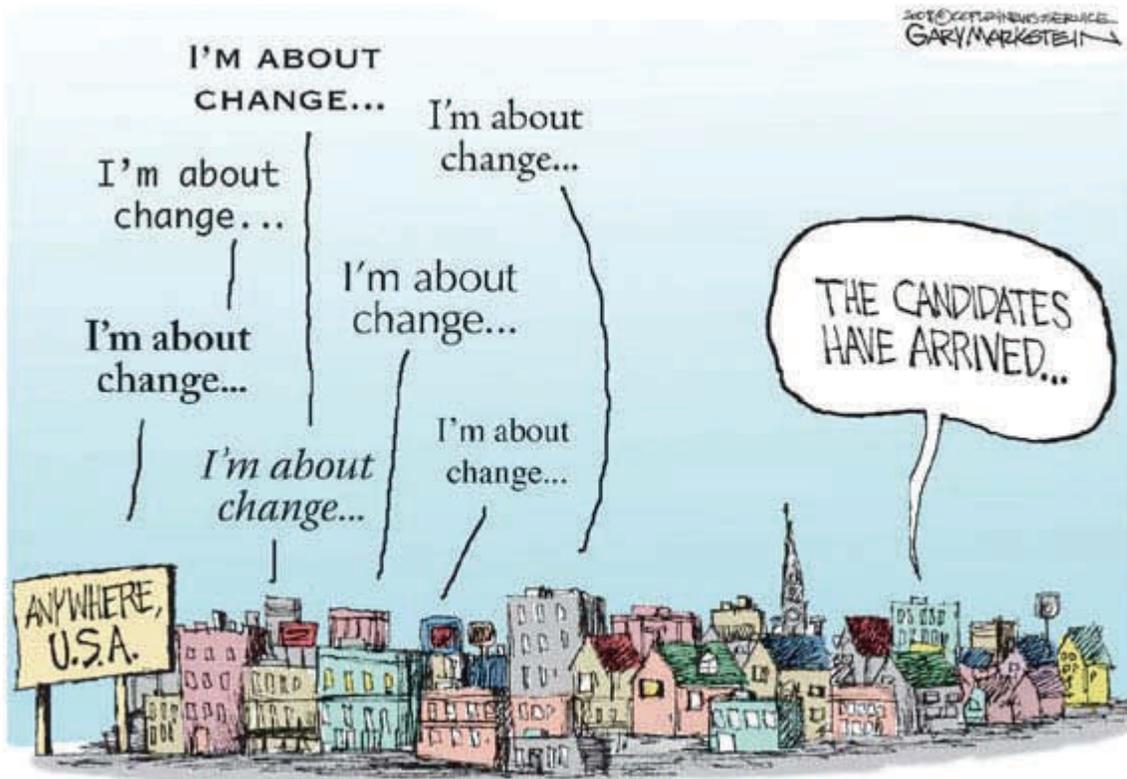
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cial duties, those statements do not receive First Amendment protection. *Ceballos*, 126 S.Ct. at 1955-56.

Marable doubtless suffered adverse employment action and thus meets the second element of the *Coszalter* test; his em-

in any way a part of his official job duties. The Supreme Court has observed that the inquiry into whether employee speech is pursuant to employment duties is a practical one. *Ceballos*, 126 S. Ct. at 1962 ('[T]he listing of a given task in an employee's written job description is neither

Engineer on his ferry, and such tasks did not include pointing to corrupt actions of higher level officials whom he purportedly thought were abusing the public trust and converting public funds to their own use by overpayment schemes.



ployer accused him of misconduct, conducted a disciplinary hearing, and suspended him without pay. This is about as adverse as it gets.”

“By contrast, in Marable’s case, his complaints concerning his superiors’ allegedly corrupt overpayment schemes were not

necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for *First Amendment* purposes.’) Thus Marable’s formal job description is perhaps not dispositive. Functionally, however, it cannot be disputed that his job was to do the tasks of a Chief

Making the practical inquiry on Marable’s job duties, which we think is required by the Supreme Court’s reasoning, we conclude that Marable had no official duty to ensure that his supervisors were refraining from the alleged corrupt practices.

Smith v. Balwin, No. 04-35253

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(December 26, 2007) “While burglarizing the home of Emmett and Elma Konzelman, either Smith or his criminal companion, Jacob Edmonds, bludgeoned eighty-seven-year-old Mr. Konzelman to death with a three-foot long crowbar. After Edmonds told police that Smith killed Konzelman, the prosecution offered Edmonds a plea deal contingent on his passing a polygraph examination. The results of the polygraph test were inconclusive, but the examiner opined that Edmonds had answered the questions truthfully and Edmonds entered the plea deal in exchange for his testimony against Smith. Despite Smith’s request, the prosecution did not reveal the results of Edmonds’s polygraph. Believing that Edmonds had passed the polygraph examination, and knowing that Edmonds would testify against him, Smith entered a no contest plea to felony murder and first degree robbery. Edmonds has now changed his story and claims that Smith did not kill Mr. Konzelman. Edmonds is unwilling to testify on Smith’s behalf, however, because the state has informed him that he will be prosecuted for the capital murder of Mr. Konzelman if he insists on claiming that Smith was not the person who wielded the lethal crowbar. Smith asserts that the state’s ac-

tions constitute prosecutorial misconduct, and he argues that his failure to exhaust his state court remedies should be excused because Smith can show actual innocence, as well as cause and prejudice. Although the resolution of these issues is not essential to our analysis, in order to more clearly demonstrate Smith’s inability to meet his evidentiary burden, we assume without deciding that two of Smith’s arguments have merit: (1) the state committed prosecutorial misconduct by threatening to prosecute Edmonds for capital murder if he testified on Smith’s behalf; and (2) the proper remedy for the prosecutorial misconduct is to compel the state to grant use immunity to Edmonds in an evidentiary hearing where Edmonds would testify that he, not Smith, killed Emmett Konzelman.

We do not assume, and we expressly reject, the *Smith* panel majority’s decision to treat Edmonds’s affidavits as ‘credible, for purposes of resolving the question whether Smith’s procedural default should bar him from presenting his habeas claims on the merits.’ *Smith*, 466F.3d at 828. Even indulging the two cited assumptions, however, we conclude that Smith has not satisfied the require-

ments of *Schlup*’s actual innocence exception with respect to his conviction for felony murder. We also hold that neither the actions of Smith’s first state post-conviction trial counsel nor the state’s withholding of the results of Edmonds’s polygraph examination constitute sufficient cause and prejudice to excuse the procedural default resulting from Smith’s failure to exhaust his state remedies.”

Long v. City and County of Honolulu, No. 05-16567 (December 21, 2007) “Cynthia Long (Ms. Long), mother of decedent Dustan Long (Long), appeals the grant of a motion for summary judgment in favor of Defendants, City and County of Honolulu, and police officer, Patrick Sterling. Ms. Long primarily contends that Sterling used deadly force against her son in violation of his Fourth Amendment rights and that the district court erred in granting Sterling qualified immunity. Because we conclude that Sterling acted in an objectively reasonable manner under the circumstances, we affirm the district court’s judgment.”



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(Continued from page 1)

communications between corporate employees (including lower-echelon employees) and corporate counsel when the communication is for the purpose of enabling counsel to provide legal advice to the corporation.⁴ Nevertheless, "[t]here is surprisingly little case law on whether a government agency may also be a client for purposes of this privilege"⁵ Recent decisions provide much-needed guidance on the applicability of the attorney-client privilege to government officials and entities.

In *Leslie v. Ohio Finance Agency*,⁶ the Ohio Supreme Court recently held that the attorney-client privilege encompasses confidential communications between state officials and state agency in-house counsel. The court acknowledged that "the government attorney-client privilege has been subject to some criticism[.]" but followed "the weight of authority" that applies the attorney-client privilege to confidential communications between government counsel and governmental employees. The fact that the attorney in *Leslie* was the state agency's "in-house" counsel rather than a member of the state attorney general's office did not negate the privilege. The court found

that application of the attorney-client privilege to confidential communications between government counsel and a governmental employee "further[s] the laudatory objectives of the privilege: complete and candid communications between attorneys and clients."⁷

Who Is the 'Client'?

In a valuable opinion, the U.S. Court of Appeals for the Sixth Circuit in <http://www.ca6.uscourts.gov/opinions.pdf/05a0393p-06.pdf> *Ross v. City of Memphis*⁸ recently held that municipal entities are "clients" protected by the attorney-client privilege. Of course, a municipality can communicate with municipal counsel only through its officials and employees. Who, then, is the "client," the official (or employee) or the municipality? The court in *Ross* held that there is presumption that the municipality is the client.

The plaintiff, Herlancer Ross, an African-American female police officer, filed racial discrimination claims under, inter alia, §1983 against the city of Memphis, Walter Crews, who was the city's former police director, and Alfred Gray, a police deputy. Mr. Crews was sued in

his individual capacity and asserted the defense of qualified immunity based on advice of counsel he had received from the city attorney. Mr. Crews invoked the attorney-client privilege and declined to reveal the contents of this advice. The federal magistrate judge ordered Mr. Crews to reveal the conversations because he waived the privilege by raising advice of counsel as his qualified immunity defense. The city objected to this order on the ground that its former employee, Mr. Crews, could not implicitly waive the city's attorney-client privilege. The Magistrate Judge rejected the city's argument. The Magistrate Judge reasoned that the importance of counsel's advice to Mr. Crews's defense outweighed the city's interest in maintaining the privilege.

The city took an interlocutory appeal from the order of the Magistrate Judge. The Sixth Circuit found that it had jurisdiction over this interlocutory appeal under the "collateral order doctrine," because the appeal raised an important issue that was not effectively reviewable on appeal from a final judgment — by then the confidential communications may have been disclosed by Mr. Crews.

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Proposed Federal Rule of Evidence 503

In other words, unless the circuit court reversed the order of the Magistrate Judge, the city would be unable to "prevent [Mr.] Crews from disclosing allegedly privileged information."⁹ On the merits, the Sixth Circuit reversed. The circuit court held that a municipal entity may assert the attorney-client privilege in civil litigation. The circuit court relied upon decisional law,¹⁰ Proposed Federal Rule of Evidence 503, which defines "client" to include public officers and public entities, and the Restatement (Third) of the Law Governing Lawyers, which states that the attorney-client privilege extends to government organizations. The circuit court found that application of the attorney-client privilege to governmental entities "helps insure that conversations between municipal officials and attorneys will be honest and complete."¹¹

The circuit court in *Ross* also held that the municipal officer's assertions of the advice of counsel defense did not operate to waive the municipality's privilege. The circuit court found that the Magistrate Judge should not have balanced the competing interests of the importance

of the privileged communications to Mr. Crew's defense against the city's interest in maintaining the privilege. The circuit court reasoned that application of the attorney-client privilege based upon a balancing of competing interests renders the privilege substantially uncertain.¹²

The circuit court said that its analysis assumed "that the City does have a privilege as to the relevant communications between its attorneys and [Mr.] Crews."¹³ This assumption "is in all likelihood correct" because when municipal officials have conversations with municipal counsel, generally, the municipality, not the individual officer, is the client.¹⁴ However, this does not mean that the individual officer can never be the client of the municipal attorney. "To do so, however, the individual officer must [clearly] indicate to the lawyer that he seeks advice in his individual capacity Requiring an individual officer to clearly announce a desire for individual advice is critical; it allows the attorney to judge whether it would be appropriate to advise the individual given the attorney's obligations concerning representation of the corporation."¹⁵ The circuit court remanded the case to the district court to develop the

record on this point.

Under *Ross*, when a municipal officer communicates with a municipal attorney there is a rebuttable assumption that the municipality is the client. Further, *Ross* clearly holds that the officer's reliance upon advice of counsel cannot operate to waive the municipality's attorney-client privilege.¹⁶

What if it turns out in *Ross* that former Police Director Crews was the city attorney's client? In that case, it is clear that Mr. Crews' assertion of the advice of counsel defense would operate as an implicit waiver of Mr. Crews' attorney-client privilege.¹⁷ This is because the attorney-client "privilege cannot be used as a shield and a sword[,]"" meaning that "the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications. Mr. Crews certainly could not assert that he relied on privileged communications and then hide behind the privilege if he ever had it."¹⁸

Split in Circuits

There is a split in the circuits over whether a governmental entity or official can assert the attorney-client privilege in grand jury proceedings.¹⁹ The

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U.S. Court of Appeals for the Second Circuit in *In re Grand Jury Investigation v. Doe*²⁰ recently held that the attorney-client privilege protects confidential communications between government counsel and government officials from disclosure in the grand jury. The court specifically found that the attorney-client privilege protected communications between the state governor and the governor's chief legal counsel from disclosure in a grand jury investigation.

The Second Circuit relied in part on the same secondary sources relied upon by the Sixth Circuit in *Ross*. Proposed Evidence Rule 503(a)(1) includes public officers and public entities within the definition of "client" for the purpose of the attorney-client privilege. "While Proposed Rule 503 was not adopted by Congress, courts and commentators have treated it as a source of general guidance regarding federal common law principals."²¹ Section 74 of the Restatement (Third) of the Law Governing Lawyers provides that the "attorney-client privilege extends to a communication of a governmental organization as it would to a private organization." The commentary to that section of the Restatement states that "[t]he privilege

aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture." These secondary sources show that "serious legal thinkers, applying 'reason and experience,' have considered the privileges protections applicable in the government context."²²

Furthermore, federal court decisional law, "while not extensively addressing the issue, generally assumes the existence of a governmental attorney-client privilege in civil suits between government agencies and private litigants."²³ While the U.S. Courts of Appeal for the Seventh, Eighth and District of Columbia circuits have "broadly questioned" whether the attorney-client privilege should apply with full force in the context of governmental clients and the grand jury, the Second Circuit held that the privilege is fully applicable

The Second Circuit reasoned that governmental officials who are charged with enforcing the law and who may face criminal charges for doing so should be "encouraged to seek out and receive fully informed legal advice.

Culture of Consultation

Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest."²⁴

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Endnotes:

1. *Swidler & Berlin v. United States*, 524 US 399, 403 (1998).
2. *Id.* at 403 (quoting *Upjohn Co. v. United States*, 449 US 383, 389 (1981)).
3. 449 US 383 (1981).
4. The Court in *Upjohn* also stressed that:
 - 1) the employees were aware that the purpose of their communications was for counsel to provide legal advice to the corporation;
 - 2) the communications were made at the request of corporate superi-

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ors;

3) the communications concerned matters within the scope of the employees' corporate duties; and

4) the communications were treated as confidential within the corporation. "Upjohn did not say that all four factors had to appear, but the first and fourth are essential for all application of the privilege." C.B. Mueller and L.C. Kirkpatrick, *Evidence: Practice Under the Rules* §5.16 pp.473-74 (2d edition 1999)

5. In re Witness before Special Grand Jury, 288 F3d 289, 291 (7th Cir. 2002).

6. 105 Ohio St. 3d 261, 824 N.E. 2d 990 (2005).

7. 105 Ohio St. 3d at 270, 824 N.E. 2d at 999

8. 423 F3d 596 (6th Cir. 2005).

9. Id at 599.

10. See cases cited in Ross, 423 F3d at 601

11. Ross, 423 F3d at 602

12. The court in Ross cited to *Swindler & Berlin v. United States*, 524 US 399 (1998) and *Upjohn v. United States*, 449 US 383 (1981).

13. Ross, 423 F3d at 605.

14. Id.

15. Id.

16. Although not discussed by the court in Ross it is possible that government counsel may purport to represent both the governmental entity and the client. In this situation counsel must ensure that the entity and officer do not have a conflict of interest. See M. Schwartz, *Section 1983 Litigation: Claims and Defenses*, §7.22 (4th edition 2005).

17. See M. Schwartz, *Section 1983 Litigation: Federal Evidence* §7.7 (3d ed. 1999).

18. Ross, 923 F3d at 604-605 (citation omitted) (quoting *United States v. Bilzerian*, 926 F2d 1285, 1292 (2d Cir. 1991)).

19. Id at 602-603 (citing competing authorities).

20. 399 F3d 527 (2d Cir. 527).

21. Id. at 532

22. Id.

23. Id.

24. Id.at 534.

SERIOUS CRIMES

First up we have a 38-year-old man from Long Island was arrested after "accidentally" setting fire to four parked cars, while attempting to steal gas from one of them. Rather than syphoning the petrol this genius thought it might be a good idea to power drill his way into the gas tanks. Not surprisingly a spark caught igniting the fuel. Then gasoline began seeping out as he ran from underneath the vehicle, spreading the flames to three other cars which "were destroyed."

Jonathan Lafever of Florida, who may have learned the hard way that stealing snakes isn't all fun and games. The 20-year-old who allegedly grabbed five serpents from a breeder in Bushnell, was apprehended Monday in a Wal-Mart when customers noticed he was covered in blood. Apparently one of the rattlesnakes, found later in his trunk, had bit him during the alleged theft. Lafever "was airlifted to Orlando Regional Medical Center for anti-venin treatment," where he remains in stable condition.

