



# The Public Lawyer

## 2008 NEVADA GOVERNMENT CIVIL ATTORNEYS CONFERENCE

**Harveys Resort – South Lake Tahoe, NV May 7-9, 2008**

The Nevada Advisory Council for Prosecuting Attorneys and the State Bar of Nevada Public Lawyers Section will co-sponsor the 2008 Nevada Government Civil Attorneys Conference, scheduled for May 7-9 at Harveys Resort at South Lake Tahoe, NV. This conference is an annual forum for networking and education on the critical issues facing government counsel representing state, municipal, county or other public entities.

The \$229.00 registration fee includes all conference materials, continental breakfast, and the

Public Lawyers Section Annual Meeting and Luncheon on May 8<sup>th</sup>. **The registration fee will be waived for 2008 members of the Public Lawyers Section and Section members may attend the conference for FREE.** The conference will feature 11 hours of CLE presentations, including 2 hours of ethics. Attendees may register directly through the Nevada Advisory Council for Prosecuting Attorneys by submitting the attached registration form with payment; the form is also available at [www.nypac.state.nv.us](http://www.nypac.state.nv.us).

Attendees are responsible for making their lodging reservations; contact Harveys Resort at 1-

800-455-4770 prior to April 7 and use group code S05NVCG for the conference rate of \$59/night plus tax.

For further information, please contact Brett Kandt at (775)688-1966; fax (775)688-1822 or e-mail [wbkandt@ag.state.nv.us](mailto:wbkandt@ag.state.nv.us).

### City’s Plan to Waive Attorney-Client Privilege Aggravates Insurer

Jan 23, 2008  
By Martha Neil  
ABA Government Law

Municipal officials in a small town in Washington state apparently thought

### Public Lawyers Section

February 2008



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**WEDNESDAY May 7**

1:00 - 1:30 PM	<b>Registration</b>
1:30 - 1:45 PM	<b>Welcome and Introductions</b> Brett Kandt, Executive Director Nevada Advisory Council for Prosecuting Attorneys and Chair, Public Lawyers Section
1:45 - 2:45 PM	<b>Nevada Open Meeting Law Roundtable</b> George Taylor, Senior Deputy Attorney General
2:45 - 3:00 PM	<b>Break</b>
3:00 - 4:30 PM	<b>Current Issues in Nevada Eminent Domain Law</b> Brian Hutchins, BH Consulting, LLC
5:00 - 6:30 PM	<b>Hospitality Suite</b> Hosted by the Public Lawyers Section Chair

**THURSDAY May 8**

8:00 - 9:00 AM	<b>Continental Breakfast</b>
9:00 - 11:00 AM	<b>Nevada Workers' Compensation Laws and Practice</b> Brian Kunzi, Director Workers' Compensation Fraud Unit
11:00 - 11:15 AM	<b>Break</b>
11:15 AM - 12:15 PM	<b>Ethics for Public Attorneys</b> John Albrecht, General Counsel TMCC, DRI and Great Basin College
12:15 - 1:15 PM	<b>Public Lawyers Section Annual Meeting and Luncheon</b>
1:15 - 2:15 PM	<b>Ethics for Public Attorneys continued</b>
2:15 - 2:30 PM	<b>Break</b>
2:30 - 4:30 PM	<b>Current Issues in Nevada Water Law</b> Paul Taggart, Esq. Taggart and Taggart, Ltd.
5:00 - 6:30 PM	<b>Hospitality Suite</b> Hosted by the Public Lawyers Section Chair

**Friday MAY 9**

8:00 - 9:00 AM	<b>Continental Breakfast</b>
9:00 - 10:30 AM	<b>Electronic Evidence and Discovery</b> Ira Victor, Director of Compliance Practice, Data Clone Labs, Inc.
10:30 - 10:45 AM	<b>Break</b>
10:45 - 11:45 AM	<b>Government Civil Practice Legislative Update</b> Roundtable facilitated by Brett Kandt, NVPAC Executive Director
11:45 AM - 12:00 PM	<b>Conference Evaluation and Conclusion</b>

they were doing the right thing by embracing an open records policy that potentially allowed residents to take a look at privileged documents and those relating to legal negotiations.

Their insurer, however, had a different view. News that members of the Monroe City Council were talking about waiving attorney-client privilege and providing confidential documents to residents prompted a threat from the city's insurer to cancel its coverage if the council doesn't reconsider, reports the Seattle Times.

"Cities are in a race to put all their records online and broadcast all of their meetings. That's common. But disclosing what the city attorney advises his client, particularly if it involves a lawsuit, that's when I came out of my rocker," says Lew Leigh, executive director of the Washington Cities Insurance Authority. The WCIA is a risk-sharing group that pools payments from all of the state's 128 municipalities.

Leigh told the Monroe city attorney that it would consider "immediate member termination" if Monroe went through with its plan to waive attorney-client privilege, the newspaper reports.

# THE JAMES M. BARTLEY AWARD

## NOMINATION FORM

### THE 2008 JAMES M. BARTLEY DISTINGUISHED PUBLIC LAWYER AWARD

The State Bar of Nevada Public Lawyers Section is seeking nominations for the 2008 James M. Bartley Distinguished Public Lawyer Award. This award is presented annually by the Section to a government attorney in the civil practice of law based upon the following criteria:

- Practice in a federal, state, or local government office or agency or a non-profit legal aid office
- Dedication to public service
- Duration of public service
- A range of experience in different fields of civil practice
- Notable contributions to public service (reported cases, litigation, presentations, publications, etc.)

Leadership on legal or public policy issues or leadership within an office

James M. Bartley was born in Illinois, and graduated from the University of Illinois and the University of Illinois Law School. Following service as an officer with the armored cavalry in Patton's Third Army during World War II, he practiced in Illinois for a number of years before moving to Las Vegas in 1964. His practice for the next 24 years was with the Clark County District Attorney and the Las Vegas City Attorney. He completed his practice serving a term as Justice of the Peace, with later service as a pro tem judge.

Jim Bartley mentored numerous generations of young civil attorneys during his years in Las Vegas. His unvarying method was to identify the problem prior to searching for a solution. He stressed brevity and clarity and did not admire the over-eloquent and disingenuous. For him, a good lawyer had as much common sense and foresight as legal knowledge and acuity. He worked from an encyclopedic knowledge of municipal law, which he used to mentor young public lawyers. Beneath his notably gruff exterior was a genuinely nice man with a rare sense of humor. He taught the importance of being forthright, of being held to a higher standard as a public lawyer, and of doing the work and getting it done right, without worrying who got the credit for it. He was a distinguished public lawyer, and this award honors his legacy.

**Nominee's Name** \_\_\_\_\_

**Nominee's Title and Office (or prior office if recently retired):** \_\_\_\_\_

#### ATTACH A BRIEF ESSAY DETAILING NOMINEE'S QUALIFICATIONS AND MERIT FOR THE AWARD.

Your Name: \_\_\_\_\_ Office: \_\_\_\_\_

Address/City/State/Zip: \_\_\_\_\_

Office Phone: \_\_\_\_\_ Email: \_\_\_\_\_

**Fax your nomination form to Brett Kandt, Public Lawyers Section Chair, at (775) 688-1822 - NO LATER THAN April 18, 2008. The Public Lawyers Section Executive Council will review all nominations and make the selection. The recipient of the 2008 James M. Bartley Distinguished Public Lawyer Award will be honored at the 2008 Nevada Civil Government Attorneys Conference, scheduled for May 7-9 at Harveys Resort at South Lake Tahoe, NV.**

## NEVADA SUPREME COURT CASES

*Pankopf v. Peterson*, 124 Nev. Adv. Op. No. 4 (February 7, 2008) “In this appeal, we consider whether an action against a residential designer based on alleged mistakes in his plans drawn to construct a personal residence is subject to the procedural requirements set forth in the provisions of NRS Chapter 40 that pertain to constructional defect actions. We hold that the provisions of NRS Chapter 40 do not apply in this case.”

*Dancer v. Golden Coin, Ltd.*, 124 Nev. Adv. Op. No. 2 (January 31, 2008) “This appeal presents two main issues. First, we consider whether, under a federal preemption analysis, class action claims of unpaid minimum wage balances brought under the Nevada Wage and Hour Law (NWHL) are more properly considered under the Federal Fair Labor Standards Act (FLSA). Given that the FLSA expressly provides that higher state minimum wage legislation may control minimum wage claims, and because Nevada’s minimum wage law provides greater employee wage protection than that provided under the FLSA, we conclude that the FLSA does not preempt the NWHL.

Second, having recognized that Nevada law governs this dis-

pute, we consider whether the claims should proceed under NRC 23, Nevada’s class action rule, with a proposed substitute class representative. We conclude that, in accordance with Nevada’s class action rule, the proposed representative’s claims were sufficiently factually and legally similar to those of the purported class to allow substitution, and thus, the district court must proceed with the NWHL claims with the proposed class representative, if still available, under NRC 23.”

*Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. Adv. Op. No. 3 (January 31, 2008) “In resolving this petition for a writ of prohibition or mandamus, we consider whether NRS 201.230(1), which defines the offense of lewdness with a minor under the age of 14, can be used to adjudicate as delinquent a minor under the age of 14. We conclude that because NRS 201.230’s plain, broad language applies to persons of all ages, the statute can be used to adjudicate as delinquent minors under the age of 14, even though they are part of the class of persons protected by the statute. Accordingly, we are not persuaded that our intervention by way of extraordinary relief is warranted.

*Lioce v. Cohen*, 124 Nev. Adv.

Op. No. 1 (January 17, 2008) “On December 28, 2006, this court issued an opinion in these consolidated appeals.[2] The defendants in each of the four underlying personal injury cases were represented by the same attorney, who gave substantially the same closing argument on behalf of his clients at each trial. Asserting that defense counsel’s closing arguments constituted misconduct, the plaintiffs sought new trials, with varying success.

In that opinion, we revised the standards under which district courts are to evaluate requests for new trials based on attorney misconduct. Next, we reversed the denial of the motions for new trials in *Lioce v. Cohen* and *Lang v. Knippenberg*, and affirmed the grant of new trials in *Castro v. Cabrera* and *Seasholtz v. Wheeler*. Additionally, we determined that the defendants’ attorney’s closing arguments in *Castro* and *Seasholtz* amounted to misconduct, and we remanded those cases with instructions to the district courts to calculate and impose monetary sanctions on defense counsel and his clients. Finally, we referred defense counsel to the State Bar of Nevada for disciplinary proceedings. This petition for rehearing followed. Having considered the petition, answers,

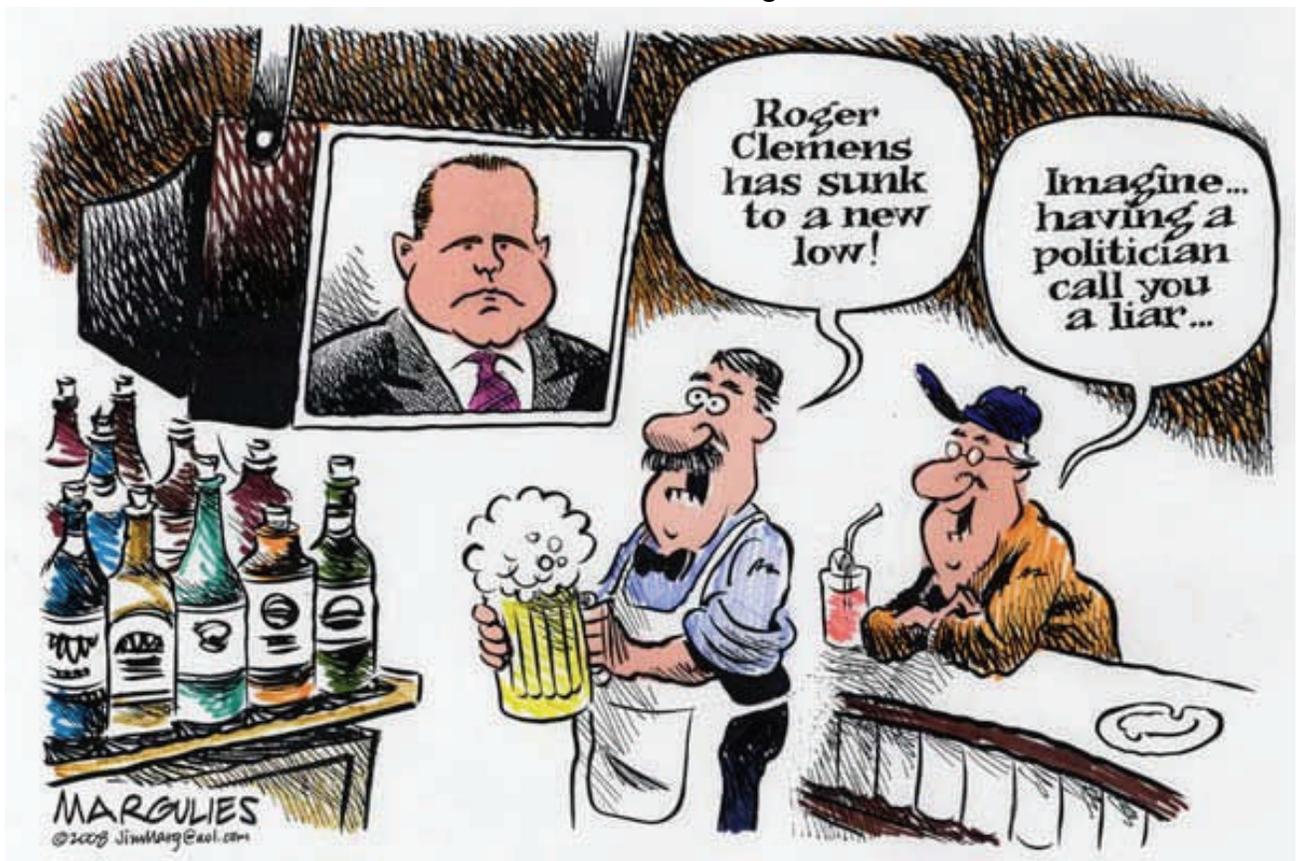
## NEVADA SUPREME COURT CASES

amici curiae briefs, and the replies, we conclude that en banc rehearing is warranted in part under NRAP 40(c). We therefore grant the petition in part, vacate our prior opinion in this matter, and issue this opinion in its place. On rehearing, we reach substantially the same conclusion as in our prior opinion, but we decline to impose monetary sanctions on defense counsel and his clients.

Because defense counsel's closing arguments encouraged the jurors to look beyond the law and the relevant facts in decid-

ing the cases before them, we agree that they amounted to misconduct. In determining whether the district courts properly decided that this misconduct warranted new trials or not, we take the opportunity to revise our attorney misconduct jurisprudence. New trial requests based on attorney misconduct must be evaluated differently depending upon whether counsel objected to the misconduct during trial. When a party successfully objects to the misconduct, the district court may grant a subsequent motion for a new trial if the moving

party demonstrates that the misconduct's harmful effect could not be removed through any sustained objection and admonishment. With respect to unobjected-to misconduct, we conclude that the district court may grant a motion for a new trial only if the misconduct amounted to plain error, so that absent the misconduct, the verdict would have been different. When ruling on a motion for a new trial based on attorney misconduct, district courts must make express factual findings, applying the above standards."



## LRIS: Department Of Labor Releases Draft Of New FMLA Rules

The Department of Labor has released the long-awaited draft of new rules on the interpretation of the Family and Medical Leave Act. In large measure, the proposed rules would tighten up on how the FMLA is interpreted, and are being perceived as being beneficial to employers. Anyone can submit comments to the DOL on the new rules; the deadline for comments is April 11, 2008.

What follows is a summary of the proposed rules prepared by Buchanan, Ingersoll & Rooney, an employer-side law firm with 18 offices across the country.

On February 11, 2008, the Department of Labor published proposed rule changes for the Family Medical and Leave Act (FMLA). These regulatory changes would be the most sweeping modifications to FMLA regulations since their initial implementation on April 6, 1995.

The FMLA provides up to 12 weeks of unpaid time off in any 12-month period as family and medical leave. Such leave includes care for a serious health condition of the employee or an immediate family member, as well as leave for the birth, adoption or foster placement of a child. Since its enactment 15

years ago, the FMLA has been the subject of legal challenges regarding its interpretation and administration. Concerns about the law include confusion about the proper definition of "serious health condition," ambiguous standards for verifying medical certification requirements and disclosure restrictions, and the difficulty of enforcing shorter, incremental leave, known as "intermittent leave."

### **Proposed Changes**

The proposed rules offer some important changes, some of which may be favorable to employers. Some highlights from these proposed changes include:

#### **Employer Notice**

Under the proposed rules, employers must still post a notice of general FMLA rights and responsibilities. In addition to this standard posting requirement, however, employers will also be required, on an annual basis, to distribute notice of FMLA rights to each employee. This distribution of annual notice can occur through an employee handbook, if one exists, or through paper or electronic form, subject to certain conditions. The Department of Labor seeks to increase employees' awareness of the FMLA through this change.

Additionally, an employer will have five business days (rather than the current two days) to notify an employee that he or she is eligible for FMLA leave upon receiving a request for leave or after learning that an employee's leave may qualify for FMLA leave.

The proposed rules would also require employers to provide employees with more specific written notice regarding FMLA leave requests. For instance, where possible, an employer must notify employees regarding the number of hours, days or weeks that an employer will designate as FMLA leave. Employers must also notify employees if leave will not constitute FMLA leave due to insufficient information or a non-qualifying reason.

#### **Employee Notice**

Under the current regulations, employees must provide 30 days notice of a need for FMLA leave when the need is foreseeable and in compliance with the employer's usual procedures. If 30 days' notice is not possible, the employee must give notice "as soon as practicable." Although the current requirements will remain the same, the Department of Labor further proposes to add that when an employee gives less than 30 days'

## THE NEW FMLA RULES

advance notice, the employee must respond to a request from the employer and explain why it was not practicable to give 30 days' notice. The Department of Labor hopes to reduce disruptions caused by unforeseen absences with this proposed change.

### Medical Certification

Management and workers have often clashed on whether proper or sufficient medical documentation has been provided to determine whether or not the worker qualifies for unpaid leave under the FMLA. The proposed rule seeks to clarify medical certification requirements, including making an important change that may permit employers to contact an employee's health care provider.

Consistent with the notice requirement change, employers would have five days to request medical certification from the date of the employee's request for leave. If an employer determines that the subsequent information received is insufficient, the employer must provide written notice to the employee of what additional information is necessary and give the employee seven calendar days to cure the deficiency. The Department of Labor has also proposed changes to the medical certifica-

tion form to better enable health care providers to understand and complete this certification. Employers would also be permitted to contact health care providers directly to clarify or authenticate documents.

The proposed regulations would permit employers to send an employee's absence schedule to his or her health care provider to confirm whether or not the employee's pattern of intermittent leave is congruent with the employee's qualifying medical condition.

Consistent with current regulations, an employer would not be able to require a recertification until the specified duration of the initial certification expires, but in all cases recertification requests would be permitted every six months.

### Intermittent Leave

One of the most sought after changes, the permitted length of intermittent leave, will remain untouched. Currently, employees may take the shortest unit of unpaid leave established under an employer's timekeeping systems. Employers find administering such leave burdensome and have advocated increasing the minimum to at least a half-day. The Department of Labor, however, has determined that it

does not have the authority to alter incremental leave and that any such changes must be made legislatively.

### Serious Health Condition

Currently, under the FMLA, it is unclear what constitutes a "serious health condition." The Department of Labor outlines this difficulty in the proposed regulations, but proposes only modest changes to clarify this issue. For instance, under the proposed rule, "continuing treatment" for purposes of establishing a "serious health condition" would be clarified to a period of incapacity of more than three consecutive calendar days and require that a worker visit a health care provider twice within 30 days of being incapacitated. Those with chronic conditions must make two visits per year to a health care provider.

### Fitness for Duty

If an employer requires a fitness-for-duty certification, the proposed regulations would allow an employer to include a description of the essential functions of the employee's job along with its eligibility notice to the employee. Employees on intermittent leave could be required to provide fitness-for-duty certifications every 30 days if reasonable safety concerns

## THE NEW FMLA RULES

exist. Additionally, subject to certain limitations, employers would be permitted to contact health care providers to clarify or authenticate the fitness-for-duty certification.

### **Coordination with Paid Leave**

Under the current regulations, employees must follow the terms and conditions of an employer's paid leave policy in order to utilize accrued paid leave during FMLA leave. The proposed regulations will clarify the concept that unpaid FMLA leave runs concurrently with paid leave provided by an employer.

### **Perfect Attendance Awards**

An employer would not have to provide perfect attendance awards to employees who take unpaid leave under the FMLA.

### **Waiver and Release**

A recent court decision brought into question the ability of an employee to voluntarily settle a claim under the FMLA. The proposed regulations clarify that employers and employees are permitted to voluntarily settle past FMLA claims without having to obtain permission from a court of law or the Department of Labor.

### **Light-Duty Time**

The Department of Labor is pro-

posing to eliminate a provision in the current regulations concerning light-duty time. The elimination of this provision will ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having the right diminished by the amount of time spent in a light-duty position.

### **Military Leave**

The proposed rules will also include regulations concerning recently enacted legislation providing FMLA leave to military personnel and their family members. As noted in Buchanan Ingersoll & Rooney's January Labor & Employment Legislation & Regulation Update, President Bush signed a new law that provides two new types of FMLA leave related to military service. Pursuant to the new law, an eligible employee can take up to 26 weeks of leave in a 12-month period to care for a spouse, child, parent or next of kin who is a service member with a serious illness or injury incurred during active duty in the Armed Forces. Additionally, the law permits eligible employees to take up to 12 weeks of FMLA leave in a 12-month period for "any qualifying exigency" that arises from a spouse's, child's or parent's active duty in the Armed Forces, including an order or call to

duty.

### **Outlook**

Comments on the proposed changes must be submitted to the Department of Labor by April 11, 2008. It is expected that the final rules will be published before President Bush leaves office.

House Education and Labor Committee Chairman George Miller (D-CA) has already expressed concerns about the proposal. Representative Lynn Woolsey (D-CA), who chairs the Workforce Protections Subcommittee on the panel, has scheduled a hearing on the FMLA for Thursday February 14. The Senate Children and Families Subcommittee of the Health, Education, Labor and Pensions Committee, which is chaired by Senator Chris Dodd (D-CT), will hold a similar hearing a day earlier. Each is expected to criticize the tenor of the proposed rule and examine ways in which to broaden the FMLA.



## NINTH CIRCUIT CASES

*United States v. Murphy*, No. 06-30582 (February 20, 2008) “Defendant Murphy appeals the district court’s denial of his motion to suppress evidence seized as a result of two searches. We conclude that one search was lawful and one was not. The first search, a protective sweep of storage units following Murphy’s arrest, was justified by the officer’s legitimate concern about the potential presence of confederates in the area. We conclude that the district court’s ruling as to this search was correct. The second search occurred two hours later, after Murphy, who was residing in the units temporarily, had refused to consent but the officers subsequently obtained consent from the individual who rented the storage units. In light of the Supreme Court’s recent decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), we reverse the district court’s denial of the suppression motion as to this search.”

*Anderson v. Terhune*, No. 04-17237 (February 15, 2008) “It is likely that few Americans can profess fluency in the Bill of Rights, but the Fifth Amendment is surely an exception. From television shows like ‘Law & Order’ to movies such as ‘Guys and Dolls,’ we are steeped in the culture that

knows a person in custody has ‘the right to remain silent.’ *Miranda* is practically a household word. And surely, when a criminal defendant says, ‘I plead the Fifth,’ it doesn’t take a trained linguist, a Ph.D, or a lawyer to know what he means. Indeed, as early as 1955, the Supreme Court recognized that ‘in popular parlance and even in legal literature, the term “Fifth Amendment” in the context of our time is commonly regarded

***“the officer queried, ‘Plead the Fifth. What’s that?’ and then continued the questioning, ultimately obtaining a confession”***

as being synonymous with the privilege against self incrimination.’ *Quinn v. United States*, 349 U.S. 155, 163 (1955); *accord In re Johnny V.*, 149 Cal. Rptr. 180, 184, 188 (Cal. Ct. App. 1978) (holding that the statement ‘I’ll take the fifth’ was an assertion of the Fifth Amendment privilege). More recently, the Court highlighted that ‘*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.’ *Dickerson v. United States*, 530 U.S. 428,

443 (2000).

We granted rehearing en banc in this appeal from the district court’s denial of Jerome Alvin Anderson’s petition for writ of habeas corpus. Anderson challenges his conviction of special circumstances murder on the grounds that he was denied his constitutional right to remain silent and that admission of his involuntary confession into evidence violated his right to due process. Specifically, Anderson claims that he invoked his Fifth Amendment right to terminate his police interrogation and that the police officer’s continued questioning violated that right.

Anderson twice attempted to stop police questioning, stating ‘I don’t even wanna talk about this no more,’ and ‘Uh! I’m through with this.’ After questioning continued, Anderson stated unequivocally, ‘I plead the Fifth.’ Instead of honoring this unambiguous invocation of the Fifth Amendment, the officer queried, ‘Plead the Fifth. What’s that?’ and then continued the questioning, ultimately obtaining a confession. It is rare for the courts to see such a pristine invocation of the Fifth Amendment and extraordinary to see such flagrant disregard of the right to remain silent.

## NINTH CIRCUIT CASES

The state court held that Anderson's statement, 'I plead the Fifth,' was ambiguous and that the officer asked a legitimate clarifying question. Under even the narrowest construction of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), the state court erred in failing to recognize this constitutional violation. The continued questioning violated the Supreme Court's bright-line rule established in *Miranda*. Once a person invokes the right to remain silent, all questioning must cease:

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

**Larson v. Palmateer**, No. 04-35465 (February 13, 2008) "Lewis Larson, Jr. appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. His claims on habeas

are that his Fifth Amendment due process rights were violated when the trial court judge required him to wear a security leg brace before the jury, denied his motion to exclude witnesses from the courtroom, allowed the admission of evidence relating to his past criminal history and exhibited judicial bias. He also claims that his Sixth Amendment right to counsel was violated when the trial court judge refused to appoint him substitute counsel. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm."

**Johnson v. Riverside Healthcare Sys., LP**, No. 06-55280 (February 13, 2008) "A prima facie claim for hostile work environment under § 1981 must raise triable issues of fact as to whether '(1) [the plaintiff] was subjected to verbal or physical conduct because of [his] race, (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive work environment.' *Manatt*, 339 F.3d at 798 (quoting *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002)) (internal quotation marks omitted). Moreover, the work environment must be perceived as abusive from both a subjective and objective point of view.

*Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000). In examining whether the workplace was objectively abusive, we consider the perspective of a reasonable person with the plaintiff's same fundamental characteristics. *See Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). Finally, in considering whether the discriminatory conduct was sufficiently severe or pervasive, we look to 'all the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1110 (9th Cir. 2000) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)).

Johnson alleges one particularly serious incident of discrimination. Johnson's encounter with Dr. Vlasak, in which Vlasak used a racial epithet and moved as if to strike Johnson, is unquestionably evidence of discrimination standing alone. Consequently, our task becomes to determine whether this incident, combined with Johnson's other allegations, raises a triable issue of fact as to whether the

## NINTH CIRCUIT CASES

discrimination Johnson faced at Riverside was so ‘severe or pervasive’ as to alter the conditions of his employment and create an abusive work environment.

*Manatt*, 339 F.3d at 798; *see also Brooks*, 229 F.3d at 923 (noting that ‘the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct’) (citations omitted).

Turning to these allegations, however, we find no indication that Johnson was subjected to racial discrimination on any other occasion aside from the incident with Dr. Vlasak. Johnson contends that a particular nurse frequently asked him to remove trash from the Operating Room and, on one occasion, refused to provide him with the necessary surgical equipment to perform a procedure. He also contends that after he was bitten by the security dog stationed in Riverside’s emergency room, the dog’s trainer told him not to complain to the hospital administrators because the dog was ‘more popular’ with the nurses than Johnson. Although these comments and actions may have been offensive, Johnson provides no evidence to suggest that they were motivated by racial animus rather than mere personal dislike.

Johnson also alleges that the Medical Staff’s Residency Selection Committee refused to consider an African-American candidate because of his race and, after rejecting the application, the Chairman and other members of the committee ‘stated in the presence of other physicians’ that they would not consider the applicant because he was African-American and might be gay. Johnson’s complaint does not allege that he

***“In the past, we have held that isolated incidents, unless ‘extremely serious,’ are insufficient to state a claim for hostile work environment.”***

was present at the time the candidate’s application was denied or at the time the Committee members’ racially offensive remarks were made. It is true that discriminatory conduct directed at an individual other than the plaintiff may be relevant to a plaintiff’s hostile work environment claim in certain circumstances. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033-34 (9th Cir. 1998) (‘[R]acist attacks need not be directed at the complainant in order to create a hostile educa-

tional environment [under Title VI].’ (citations omitted)); *see also Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985) (‘[E]vidence tending to show [a supervisor’s] harassment of other women working alongside [the plaintiff] is directly relevant to the question whether [the supervisor] created an environment violative of Title VII’) (citation omitted). In this case, however, the Committee members’ conduct was not directed at Johnson, and he alleges that he only learned about it indirectly. Thus, Johnson points to just two incidents of discriminatory conduct over the course of his twenty-eight-month tenure at Riverside, and only one in which he was the victim.

In the past, we have held that isolated incidents, unless ‘extremely serious,’ are insufficient to state a claim for hostile work environment. *Manatt*, 339 F.3d at 798 (quoting *Faragher*, 524 U.S. at 788); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 642-43 (9th Cir. 2002) (concluding that employee failed to state a hostile work environment claim under Title VII where he was yelled at in front of others and told that he had ‘a typical Hispanic macho attitude,’ and that he should work in the field because ‘Hispanics do good in the field’); *Kortan*,

## NINTH CIRCUIT CASES

217 F.3d at 1110- 1 (holding that a plaintiff failed to state a hostile work environment claim where her supervisor referred to other females as ‘castrating bitches,’ ‘Madonnas,’ or ‘Regina’ in her presence and called the plaintiff ‘Medea’ at least once). Thus, to establish the severe or pervasive discrimination necessary for a hostile work environment claim, we have required plaintiffs to allege that the offending conduct occurred with a greater frequency than Johnson has here. *See Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1056-57 (9th Cir. 2007) (determining that a female employee established a prima facie case for hostile work environment where her boss repeatedly solicited her to perform sexual favors over several months and engaged in five significant incidents of harassing conduct, including one in which he followed her into a women’s restroom and kissed her); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 872-73 (9th Cir. 2001) (concluding that an employee had stated a hostile work environment claim where co-workers and supervisors called him a ‘faggot’ and a ‘fucking female whore’ at least once a week and often several times a day).

***Harris v. Carter***, No. 06-35313

(February 8, 2008) “Jerry Harris appeals the district court’s order dismissing Harris’ 28 U.S.C. § 2254 petition for a writ of habeas corpus as time-barred and concluding that Harris is not entitled to equitable tolling. Harris argues that he is entitled to equitable tolling because he relied on our precedent. We were subsequently overruled by the Supreme Court in a decision that holds that untimely state habeas corpus petitions do not toll the federal statute of limitations for filing a federal petition. Harris’ federal habeas petition, which would have been timely under our existing precedent, became time-barred when the Supreme Court decided *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). Because we hold that Harris is entitled to equitable tolling, we reverse the judgment of the district court dismissing Harris’ petition as untimely and remand to permit the district court to consider the merits of Harris’ petition.”

***Costco Wholesale Corp. v. Hoen***, No. 06-35538 (January 29, 2008) “In these consolidated appeals, we must decide whether certain restrictions imposed by the State of Washington on the sale of wine and beer are preempted by federal anti-trust laws. If the challenged restraints are subject to federal

preemption, we must then decide whether they might be otherwise saved by operation of the State’s powers under Section 2 of the Twenty-first Amendment to the United States Constitution.”

“In conclusion, we reverse the judgment of the district court insofar as it held that most of Washington’s restraints on the sale of beer and wine were hybrid restraints subject to preemption under the Sherman Act. We affirm the district court’s rejection of Costco’s challenge to the retailer-to-retailer sales ban. We also affirm its conclusion that under our precedents, the post-and-hold scheme is a hybrid restraint of trade that is not saved by the state immunity doctrine or the Twenty-first Amendment. Each party shall bear its own costs on appeal.”

***Hess v. Bd. of Parole and Post-Prison Supervision***, No. 06-35963 (January 29, 2008)

“Willie Fern Hess appeals from the district court’s denial of his 28 U.S.C. § 2254 habeas corpus petition. He asserts that Oregon Revised Statute § 144.125(3) (1991), which allows the Parole Board to postpone his parole release date if it finds he has ‘psychiatric or psychological diagnosis of a present severe emotional disturbance such as to

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constitute a danger to the health or safety of the community,' is unconstitutionally vague. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.”

***Arizona Life Coalition, Inc. v. Stanton***, No. 05-16971 (January 28, 2008) “Arizona Life Coalition appeals a summary judgment in favor of Stacey Stanton and other members of the Arizona License Plate Commission. Life Coalition contends that the Commission violated its First Amendment right to free speech and Fourteenth Amendment right to equal protection by arbitrarily denying its application for a special Arizona organization license plate that would portray its message ‘choose Life.’ We agree that the Commission violated Life Coalition’s First Amendment right to free speech and therefore do not reach its equal protection argument. Messages conveyed through special organization plates— although possessing some characteristics of government speech—represent primarily private speech. Through its special organization license plate program, Arizona has created a limited public forum for all nonprofit organizations that meet the State’s statutory requirements. Because the Commission denied Life Coalition’s

application on grounds not specified in the statute or related to the limited purpose of the license plate forum, we reverse the district court’s grant of summary judgment in favor of the Commission.”



***United States v. Snipes***, No. 06-30215 (January 28, 2008) “Appellant Sonny Snipe1 challenges his conviction and sentence for possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k) and 18 U.S.C. § 924(a)(1)(B). Snipe’s conviction followed a warrantless entry by police, who were responding to an emergency call. During the course of their search, police saw drugs in plain view. They returned with a search warrant and seized drugs and the firearm. Our review of Snipe’s motion for suppression requires us to revisit, and modify, our decision in *United States v. Morales Cervantes*, 219 F.3d 882, 888 (9th Cir. 2000), in light of the Supreme Court’s recent decision in *Brig-*

*ham City v. Stuart*, 126 S. Ct. 1943 (2006). For the reasons set forth below, we affirm.”

“*Brigham City* requires us to reconsider and revise *Cervantes* in three critical respects. The first prong of *Cervantes* survives *Brigham City*, and indeed remains the core of the Fourth Amendment analysis of exigent circumstances. Considering the totality of the circumstances, law enforcement must have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm. Second, because *Brigham City* rejected any subjective analysis, we reject *Cervantes*’ subjective second prong and hold that law enforcement’s subjective motivations are irrelevant in determining whether the emergency doctrine applies. Third, we also reject *Cervantes*’ third prong—and Snipe’s attempt to engraft an expanded probable cause inquiry onto that prong—as superfluous because *Brigham City* failed to conduct any traditional probable cause inquiry. Instead, the Court assumed that probable cause to associate the emergency with the place to be searched exists whenever law enforcement officers have an objectively reasonable basis for concluding that an emergency is

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unfolding in that place.

Indeed, even before Brigham City, both the Second and Eleventh Circuits had held that, ‘in an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger.’

*United States v. Holloway*, 290 F.3d 1331, 1338 (11th Cir. 2002); accord *Koch v. Brattleboro*, 287 F.3d 162, 169 (2d Cir. 2002). And finally, because Brigham City explicitly considered the officers’ manner of entry, we hold that any subsequent review of an entry pursuant to the exigent circumstances doctrine must consider the officers’ manner of entry.”

“Thus, in place of *Cervantes*, we now adopt a two pronged test that asks whether: (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search’s scope and manner were reasonable to meet the need. Under that test, then, as previously under *Cervantes*, if law enforcement, while ‘respond[ing] to an emergency, discovers evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe that such evidence would be

found.’”

***United States v. Comprehensive Drug Testing, Inc.***, No. 05-10067 (January 24, 2008) “We must decide whether the United States may retain evidence it seized from Major League Baseball’s drug testing administrator, and enforce an additional subpoena, as part of an ongoing grand jury investigation into illegal steroid use by professional athletes.”

“To summarize the resolution of these consolidated appeals: 1) We have no jurisdiction to address the legal foundation for the grant of the Rule 41(g) motion in the Central District of California, although we recognize that our authoritative interpretation of *Tamura* conflicts with the vision of *Tamura* upon which that order was based. The government cannot obtain redress for any alleged errors or impropriety in that order, where it failed to object in a timely manner. The government’s appeal of the grant of the Rule 41(g) motion is DISMISSED for lack of jurisdiction; the order of the Central District of California denying the government’s motion for reconsideration is AFFIRMED. 2) The government’s seizures at the Quest facility in Las Vegas were reasonable under the Fourth

Amendment. The order of the District of Nevada granting the Rule 41(g) motion is REVERSED. 3) The record, illuminated by caselaw, reveals that the subpoenas to CDT and Quest, which covered the same evidence as the contemporaneous search warrants, were not unreasonable and did not constitute harassment. The order of the Northern District of California quashing the May 6 subpoenas is REVERSED.”

***Beltran v. Santa Clara County***, No. 05-16976 (January 24, 2008) “Melissa Suarez, a social worker for Santa Clara County’s child protective services, investigated whether Lori Beltran was abusing her son, Coby. After this investigation, Suarez’s supervisor Emily Tjhin filed a child dependency petition, which Tjhin signed under penalty of perjury. This petition included a three-page statement of facts describing the findings of Suarez’s investigation. Suarez also filed a separate custody petition, which she signed under penalty of perjury. The custody petition attached and incorporated by reference the three-page statement of facts from the dependency petition.

The dependency petition was denied, Coby was returned to his parents, and the Beltrams

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sued Suarez and Tjhin under 42 U.S.C. § 1983, charging constitutional violations in removing Coby from the Beltrans' custody and attempting to place him under the supervision of the state. Specifically, the Beltrans claimed that Suarez and Tjhin fabricated much of the information in the three-page statement of facts. Relying on *Doe v. Le-*

*bos*, 348 F.3d 820, 825-26 (9th Cir. 2003), the district court held that Suarez and Tjhin had absolute immunity for their actions connected to signing and filing the dependency and custody petitions—including the alleged fabrication of evidence and false statements. It therefore dismissed plaintiffs' claims that were based on the allegedly

false petition statements. The district court eventually granted summary judgment to the defendants on the remainder of plaintiffs' claims, but those issues are not before us, as plaintiffs appeal only the dismissal of claims based on absolute immunity.

Parties to section 1983 suits are generally entitled only to immu-



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nities that existed at common law. *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976). We have therefore ‘granted state actors absolute immunity only for those functions that were critical to the judicial process itself,’ such as “‘initiating a prosecution.’” *Miller v. Gammie*, 335 F.3d 889, 896 (9th Cir. 2003) (en banc) (quoting *Imbler*, 424 U.S. at 431). It follows that social workers have absolute immunity when they make ‘discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents.’ *Id.* at 898. But they are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren’t similar to discretionary decisions about whether to prosecute. A prosecutor doesn’t have absolute immunity if he fabricates evidence during a preliminary investigation, before he could properly claim to be acting as an advocate, *see Buckley v. Fitzsimmons*, 509 U.S. 259, 275 (1993), or makes false statements in a sworn affidavit in support of an application for an arrest warrant, *see Kalina v. Fletcher*, 522 U.S. 118, 129-30 (1997). Further-

more, as prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, a fortiori, social workers conducting investigations have no such immunity. *See id.* at 126.

The district court’s error is perfectly understandable, as it relied on our incorrect ruling in *Doe v. Lebbos*, which we overrule today. We reverse the district court’s ruling that defendants are entitled to absolute immunity and remand for further proceedings consistent with this opinion.”

***Jackson v. Brown***, No. 04-99006 (January 23, 2008) “Earl Jackson petitions for a writ of habeas corpus challenging (1) his state court convictions for two counts of burglary and two counts of murder, (2) the jury’s findings of special circumstances making him death-eligible, and (3) his ultimate death sentence. The district court denied relief as to his convictions, but granted conditional relief as to the special circumstances findings and the death sentence. Warden Brown does not appeal the district court’s judgment as to the death sentence itself, but appeals the relief granted as to the special circumstances findings. Jackson cross-appeals the district court’s

denial of relief as to the underlying convictions. We affirm the district court’s partial grant of Jackson’s petition as to the special circumstances and death sentence and its partial denial as to his convictions.”

***Shakur v. Schriro***, No. 05-16705 (January 23, 2008) “We must decide whether prison officials violated the Religious Land Use and Institutionalized Persons Act, the Free Exercise Clause, and the Equal Protection Clause by denying a Muslim inmate’s request for a religious dietary accommodation.”

“Amin Rahman Shakur is an inmate of the Arizona Department of Corrections at Florence, Arizona. While incarcerated, Shakur changed his inmate religious preference designation from Catholic to Muslim. In due course, ADOC granted Shakur’s request to adopt for religious reasons a lacto-vegetarian diet, which includes milk but not meat or eggs. Shakur currently receives an ovo-lacto vegetarian diet, which includes milk and eggs, but no meat. Shakur has contended throughout the administrative grievance process and this litigation that the vegetarian diet causes him hardship because it ‘gives [him] gas’ and ‘irritates [his] hiatal hernia.’ His primary issue with the diet is

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that his gastrointestinal discomfort interferes with the state of ‘purity and cleanliness’ needed for Muslim prayer.”

“In conclusion, the district court’s summary disposition of Shakur’s claims based on a sparse factual record warrants reversal. As *Ward* makes clear, only a careful analysis of a fully developed record can justify the burdening of an inmate’s religious rights.”

***United States v. Hartog***, No. 05-16614 (January 22, 2008) “Daniel Den Hartog, a twice-convicted drug smuggler and trafficker who had on deposit in certain Cayman Island bank accounts \$1.67 million in alleged drug trafficking proceeds, appeals the grant of summary judgment in favor of the United States in its civil forfeiture action filed in the United States District Court for the Northern District of California. We must decide whether (1) the district court applied the correct jurisdictional standard and properly found that it had *in rem* jurisdiction over the forfeited funds; (2) the government met its burden of demonstrating probable cause to seize the funds, so as to warrant summary judgment; and (3) the five-year delay between the government’s seizure of the

funds in August 1993 and the filing of this action in June 1998 violated Hartog’s due process rights. Because we conclude that jurisdiction properly lies in the Northern District of California, that Hartog failed to adduce a genuine issue of material fact that the funds derived from legitimate sources, and that Hartog suffered no prejudice due to the government’s delay, we affirm the district court.”

***Price v. Sery***, No. 06-35159 (January 22, 2008) “The constitutionality of the City of Portland’s policy on the use of deadly force by its police officers is squarely presented by this appeal from grant of summary judgment by the decedent’s estate.”

“On March 28, 2004, in the course of a routine traffic stop, City of Portland, Oregon Police Officer Jason Sery shot and killed James Jahar Perez, the driver of the stopped vehicle. Certain key facts surrounding the shooting are in dispute, but they are not relevant to this limited appeal. The district court, however, found a number of facts to be undisputed, which we recite here to provide adequate context.”

“For the foregoing reasons, we

agree with the district court that the City’s official policy concerning the use of deadly force, as written, does not violate the requirements of the Constitution. Further, we agree with the district court that Price has not made a sufficient showing of a failure to train on the part of the City to survive summary judgment. We conclude, however, that a genuine issue of material fact exists as to whether a ‘longstanding’ practice or custom of the City might in fact have deprived Perez of his constitutional rights.”

***Frantz v. Hazey***, No. 05-16024 (January 22, 2008) “Karl Frantz appeals the district court’s denial of his petition for a writ of habeas corpus. Invoking the Sixth Amendment right to self-representation and the limits on advisory attorneys’ participation described in *McKaskle v. Wiggins*, 465 U.S. 168 (1984), Frantz challenges his exclusion from a chambers conference in which his advisory counsel participated and discussed how the judge should respond to a query from the deliberating jury. The Arizona Court of Appeals denied Frantz’s claim on harmless error grounds. Clearly established Supreme Court law holds, however, that a *McKaskle* error is structural and therefore not subject to harmless error analy-

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sis. Deciding this appeal first requires that we clarify our approach to reviewing state court decisions that rely on legal principles contradicting clearly established Supreme Court law but do not necessarily reach the wrong result. Having done so, we then proceed to consider the *McKaskle* issue on its constitutional merits.”

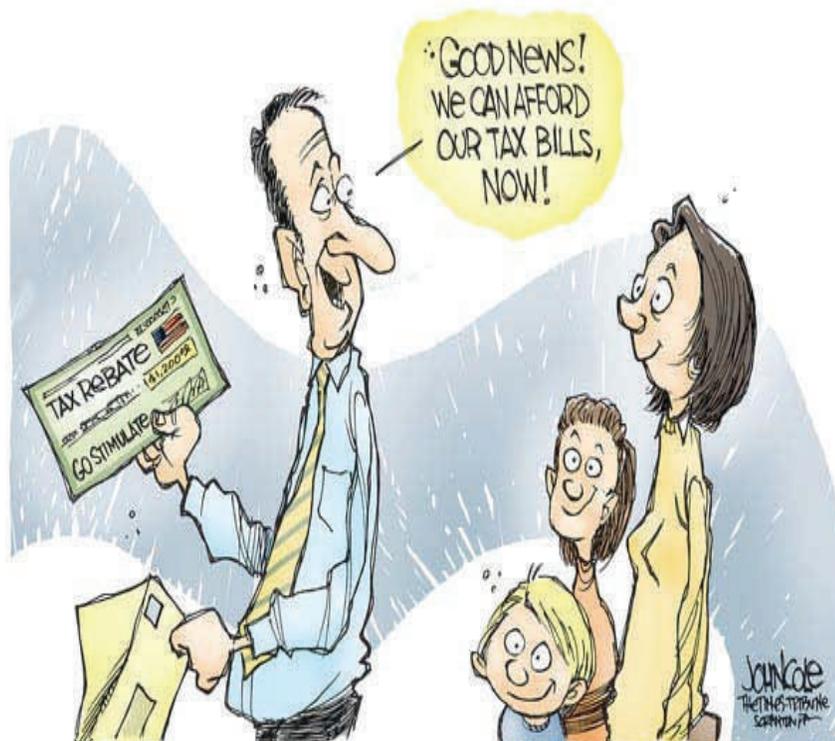
***Greene v. Solano County Jail***, No. 06-16957 (January 22, 2008) “In his civil rights action against Rourk, Greene alleged that the Claybank jail’s policy of prohibiting maximum security prisoners from participating in group worship was a violation of his rights under the Religious Land Use and Institutionalized Persons Act of 2000 (‘RLUIPA’), 42 U.S.C. §§ 2000cc *et seq.*, under the First, Eighth and Fourteenth Amendments, and under California Penal Code section 4027.”

“The Supreme Court has recognized RLUIPA as ‘the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens . . . .’ *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). The statute itself reflects this intent stating, ‘This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the

terms of this chapter and the Constitution.’ 42 U.S.C. § 2000cc-3(g). *See also Warsol-dier*, 418 F.3d at 995.

Congress effectuated this intent by distinguishing RLUIPA from traditional First Amendment jurisprudence in at least two ways. First, it expanded the reach of the protection to include any ‘religious exercise,’ including ‘any exercise of religion, whether or not compelled by or central to, a system of religious belief.’ *Cutter*, 544 U.S. at 715 (quoting 42 U.S.C. § 2000cc-5(7)(A)). In fact, RLUIPA ‘bars inquiry into whether a particular belief or

practice is “central” to a prisoner’s religion.’ *Cutter*, 544 U.S. at 725 n.13; 42 U.S.C. § 2000cc-5(7)(A). Second, as opposed to the deferential rational basis standard of *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), RLUIPA requires the government to meet the much stricter burden of showing that the burden it imposes on religious exercise is ‘in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.’”



# HAPPY PUBLIC LAWYERS

## 2006 Pulse Study Finds Public Lawyers More Satisfied

Public sector lawyers are more likely than private practitioners or in-house counsel to express the greatest degree of professional satisfaction, but they are also a group most likely to report an increase in the amount of work expected of them.

These findings, and others, come from the *Pulse of the Legal Profession, 2006*, a quantitative study commissioned by the ABA. The goal of the tracking study is to identify and monitor the emerging trends and needs of the profession. Pulse studies typically begin with a focus group phase followed by a quantitative phase. The focus group phase allows participants to identify, in their own words, new issues and trends in the profession while the quantitative phase seeks to quantify these trends. This particular study built upon a focus group study in 2005 and two quantitative studies done in 2001 and 2003. For 2006, the majority of the interviews were conducted online with a small number conducted over the telephone.

This Pulse study found that public sector lawyers are more likely to find the practice of law intellectually stimulating (89%), express pride in being an attorney (88%), feel like they are contributing to the greater good (87%), feel valued by their organization (70%), feel that they have altered their career to enhance their work/life balance (69%), and express satisfaction with their work/life balance (62%). Public sector lawyers report the highest levels of career satisfaction (68%), are most likely to say they would recommend a legal career to a young person (55%) and are the most likely segment to say they will be practicing law in five years (85%).

In terms of the state of the profession, public sector lawyers expressed the greatest concern about the independence of the judiciary (72%) and their belief that the law is becoming increasingly politicized (72%). Public sector lawyers are also more likely to report their state and local courts are poorly funded (57%) and that federal courts are poorly funded (35%).

Public sector lawyers were more concerned about the prohibitive cost of law school tuition (65%).

For more information about the Pulse study, or to obtain an electronic copy of the report, contact [marketresearch@staff.abanet.org](mailto:marketresearch@staff.abanet.org).

**LAWYERS HAVE GOTTEN LESS CIVIL TO EACH OTHER OVER TIME**

